Business Immigration Cheat Sheet

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I. Immigration Background Information

A. All foreign nationals, with the exception of U.S. permanent residents, must obtain authorization from U.S. government in order to work

B. "Work authorization" = work visa or work approved by U.S. government specifically or as incidental to status (e.g., F-1 student's work on campus)

C. US Citizenship and Immigration Services ("USCIS") (previously known as INS) controls most work visas

D. Section 214(b) of the Immigration and Nationality Act presumes that all visa applicants are **immigrants** except those listed below, unless proven otherwise (burden of proof on visa applicant)

1. Immigrant = intention of permanently staying in the U.S.

2. Nonimmigrant = coming to the U.S. for a finite period

3. Most visas except L, H, O, K, V may not be granted if the applicant applied for immigrant visa or showed immigrant intent. L, H, O, K, V visas are "dual intent visas" – cannot be denied just because the applicant applied for an immigrant visa

E. Work visas (nonimmigrant visas) are valid for a finite period. They may lead to an immigrant visa or permanent residency ("Green card")

1. Some nonimmigrant visa categories are very similar to immigrant visa categories (e.g., O-1 (nonimmigrant) and EB-1 (immigrant)).

2. Standard usually more strict (higher standard) in immigrant visa adjudication, even in cases of similar visa categories (O-1, EB-1).

F. U.S. Government agencies involved in hiring a foreign national:

1. U.S. Department of State ("DOS") – responsible for pre-clearance (e.g., security) and issuance of visas in U.S. consulates abroad (applicant's home country or country of residence)

2. USCIS - responsible for admission and extension of visas and for approval of most work visas prior to issuance at the consulate

3. U.S. Department of Labor ("DOL") – responsible for protection of U.S. workers and foreign workers. Main responsibilities include prevailing wage determination and labor certification adjudications

4. U.S. Customs and Border Protection ("CBP") - responsible for protection of our borders by reviewing applications for entry for admission to the U.S. based on current visa status

G. The basic process of admission of foreign workers into the U.S. is as follows:

1. Filing a work visa petition with USCIS

    a. E, F, or J visa applicants may apply directly to DOS without prior approval of USCIS

    b. Visa exempt – visa waiver, extensions, change of employers in the same nonimmigrant category

2. DOS issuance of visa (visa stamp in passport)

3. Application for entry to the U.S. with CBP at port-of-entry and issuance of the I-94 card

4. Application for extension or change of status with USCIS (if here in status and eligible - USCIS will issue new I-94 card)

5. Visa = admission ticket, controls dates of admission to the U.S. and the I-94 controls dates of authorized stay in the U.S. (until specific date or duration of status ("D/S"))

6. Violations of status can make a foreign national ineligible for change of status or extension of status, in addition to deportation and in some cases may trigger a bar to reenter the U.S. for 3/10 years

    a. Overstay of the I-94 expiration date of more than 180 days may trigger a 3 year bar

    b. Overstay of the I-94 expiration date of more than 1 year may trigger a 10 year bar

    c. D/S overstays may not be subject to re-entry bars, unless there is a formal finding of CIS or Immigration Judge (IJ)

    d. Reentry bar is also a bar to changing status or adjusting status
    e. Reentry bar is activated upon departure from the U.S.

7. "Out of status" = violated status (e.g., unauthorized employment)

8. "Unlawful presence" = overstay of I-94 expiration date

II. F-1 Students – employment issues

A. Usually, students are not permitted to work without Employment Authorization Document ("EAD") issued by USCIS, except for the following circumstances:

1. On campus employment – limited to 20 hours a week while school is in session or full time during vacations (8 C.F.R. §214.2(f)(9)(i))

a. On campus includes an off-campus location which is educationally affiliated with the school

b. On campus employment can be in any position that directly serves the student body AND it must not displace a U.S. resident. Test: whether job is usually performed by students or not

c. On campus employment as part of a scholarship, fellowship, post-doctoral appointment, etc. (or educationally related or affiliated with the school)

2. A student may be authorized by the Designated School Officer ("DSO") to work off campus for up to 20 hours a week (or full time when school is not in session) after studying a full academic year (8 C.F.R. §214.2(f)(9)(ii))

3. Curricular Practical Training ("CPT") or "work study" programs, e.g., internship or academic training

a. A student may not engage in CPT during the first nine months in school, except for graduate students

b. If the student received more than 1 year of CPT, he/she is ineligible for OPT

c. CPT must be noted in SEVIS and on Form I-20

4. Hardship Waiver - requires prior approval by USCIS, by establishing:

a. "Severe economic hardship" caused by unforeseen circumstances beyond the student's control (8 C.F.R. §214.2(f)(9)(ii)(C))

b. There must be no suitable and available on campus employment opportunity

c. The student must have completed a full academic year of study (nine months)

d. The student must be in good academic standing

e. The DSO must recommend work authorization

f. The student can work no more than 20 hours while school is in session

5. Optional Practical Training ("OPT") -- post-graduate training in field of study, must be USCIS authorized (8 C.F.R. §214.2(f)(10)-(11)):

a. May be obtained during school or after graduation

b. Limited to a total of 12 months in a student's lifetime

c. Must be completed within 14 months of the student's graduation

d. DSO must recommend the training, based on whether the training sought is related to the student's field of study and whether it is appropriate for their educational level

e. DSO must note in SEVIS and send the I-12 and I-765 to USCIS service center

B. Documentary requirements for employment authorization: Valid I-20 and EAD card

III. J-1 Nonimmigrants

A. Programs administered by the DOS

1. Program Sponsors are designated by DOS for specific categories

B. INA §212(e): many J visa holders are subject to a two-year home residency physical presence requirement at the end of J period

