



Immigration 101

by Amy L. Erlbacher-Anderson

In light of record low unemployment rates, employers are looking for creative ways to hire the people they need to operate their businesses. In my practice, a wide variety of questions are being asked by many kinds of organizations wishing to tap into the labor market outside the U.S. or hire those present in the U.S. in a nonimmigrant visa status. My answers have, over time, developed into the following basic explanation of U.S. immigration law with respect to immigrants with legal status. As you read this article, please keep in mind that this is a simple explanation of one aspect of a very complex legal area that changes often with little warning.

Overview

Under federal law, a person must have a visa status of some type to both enter the U.S. on a temporary basis and to remain in the U.S. on a permanent basis. Most legally enter the U.S. with a temporary visa status, then obtain a permanent status through one of several methods. Lawful permanent residents

may later become U.S. citizens through the naturalization process. Immigrants living in the U.S. illegally are generally those individuals who do not enter the U.S. with a legal status or those who stay beyond the amount of time granted by their legal status, and are considered to be "out of status" and deportable (also known as being eligible to be placed in removal proceedings). If these individuals remain in the U.S. for a sufficient amount of time with no legal status, they can be barred from returning to the U.S. for three years, 10 years, or life if they leave.

There is also a significant difference between a visa *status* and a visa *stamp*. A visa *stamp* is nothing more than a brightly colored foil placed by a U.S. consulate in a person's passport which allows them to enter the U.S. in the status listed on the stamp between the dates listed as the stamp's validity period. A visa *status* is the bundle of rights one receives when an individual either enters the U.S. using a valid visa stamp or is approved for a change of nonimmigrant visa status by the U.S. Citizenship and Immigration Service through a petition or application filed while present in the U.S.

There are several agencies involved in the immigration process. Both the U.S. Department of State and the U.S. Department of Homeland Security (DHS) play roles in our immigration system. DHS is divided into several sub-agencies, the most important of which are the U.S. Citizenship and Immigration Service (USCIS), Customs and Border Protection (CBP), and Immigration and Customs Enforcement (ICE) but also includes Transportation Security Administration (TSA). USCIS grants immigration benefits within the U.S. while CBP controls the flow of people and goods in and out of the country. ICE enforces our immigration laws. The U.S. Department of Labor and Department of Justice also have roles in the system protecting both U.S. workers and foreign national workers.

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Nonimmigrant Visa Status¹

A nonimmigrant visa status is a legal status that allows a foreign national to enter the U.S. for a pre-determined amount of time and for a specific purpose. Nonimmigrant visa status is generally conferred through the issuance of a visa stamp at a U.S. consulate in the individual's home country through an application process controlled by the U.S. Department of State and includes an interview at a U.S. consulate abroad. Nonimmigrant visa status can also be obtained through a change of status approved by the USCIS through a petition process when the person is already present in the U.S. in another nonimmigrant visa status.

The most common visa used to enter the U.S. is the B-1/B-2 visa (commonly called the *visitor* visa), although individuals from a select number of countries are allowed to enter without a visa under the Visa Waiver Program (Electronic System for Travel Authorization (ESTA) if apply electronically). The B-1/B-2 visitor visa allows a person to enter the U.S. for up to six months for travel or business. It does not provide any authorization to work, including working remotely for a business located in another country, except in limited circumstances. The intent of a B-1 business visa entry is to perform services for a company abroad, while on their payroll, for a small number of stated purposes in the U.S. The intent of a B-2 visitor visa entry is to vacation, such as visiting family or Disney World.

The most common *employment-based, nonimmigrant visas* include:

1. H Visas – only a limited number of H-1B visas and H-2B visas are available on a fiscal-year basis. For example, there are only 65,000 regular H-1B visas available each fiscal year (October to September) and an additional 20,000 for individuals who have graduated from a U.S. college or university with an advance degree. Most years or, in the case of H-2 visas, every six months, the available visas have been assigned before the period of time to which they apply has even begun.

- a. H-1B – available to persons to be employed in a specialty occupation and who hold the credentials required by the position. Generally, the position must require application of a body of specialized knowledge and the attainment of the minimum of a bachelor's degree. Individuals are limited to a total of six years of visa validity, except under special circumstances. The employer must pay the "prevailing wage" for the position and location of employment, which must be attested to by application with the U.S. Department of Labor.
- b. H-2A – available to persons to be employed as temporary or seasonal agricultural workers. Employers must demonstrate that there are no

available, capable U.S. workers by conducting required recruitment.

