

Permanent Residence via Employment: An Overview

Presented by DAVID A.M. WARE, Attorney at Law

DAVID WARE & ASSOCIATES

Metairie • Baton Rouge • Pensacola • Jackson

800-537-0179/504-830-5900

<http://www.david-ware.com>

dware@david-ware.com

Routes to Permanent Residence

- Employment-based
- Family-based
 - U.S. citizen or permanent resident spouse
 - USC or PR parent; USC child over 21; USC sibling
 - Long waits for all but USC spouse or parent
- Asylum
- Diversity Visa Lottery
- Large Investment
- Special Programs
- Removal Proceedings

PR--Popular Misconceptions

- There is no such thing as “sponsorship” for permanent residence by a friend, someone with “connections”, or distant relative.
- Congressmen can help with PR only by sponsoring a “private bill” in the most extreme situations where no legal remedy exists. Very rare! Otherwise, only can help if case “stuck”.
- Other influential community members generally cannot help.
- Adoption does not confer immigration benefit unless *completed* while under age 16.
- The mere accrual of time spent in the US generally does not result in PR.
- Sponsorship by an employer or most family members does not generally result in an automatic right to remain in the US while sponsorship is ongoing; person must have independent nonimmigrant status, eg, F 1, H1B.

EB-1 (“Priority Workers”)¹

- Quota approx. 40,000
- A. Extraordinary ability or achievement in sciences, arts, education, business, or athletics
- B. Outstanding professor/ researcher
- C. Certain multinational executives/ managers

Extraordinary ability

- Alien “has risen to top of field of endeavor.”²
- One time internationally renowned award or at least three of ten types of evidence.³
- Extraordinary ability will be utilized in activity in US.
- No labor certification or job offer required.⁴

Outstanding professor / researcher⁵

- Alien of national or international renown
- Three years of teaching and/or research
- Two of six types of evidence⁶
- If for private research company must show employment of three other full time researchers
- Company must have research accomplishments⁷
- Full time, permanent job offer required
- No labor certification required⁸

Multinational executives/managers⁹

- Permanent full time job offer
- Company doing business at least one year in U.S.
- Worked abroad for U.S. company or parent, subsidiary, or affiliate of same for one year, during three years prior to entry to U.S., as manager or executive¹⁰
- Coming to work in same U.S. company, parent, subsidiary or affiliate as manager or executive
- No labor cert. required

EB-2 Advanced Degree Professionals & Aliens of Exceptional Ability¹¹

- Quota approx. 40,000
 1. Professional with advanced degree
 2. Aliens of exceptional ability
 3. National interest waiver of job offer and labor certification for prof. with advanced degree or alien of exceptional ability¹²

Members of professions holding advanced degrees¹³

- Permanent full time job offer
- “Member of professions” – a position requiring at least a Bachelor’s degree¹⁴
- Individual must hold advanced degree
- Requires labor certification¹⁵

Alien of exceptional ability¹⁶

- Exceptional ability means “a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business”¹⁷
- Permanent job offer
- Three of six types of evidence
- No labor cert. required
- Note “duplicate” category under Schedule A, Group II labor certification; standard higher under DOL regs?

National interest/job offer waiver¹⁸

- Advanced degree or exceptional ability
- Activity in area which will benefit entire country, directly or indirectly (eg, transportation links)
- Activity is of “intrinsic merit”
- Alien must affect field to greater degree than average, so that labor certification and job offer should not be required in exercise of discretion.¹⁹

EB-3 Skilled workers, professionals, and other workers²⁰

- Approx. 40,000
- Members of the professions holding minimum of Bachelor's degree
- Skilled workers (where job requires at least two years education, training or experience)²¹
- Other workers (where job requires less than two years education, training, or experience).
Limited to 10,000 per year.
- Generally requires labor cert., except nurses and physical therapists
- Full time employment

EB-4 Religious Workers²²

- Approx. 10,000
- Member of denomination for two years²³
- Qualified to carry out job
- Job offer in U.S. from “bona fide nonprofit religious organization”²⁴
- Carrying on work continuously for two years prior; *full time, paid, no students!*

EB-5 Employment Creation²⁵

- Approx. 10,000 /max. 3,000 targeted areas
- New business (established after Nov. 29, 1990)²⁶
- Rural area or area with 150% unemployment rate: 500K, 10 full time jobs²⁷
- Urban area, or area with less than 150% natl. u/e rate: 1 million, 10 full time jobs²⁸
- Existing business: invest required amt., increase net worth by 40%, and create 10 new jobs.
- Targeted area: can show indirect job creation, eg, contract workers.²⁹
- CR for two years.