C. J-1's subject to §212(e) must obtain a waiver before applying for H-1B or permanent residency (O-1 may be a temporary solution)

D. Dependents may apply for work authorization

IV. H-1B "Specialty Occupation" Nonimmigrants

A. Primary category for hiring foreign national professionals in the workforce

B. What are the requirements for an H-1B?

1. Offered position must require a bachelor degree in a specific field as a minimum for entry into that position (8 CFR §214.2(h)(4)(iii)(A))

2. Foreign national entering the position must have a bachelor degree in a related field or the equivalent (8 CFR §214.2(h)(4)(iii)(D)(1))

a. "equivalent" = foreign degree that has been evaluated by a professional company authorized to conduct evaluations and determined to be the equivalent to a U.S.-based university-level bachelor degree

b. "equivalent" = three years of professional-level experience in a related field for every year of university level study not completed or missing

C. H-1B Limitations:

1. H-1B is "job" specific – foreign national must be engaging in job duties substantially similar to those as described in the H-1B Petition filed with the USCIS

2. H-1B is "employer" specific – foreign national must be employed by the entity that is listed as the "Petitioner" on the H-1B Petition filed with the USCIS (with a few exceptions which will be discussed below)

3. Foreign National in H-1B status limited to six-year stay in the United States (8 CFR §214.2(h)(13)(iii)(A), however, some exceptions allow for individual to remain beyond six-year period:

a. Time spent outside the U.S. (vacation, leave of absence, other trips). Caution: a short trip abroad may not be recognized by the USCIS

b. The foreign national has initiated the immigrant visa ("green card") process in some manner at least 365 days prior to the individual's six-year limit of stay in the United States (must have filed a labor certification or I-140 at least a year before applying for the extension). American Competitiveness in the 21st Century Act ("AC21", P.L. 106-313), INA §106

4. Employer must pay the "prevailing wage:" the wage that has been determined by the DOL to be offered to similarly employed individuals within the geographic location of the employment (20 CFR §§655.730(d)(1) and 655.731)

    a. Prevailing wage may be determined by the DOL, in which case the employer is protected in case of a wage dispute or DOL investigation

    b. Prevailing wage may be determined by using another source or a private survey, provided the data has been updated at least once in the past year, in which case the employer must support its wage in case of a dispute or DOL investigation

    c. Employers are required to pay the wages to the H-1B workers and must not bench them such as for lack of work. If the employee wishes to take a leave of absence that is permitted. The test is whether the lack or work is due to the employer's wishes or conditions or the employee's.

    d. Pay of an H-1B worker's salary is usually done according to the employer's established salary practice.

    e. Under new law effective March 8, 2005, the employer must pay 100% of the prevailing wage (previously allowed to pay 95%)

5. Annual Cap: under current Regulations, there are only 65,000 H-1B visas available during the current fiscal year (10/01/2012 to 09/30/2013) (8 CFR §214.2(h)(8)(i)(B)). Cap exemptions:

    a. Workers employed by an institution of higher learning

    b. Workers employed by a nonprofit institution related to or affiliated with an institution of higher learning

c. Workers employed by a nonprofit or government research organization

d. Beneficiaries of J-1 visas who received waiver of the 2-year foreign residency requirement

e. Workers applying for an H-1B extension

f. Workers applying for an H-1B change of employer (if previously subject to the H-1B cap)

D. H-1B Process:

1. Once the employer locates a qualified candidate who requires sponsorship:

   a. Labor Condition Application ("LCA") is prepared, posted for ten days at the employer's work location, and filed with the U.S. Department of Labor ("DOL"). Employer must attest to four items:

      1) Pay the prevailing wage (20 CFR §655.730(d)(1));

      2) Provide similar working conditions (20 CFR §655.732);

      3) There is presently no strike or lockout in that work location (20 §CFR 655.733); and

      4) Notice of the employer's intent to hire an H-1B worker has been provided to the employees. (20 CFR §655.734)

   b. The LCA may be filed electronically now at http://www.lca.doleta.gov/ for approval. It must then be signed by the employer's official or representative

   c. Form I-129, Petition for Nonimmigrant Worker with attached H Supplement is prepared and filed, along with the following supporting documents, with the USCIS:

      1) DOL certified LCA

      2) Form I-129W (Note: as of 03/08/2005 there is a $1,500 worker training fee required to be submitted

with the petition as well as a $500 fraud protection fee)

3) Employer's letter in support of the Petition

4) Basis for qualification of the foreign national (i.e., copy of degree and transcripts, resume and letters of experience (if applicable))

5) Copy of passport, I-94 (if the foreign national is in the U.S.), evidence of the foreign national's current, valid status within the United States (if applicable)