- c. H-2B – available to persons to be employed as a temporary, seasonal, or intermittent non-agricultural workers. The position may be skilled or unskilled – common positions include landscapers, hotel or resort employees, restaurant staff, certain childcare workers, and sports instructors.
- d. H-3 – available to persons who will enter the U.S. at the invitation of an organization for the purpose of receiving training in any field, except medicine.

2. L-1 Visas - available for persons brought to the U.S. in an inter-company transfer in an executive, managerial, or specialized knowledge capacity and requires a multinational corporation structure. The employee must have been employed with an affiliated company for at least one year out of the past three years, and the companies must have a certain relationship to each other. A subcategory of L visa allows for an individual to enter the U.S. to open a new office for a foreign company; however, the L visa status will only be valid for one year. There is no quota on the L visa category nor do prevailing wage rules apply.

3. J-1 Visa – available for students, scholars, trainees, teachers, au pairs, professors, research assistants, specialists, and leaders in a field of specialized knowledge. A J visa must be sponsored by an approved exchange program, which is obtained through an application process by the sponsor. J visas are not subject to an annual quota or wage rate minimums; however, they are limited to a three-year validity period. At the end of the J visa status, most individuals are subject to a two-year home residency requirement, which can only be waived in limited circumstances by application to the U.S. Department of State.

4. TN Visas – available only to nationals from Canada or Mexico and limited to approximately 60 listed professions, most of which require a post-secondary or college degree. Mexican nationals must obtain approval of their initial TN visa status by application through a U.S. consulate. Canadian nationals can simply show up at a port-of-entry (whether a land crossing, an international U.S. airport, or a pre-clearance office in an airport abroad) and apply in-person. There is no quota on TN visas nor are they subject to the prevailing wage rules.

5. O Visas – available to individuals who can show they have "extraordinary" abilities in the form of sustained national or international acclaim. Artists, athletes, entertainers, scientists, educators, high-end chefs who can demonstrate that they are at the top of their field may qualify for an O visa. O visas are not subject to an annual quota or required to pay the prevailing wage. There is also no limitation on the number of O visa extensions an individual may request.

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An individual may also enter the U.S. on a *non-employment based visa or status* for a number of different reasons. In addition to the B visitor visa mentioned above, the most common non-employment based visas and/or statuses are:

1. Refugees and Asylees – A refugee is a person wishing to flee or unwilling to return to their home country because of persecution or fear of persecution; an asylee is a refugee who has requested asylum upon entry into the U.S. or shortly thereafter. An asylee will generally, ultimately, apply for permanent resident status.

2. Fiancé(e)s – A person admitted to the U.S. for a short time to marry a U.S. citizen (under a K-1 visa). A fiancé(e) will apply for permanent resident status through their citizen spouse after the marriage has taken place (required within 90 days of entry into the U.S.).

3. Temporary Protected Status – A person from a country designated by the U.S. Department of Homeland Security as having conditions or circumstances preventing the country from adequately handling the return of its citizens and/or that are such that its people are unable to return home safely and should be allowed to remain in the U.S. until conditions improve – for example, Venezuela, Syria, and Afghanistan.

4. Students – A person who attends school in the U.S. under an F-1 visa or an M-1 visa. The student visa categories are designed to enable foreign persons to enter the U.S. to take part in an academic program of study, leading to an undergraduate or graduate degree(s) for F-1 visas or a degree or certificate in vocational education for M-1 visas. Employment may be allowed for a student visa holder, depending on the circumstances, which include: on-campus employment, off-campus employment, curricular practical training (employment that is an integral part of an established curriculum), and optional practical training (post-graduation employment directly related to a student's major area of study).

5. Dependents – the immediate family members of a non-immigrant can receive nonimmigrant visa status and, in a few cases, authorization to work. A dependent only includes spouse and children until age 21.

