

March 29, 2011

EMPLOYMENT-BASED IMMIGRATION TO THE UNITED STATES

A Fact Sheet

U.S. law provides employers with several limited ways to bring foreign workers into the U.S. on a temporary or permanent basis. Employment-based immigration visa categories generally have limited and static numerical caps. In addition, before petitioning for a foreign worker, an employer is often required to obtain certification from the Department of Labor (DOL) that there are no U.S. workers available, willing, and qualified to fill the position at a wage that is equal to or greater than the prevailing wage generally paid for that occupation in the geographic area where the position is located. The purpose of this restriction is to demonstrate that the admission and hiring of foreign workers will not adversely affect the job opportunities, wages, and working conditions of U.S. workers.¹

Temporary Employment Visas

Temporary employment visas allow employers to hire foreign nationals to work in a specific job for a limited time period. Depending on the visa classification and, in some cases, the nationality of the intended employee, the employer may be required to file, as a first step, a petition for a nonimmigrant worker with U.S. Citizenship and Immigration Services (USCIS).² If approved, a State Department consular officer then determines the foreign worker's eligibility for a nonimmigrant visa.³ Once the visa has been issued, the worker may travel to the United States to assume employment with the petitioning employer. Upon arrival in the U.S., a Customs and Border Protection (CBP) officer will inspect the worker to confirm eligibility for admission and to determine the specific length of stay.⁴ Upon expiration of the period of stay (assuming it has not been extended by USCIS), the worker must depart the United States.

| Common Temporary Employment Visas | | | | |
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| | H-1B | H-2A | H-2B | L-1A & L-1B |
| Who is eligible? | Highly educated foreign professionals in "specialty occupations" that require at least a bachelor's degree or the equivalent. ⁵ | Temporary agricultural workers. | "Seasonal," non-agricultural temporary workers. | An alien employed by an employer abroad for at least one year in the past three years in a capacity that is "managerial, executive, or involves specialized knowledge" and whose services in the United States are being sought in one of those capacities by the same employer in the U.S., or a parent, subsidiary or affiliate thereof. ⁶ |
| How many | 65,000 per year, ⁷ | No annual limit. The H-2A program | 66,000 per year. ¹⁰ | No annual limit. |

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| per year? | plus 20,000 more for foreign professionals with a Masters or Doctoral degree from a U.S. university. ⁸ | usually places about 40-50,000 workers per year, about 2-3% of the overall agricultural workforce. ⁹ | | |
| For how long? | Three years, with a renewal for up to six years total. ¹¹ | Up to one year, can be renewed yearly for up to three years. ¹² | Up to one year, and may be renewed twice for a total of up to three years. ¹³ | One year if establishing a new office, otherwise for three years. L-1A employees may be granted two year extensions for up to seven years (five years for L-1Bs). ¹⁴ |
| Permanent employment visa eligible? | H-1B visa holders may be sponsored for permanent visas by their employers. | H-2A workers cannot be sponsored for permanent visas for the same job by their employers. ¹⁵ | H-2B workers cannot be sponsored for permanent visas for the same job by their employers. ¹⁶ | L visa holders may be sponsored for permanent visas by their employers. |
| Need labor certification? | No, but the employer must attest, on a labor condition application (LCA) certified by DOL, that employment of the H-1B worker will not adversely affect the wages and working conditions of similarly employed U.S. workers. The LCA must be posted at the worksite for ten days. ¹⁷ | Yes, the Department of Labor must certify that there is no qualified U.S. worker who can fill the position. ¹⁸ | Yes, the Department of Labor must certify that there is no qualified U.S. worker who can fill the position. ¹⁹ | No. |
| May they bring their spouses and children under 21? | Yes, spouses and children under 21 may enter on an H-4 visa but may not work. ²⁰ | Yes, spouses and children under 21 may enter on an H-4 visa but may not work. ²¹ | Yes, spouses and children under 21 may enter on an H-4 visa but may not work. ²² | Yes, spouses and children under 21 may enter on an L-2 visa, and are allowed to work. ²³ |

Permanent Employment Visas

A permanent employment visa (commonly referred to as a “green card”) allows a foreign national to work and live lawfully and permanently in the United States. Lawful permanent residents are subject to fewer restrictions than temporary workers (nonimmigrants), and generally may apply for U.S. citizenship after five years.²⁴ In most cases, the individual’s employer must file a petition with USCIS.²⁵ If the individual is already in the U.S. on a temporary visa, he or she may apply for “adjustment of status” to permanent residence after USCIS approves the employer’s petition. If the individual is outside the U.S., or is in the U.S. but chooses to have the immigrant visa application processed abroad, then the immigrant visa is processed by a U.S. consular officer.²⁶

Because of numerical and per-country limits (detailed below), some individuals must wait a significant period of time to apply for adjustment of status or an immigrant visa even after the petition is approved by USCIS. The Department of State issues a monthly visa bulletin, summarizing the availability of visa numbers for each preference category on a per-country basis. While some visas are “current,” allowing the individual to immediately apply for permanent residence, other categories are considerably backlogged, requiring the applicant to wait years.

