Business Immigration, Workforce and Compliance Law

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Supplemental Materials

Class #2

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Overview of Bases for Temporary and Permanent Immigration to the United States

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This listing of visa classifications is intended to furnish you with an overview of the U.S. visa process and a general description of the various types of visas issued by the U.S. government.

NON-IMMIGRANT VISA CATEGORIES

A Non-Immigrant visa is a temporary visa. It is generally issued to people whose domicile is abroad who seek to be in the United States on a temporary basis.

THE NON-IMMIGRANT VISA PROCESS

Non-immigrant visas with alphabetical designations from A through V are issued by Foreign Service Offices of the U.S. Department of State at U.S. Embassies and Consulates abroad. Visas are stamped into a valid travel document, usually a passport. The visa bears the date of its issuance as well as the date of its expiration. It also designates the number of applications for admission at the U.S. border for which it is valid. A visa is only an entry document; it does not define visa status or length of stay permitted once a person is admitted to the United States.

At the border, the U.S. Department of Homeland Security (DHS), through its Customs & Border Patrol (CBP) division, has jurisdiction to admit the alien in the status for which the visa has been granted, and does so by recording the date of entry, the status in which the alien is admitted, and the duration of his or her authorized stay. ***(A record of admission may be printed from the CBP website.***) Future extensions of stay or changes of nonimmigrant visa status are

noted on a Form I-797 Notice of Approval, granted by another division of Homeland Security, now called Citizenship and Immigration Services (CIS) in response to an affirmative filing.

Citizens of Canada may present themselves at the border with appropriate documentation to request admission under the various non-immigrant visa categories without first obtaining a visa stamp at a U.S. Embassy or Consulate, except for E-1, E-2 visas and K visas.

In addition, under a special program (the "Visa Waiver Program") nationals of 38 countries to date have been allowed to enter the United States as visitors without first obtaining a visa stamp. ***They must, however, first secure authorization to enter the United States on-line by utilizing the government's Electronic System for Travel Authorization ("ESTA" and are limited to a stay of up to a maximum of 90 days).***

CHANGE FROM ONE NON-IMMIGRANT VISA CLASSIFICATION TO ANOTHER

An alien who enters in one non-immigrant classification may, with certain exceptions, apply to change to another non-immigrant status while in the United States. The application must be made while the alien is in lawful status, that is, during the authorized period of stay and prior to any violation of status such as unauthorized employment. **Classifications that generally cannot be changed to another non-immigrant classification in the United States are: C, D, S, K and visa waivers (J-1 in certain circumstances).**

CHANGE TO IMMIGRANT CLASSIFICATION

An immigrant visa is a permanent visa, synonymous with permanent residence or "green card."

An alien who enters in a non-immigrant classification may, after the filing of a petition classifying the alien in a preference category, and usually after the approval of such a petition, apply to change status to that of a lawful permanent resident (evidenced by a "green card") through a process called "adjustment of status." In cases where the alien otherwise qualifies for immigrant status, but has engaged in unauthorized employment while here temporarily, or has violated the terms of a nonimmigrant visa, immigrant status may, under certain circumstances, nevertheless be obtained through the issuance of an immigrant visa at an American Consular Post abroad. Any person seeking to adjust status from A, E or G status must also file a waiver of immunities/special privileges.

PRESUMPTION OF IMMIGRANT INTENT

By law, all persons applying for visas or for admission at the border as nonimmigrants, are presumed to have the intention of residing here permanently as immigrants. (An exception to

this rule applies to "H" and "L" visa holders and in some instances O-1 visa holders.) Accordingly, all intending non-immigrants have the burden of proving that their intent is non-immigrant in nature. For example, they must generally prove the existence of an unrelinquished foreign domicile to which they intend to return upon the conclusion of their temporary purpose in the United States. The same burden applies when applications are filed for extensions of non-immigrant status, revalidation of non-immigrant visas or other benefits which presuppose an intention to depart.

UNLAWFUL PRESENCE

Overstaying past a period of authorized stay, even for one day, will invalidate the alien's nonimmigrant visa, which may not then be used for return to the United States. Moreover, with certain exceptions, an individual who has overstayed by even one day may only apply for a new visa in the country of his or her nationality, eliminating "third country processing" at American Consulates at more convenient locations (such as Canada or Mexico).

Other ramifications of unlawful presence render certain long-term overstays inadmissible to the United States. Any overstay of 180 days or more may have irreversible consequences. In view of these rules, it has become increasingly important to carefully monitor the status of individual nonimmigrants to ensure that no overstay occurs.

NON-IMMIGRANT CLASSIFICATIONS

A, Diplomats and Foreign Government Officials

An ambassador, public minister, diplomat or consular officer, cultural attaché or trade representative, or other foreign government official or employee, as well as their spouses and children, may be admitted as A-1 or A-2 nonimmigrants, and their attendants, servants and personal employees and members of their families may be admitted as A-3 nonimmigrants, on the basis of reciprocity. Certain A-1 and A-2 dependents may be granted employment authorization. If an A visa holder seeks to adjust status to permanent residence, an application for a waiver of special privileges must be filed and can be submitted concurrently with the Adjustment of Status application.