6) Financial information and background information about the petitioner as well as a well-written job description is recommended

d. Petition approved by the USCIS:

1) "Normal" processing = approximately three to six months

2) Premium Processing:

a) $1,225 additional fee to the USCIS upon filing the petition

b) 15 days processing (including weekends and holidays). Caveat: issuance of a request for additional evidence ("RFE") stops the clock. The clock restarts upon receipt of an answer to the RFE which starts another 15-day period to adjudicate the petition

e. Employer should create and maintain separate LCA documentation file, known as the "Public Access File", which includes the following items for each LCA filed, within one day of filing the LCA (20 CFR §655.760):

1) Copy of DOL certified LCA

2) Actual wage information – should provide information explaining and demonstrating employer's "actual" wage for the position, i.e., what the employer pays other individuals in the same or similar positions

3) Prevailing wage information – generally a copy of the SESA prevailing wage determination

4) Summary of benefits being provided to foreign national as well as others employed in same or similar position

f. Employer should retain LCA for one year beyond the last date for any H-B employed under the LCA, the date the LCA expires, or the date the LCA was withdrawn by the employer with the DOL (20 CFR §655.750(b))

E. H-1B Portability

1. American Competitiveness in the 21st Century Act ("AC21", P.L. 106-313) has increased portability for H-1B workers as well as for workers with pending adjustment applications (to be discussed in further detail below)

2. AC21 §105 changed INA §214 as follows:

"(m)(1) A nonimmigrant alien described in paragraph (2) who was previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant as provided under subsection (a). Employment authorization shall continue for such alien until the new petition is adjudicated. If the new petition is denied, such authorization shall cease

(2) A nonimmigrant alien described in this paragraph is a nonimmigrant alien--

(A) who has been lawfully admitted into the United States;

(B) on whose behalf an employer has filed nonfrivolous petition for new employment before the date of expiration of the period of stay authorized by the Attorney General; and

(C) who, subsequent to such lawful admission, has not been employed without authorization in the United States before the filing of such petition."

3. H-1B worker that are currently holding H-1B status can begin employment with a new employer as soon as the new employer files an I-129 H-1B petition for new employment, provided the alien is in the U.S., a nonfrivolous petition for new employment is filed while the person is in status, AND that the person must not have engaged in unlawful employment

4. Regulations have not been published yet by the USCIS as to the H-1B portability issue. However USCIS is likely to take restrictive interpretation

5. Broader interpretation of AC21 may include any person who held H-1B status before ("who was previously issued a visa" does not state immediately preceding the current application). Therefore this may include cases where a person changed status from H-1B to B-1, and then back to H-1B. However since no interpretation was implemented by USCIS, a more conservative approach may be better

6. I-9 compliance – a copy of the previous H-1B approval notice, along with the person's I-94 and new application's receipt may be required

7. Practice pointer: most of the time USCIS requests a last pay stub as evidence of maintenance of a person's status to be filed with the change/extension of status requests for H-1B portability issues. Therefore, when hiring a new H-1B employee or when laying off an H-1B employee, the employer must be sensitive to such issue, especially in a lay-off where the H-1B employer falls out of status as soon as the salary stops. Prolonged severance pay packages, or giving sufficient notice may help the laid-off H-1B worker to find other avenues. It may be beneficial for both parties, since if the laid-off H-1B worker decided to stay in the U.S., the employer is not obligated to pay for his/her return transportation home.

F. Filing a new petition

1. According to 8 CFR §214.2(h)(2)(E), the employer must file an amended or new petition, with fee, to the Service Center where the original petition was filed to reflect "any material changes in the terms and conditions of employment". The determination of what "material" is must be made on a case-by-case basis

2. Factors for determination include: change in job location, significant change in job title, significant change in job duties, adding on additional duties, etc.

G. Withdrawal of H-1B petition

1. Once the employment terminates, it is good practice that the employer notify the USCIS Service Center and withdraw the I-129 petition for the laid off employee

2. A letter of withdrawal with a copy of the I-797 approval notice should be sent to the USCIS Service Center

3. If the I-129 petition is not withdrawn, the employer may re-hire the H-1B employee at a later stage, as it already has an approved H-1B petition for him/her. Caveat: there is DOL precedence that if the H-1B has not been withdrawn, the employer could be liable for back wages based on the certified LCA

V. L-1 Intracompany Transferees

A. The two companies engaged in the transfer of the employee must have a "qualifying" relationship:

1. Same employer/branch offices: The U.S. and foreign businesses are just different operating offices of the same entity. (8 CFR §214.2(l)(1)(ii)(J))

2. Parent/Subsidiary relationship:

a. One entity directly or indirectly owns more than half of and controls the other entity;

b. One entity directly or indirectly owns half of and controls the other entity;

c. One entity directly or indirectly owns half of, and has equal control AND veto power over, the other entity; or

d. One entity directly or indirectly owns less than half of, but in fact, controls the other entity. (8 CFR §214.2(l)(ii)(I) and (K))

3. Affiliation:

a. Both entities are owned and controlled by the same parent or individual;

b. Both entities are owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity; or

c. Both entities are accounting partnerships (or similar organizations) marketing their accounting services under the same internationally recognized name under an agreement with a worldwide coordinating organization owned and controlled by the member accounting firms. (8 CFR §214.2(l)(ii)(L)).