The overall numerical limit for permanent employment-based immigrants is 140,000 per year.²⁷ This number includes the immigrants plus their eligible spouses and minor children, meaning the actual number of employment-based immigrants is less than 140,000 each year. In addition, each country is limited to 7 percent of the worldwide level of U.S. immigrant admissions, otherwise known as per-country limits.²⁸ The 140,000 visas are split between five preferences, detailed below:

| Permanent Employment-Based Preference System | | |
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| Preference Category | Eligibility | Yearly Numerical Limit |
| Total Employment-Based Immigrants | | 140,000 for principals and their dependents |
| 1 Priority Workers | “Persons of extraordinary ability” in the arts, science, education, business, or athletics; outstanding professors and researchers, multinational managers and executives. ²⁹ | 40,000* or 28.6% |
| 2 Professionals with Advanced Degrees or Exceptional Ability | Members of the professions holding advanced degrees, or persons of exceptional abilities in the arts, science, or business. ³⁰ | 40,000** or 28.6% |
| 3 Skilled Workers, Professionals, and Unskilled Workers | Skilled workers with at least two years of training or experience, professionals with college degrees, or “other” workers for unskilled labor that is not temporary or seasonal. ³¹ | 40,000*** or 28.6% “Other” unskilled laborers restricted to 5,000 ³² |
| 4 Certain Special Immigrants | Certain “special immigrants” including religious workers, employees of U.S. foreign service posts, translators, former U.S. government employees and other classes of aliens. ³³ | 10,000 or 7.1% |
| 5 Immigrant Investors | Persons who will invest \$500,000 to \$1 million ³⁴ in a job-creating enterprise that employs at least 10 full time U.S. workers. ³⁵ | 10,000 or 7.1% |
| *Plus any unused visas from the 4 th and 5 th preferences **Plus any unused visas from the 1 st preference ***Plus any unused visas the 1 st and 2 nd preference | | |

The Backlog

The date that determines when an individual is eligible to apply for permanent residence is known as the “priority date.” This is the date the application for labor certification is filed with DOL, or if a labor certification is not required, the date the petition for the immigrant worker is filed with USCIS. Because of the numerical and per-country limits placed on permanent employment-based visas, the backlog in filing for permanent residence can be extensive.

As of April 2011, the first, fourth, and fifth preference categories had priority dates which were current for all nations. For unskilled workers in the third preference, where only 5,000 visas are available each year, demand far exceeds the supply of visas. Consequently, at the time of publication of this fact sheet, USCIS began processing visas for unskilled workers (from most countries) whose application priority date was July 2003. In other cases, backlogs occur when the demand for workers from specific countries outpaces the overall per-country limit. For instance, at the time of publication of this fact sheet, USCIS was only considering visa applications of Chinese and Indian workers in the second employment preference whose applications were filed on or before July and May 2006, respectively.³⁶

How Much Do These Visas Cost?

Employers must pay a \$325 filing fee for the temporary work visas listed above (H-1B, H-2A, H-2B), as well as a training fee of \$750-\$1,500 depending on the size of the employer, and an additional anti-fraud fee of \$500. Employers who have more than 50 employees, more than half of whom are H-1B or L visa holders, must pay an additional \$2,000 fraud fee for H-1B applicants and \$2,250 for L visa applicants.³⁷

Application fees for permanent employment-based visas cost \$580 for the initial labor certification, plus an additional \$720-\$985 to obtain the actual permanent resident visa (“green card”) either through consular processing or adjustment of status in the U.S.³⁸

Endnotes

¹ U.S. Department of Labor, [Foreign Labor Certification: Hiring Foreign Workers](#).

² Immigration & Nationality Act § 214.

³ INA § 222(c).

⁴ American Immigration Lawyers Association (AILA) Backgrounder: [Legal Immigration to the United States](#), p. 4.

⁵ INA § 101(a)(15)(H); AILA, *Solutions That Work: A Policy Manual for Immigration Reform*, p. 23 (Washington, DC: 2010). Employers who abuse the system can be debarred by the Department of Labor. 20 CFR §§655.810(d), 655.855. H-1B visas may not be used to replace striking workers. 20 CFR § 655.733.