B-1, Visitors for Business

A visitor for business is an alien who intends to conduct business in the United States which benefits a foreign employer, not in the nature of employment. He or she may not engage in local employment, nor displace a resident American worker, nor receive any direct remuneration for services from a United States source. Proper B-1 activities include but are not limited to: meetings, audits, interviews and inventory. The B-1 visitor may be initially admitted to the United States for a maximum period of one year until the purpose of the trip has been

completed, and may apply for extensions of stay which are necessary to complete that purpose. In practice, due to heightened security concerns, most visitors are admitted for six months or less.

B-2, Visitors for Pleasure

A visitor for pleasure is an alien admitted for a personal visit to friends or relatives, on holiday or for tourism. The initial period of admission is typically six months, allowing for a maximum stay of one year. Extensions of stay are permitted in appropriate circumstances. Persons coming primarily for the purpose of performing skilled or unskilled labor, study, or representing information media are not properly classifiable as B-2 visitors. Visitors may not attend school or engage in employment in the United States.

Visitors - Visa Waiver Program

Nationals visiting the U.S. from a list of certain countries, based upon a historically low rate of non-immigrant visa refusals, have been permitted to enter the United States as visitors for business or pleasure without first obtaining visas under the Visa Waiver Program. Individuals entering under this program are permitted to remain in the United States for a maximum period of 90 days, and are barred from extending their stay or changing status while in the United States. These visitors are also prohibited from attending school or engaging in employment. DHS has now implemented an Electronic System for Travel Authorization (ESTA) that requires that visa waiver applicants receive an electronic travel authorization prior to departing for the U.S. If ESTA clearance is denied, applicants must go to the US Consulate and obtain B1/B2 visa even if they are a national of a waiver country. ESTA clearances are valid for 2 years.

C-1, Transit Aliens

A transit alien is an alien in immediate and continuous transit through the United States. A maximum period of twenty-nine days is authorized, not subject to extension or change of status.

D, Alien Crewmen

Alien crewmen, serving in such capacity while in port, are admitted for a maximum of twenty-nine days, not subject to extension. They may not work as crewmen except on the vessel or aircraft on which they arrived, or another similar vessel or aircraft of the same transportation company, and may not work on domestic flights. This non-immigrant category is not subject to change of status to another non-immigrant category.

E-1, Treaty Traders

A treaty trader is an alien who enters the United States in furtherance of the provisions of a Treaty of Commerce and Navigation between the United States and the foreign country of which the alien (and the alien's employer) is a national. For E visa purposes, a person is a national of a country whose passport he carries, regardless of place of birth, even though

elsewhere in U.S. immigration law the concepts of nationality and citizenship are differentiated. The E-1 visa holder must be coming solely to carry on substantial trade principally between the United States and the foreign treaty country of which he/she is a national. The initial period of admission is for two years, although the visa may be granted for up to five years. Extensions of stay are possible upon filing an updated application reporting on the current volume of trade between the treaty country and the U.S. enterprise. While there is no requirement for an overseas unrelinquished domicile, the alien must intend to return to a home abroad once the purpose of admission has been accomplished. Treaty traders may apply for the E-1 visa at a U.S Embassy; the company does not need to file a petition to the immigration service. E-1 spouses are eligible for employment authorization.

E-2, Treaty Investors

An alien who enters pursuant to the provisions of a Treaty of Commerce and Navigation between the United States and the foreign country of which he/she is a national (same definition as for E-1, above), who is coming to the U.S. solely to develop and direct the operations of an enterprise in which the alien has invested, or is actively in the process of investing a substantial amount of capital, qualifies for E-2 status. The initial period of admission is two years, and the visa may be granted for up to five years, with extensions available in appropriate circumstances. Executives, managers, and essential specialized employees of foreign firms from a treaty country which have made a substantial investment may also qualify. Treaty investors may apply for the E-2 visa at a U.S Embassy; the company does not need to file a petition to the immigration service. E-2 spouses are eligible for employment authorization.

E-3, Professionals

An Australian national coming to perform services in a "professional specialty occupation" is eligible for the E-3 visa. This classification mirrors the standards of the H-1B visa category, described below: the job must be one that generally requires a related baccalaureates degree, the alien must have the appropriate credentials for the job, and the U.S. employer must file a labor condition application attesting that it will pay the prevailing wage for the job offered, and the benefits and working conditions offered to the E-3 professional will be similar to those offered to U.S. workers. However, an E-3 employer does not have to file a petition with U.S. Citizenship & Immigration Services. E-3 Australian professionals may apply for the E-3 visa at a U.S Embassy. Extension of stay and change of status can be filed in the U.S.; however, Premium Processing is not available for E3 application. E-3 spouses are eligible for employment authorization. The period of admission is limited to two years, but may be renewed or extended in certain circumstances. The E-3 professional must continue to demonstrate nonimmigrant intent. The annual cap of 10,500 E-3 visas has never been met.