B. The individual must be employed in a qualifying capacity at the foreign employer and be offered employment in a qualifying capacity at the U.S. employer:

1. L-1A: Managerial or Executive (7 year maximum stay; 3 year initial admission with 2 year extensions available):

a. Manager:

1) Manages the organization, or a department, subdivision, function, or component of the organization;

2) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function (department, subdivision) of the organization;

3) Has the authority to take or recommend personnel actions or functions at a senior level within the organizational hierarchy or with respect to the function managed; and

4) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. (INA §101(a)(44)(A)).

b. Executive:

1) Directs the management or a major component or function of the organization;

2) Establishes the goals and policies of the organization, component, or function;

3) Exercises wide latitude in discretionary decision-making; and

4) Receive only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization. (INA §101(a)(44)(B)).

2. L-1B: Specialized Knowledge (5 year maximum stay; 3 year initial admission with 2 year extension available):

   a. Special knowledge of the company's products, services, research, equipment, techniques, management, or other interests and their application in international markets or an advanced level of knowledge of processes and procedures of the company. (8 CFR §214.2(l)(1)(ii)(D))

   b. Since March 8, 2005, the USCIS has focused on the L-1B and the "outsourcing" of employees – placing international transferee at an unaffiliated employer upon entry into the U.S. These L-1B situations are highly scrutinized and often denied.

C. Transferee must have worked abroad for a qualifying employer in a qualifying capacity for at least one year out of the last three years before the transferee's application for admission in L-1 status. (8 CFR §214.2(l)(3)(iii))

D. Special Situation: New Office L-1 Petitions (e.g., foreign employer seeking to start-up new U.S. affiliate) – initial admission will only be valid for 1 year and documentation is the key (must demonstrate ability to sustain business and must demonstrate "start-up" activities including business lease, wire transfers, etc.).

E. Special Situation: Large multinational companies are usually eligible to file for a Blanket L Petition approval with the USCIS which will allow the organization to apply for L-1s directly at the US Embassies and Consulates and bypass USCIS processing (see generally 8 CFR §214.2(l)(14))

F. Special Situation: Canadian citizen transferees: Eligible to file directly at Class A Port-of-Entries ("POE") or Pre-Flight Inspections ("PFI") for the L-1 classification. All other individual petitions are filed with the USCIS on Form I-129 (processing times range between 30-90 days without Premium Processing).

VI. Trade NAFTA ("TN") Classification for Mexican and Canadian Citizens

A. Annex 1603.D.1 of the North American Free Trade Agreement ("NAFTA") establishes a list of Professionals who may enter the U.S. in the TN classification.

B. Three-year initial admission and three-year extensions can be granted indefinitely (in theory; in practice, because this is a nonimmigrant visa, the CBP will heavily scrutinize the application for a second three-year extension and beyond.

C. Canadian Citizens:

1. File directly at a Class A POE or PFI

2. Must be coming to U.S. to fill a listed position and must meet the qualifications listed for that position (documentation is key)

D. Mexican Citizens:

1. File directly at the U.S. Embassy or Consulate

2. Must be coming to U.S. to fill a listed position and must meet the qualifications listed for that position (documentation is key)

VII. O-1 Extraordinary Ability Nonimmigrants

A. Limited to those individuals who have risen to the very top few percent in the field of listed expertise (business, sciences or education) (8 CFR §214.2(o)(1)(i))

B. Requirements for an O-1 (8 CFR §214.2(o)(1)):

1. Major Inter/National Award (i.e., Nobel, Pulitzer, etc.), **or**

2. Other "comparable evidence" that does not readily apply to the categories listed below; **or**

3. Documentation from <u>at least</u> three of eight categories 8 CFR. §214.2(o)(3)(iii):

a. Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

b. Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;

c. Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;

d. Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;

e. Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;

f. Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media;

g. Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;

h. Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence

C. O-1 Highlights:

1. Exclusive category that should be reserved for those individuals who are recognized as industry leaders

2. O-1 is filed on Form I-129 with attached O Supplement to the USCIS along with all of the supporting evidence demonstrating the foreign national’s extraordinary ability

3. Practice Note: **the offered position need not require an individual of extraordinary ability**

4. Initial O-1 period of validity is three years. **Annual extensions allowed for an "indefinite" period** – foreign national must continue to demonstrate that work is outstanding the field and that new achievements worthy of O-1 status have been completed

5. O-1 employment must be for the duration of a specific "event". "Event" is not necessarily for a short duration, it may include a full academic year or longer for example.

D. O-1 Advantages and Disadvantages:

1. May lead to permanent residency "Green Card", as it is very similar to the EB-1 extraordinary ability / outstanding researchers and professors category. Even though the scrutiny of EB-1 cases is higher than O-1's, if a nonimmigrant was granted an O-1 visa, it may be used as prima facie evidence for the EB-1 category. If an EB-1 is subsequently denied, a motion to reopen or appeal based on "gross error" may be filed

2. May be renewed indefinitely (unlike the 6-year limitation on H-1B's), in 1 year increments after the first 3 years

3. Nonimmigrants that previously held J-1 status who are still subject to the 2 year home residency requirement may be granted O status

4. The key disadvantage to the O-1 is the documentary requirements needed in order to succeed in the petition. Even if a person qualifies in the opinion of the attorney reviewing the petition, the USCIS may not agree.