⁶ INA § 101(a)(15)(L). Foreign companies often bring in L nonimmigrants to facilitate the building of factories in the U.S., open new offices, and hire U.S. workers. AILA Backgrounder: [L-1 Visas and Economic Growth: Preserving and Strengthening the Intracompany Transferee Visa Category](#).

⁷ However, in most years many more applications are received.

⁸ U.S. Department of State, [Temporary Worker Visas](#).

⁹ AILA, *Solutions That Work: A Policy Manual for Immigration Reform*, p. 15 (Washington, DC: 2010).

¹⁰ U.S. Department of State, [Temporary Worker Visas](#). However, in the past, Congress has exempted returning workers, or workers who have participated in the program in one of the previous three years, from the cap. AILA Talking Points: [Immigration 101: H-2B and H-1B Workers](#) (Washington, DC: March 19, 2010). 33,000 of the H-2B visas are allocated for the first half of the fiscal year (October-March), and 33,000 for the second half (April-September). U.S. Citizenship and Immigration Services (USCIS), [Cap Count for H-2B Nonimmigrants](#).

¹¹ A seventh year is available for H-1B workers who have a green card application pending.

¹² USCIS, [H-2A Temporary Agricultural Workers](#).

¹³ USCIS, [H-2B Temporary Non-Agricultural Workers](#).

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- ¹⁴ USCIS, [L-1A Intracompany Transferee Executive or Manager](#).
- ¹⁵ INA § 101(a)(15)(H)(ii)(a).
- ¹⁶ INA § 101(a)(15)(H)(ii)(b).
- ¹⁷ See generally, 20 CFR § 655.730.
- ¹⁸ USCIS, [H-2A Temporary Agricultural Workers](#).
- ¹⁹ USCIS, [H-2B Temporary Non-Agricultural Workers](#).
- ²⁰ USCIS, [H-1B Specialty Occupations](#).
- ²¹ USCIS, [H-2A Temporary Agricultural Workers](#).
- ²² USCIS, [H-2B Temporary Non-Agricultural Workers](#).
- ²³ USCIS, [L-1A Intracompany Transferee Executive or Manager](#).
- ²⁴ Ruth Ellen Wasem, [U.S. Immigration Policy on Permanent Admissions](#) (Washington, DC: Congressional Research Service, April 1, 2010), p. 1.
- ²⁵ Ibid. In addition, “If the prospective LPR does not have legal residence in the United States, the petition is forwarded to the Department of State’s Bureau of Consular Affairs in their home country after USCIS has reviewed it.” Ibid. The second and third employer preferences also require certification from the Department of Labor that they meet the qualifications for the job and that a labor shortage exists in that occupation. Ibid., p. 4. Aliens of extraordinary ability under INA § 203(b)(1)(A) and certain aliens with advance degrees or who have exceptional ability under INA § 203(b)(2) whose admission is in the “national interest” do not require employer petitions.
- ²⁶ Ibid., p. 1.
- ²⁷ INA § 201(d); U.S. Department of State, [Employment-Based Immigrant Visas](#).
- ²⁸ Ruth Ellen Wasem, [U.S. Immigration Policy on Permanent Admissions](#) (Washington, DC: Congressional Research Service, April 1, 2010), p. 5; citing INA § 202(a)(2).
- ²⁹ INA § 203(b)(1); U.S. Department of State, [Employment-Based Immigrant Visas](#).
- ³⁰ INA § 203(b)(2); U.S. Department of State, [Employment-Based Immigrant Visas](#).
- ³¹ INA § 203(b)(3); U.S. Department of State, [Employment-Based Immigrant Visas](#).
- ³² Stuart Anderson, [U.S. Immigration Reform Should Focus on Improving the Employment-Based Visa System](#) (Washington, DC: Cato Institute, January, 2011), p. 1; citing § 203(e) of the Nicaraguan Adjustment and Central American Relief Act, as amended by § 1(e) of Pub. L. 105-139.
- ³³ INA § 203(b)(4); U.S. Department of State, [Employment-Based Immigrant Visas](#).
- ³⁴ Depending on the unemployment rate in the geographical area. U.S. Department of State, [Employment-Based Immigrant Visas](#).
- ³⁵ INA § 203(b)(5); U.S. Department of State, [Employment-Based Immigrant Visas](#).
- ³⁶ U.S. Department of State, [Visa Bulletin for April, 2011](#).
- ³⁷ USCIS, [Instructions for I-129, Petition for a Nonimmigrant Worker](#).
- ³⁸ Ibid.