F-1, Students (see also M-1 status for nonacademic students)

Bona fide students who seek to enter the United States temporarily and solely for the purpose of pursuing a full course of study in an educational program at an established institution of learning which has been approved by U.S. Citizenship & Immigration Services for attendance

by foreign students can qualify for F-1 status. Prior to issuance of an F-1 visa or application for a change of status in the U.S., the prospective student must be admitted by the school and issued an authorizing document, a Form I-20, approved by the Designated School Official, and the student must present this document in order to be accorded F-1 classification. F-1 visa status may not be accorded to an alien for the purpose of attending public elementary schools or publicly-funded adult education programs. F-1 visas may only be accorded for attendance at public secondary schools after the alien reimburses the educational agency administering the school for the expense of providing such education and the proposed period of stay does not exceed 12 months. The alien spouse and minor children of such aliens are classified in F-2 category. F-2 spouses and children are not eligible for work authorization.

Schools and students are carefully monitored through an interactive database system known as SEVIS that tracks all U.S. schools who sponsor non-immigrant students, and monitors the current status of all non-immigrant students registered in the system, both before and after they are admitted to the United States.

Students are generally admitted for "duration of status." Duration of status is defined to include the program of study, any period of practical training authorized, plus an additional grace period of sixty days (if a student does not complete the course of study they are not entitled to the 60 day grace period). Students must obtain permission in advance to accept employment. Authorization for part-time employment is issued in very limited circumstances (although not in the first year of the program), either based upon unforeseen financial hardship or for practical training relating to the course of study (known as curricular practical training or CPT). Students granted CPT may work up to 20 hour per week during school sessions or 40 hours per week on vacations and school recesses. A period of optional practical training (OPT) may also be authorized for a period following the student's completion of a bona fide educational program. The amount of time spent in CPT can be deducted from the maximum amount of time permitted on OPT (1 year). If a student completes one full year on CPT, the student will not be permitted to engage in OPT.

If a student does not work for 90 days consecutively during OPT then OPT becomes invalid and the student must leave. OPT may only be granted once for each level of study. Thus, if a student completes a bachelor's degree and completes one year of OPT and then goes back to school and completes another bachelor's degree, he or she will not be eligible for a new period of OPT. However, if the student enrolls in a master degree program and completes it, he or she will be eligible for another year in OPT.

Students currently engaged in post-completion OPT who have completed a degree in a STEM (Science, Technology, Engineering or Mathematics) field may apply for an additional 17 months of employment authorization, for a total of 29 months of employment authorization. Students must file an application with USCIS to apply for the STEM Extension. During the STEM Extension period students may only work for employers who are enrolled in the E-verify system and the employer must agree to update Immigration when the student leaves or the employment is terminated.

What is the Cap-Gap Extension?

The U.S. Citizenship and Immigration Services (USCIS) now extends the authorized period of stay for all F-1 students who have filed an H-1B petition and change of status request (filed under the cap for the next fiscal year) prior to the expiration of their OPT employment authorization card. If USCIS approves the H-1B petition, the student is given an extension that enables him/her to remain in the United States until the requested start date indicated on the H-1B petition. The Designated School Official (DSO) at the Office of International Students(OIS) will process the Cap-Gap Extension I-20 on behalf of the student. In order for the DSO to indicate that a student has a Filed or Waitlisted Cap-Gap Extension, the student must be able to provide proof that the H-1B petition has been timely filed. If the H-1B petition is filed (and accepted) while the EAD is still valid, the student's work authorization is also extended until October 1st when the H-1B takes effect. If the H-1B is filed (and accepted) during the student 60 day grace period then the student is authorized to remain in the United States until the H-1B takes effect, but their work authorization is not extended through October 1st.

G, Employees of International Organizations

G visas are available to representatives, officers and employees of certain international organizations that are not classifiable as U.S. employers, such as the United Nations, the World Bank, the World Health Organization, etc., as well as to their family members, servants and personal employees. If a G visa holder seeks to adjust status to permanent residence, an application for a waiver of special privileges must be filed and can be submitted concurrently with the Adjustment of Status application.

H-1B, Specialty Occupation Workers

An alien coming temporarily to the United States to perform services in a "professional specialty occupation" qualifies for H-1B visa status upon approval of a petition filed by a sponsoring U.S. employer. By statute and precedent decision, qualified occupations are those which require at least a 4-year baccalaureate degree related to the job (or its equivalent) as a prerequisite to entry-level employment. A qualified alien is a person who has the appropriate education and training for the offered position. While an H-1B position is offered to the alien for a temporary period, the position itself can be of an ongoing nature. H-1B aliens are admitted for the period of time requested by the employer in a petition to classify the alien in H-1B status, not to exceed an initial period of three years, and extensions of stay may be obtained in appropriate circumstances. The statute places a limit of six years on stay in H-1B status, but exceptions apply in certain circumstances where a U.S. employer has filed an immigrant visa petition or application for labor certification more than a year before the expiration of the H1B worker's 6th year in H-1B status.

There is a numerical limitation on how many new H-1 approvals can be issued in any fiscal year (October 1 through September 30) which has lately resulted in H-1B visas being unavailable for much of the year. In addition, filing fees for this visa category are very substantial.