5. Adjudication of the O-1 category is getting tougher and tougher, with USCIS examiners misinformed in the law or its interpretation. Since it is a more discretionary visa, problems may arise.

VIII. Travel and Extensions

A. Usually applications for extension of status filed before the expiration of the nonimmigrant's current status are considered to be timely filed. Late filings may be excused at the discretion of USCIS if the delay was due to extraordinary circumstances beyond the control of the applicant or petitioner (8 CFR §214.1(c)(4)).

B. Persons holding nonimmigrant visas, such as H-1B, J-1, O-1 who timely file an application for the extension of their status with the same employer are automatically authorized to continue their employment for up to 240 days from the date of expiration of their current status, or until a denial of the application filed, whichever is earlier (8 CFR §274a.12(b)(20)) - Practice Note: despite the individual's ability to work, the GA Department of Driver Services will not issue a Driver's License without the actual Approval Notice.

C. INA §222(g)

    1. INA §222(g) states that if an alien admitted on a nonimmigrant visa and remained in the U.S. beyond the period of authorized stay (I-94 expiration), that visa shall become void. Such a person is ineligible to be readmitted to the U.S. as a nonimmigrant except on a basis of a new visa issued in a consulate in the home country of that person OR where extraordinary circumstances are found by the Secretary of State to exist.

    2. DOS cable re consolidated summary of INA §222(g), 071654Z JUN 99, finds extraordinary circumstances exist in cases where an alien filed a timely, non-frivolous application for a change or extension of status. Such an alien is entitled to a 120-day automatic tolling period during which the running of the unlawful presence clock is suspended

D. Nonimmigrants with valid, unexpired multiple entry visas, may travel abroad and return using the same visa.

    1. F-1 visa holders must travel with a valid I-20

    2. J-1 visa holders must travel with a valid DS-2019

    3. H-1B, O-1 visa holders must travel with original I-797 approval notice

    4. Change of employers within the same nonimmigrant category will require filing a new I-129 petition with USCIS. Once the petition is approved, a new visa stamp is not required as long as the nonimmigrant stays within the same category (e.g., H-1B), his/her visa remains unexpired and he/she travels with the original I-797 approval notice for the new employer

E. Travel with nonimmigrant visa vs. Advance Parole (based on pending green card application)

1. AOS ("Adjustment of Status") alien who entered with Advance Parole is not eligible for a change of status to a nonimmigrant visa category

2. Advance parole currently takes up to 9 months to obtain at USCIS Texas Service Center. It can only be expedited in cases of an extreme emergency.

3. Processing delays in consulates abroad since 9/11 – employee may be stuck abroad waiting for a visa, especially (but not only) if from the 16 Muslim countries

4. 8 CFR §245.2(a)(4) states that a departure of an alien after filing an application for adjustment of status, without first obtaining an advance parole document may be considered abandonment of the AOS application. Consequence: the alien should re-file the AOS, and receives a new priority date

5. 8 CFR §245.2(a)(4)(ii)(C) states that the travel outside of the U.S. by an AOS applicant in lawful H-1 or L-1 status is not deemed an abandonment of the application if upon returning to the U.S. the alien remains eligible for H or L status and coming to resume employment with the same employer. The same applies to family members in L-2 or H-4 status. The alien must travel with the original I-797 receipt notice for the I-485

6. Traveling on work visa (e.g., H-1B) and engaging in other employment (e.g., moonlighting with an approved I-765 work card) may be allowed, as long as the employee hasn't violated his/her H-1B status otherwise, and works primarily for the H-1B employer. The employer should maintain the I-9 on the primary H-1B in this case

7. Conclusion: the dual status of H-1B and AOS can be helpful, especially due to the length of advance parole issuance, and inability to change status from AOS to another nonimmigrant category

IX. Obtaining Permanent Residency ("Green Card") for the Foreign National through Employer Sponsorship

A. Generally, three-step process:

1. Application for Alien Employment Certification ("AEC") prepared and filed with the DOL unless exemptions apply (discussed below);

2. Form I-140 Petition for Immigrant Worker prepared and filed with the USCIS;

3. Application to Adjust to Permanent Residence Status filed with USCIS **or** Consular Processing Immigrant Visa Application filed with National Visa Center ("NVC")

   Note: Regulation published in the Federal Register, July 31, 2002 (Volume 67, Number 147 (Page 49561-49564)) allows for concurrent filings of I-140 and I-485 petitions. Concurrent filing must be noted in the cover letter accompanying the petition, and forms such as I-765 (application for employment authorization document) and I-131 (advance parole) may be granted due to the pendency of the I-485. Concurrent filing is only available if individual has a "current" priority date (discussed below).