Labor Certification

- What is it?
 - The first step in the “green card” process for most EB petitioners
 - Required for all workers under EB 3, and most under EB 2.
 - Determination by DOL that there are no U.S. workers able, willing, qualified, and available for the position and that the foreign national’s employment will not adversely impact wages and working conditions of U.S. workers.³⁰
 - How is it obtained?
 - Generally, employer must demonstrate proper recruitment efforts and that no qualified U.S. worker is ready, willing and able to take up job.

Labor Certification, ctd.

- PERM: Program Electronic Review Management System³⁵
- Adjudication in about six months in most cases.
- Must set up subaccount for attorney representation.
- May be filed “paper” or electronically.
- Two new forms: ETA 9089 (Application for Permanent Labor Certification) and ETA 9088 (Prevailing Wage Determination Request).

Labor Certification, ctd.

- Problems
 - Complicated and arcane requirements, not “real world”
 - Unforgiving computer system now “reads” applications
 - Qualified U. S. worker need only meet the *minimum qualifications* for the position
- Overview of Process
 - Obtain prevailing wage determination
 - Conduct proper recruitment and prepare “recruitment report”
 - Post notice for 10 business days and publish in usual in-house media
 - Wait 30 days (but not more than 180 days from earliest recruitment) and file ETA-9089 online in PERM system
 - DOL may approve, audit, or deny
 - If approval, employer may file I-140 for employee

Labor Certification, ctd.

- **PROCESS: Professional Occupations**

- Employer must conduct proper recruitment (30 to 180 days before filing), including:

- **MANDATORY RECRUITMENT**

- *Job Order:*

- Place ad with State Workforce Agency (SWA) to go into job bank and remain active for 30 days

- *Advertisements in newspaper or professional journal*

- Two Sundays in most appropriate newspaper of general circulation in area of employment
 - If job requires experience and advanced degree, and professional journal ad would be normal, employer may place advertise in professional journal in lieu of one Sunday newspaper ad

- **ADDITIONAL RECRUITMENT, *three* of the following**

- recruitment at job fairs
 - recruitment through the employer's web site
 - recruitment through a job search web site (other than the employer's site)
 - on-campus recruiting
 - recruitment through trade or professional organizations
 - use of private employment firms or placement agencies
 - use of an employee referral program
 - use of a campus placement office
 - recruitment through a "local" or "ethnic" newspaper
 - radio and television advertisements.

Labor Certification, ctd.

- **PROCESS: Nonprofessional Occupations**
 - Employer must conduct proper recruitment (30 to 180 days before filing), including:
- **MANDATORY RECRUITMENT**
 - *Job Order:*
 - Place ad with State Workforce Agency (SWA) to go into job bank and remain active for 30 days
 - *Advertisements in newspaper*
 - Two Sundays in most appropriate newspaper of general circulation in area of employment
- **No “additional recruitment” required**

Labor Certification, ctd.

- “Special Handling” labor certification for college and university teachers
 - Permits employer to establish that it hired foreign national after competitive recruitment and selection process including advertising in a national publication. Unlike regular handling process, employer permitted to select *best* qualified applicant, not *only* qualified.³⁶
 - Requires only one ad in national professional print journal (to DOL print means paper – so not online)
 - Must be filed within 18 months of foreign national’s selection.³⁷
 - Available for
 - Full-time positions that include “some actual classroom teaching.”³⁸
 - Community/Junior college teachers but not elementary or high school teachers, or vocational school teachers.³⁹

Labor Certification, ctd.