The Labor Condition Application ("LCA")

As a prerequisite to filing a petition for an H-1B specialty occupation worker, the U.S. employer must file a labor condition application with the Department of Labor, attesting that the foreign professional will be paid at least the prevailing wage for the occupation. Included in this attestation, which provides the title and salary for the position and the location where the non-immigrant will work, is an assertion that the actual wage level paid to other employees or the prevailing wage (whichever is higher) will be paid to the foreign H-1B professional, that the foreign worker's employment will not adversely affect the working conditions of similarly employed U.S. workers, that there is not a strike, lockout or work stoppage involved in this employment, and that notice of the filing has been either provided to the bargaining representative or, if there is no bargaining representative, that such notice has been properly posted. Employers are required to retain the LCA with other documentation in a "Public Access File" which must be available for inspection for one year past the date of the LCA's expiration or one year from its withdrawal.

H-2, Temporary Workers

This category is available to aliens coming temporarily to perform services or labor that meet a temporary need, provided that unemployed persons capable of performing such services cannot be found in the United States. Prearranged employment with a U.S. employer must exist, and the employer must first apply for a temporary labor certification, by demonstrating to the U.S. Department of Labor that Americans capable of performing these services cannot be located and that the alien is coming to perform services which are themselves temporary in nature. A grant of certification by the U.S. Department of Labor shows U.S. Citizenship & Immigration Services that American workers are unavailable, and the petition may go forward. H-2A visas are available for temporary agricultural workers; H-2B visas are available for other temporary positions for which the U.S. employer can demonstrate a temporary need for workers that is a seasonal, peakload, one-time, or serves an intermittent need. The initial period of admission may not exceed 364 days. Extensions may be obtained in very limited circumstances. H-2 visa status is limited to a maximum of three years.

Like the H-1B visa, there is a numerical limitation on how many new H-2 approvals can be issued in any fiscal year, which results in such visas being unavailable for significant parts of the year. The H-2 numerical quota is semi-annual and thus opens twice per year.

H-3, Trainees

A trainee is an alien coming temporarily to the United States for formal, structural training at the invitation of an individual, organization, firm or other trainer in any field of

endeavor, including agriculture, commerce, communications, finance, government, transportation and the professions as well as in a purely industrial establishment. The petitioner must describe the type of training to be given, the source of remuneration of the trainee and whether or not any benefit will accrue to the petitioner, and must demonstrate why it is necessary for the alien to be trained in the United States, why such training is unavailable in the alien's home country abroad, and why the U.S. employer is willing to incur the cost of training. The trainee is not permitted to engage in productive employment unless it is incidental and necessary to the training, and may not engage in employment which will displace a U.S. worker; the U.S. employer-trainer may not use H-3 trainees to fill positions ordinarily held by U.S. workers. The period of initial admission is that requested in a petition filed by the sponsoring employer-trainer and approved by USCIS, generally the full period required for training, but not to exceed two years.

I, Journalists & Foreign Media Representatives

An alien is admitted in I status, upon a reciprocal basis, as a bona fide representative of a foreign press, radio, film or other foreign information media organization, who seeks to enter the United States solely to engage in such vocation, and the spouse and children of such representative. A media representative must have press credentials and a signed contract of employment with the foreign media organization or its U.S. bureau, affiliate or branch office. The initial period of admission is for the duration of the offered employment. An I visa will typically be issued for the full term of the employment contract, as limited by visa reciprocity rules. Admission in I visa status constitutes an agreement by the alien not to change media or to change employers without obtaining prior approval from the immigration service.

J, Exchange Visitors

An alien who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, coming temporarily as a participant in a program designated by the Department of State for the purpose of teaching, instructing, lecturing, studying, observing, conducting research, practical training, etc. in an approved exchange program, and the alien's spouse and minor children of such participant, are admissible in J-2 visa categories. Certain J-1 aliens, and their dependents, are required by law to return to their own country for a period of two years to impart the knowledge they have gained in the U.S. before they may apply for H or L visas, or status as immigrants, unless a waiver of such two year period is granted. The J exchange visitors subjected to this two-year foreign residency requirement include doctors who receive post-graduate medical training in the U.S., trainees whose programs receive government funding, and any scholars or trainees whose exchange program is in a field designated by the home country as a skill set that country wishes to retain. The initial period of admission for a J nonimmigrant is as specified on the authorizing Form DS-2019 (formerly IAP-66) issued by the program sponsor, which varies according to the type of exchange program - up to three years for scholars, teachers and research fellows; up to 18 months for trainees.

The status of J-1 exchange visitors and their programs is carefully monitored through the Department of Homeland Security's interactive SEVIS database in much the same way as the status of F-1 students.

J-1 trainees must have completed a Bachelor's degree abroad and have one year experience in the field or have five years experience in the field. Individuals who graduated from U.S. colleges and universities are NOT eligible for J-1 visa status unless they have another foreign degree or five year experience on which the training is based. J-1 status may also be granted for an "internship" for a period of 12 months to a foreign national who completed a Bachelor's degree abroad within the past 12 months.

K-1, Fiancé(e)s of U.S. Citizens

Those engaged to be married to U.S. citizens who seek to enter the United States solely to enter into a valid marriage with the U.S. citizen petitioner within 90 days after entry, and the minor children of such persons, may be admitted in K-1 and K-2 visa status. The period of admission is 90 days. K-1 aliens are ineligible for extension or change of nonimmigrant visa status; they may only adjust status to lawful permanent resident on the basis of marriage to the U.S. citizen petitioner.

K-3, Spouses of United States Citizen Petitioners

K-3 visa classification is available to individuals who marry a United States citizen abroad and wishes to enter the United States with his or her spouse and his/her minor child (K-4) to file and process an adjustment of status application.