B. First Preference: Priority Workers ("EB-1"): **No AEC required as prerequisite for filing**

   1. Extraordinary Ability ("EB-1-1") Priority Workers

      a. Similar to O-1 nonimmigrant classification discussed above

      b. EB-1-1 Requirements (8 CFR §204.5(h)(2)):

         1) Receipt of major international or national Award (i.e., Nobel, Pulitzer, etc.), **or**

         2) Other "comparable evidence" that does not readily apply to the categories listed below; **or**

         3) Documentation from at least three of ten categories:

            a) Original contributions of major significance in the field of expertise;

            b) Articles written by the foreign national in major professional journals or other media;

            c) Employment in a critical or essential capacity for distinguished organizations;

            d) Lesser international or national awards for excellence in the field;

            e) High remuneration in the field;

f) Memberships in organizations that require outstanding achievement as a criteria for membership;

g) Publications in professional or major media about the foreign national or the foreign national's work;

h) Foreign national has served as the judge of the work of others in the field;

i) Commercial successes in the performing arts;

j) Display of work at artistic exhibitions (8 CFR §204.5(h)(3))

2. Outstanding Researchers and Professors ("EB-1-2")

a. EB-1-2 Requirements:

1) Foreign national must demonstrate at least three years of teaching or research experience in the offered academic area

2) Foreign national must have a job offer in a tenured or tenure-track position or for a term of indefinite duration

3) Receipt of major international or national award (Nobel, Pulitzer, etc.); or

4) Documentation from at least two of six specified categories:

a) Lesser international or national prizes or awards for excellence

b) Memberships in organizations that require outstanding achievement in the field as criteria for entry into the organization

c) Publications in professional or major media about the foreign national or the foreign national's work

d) Foreign national has served as the judge of the work of others in the field

e) Original scientific or scholarly contributions to the field

f) Authorship of scholarly books or articles in major media with international circulation (8 CFR §204.5(i)(3))

3. Multinational Managers or Executives ("EB-1-3"): Identical to the L-1A nonimmigrant visa category discussed above.

C. Second Preference: Foreign National Professionals with Advanced Degree or Exceptional Ability ("EB-2"): **subject to AEC unless otherwise specified**

1. National Interest Waiver of Job Offer Requirement ("NIW"): **No AEC required** (INA §203(b)(2)(B))

a. NIW must meet the "National Interest" Test":

1) Foreign national will work in area of "substantial intrinsic merit," which includes the following seven, non-exclusive factors:

a) work will improve the U.S. economy;

b) work will improve the working conditions and wages of U.S. workers;

c) work will improve education and training programs for underqualified workers

d) work will improve health care

e) work will provide more affordable housing for poorer U.S. residents

f) work will improve the U.S. environment (*In Matter of New York State Department of Transportation*, Int. Dec. 3363 (Acting Assoc. Comm'r, 1998))

2) Interested U.S. government agency has specifically made request for work (*In Matter of New York State*

Department of Transportation, Int. Dec. 3363 (Acting Assoc. Comm'r, 1998))

3) Foreign national's proposed activity will be "national in scope" – benefit must accrue to more than a particular region of the United States (*In Matter of New York State Department of Transportation*, Int. Dec. 3363 (Acting Assoc. Comm'r, 1998))

4) Foreign national will serve the national interest to a substantially greater degree than an available U.S. worker having the same minimum qualifications (*In Matter of New York State Department of Transportation*, Int. Dec. 3363 (Acting Assoc. Comm'r, 1998)):

a) Foreign national must demonstrate a track record of success with some degree of influence on the field as a whole

b) Foreign national's expertise must be significantly above that normally encountered in the field

2. Schedule A, Group II Labor Certification Exemption

a. DOL has exempted from AEC requirement foreign nationals deemed to have "exceptional ability" in the sciences or arts (including college and university professors)

b. "Science or art" = "any field of knowledge and/or skill with respect to which college and universities commonly offer specialized courses leading to a degree (20 CFR 656.20(b))

c. Requirements:

1) Job must require individual of exceptional ability

2) Foreign national must have widespread acclaim and international recognition in the field

3) Application for Alien Employment Certification Forms are filed directly with the USCIS (in lieu of the DOL) (8 CFR §204.5(k)(4)(i))

4) Foreign national must meet at least two of seven listed criteria:

a) Internationally or nationally recognized prizes or awards for excellence

b) Membership in organizations that require outstanding achievement as a prerequisite for entry

c) Published material in major media about the foreign national

d) Foreign national has served as the judge of the work of others in the field

e) Original scientific or scholarly contributions to the field

f) Authorship of scholarly articles in major media by the foreign national

g) Display of work in more than one country (8 CFR §204.5(k))

d. Generally filed in conjunction with EB-1-1 case to provide "safety net" to employer and foreign national in the "green card" process

e. Occupation must be listed on Schedule A, Group II of the DOL Regulations (20 CFR §656.22)

3. Foreign Nationals of Exceptional Ability in the Sciences, Arts or Business

a. Generally for non-Schedule A, Group II Occupations

b. AEC Forms are filed directly with the USCIS (in lieu of the DOL)

c. Requirements:

