

Summary of Immigrant Visa Options

General Information

Permanent residence status requires that an application be made for an immigrant visa. Immigrant visas to the U.S. are generally categorized based on family relationships, humanitarian bases (asylum/refugee), and employment.

In the employment-based context, similar to non-immigrant visa options, there are a number of employment-based visa preference categories that employers and foreign nationals can utilize to obtain permanent residence status. The primary categories generally range from those for individuals who have at least a bachelor's level degree and will work in a position requiring such a degree, to those set aside for extraordinary individuals, such as Nobel Prize winners. There are no realistic options to obtain permanent residence status for someone in a lesser-skilled or unskilled position based upon employment.

Basic Process – The basic process for most foreign nationals seeking employment-based permanent residence involves three steps: (1) a “labor market test” for any qualified, willing and able U.S. workers and application with the U.S. Department of Labor (known as “Labor Certification”), (2) an immigrant visa petition filed with the U.S. Citizenship and Immigration Services (“USCIS”), and (3) the individual’s application with USCIS within the U.S. for permanent residence (referred to as the “Adjustment of Status” application) or an application at a U.S. consulate (referred to as Consular Visa Processing).

Academic Positions – Faculty members of academic institutions are subject to a modified labor market test. In order to satisfy the requirements of this test, the employer must show that there are no **equally** qualified, willing and able U.S. workers for the position.

Fee Payment Issues - Pursuant to the U.S. Department of Labor’s recent regulation, effective July 16, 2007, **all expenses associated with Labor Certification (e.g. attorney’s fees and advertising costs) are to be paid by the employer.** Expenses associated with the second and third steps of the process can be paid by the sponsored employee.

Labor Certification Exemptions – It is possible to avoid the first step, Labor Certification, in certain cases based upon the following:

- o An individual’s extraordinary ability or if the employment will be in the national interest
- o Employment as a Nurse and Physical Therapist
- o Employment as a physician who will work full-time in a health shortage area or for the VA for an aggregate of 5 years

Projections of Visa Availability - Across the board, there are limited numbers of employment-based immigrant visas available at this time. Additionally, these immigrant visas will likely be in short supply over the next couple of years. This has caused and will continue to cause significant delays, often amounting to several years, for employers and employees to advance cases to the third step and to completion.

Permanent Residency “Portability” – Under current law, certain foreign nationals who have completed a significant portion of the permanent residence process with another employer may change employers. More specifically, if a candidate has completed Steps 1

and 2 of the "Basic Process" described above **and** his or her application for Step 3 has been on file for 180 days without adjudication, that person is eligible to take up employment with another U.S. employer in the "same or similar occupation."

If an employer encounters a candidate in this situation, it needs to consider two things. One is determining whether the position the person was sponsored for is the "same or similar" to the one with the new employer. We strongly advise that this determination be made with advice of counsel before the candidate leaves his or her current sponsoring employer. Second, the employer needs to ensure the candidate's ongoing nonimmigrant, or temporary, work authorization status. Individuals pursuing permanent residence status in this situation should maintain an underlying, independent work authorization because, if the permanent residence case were denied, the person would still have work authorization.

There are a number of people in the U.S. who are able to potentially utilize "portability" at this time. However, the number of candidates who can potentially utilize "portability" will sharply increase next spring by the tens of thousands. Employers encountering such a candidate should seek legal counsel before offering employment to the person.

Non-Degreed Positions - As indicated above, there are essentially no options to obtain permanent residence status for someone in a lesser-skilled or unskilled position based upon employment. The current annual visa quota for what is referred to as "Third Preference Other Workers" is 5,000 and from 1990 until 2002 was set at 10,000 per year. This quota does not mean that 5,000 workers can legally immigrate to the U.S., but also includes a legal immigrant's family members. For example, if each worker has only one dependent, a total of 2,500 workers in this category can legally immigrate to the U.S. Over the last 17 years, an average of about 8,200 people per year have permitted to become U.S. permanent residents on the basis of employment opportunities requiring less than a specialized associate's degree.