L-1, Intra-company Transferees

An L-1 intra-company transferee is an individual who has been employed for one year of the past 3 years in a managerial or executive capacity by a foreign firm or corporation and seeks to enter the United States temporarily in order to continue to render his services to an affiliate or subsidiary thereof in a capacity which is also managerial, executive or involves specialized knowledge which is not readily available in the U.S. job market. An L-1 petition filed with USCIS may be granted for an initial period of up to three years. Extensions may be available thereafter in increments of no more than two years, if such need is sufficiently documented. The statute limits the total stay in L-1 status (or L-1 and H-1 status combined) to five consecutive years for L-1B "specialized knowledge" visas and seven years for L-1A "executive" or "managerial" visas. The spouse and minor children (L-2) of such aliens are generally granted periods of admission and extension of stay to match those of the primary applicant, and L-2 spouses are eligible for employment authorization.

M-1, Non-Academic Students

Bona fide students seeking to enter the United States to pursue a full course of study at an established vocational or other recognized non-academic institution, other than in a language

training program, qualify for M-1 visas. The alien spouse and minor children of such aliens are classified in the M-2 category. Non-academic students are admitted for the period of their school program plus thirty days. A very limited period of "practical training" may be authorized at the end of the program, which requires employment authorization.

N, Relatives of Employees of Certain International Organizations

Certain relatives of long-term employees of the United Nations and other international organizations are eligible to remain in the United States under this provision.

O-1, Aliens of Extraordinary Ability

O-1 visas are issued to aliens of "extraordinary ability" in the sciences, education, business and athletics, who have demonstrated "sustained national or international acclaim and recognition for achievements in the field of expertise" showing that the alien “is one of the small percentage who have risen to the very top of the field.” The standard for extraordinary ability in the arts is “distinction,” as supported by evidence that the alien is “recognized as being prominent in the field.” The standard for athletics, business or science is “outstanding achievement.” A petition must be filed with the immigration service, either by a U.S. employer for ongoing employment, or by a U.S. agent for a defined series of engagements supported by a contract or contracts, and an itinerary stating where and when the alien of extraordinary ability performs services. Advisory consultation with a labor union, management organization or other peer group is required. Short of a major, widely-recognized international award, at least three types of evidence must be provided. The maximum period of initial admission permitted is three years, which may be renewed or extended in one year increments thereafter, but there is no fixed limit on the total length of stay. O-1 visa status will only be granted for the amount of time necessary to fulfill the itinerary. The alien must show that he or she is sustaining their acclaim to be eligible for renewal of O-1 status.

O-2, Assistants to Aliens of Extraordinary Ability

O-2 visas are issued to aliens entering for the purpose of assisting the performance of an alien of extraordinary ability must establish that they are an integral part of the performance because of critical skills or long-standing relationship with the principal performing alien. An O-2 is not authorized to work independent of the O-1 principal alien, and will be admitted for the same length of time as the principal.

P-1, Athletes and Entertainers

In the case of athletes performing as individuals or teams, and artists performing as part of an internationally recognized entertainment group are issued P-1 visas. The group must be based abroad, and at least 75% of the members must have been with the group for one year or more. A petition must be filed with the immigration service, by a U.S. agent or employer, including a contract and itinerary stating where and when the group will perform or compete.

Like the O-1, the P visa requires consultation with appropriate labor unions, or peer groups in occupations where there is no union. The maximum period of initial admission for an athlete is five years, for a team it is one year, and for an entertainment group, up to one year, if supported by contracts and itinerary. Support staff may enter with the entertainment group. They are granted P-1S classification. This requires a separate petition.

P-2, Athletes and Entertainers (Reciprocal Exchange)

Athletes and entertainers entering the United States to perform under reciprocal exchange programs are issued P-2 visas. This category is not petition based, and generally does not require labor consultation because the reciprocal exchange is customarily between two unions, one in the U.S. and one abroad.

P-3, Athletes and Entertainers (Culturally Unique)

Athletes and entertainers entering to perform in a culturally unique program are issued P-3 visas. The individual or group must show some evidence of distinction in the art form or sport (examples include flamenco, Kabuki, capoeira). Like the P-1, a majority of the group must have worked together for at least a year, a petition must be filed with the immigration service by a U.S. agent, or employer, including a contract and itinerary stating where and when the group will perform or compete, and a labor advisory opinion from a union or peer group is required. The maximum period of initial admission is three years, if supported by contracts and itinerary, and P-3 status may be extended for a maximum stay of five years.

Q, Cultural Exchange

Aliens entering the United States to participate in designated international cultural exchange programs that provide practical training, employment and sharing of culture may obtain Q visas. The maximum period permitted under this visa category is fifteen months.

R, Religious Workers

Certain religious workers entering the United States to perform work in a religious vocation, religious profession or traditional religious occupation for a bona fide non-profit religious organization in the U.S., who have had membership in the same religious denomination as the sponsoring U.S. organization for at least two years preceding the application, and their spouses and children, qualify for R visas. Recent changes to the regulations now require that the U.S. sponsor first file a petition with USCIS before the visa application can be made. Additional recent strictures require an investigatory visit to the premises of the sponsoring organization prior to the granting of the petition. The initial period of approval has also been reduced from 36 months to 30 months; extensions for an additional 30 months may be obtained. Premium Processing is available for this visa category, but only if the organization has undergone a recent investigatory visit (i.e. has a recent approval).