1) Job must require individual of exceptional ability

2) Foreign national must meet at least three of six listed criteria:

a) Foreign national must have an advanced degree in the field

b) Foreign national must have at least ten years of full-time experience in the occupation

c) Foreign national must have licensure or certification in the field

d) Foreign national must receive high remuneration when compared with others in the field

e) Foreign national must have received recognition for achievements and significant contributions to the field

d. Generally filed in conjunction with EB-1-1 to provide "safety net" to employer and foreign national in the "green card" process

4. Special Handling Labor Certifications for Foreign National College and University Teachers – **must file AEC with DOL**

a. Specialized labor certification process – University must show that no ***equally*** qualified U.S. worker is available as opposed to the "traditional" labor certification process in which the employer must show that no ***minimally*** qualified U.S. workers are available (20 CFR 656.21a)

b. University must demonstrate that a competitive recruitment and selection process was undertaken and the foreign national was as or more qualified than any U.S. worker who applied for the position

c. Application must be filed within eighteen months of the foreign national's hire

5. Advanced Degree Professionals – **must file AEC with DOL** (8 CFR §204.5(k)(3)(i))

a. Foreign national must hold a master degree, its equivalent in education and experience, or higher

b. "Equivalent" = foreign degree that has been evaluated by a professional company authorized to conduct evaluations and determined to be the equivalent to a U.S.-based university-level master degree

c. "Equivalent" = three years of professional-level experience in a related field for every year of university level study not completed or missing

D. Third Preference Professional, Skilled and Unskilled Workers (EB-3)

1. Generally, H-1B visa holders will fall under the EB-3 Professionals category and require an AEC with the DOL (discussed below)

2. Skilled Workers – position offered must require at least two years of experience as a minimum for entry

3. Unskilled Workers - position offered requires less than two years of experience as a minimum for entry (significant backlogs render this category practically unusable)

E. AEC Process – How and Why? (20 CFR §656)

1. DOL requires that an employer demonstrate that no minimally qualified U.S. workers were ready, willing and able to accept the position offered in the AEC

2. AEC is designed to protect the U.S. workforce (20 CFR §656.21(b)(2))

3. Generally, an AEC is employer, position and geographic specific (20 CFR §§656.20(a), 656.21(a), 656,21a(a), and 656.23(d):

a. If employer withdraws the AEC or the foreign national leaves the employer, the foreign national would need to file a new AEC with the new employer

b. Generally, if the foreign national undertakes a "substantially dissimilar" position from the offered position in the AEC while the "green card" is in process, then the foreign national may lose eligibility benefits for the green card if a new AEC is not filed for the new position

c. Generally, if the foreign national is transferred to a new location (i.e., from the Austin, Texas location to the Atlanta, Georgia location), then the foreign national would need to file a new AEC to maintain the "green card" process

4. DOL Analysis of the AEC:

   a. DOL will review the employer's stated minimum requirements, job description and salary offered and ensure that the employer's requirements meet the industry standard, are not unduly restrictive, and the employer is paying the prevailing wage

5. AEC recruitment under the PERM Program:

   1) Employer files an extended attestation-style form (similar to LCA) through an automated system

   2) Processing:

      a) Unless application flagged for audit (either for cause or randomly), the process will be handled entirely through electronic means

      b) Automated system will read forms and detect responses that flag the case for an audit

      c) If case is not flagged for audit, then DOL Certification could take as little as 3 months to obtain

      d) If case is flagged for audit, employer will be notified of deficiency and given 21 days to produce documentation that its attestations regarding the recruitment were truthful - audited cases are currently taking more than 15 months to process

   3) Other nuances of the PERM process:

      a) Job requirements must be stated in terms of degree and experience only (no special requirements will be allowed unless "normal" to the occupation (not employer) and the employer has recently employed a U.S.

worker with the same skills in the same occupation)

b) Employer must demonstrate that U.S. workers who do not meet the minimum requirements for the position could not be trained in a "reasonable period of on-the-job training"

c) Employer cannot utilize foreign national's experience gained with that employer as qualifying experience for the offered position

d) Undertake recruitment program consisting of: (a) placing a job order with the State Workforce Agency; (b) print advertising, e.g., depending on the occupation, two Sunday newspaper ads or one national journal ad; (c) three additional forms of recruitment from among a list of acceptable forms (the list includes Internet job sites, the employer's own web site, on-campus recruiting, job fairs, and headhunters); and (d) notice to potentially qualified workers whom the employer laid off in the preceding six months.

F. Post-DOL Certification of the AEC, Finishing the "Green Card" Process

1. Employer will file I-140 Immigrant Visa Preference Petition with the USCIS:

    a. Must demonstrate that foreign national is qualified for the position offered in the AEC (if applicable) or that the foreign national meets the requirements of an exempt and/ or excepted category as listed above

    b. Employer must be mindful of job changes by the foreign national since the filing of the AEC

    c. I-140 processing time is between 6-12 months through the Texas Service Center of the USCIS

2. Foreign National will file I-485 Application to Adjust Status with the USCIS or Packet III with the National Visa Center

a. Adjustment of Status:

1) Process takes place entirely in the United States

2) Foreign national applicant and dependents can file for work and travel authorization (generally, this is often the only way an applicant's spouse can obtain work authorization in the United States)

