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OVERVIEW OF EMPLOYMENT-BASED PERMANENT RESIDENCE

The process for obtaining permanent residence based on employment usually involves three phases: labor certification, petition to the immigration service, and application to adjust status to Lawful Permanent Resident status or obtain an immigrant visa. The purpose of this memo is to describe the process and to provide general information about it. Nothing in it should be considered legal advice. Before acting on any information provided here, please seek the counsel of a qualified immigration attorney. For more information, see our web site: **www.David-Ware.com.**

Persons who are skilled or educated—and who have job offers—have the possibility of immigrating to the U.S. Employment-based immigration is limited to 140,000 persons per year. The process is three-fold: (a) the employer must first obtain a "labor certification" from the U.S. Department of Labor (DOL); (b) the employer then petitions the immigration service on behalf of the foreign national for immigrant classification under the employment-based second or third preference; and, (c) the foreign national applies to the immigration service for Lawful Permanent Resident status or the "green card" through adjustment of status in the U.S. or consular processing overseas.

I. LABOR CERTIFICATION

In most cases the employer must obtain "labor certification" from the DOL confirming that there are no U.S. workers able, qualified and willing to perform the work for which the foreign-born individual is being hired. To establish this, the employer must advertise and perform other recruitment efforts to find someone who is already a U.S. citizen or permanent resident qualified to take up the position. The employer also must offer the position at the "prevailing wage."

The key to the labor certification process is for the employer to decide true minimum requirements for the position. The requirements generally must be standard for the occupation and not more than the worker had when hired into the job offered. Nor can the requirements be tailored to the specific skills and qualifications of the intended employee.

The new PERM labor certification system promises quicker decisions on labor certification applications but also has imposed more recruiting requirements on employers. The key aspects of the beneficial "special handling" for university and college teachers are retained in the PERM system. The requirements for other kinds of positions, though, seem more onerous under PERM.

Labor certification is the first step in the process to obtain permanent residence or the "green card." It is a lengthy process and does not provide the foreign national authorization to remain or work in the U.S., unless he or she holds another nonimmigrant visa status that authorizes work (such as H-1B status). In some regions, the process could take more than two years.

a. How can an employer advertise a job it may not intend to fill?

In short, because the law requires such a "test" of the labor market. This is the means that DOL has created for ensuring that there are no qualified U.S. workers willing to take the position. Some employers are reluctant to undertake the process as they consider it disingenuous, others balk at the time and expense involved, and everyone is concerned that a qualified U.S. worker might apply and make it impossible to pursue labor certification. In this case, the employer is not necessarily required to hire the applicant and discharge the foreign worker, but it does make labor certification impossible.

b. Don't qualified U.S. workers apply for all job openings?

No. In fact, quite often no minimally qualified U.S. workers apply for certain jobs.
This is an important question that requires careful analysis before recruitment is undertaken. Employers must carefully describe job requirements so that the recruitment is an honest and ethical one, but also so that the applicant pool is limited to those who are actually qualified for the job.

c. Are any jobs exempt from labor certification, like those in shortage areas?

Physical therapists and professional nurses are exempt from rigorous labor certification requirements. Also college and university teachers benefit from special selection criteria and reduced recruiting steps. See the "PERM Overview" for more information on this.

d. Can Labor Certification be Avoided Altogether?

Labor Certification is only required for individuals applying under the employment-based second and third preference categories (*see* below).

Individuals who qualify under the employment-based first preference do not require a labor certification. The three categories under the first preference are: (i) Persons of Extraordinary Ability; (ii) Outstanding Professors and Researchers; and (iii) Multinationals Executives or Managers.

(i) Persons of Extraordinary Ability

In order to establish "extraordinary ability in the sciences, arts, education, business, or athletics," a person must provide extensive documentation of sustained national or international acclaim and recognition of his or her achievements in the field. Extensive documentation is required. No job offer is required.

Evidence to demonstrate "sustained or international acclaim" could be a one-time achievement such as a major international award. If the applicant is not the recipient of such an award, then documentation of any three of the following is sufficient:

1. Receipt of lesser nationally or internationally recognized prizes or awards.

2. Membership in an association in the field for which classification is sought requiring outstanding achievement of their members, as judged by recognized national or international experts.

3. Published material about the person in professional or major trade publications or other major media.

4. Participation as a judge of the work of others.

5. Evidence of original scientific, scholastic, artistic, athletic, or business-related contributions of major significance.

6. Authorship of scholarly articles in the field.

7. Artistic exhibitions or showcases.

8. Performance in a leading or cultural role for organizations or establishments that have a distinguished reputation.

9. High salary or remuneration in relation to others in the field.

10. Commercial success in the performing arts.

(ii) Outstanding Professors and Researchers

An individual who has at least three years of experience in an academic field may establish that he or she is an outstanding professor/researcher by demonstrating international recognition as outstanding in a specific area of that field.