S, Witnesses and Informants

Certain aliens who will be serving as witnesses in federal or state court with respect to criminal enterprises, when such alien is determined by the Attorney General to possess critical and reliable information; certain aliens who will provide critical and reliable information, as determined by the Secretary of State and Attorney General jointly, respecting terrorist organizations or operations, to Federal law enforcement authorities or a federal court, and where appropriate the spouse, married or unmarried sons and daughters and parents of such alien, may be accorded S visas. The S visa may not be changed to another non-immigrant visa in the United States.

T, Certain Victims of Trafficking in Persons

Certain aliens who have been victims of severe forms of trafficking in persons who are physically present in the United States and have assisted in the investigation of the prosecution of acts of trafficking and the spouse, children and parents of such victim maybe eligible for this classification.

TN, Entrants under NAFTA

Citizens of Canada or Mexico who seek temporary entry as business persons to engage in certain designated business activities at a professional level may be admitted to the United States in accordance with the terms of the North American Free Trade Agreement (NAFTA). Such individuals are currently admitted with the TN visa designation for an initial admission of up to three years. TNs are not limited to the number of years they may be in TN status but TN holders are subject to prove non-immigrant intent.

U, Victims of Severe Criminal Activity/Materials Witnesses

Aliens who have suffered substantial physical or mental abuse as a result of having been a victim of criminal activity involving violation of one or more certain federal, state or local criminal statutes relating to rape, torture, trafficking, incest, domestic violence and other such similar crimes and individuals having knowledge of such crimes may under appropriate circumstances be eligible for this visa classification.

V, Special Limited Provision for Spouses and Children of Permanent Residents

Aliens who could be classified in the V non-immigrant category if the beneficiary of a petition according preference status was filed with the Attorney General on or before December 21, 2000. Children of the principal alien are eligible to receive this benefit as well.

PERMANENT RESIDENT (IMMIGRANT) ALIEN STATUS CATEGORIES

The status of a lawful permanent resident of the United States may be obtained by applicants who meet both the qualitative and quantitative requirements of the law. Qualitatively, they must prove themselves not to be ineligible for immigrant status under any of the general categories of inadmissible aliens specified in the law (8 U.S.C. 1182(a)), including criminality, fraudulent use of documents, mental defect, Communist party affiliation, drug trafficking, terrorism, contagious diseases of public health significance, etc. Quantitatively, they must either obtain a family preference classification based upon the petition of specified close relatives who are citizens or lawful permanent residents of the United States; or upon the petition of a sponsoring employer or prospective employer for an employment-based preference; or based on a major investment in the United States; or through extraordinary ability; or through selection through the Diversity (lottery) Visa program. The effect of the law's national and worldwide quota limitations often results in extended waiting periods before permanent resident status may be finally obtained. Such status may be sought either through an immigrant visa application before a U.S. Consular Officer abroad or, in certain circumstances, in adjustment of status proceedings within the United States.

EMPLOYMENT-BASED IMMIGRANTS

The Immigration Act of 1990 presented Congress' most recent revision of the visa allocation formula. The great majority of these visas are allocated for the various categories of family reunification. 140,000 visas are provided for employment-based immigration.

The Immigration Act now defines five categories or preferences (of which three have additional subcategories of their own) for immigration based on employment or employment-creation:

PREFERENCE I
"PRIORITY WORKERS"
(40,000 VISA NUMBERS AVAILABLE PLUS SPILL DOWN FROM PREFERENCES IV AND V)

Employment I - Sub-category I (E11)

Aliens with "extraordinary ability" in arts, sciences, education, business or athletics.

To qualify in this sub-category, the applicant must show that he or she is one of that small percentage who have risen to the very top of their field of endeavor, and must be able to demonstrate that his or her contribution would "substantially benefit" the United States prospectively.

This category does not require an employer to file the petition. It can be a "self-petition."

Employment I - Sub-category II (E12)

Outstanding Professors and Researchers.

To qualify in this category, the applicant must establish international recognition or acclaim, and must show at least three years of full-time experience in teaching or research in the field, and must have an offer of full-time employment for a tenured or tenure-track teaching position, or a comparable research position in private industry, in organization that has a full-time research staff of three or more individuals. The petitioner itself must also be shown to have acclaim.

Employment I - Sub-category III (E13)

Certain Multinational Executives and Managers.

A person who was working abroad in a managerial or executive position for one year or more in the three-year period immediately prior to transfer into the United States, who has been offered a similar managerial or executive position in the U.S. with a parent, subsidiary, branch or affiliate of the same company they worked for abroad, qualifies for this immigrant visa category, whether or not he or she has a university degree.

PREFERENCE II
PROFESSIONALS AND ALIENS OF "EXCEPTIONAL ABILITY"
(40,000 VISA NUMBERS AVAILABLE PLUS SPILL DOWN FROM PREFERENCE I)

Immigrant status is available to qualified immigrants who are members of the professions holding advanced degrees or their equivalent, or who because of their exceptional ability (which must be demonstrated by more than just a degree or license) in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States.