3) Foreign national is eligible for "green card portability" once the application has been pending for more than 180 days – generally, foreign national can accept employment with a new employer in a similar capacity without losing "green card" eligibility (AC21 §106(c)). The new job must be in "the same or similar occupational classification for the job for which the petition was first filed"

b. Consular Processing:

1) Applicant and dependents will be required to return to home country to obtain medical examinations and to be present at the "green card" interview

2) Depending on which Consulate/Embassy is utilized, processing can be from 6 months to 18 months

3) No "green card portability" through this process

c. Adjustment of Status vs. consular processing:

1) Sometimes the best solution is to apply for both

2) Depends on the Service Center adjudicating the adjustment of status and the consulate abroad

3) Depends on visa status and travel issues of the nonimmigrant

X. I-9 Requirements

A. Immigration Reform and Control Act of 1986 ("IRCA") – imposes penalties on employers for knowingly hiring or continuing to employ foreign nationals who are not authorized to work in the United States.

B. Background Information:

1. It is illegal under IRCA for an employer to hire aliens who cannot present documentation evidencing their authorization to work in the U.S.

2. The regulations impose a variety of paperwork requirements on employers to insure that workers have presented proper documentation to establish their authorization to work:

    a. Within three days of hire, an employer must attest under penalty of perjury on INS Form I-9 that employment and identity documents have been presented and examined.

    b. Violations of these paperwork requirements, even technical ones, can result in the imposition of substantial fines.

    c. The new employer resulting from a merger or acquisition is responsible for the adequacy of the I-9 records of the predecessor employer.

3. Due Diligence review of I-9 policies:

    a. An employer must not knowingly hire any person not authorized to work in the United States and must not knowingly continue to employ any person who is not authorized to work in the United States.

    b. The employer must verify the employment eligibility of **every** person hired by the employer whether the person hired is a citizen or foreign national.

    c. Has each person with hiring authority been provided with a written copy of the company's policies with respect to the hiring of new employees?

    d. Does the company have a company handbook regarding the interview of potential employees?

    e. Is there a person in charge of centralized oversight of the compliance program?

C. Auditing I-9 records: Prepare a random sample list of employees hired since November 6, 1986, including the date of hire and termination (a number that will represent a sufficient "test" group):

    1. Check I-9 records for improper completion:

Employee has failed to check one of the three boxes regarding immigration status;

Employee has checked too many boxes, e.g., claims to be a citizen and a permanent resident;

Employee has failed to insert the expiration date of time-limited work authorization;

Employee has failed to sign and/or date Part 1;

Employer has photocopied documents and attached them to the I-9 form, but has failed to identify the documents under List A, B or C;

Employer has failed to record the expiration date of time-limited work authorization documents;

Under Section 2, the employer has failed to insert the date the employee starts work;

Employer failed to sign and/or date the I-9;

Documents which do not establish employment eligibility or identity have been accepted, e.g., USCIS approval notice;

2. Check I-9 records by verifying work authorization for the listed employees:

List A (Documents that establish BOTH identity and employment eligibility):

U.S. Passport;
Certificate of U.S. Citizenship (USCIS Form N-560 or N-561);
Certificate of Naturalization (USCIS Form N-600);
Unexpired foreign passport with I-551 stamp or attached USCIS Form I-94 indicating unexpired employment authorization;
Alien Registration Receipt Card with photograph (USCIS Form I-151 or I-551);
Unexpired Temporary Resident Card (USCIS Form I-688);
Unexpired Employment Authorization Card (USCIS Form I-688A);
Unexpired Reentry Permit (USCIS Form I-327);

Unexpired Refugee Travel Document (USCIS Form I-571); and
Unexpired Employment Authorization Document issued with by the USCIS which contains a photograph (USCIS Form I-688B);

List B (documents that establish identity) – must present document from BOTH List B and List C:

Driver's license or state issued I.D. card;
I.D. card issued by state, federal or local government agencies or entities;
School I.D. card with a photograph;
Voter's registration card;
U.S. military card or draft record;
Military dependent's I.D. card;
U.S. Coast Guard Merchant Mariner Card;
Native American tribal document; or
Driver's license issued by Canadian government;

List C (documents that establish employment eligibility) – must present document from BOTH List B and List C:

U.S. social security card (other than card stating that it is "not valid for employment");
Certification of Birth Abroad issued by the DOS;
Original or certified copy of birth certificate;
Native American tribal document;
U.S. citizen I.D. card (USCIS Form I-197);
I.D. card for use of Resident Citizen in the United States (USCIS Form I-179); or
Unexpired employment authorization document issued by USCIS other than those listed on List A;

3. Establish procedure to reverify employees with time-limited employment authorization, e.g., establish "hot date" calendar listing employees whose employment verification expires on certain dates;

4. Discontinue any verification procedures that may appear discriminatory based upon a person's national origin:

   a. An employer cannot refuse to hire an individual based on that individual's national origin or citizenship status ("national origin discrimination");

b. An employer cannot discharge an individual based on that individual's national origin or citizenship status ("national origin discrimination");

c. An employer cannot request certain or specific documents in completing the employment eligibility procedure (this is "document abuse"); and

d. An employer cannot refuse to accept documents during the employment eligibility procedure that are acceptable under law, relate to the individual and appear to be genuine on their face (also called "document abuse").