This individual must be sponsored by an institution for ***a tenure (or tenure track) teaching position or a comparable research position*** at a university or institute of higher education to conduct research. Careful documentation of this is crucial. The individual may also be sponsored by a private employer to conduct research if it employs at least three persons full-time in research activities and if the employer has achieved documented accomplishments in an academic field.

Evidence that the professor/researcher is recognized internationally as outstanding in the academic field must include at least two of the following:

1. Receipt of major prizes or awards for outstanding achievements.

2. Membership in an association requiring outstanding achievement.

3. Published material in professional publications written by others about the applicant’s work.

4. Evidence of participation as a judge of the work of others.

5. Evidence of original scientific research.

6. Authorship of scholarly books or articles in the field.

(iii) Multinational Executives and Managers

An individual may be classified as an executive or manager if he or she is to be employed in an executive or managerial capacity by a U.S. parent, subsidiary, branch, or affiliate of a foreign corporation. The alien must further establish that

he or she worked in a managerial or executive capacity for one year prior to entry into the U.S. in the parent, subsidiary, branch, or affiliate of the U.S. entity.

(iv) National Interest Waivers

The time-consuming labor certification procedure may be avoided altogether if the foreign national can establish that the "job offer" requirement should be waived in the national interest. The individual must demonstrate that he or she would be doing something so significant as to benefit the U.S. national interest.

In a recent decision of the Administrative Appeals Office of the Immigration and Naturalization Service (*In Re New York State Department of Transportation*, Int. Dec. 3363), a three-prong test was established, greatly increasing the difficulty of obtaining such a waiver:

1. The person must seek employment in an area of substantial intrinsic merit;

2. The person must demonstrate that the proposed benefit will be national in scope; and,

3. The person must demonstrate persuasively that the national interest would be adversely affected if a labor certification were required for the beneficiary (*i.e.,* that the national benefit offered outweighs the inherent national interest in the certification process).

II. LAWFUL PERMANENT RESIDENCE PETITION

After the labor certification is approved, if required, the next step is preparation and submission of the permanent residence petition to the immigration service.

a. Employment-Based First Preference

As mentioned above, labor certification is not required for persons eligible for any of the he three categories under the first preference: Persons of Extraordinary Ability; Outstanding Professors and Researchers; and Multinationals Executives or Managers. Only a petition to the immigration service (often requiring extensive supporting documentation) is required.

b. Employment-Based Second Preference

The approved labor certification, along with supporting documents, is filed with the immigration service to seek qualification of the foreign national in one of the following categories of sponsorship: "Members of the professions with advanced degrees or the equivalent," or "aliens of exceptional ability in the sciences, arts or business."

c. Employment-Based Third Preference

The approved labor certification, along with supporting documents, is filed with the immigration service to seek qualification of the foreign national qualifies in one of the following categories of sponsorship: Professionals, skilled, or unskilled workers.

It takes many years to obtain approval in the third preference unskilled category. Strategies to avoid the third preference classification whenever possible are imperative.

The employment-based second and remaining third preferences are also backlogged for China and India. The third preference is more backlogged than the second preference. It is, therefore, important—whenever possible—to classify the foreign worker from China or India in the second preference rather than the remaining third preference.

III. APPLYING FOR ADJUSTMENT OF STATUS OR CONSULAR PROCESSING

a. Adjustment of Status

If the worker is within the U.S., he or she may apply for adjustment of status by filing an application with the immigration service. The individual's priority date, established at the time of filing the initial application for labor certification with DOL, should be current at the time of filing this application. The application can remain pending for several months before the immigration service issues lawful permanent residence to the foreign national. If the foreign national needs to travel abroad during this time, he or she must seek special travel permission known as "advance parole." The foreign worker must also have employment authorization while the adjustment application is pending.

b. Who is Eligible For Adjustment of Status?

Adjustment of status is only available to individuals who have always maintained lawful status in the U.S.. There were programs allowing people who had violated their status to adjust status if they had filed labor certifications or immigrant petitions prior to April 30, 2000 and paid a penalty of $1,000. There are no such programs now, but persons who have violated status and wish to adjust to LPR should contact an immigration attorney.

c. Consular Processing

Foreign nationals based overseas can process their immigrant visas at consular posts in their home countries. Individuals who violated their status in any way and are not eligible for adjustment of status under any of the enumerated exemptions must return to their home country for consular processing. Under the 1996 Immigration Act, individuals who overstayed their nonimmigrant visas by more than 180 days would be barred from reentering the U.S. for three years. Individuals who overstayed their nonimmigrant visas for more than one year would be barred from reentering the U.S. for 10 years. There are very limited exceptions for overcoming these bars.