Normally certification must be obtained from the Department of Labor that there are not American workers ready, willing and available for the position, in most cases (See "Labor Certification" below). However, such certification and a specific job offer may be waived for applicants in this category if their work is established to be in the national interest, and if the worker possesses an advanced degree or has exceptional ability in their field of endeavor. However, a precedent case decided in 1998 substantially narrowed the National Interest Waiver category. Such cases must now meet three stringent tests: (1) the field of endeavor in which the alien works must have substantial intrinsic merit, (2) the benefits from the alien's work must be national in scope, and (3) the prospective benefits to the U.S. from the alien's prospective work must be great enough to outweigh the benefit inherent in protecting the U.S. labor market.

Also, aliens who have demonstrated exceptional ability in the sciences or arts (except the performing arts) may be eligible for another classification that avoids labor certification, called Schedule A, Group II, if they can show substantial extrinsic evidence of their achievements, similar to the "extraordinary ability" category described above.

Labor Certification – the PERM process

The Department of Labor has a complex procedure for certifying that a job may be offered to a foreign worker because the employer has tested the labor market and found that there are no qualified U.S. workers available to fill the offered position. This is called permanent alien labor certification, or "PERM," an acronym for the electronic filing system, implemented in March 2005. The process includes a set of mandatory recruitment efforts by the employer to test the American labor market, which must be completed within a specific time-frame before an application can be filed and a certification can be issued by the Department of Labor.

A PERM filed under the second preference must entail a job offer for a position that requires a person to have a bachelor's degree plus five years experience or a master's degree as a minimum requirement before entering into that position and properly performing the job duties.

PREFERENCE III
SKILLED WORKERS, PROFESSIONALS AND OTHER WORKERS
(40,000 VISAS PER YEAR PLUS ANY UNUSED VISAS UNDER PREFERENCES I AND II)

Employment III - Sub-category I (E31)

Skilled Workers - An alien qualifies as a skilled worker if at the time of petitioning for classification, the alien qualifies to perform skilled labor requiring at least two years' training or experience and is being sponsored for a position which is not temporary or seasonal in nature, for which qualified workers are not available in the United States. This category requires the use of the alien labor certification process.

Employment III - Sub-category II (E32)

Professionals - This category is reserved for professionals, defined as aliens holding baccalaureate degrees and members of the professions employed in positions for which United States workers are not available. This category requires the use of the alien labor certification process.

Employment III - Sub-category III (EW)

"Other Workers" - This sub-category is reserved for aliens capable of performing unskilled labor not of a temporary or seasonal nature for which qualified workers are not

available in the United States. Since a cap of 10,000 visas (within this overall 40,000 limit) is set for applicants seeking to qualify as "other workers," there is a substantial waiting period under this sub-category. This category requires the use of the alien labor certification process.

Schedule A, Group I: Pre-certified Shortage Occupations

Unlike all other occupational groups in the employment-based third preference category, two groups have been "pre-certified" by the labor department due to longstanding critical labor shortages throughout the United States, namely Registered Nurses and Physical Therapists. U.S. employers do not need to go through alien labor certification to sponsor workers in these two occupations. There were 50,000 visas allocated to this subcategory. However, the 50,000 visas were exhausted several years ago so, regardless of the shortage, individuals in these two occupations face significant delays due to quota backlogs. Regardless of the visa allotment being unavailable, these occupations remain exempt from the filing of a labor certification with the Department of Labor (PERM) and all advertising requirements associated with that filing.

PREFERENCE IV
SPECIAL IMMIGRANTS
(10,000 VISAS AVAILABLE PER YEAR)

This category is reserved for certain qualified special immigrants such as religious workers, victims of spousal abuse, certain former United Nations employees, etc. The religious worker special immigrant category is distinguished from the temporary religious worker visa by an important feature: it requires two years' prior full-time paid work experience in a religious occupation, profession or the ministry, as opposed to merely two years' prior membership in the religious denomination of the sponsoring U.S. tax-exempt religious organization.

PREFERENCE V
EMPLOYMENT-CREATION IMMIGRANTS
(10,000 VISAS AVAILABLE PER YEAR)

This "investor" provision provides visas to applicants who invest a minimum of a million dollars in a new commercial enterprise in the United States which will result in the creation of employment for at least ten "qualified workers" (United States citizens and permanent residents) other than immediate family members of the investor. In certain exceptional circumstances, including where the investment is made in an area of high unemployment or a rural area, the amount may be reduced to $500,000. An investor may commit $500,000 to a pre-approved Regional Center in which case employment of 10 U.S. workers may be "indirect" and attributable to the Regional Center's project. The permanent residence is granted for a two year period. With 90 days of its expiration, the applicant must file a petition to remove the conditions on his or her residency. This petition (form I-829) is adjudicated at the goal of ensuring that the investment is still at risk, that the investment vehicle is still engaged in the same business activities and the appropriate number of employees are still employed with the enterprise.

EB-5 statistics for fiscal year 2012 showed that I -526 immigrant petitions by alien entrepreneurs were being approved at a 79% clip and I-829 petitions by entrepreneurs to remove the conditions of residence status at a 92% rate. The number of approved I-526 petitions grew from 640 in 2008 to 3700 in the last fiscal year. Chinese nationals comprise a very large percentage of filing. A quota retrogression is expected for Chinese nationals only.