- **Keys to Success**

- **“Normal” (per DOL) or justifiable job requirements**

- If employer can require master’s or bachelor’s plus five years of experience, EB-2 and shorter queue

- **No requirements beyond employee’s at start of employment**

- Employer cannot require more education or experience for the job than the employee had when she/he started

- **Careful recruitment and filing**

- Carefully establish job requirements
 - Gather documents (diplomas, experience letters) establishing that employee met requirements before accepting job
 - Create advertisements and conduct mandatory recruitment carefully
 - Choose additional recruitment vehicles strategically
 - Post notice in two places for 10 consecutive business days (or provide notice to union), and note dates and place of posting
 - If employer usually posts such notices in in-house media (intranet, newsletter), post there
 - Employer must carefully review applications to see if applicants meet requirements and reject in writing if not (interview if they seem to qualify)
 - Prepare thorough “recruitment report” and audit file
 - Wait 30 days (but not more than 180 days) and file TA-9089 online
 - Meticulous attention to detail in filing ETA-9089
 - If audited, respond timely and with thorough required evidence

Finalizing Permanent Residence through Employment

- Employer files petition (I 140), *or*
- Self petitioner (extraordinary ability or NIW) files petition
- Approved labor certification must be included if applicable, along with evidence that alien met qualifications for job at time LC filed.
- Employer must always prove financial ability to pay alien throughout (LC and) I140 process.

Permanent Residence

- Adjustment of status (AOS) can be filed simultaneously with I 140 (but not I 360 EB 4), or following petition approval.
- If petition is “discretionary”, eg, NIW, EB 1 Extraordinary or Outstanding, then usually best to file AOS after petition approval.
- If alien outside US or does not qualify for AOS, immigrant visa is processed through National Visa Center, then at US consulate abroad where alien resides.

ENDNOTES

1. INA§203(b)(1)(A)-(C).
2. 8 C.F.R. §204.5(h)(2).
3. 8 C.F.R. §204.5(h)(3).
4. 8 C.F.R. §204.5(h)(5).
5. 8 C.F.R. §204.5(i).
6. 8 C.F.R. §204.5(i)(3).

Notes

7. 8 C.F.R. §204.5(i)(3)(i).

8. 8 C.F.R. §204.5(i)(3)(iii).

9. 8 C.F.R. §204.5(j).

10. 8 C.F.R. §204.5(j)(3)(i).

11. INA §203(b)(2); 8 C.F.R. §204.5(k).

12. 8 C.F.R. §204.5(k)(4)(ii).

13. 8 C.F.R. §204.5(k).

Notes

14. 8 C.F.R. §204.5(k)(2).

15. 8 C.F.R. §204.5(k)(3)(i).

16. 8 C.F.R. §204.5(k)(3)(ii).

17. 8 CFR 204.5(k)(2).

18. 8 CFR 204.5(k)(4)(iii).

19. *See Matter of New York Dept. of Transportation (NTDOT), Int. Dec. 3363 (Comm'r 1998).*

20. 8 CFR 204.5(l).

Notes

21. 8 CFR 204.5(l)(3)(ii).

22. 8 CFR 204.5(m).

23. 8 CFR 204.5(m)(1).

24. 8 CFR 204.5(m)(2).

25. 8 CFR 204.6.

26. 8 CFR 204.6(e).

27. 8 CFR 204.6(i).

Notes

28. 8 CFR 204.6(f).

29. 8 CFR 204.6(f)(2).

30. See INA §212(a)(5)(A)(i); 20 C.F.R. §656; *Employment and Training Administration, U.S. Dept. of Labor, Technical Assistance Guide (TAG), No. 656, Labor Certification (1981)*;

31. General Administrative Letter (GAL) I-97, “Measure for Increasing Efficiency in the Permanent Labor Certification Process,” (Oct. 1, 1996) (GAL I-97).

Notes

32. "Evaluating Reduction in Recruitment (RIR) Requests in an Environment of Increased Layoffs," Dale Ziegler Memorandum, March 20, 2002.
33. "Clarification of Reduction in Recruitment (RIR) Requests in an Environment of Increased Layoffs," Dale Ziegler Memorandum, May 23, 2002.
34. "Processing of Regional Office Reduction in Recruitment (RIR) Requests," William Carlson Memorandum, November 20, 2003.
35. 67 Federal Register 30465 (May 6, 2002).
36. 20 C.F.R. §656.21a(a)(1)(iii).

Notes

37. *See President & Fellows College, 2001-INA-136 (BALCA, Jan. 24, 2002).*
38. *Technical Assistance Guide (TAG), No. 656, p. 68.*
39. *See Matter of Dearborn Public Schools, 91-INA-222 (BALCA, Dec. 7, 1993) (en banc).*