FAMILY-SPONSORED PREFERENCES AND DIVERSITY IMMIGRANTS

(a) Family Sponsored Immigrants

Immediate relatives of U.S. citizens (including the spouse, minor children and parents of adult U.S. citizens) remain an unrestricted category, not subject to numerical limitation and therefore not subject to long waiting periods. However, the number of immediate relative applicants admitted is tabulated and can impact on and reduce the number of visas available in the family-sponsored preference categories.

Family relationships which are also eligible for preference consideration are the following:

First Preference	Unmarried Sons and Daughters of United States Citizens
Second Preference	Divided into two Sub-Categories; Sub-Category 2A - Spouses and Unmarried Children of Permanent Resident Aliens Sub-Category 2B - Unmarried Adult Sons and Daughters of Permanent Resident Aliens
Third Preference	Married Sons and Daughters of United States Citizens
Fourth Preference	Brothers and Sisters of United States Citizens

(b) Diversity Immigrants

"Diversity immigration" is another of the euphemisms found in the Immigration Act of 1990. In fact, the “Diversity Visa lottery” program designates each year a list of countries which have comprised only a very small percentage of immigrants from immediately preceding years, and citizens of these countries may file an electronic application with the State Department for possible random or chronological selection for immigrant visas without any reference to the applicant's relationship to a United States sponsor. However, the application period is limited to two months per year, and under present regulations, a lottery applicant must have at least a high school education or two years' experience in a position which requires such experience.

TAX NOTES

Who is a resident for tax purposes?

The Deficit Reduction Act of 1984 creates a statutory definition of the term "resident alien" for tax purposes. Included are two tests, one based upon visa status and the other based upon "substantial presence" in the United States.

Pursuant to I.R.C. Section 7701(b)(1)(A)(i), an alien who has been granted the immigration status of U.S. permanent residence is a resident for U.S. tax purposes, without exception. Absence from the United States for the entire year does not prevent the absolute determination that the person is a resident for tax purposes unless the status of permanent residence has been terminated under the immigration laws. I.R.C. Sec. 7701(b)(5). Permanent residence status can be relinquished in appropriate cases.

Under the "substantial presence" test, an individual is a resident for tax purposes if he has been physically present in the United States for 183 days or more within the calendar year. I.R.C. Sec. 7701(b)(3)(A)(ii). Alternatively, one is deemed "substantially present" in the United States if he has been "cumulatively present" in the United States over the last three years for a sufficient number of days. Cumulative presence is calculated by means of a complex formula, set forth in the statute. An exception to the cumulative presence rules is provided for an individual alien who is able to show that his "tax home" and family connections remain in a foreign country. Teachers, students and certain employees of foreign government agencies are generally exempt from the resident alien rules.

Important Rules relating to Tax Avoidance

On August 21, 1996, the President signed into law the Health Insurance Portability and Accountability Act of 1996, which applies special tax rules to U.S. citizens who renounce their citizenship and certain green card holders who give up their resident status for the purpose of avoiding U.S. taxes.

A U.S. citizen who renounces citizenship for the purpose of avoiding Federal income, estate or gift taxes will be taxed as a citizen on both U.S. source income and any income "effectively connected" with a U.S. trade or business for ten years after expatriation. An individual will be presumed to have renounced citizenship to avoid taxes if his/her average annual net income for the five years preceding renunciation was greater than $100,000 or his/her net worth is $500,000 or more. Certain exceptions to the presumption apply.

Any "long term resident" of the United States who ceases to be a lawful permanent resident or who commences to be treated as a tax resident of another country under a treaty tie-breaker provision will receive similar tax treatment. A "long term resident" is a non-U.S. citizen

who has been a lawful permanent resident of the United States in at least eight of the 15 years preceding the loss of residence or assumption of tax residence in another country.

The foregoing is a brief summary only, and it is important to review the details carefully with tax counsel as they may apply to individual cases. The tax rules went into effect as of February 6, 1995.

In a related provision, under IIRAIRA, signed into law September 30, 1996, persons who officially renounce U.S. citizenship after the date of the Act and are found by the Attorney General to have done so for tax avoidance purposes are inadmissible to the United States. A determination will be made applying the IRS presumption and rules noted above. This provision applies only to former U.S. citizens, not to former lawful permanent residents. Waivers may be available for visiting the United States.

A Word about Estate Taxes and Immigration Status

Pursuant to IRC Section 2056(d), as amended in November 1988, in cases of transfers made by a U.S. citizen or resident decedent to a surviving spouse who is not a citizen of the United States, the marital deduction is not available unless there is a disposition by means of a qualified domestic trust. Accordingly, it may be important for foreign spouses to consider applying for naturalization to become U.S. citizens, in order to avoid excessive estate taxes.

Note that the Health Insurance Portability and Accountability Act of 1996 also extended expatriate estate and gift tax provisions to certain long-term U.S. residents who terminate U.S. residency, and applied the presumption of tax avoidance noted above with respect to certain high income or wealthy decedents.

Further Advice

This memo is not intended to be all-inclusive or to furnish advice in a particular case. Please feel free to contact our office for further information and advice.