6. DACA - Deferred Action for Childhood Arrivals is a form of administrative relief that protects eligible immigrants who came to the U.S. when they were children from deportation. DACA gives undocumented immigrants: a) protection from deportation, and b) a work permit. The program requires that the DACA status and work permit be renewed every two years. It is solely a discretionary determination to defer removal action as an act of prosecutorial discretion; DACA does not confer any lawful status.

Individuals in these non-employment visa statuses are or can become eligible for employment authorization.

Immigrant Visas²

Most individuals become eligible to remain in the U.S. by first qualifying for an immigrant visa and then applying to adjust their status to be a lawful permanent resident. With the exception of the visa "lottery" that the Department of State has each year and taking into account that those approved for asylum are, eventually, allowed to apply for permanent resident status, there are essentially two ways to obtain an immigrant visa—through employment or through certain family members. Within these two methods, there are different categories of immigrant visas, many of which are subject to long backlogs because of a cap placed on the number of immigrant visas that can be issued each year.

1. Employment-Based Immigrant Visas – There are nine employment-based "preferences" for immigrant visas. These preferences are defined based on the type of individual for whom the immigrant visa is based, ranging from internationally renowned individuals to unskilled workers. Special categories exist for religious workers and certain "exceptional" individuals as specified in a designated list. The annual quota, generally around 140,000 visas in total, placed on employment-based visas is divided among the categories, then divided again among the recognized countries of the world.



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A “typical” adjustment process for an employee involves three steps: labor certification with the U.S. Department of Labor, a determination of eligibility for an immigrant visa with the USCIS, and application to adjust status from a nonimmigrant to a legal permanent resident.

2. Family-Based Immigrant Visas – There are five family-based “preferences” for immigrant visas. These preferences are defined based on the individual’s familial relationship to a U.S. citizen or a U.S. legal permanent resident. Not all family members of legal permanent residents or citizens can qualify for an immigrant visa. Special categories of immigrant visas are available to a battered spouse or child, widows and widowers of U.S. citizens, a person born to a foreign diplomat, and individuals holding K and V nonimmigrant visas. Family-based immigrant visas are also subject to annual quotas, with the exception of immediate relatives (spouse, parent, minor child) of a U.S. citizen.

Special rules apply to individuals holding fiancé(e) visas and prospective adopted children as well as children who have been neglected or abandoned in the U.S. and are wards of the state or a juvenile court. There are also special rules for certain Iraqi and Afghan citizens who assisted U.S. troops and/or the U.S. government in war efforts.

At present, nearly all of these categories (except the spouse, minor children, and parents of a U.S. citizen) have significant backlogs due to the annual quotas on the number of immigrant visas available each governmental fiscal year. The impact of a backlog in a visa category is to delay these individuals’ ability to apply for permanent residence status until their category for their home country progresses to their “priority date.” This delay can last for months, years, or decades.

Permanent Resident Status³

Once an individual has received approval for an immigrant visa and their visa category is current, they can submit an application (an adjustment application) to the USCIS to become a legal permanent resident of the U.S. or can apply for permanent resident status with the U.S. Department of State and process through a U.S. consulate. The individual must pass several security checks, have a medical examination, and prove that he or she will not become a public charge and may be required to complete an interview to discuss the application (and the validity of his or her marriage to the citizen sponsor, if applicable). If approved, the individual is granted permanent resident status and is issued a “green card.” As a permanent resident, the individual has nearly all of the rights and obligations of a U.S. citizen and can remain an legal permanent resident for the rest of his or her life.

Citizenship

If an individual is a permanent resident for at least 5 years (2 years if the immigrant visa was based on marriage to a U.S. citizen) and meets a number of residency and other requirements, he or she may apply to become a U.S. citizen. No one is required to become a citizen. The naturalization process includes an application, more security checks, and another interview in addition to taking a civics exam and several English tests. If successful, the person receives a naturalization certificate and is eligible for a U.S. passport and all other rights of a U.S. citizen.

Employment Verification

Fun fact – it was not until November 6, 1986, and the passing of the Immigration Reform and Control Act that the U.S. had its first laws imposing employer sanctions and criminalizing the act of knowingly hiring an undocumented worker. To avoid sanctions, all employers are required to verify identity and employment authorization, which led to the creation of the Form I-9. All employers must complete the Form I-9 for any person hired to provide services as an employee after November of 1986.

E-Verify is a mostly voluntary electronic employment eligibility database system operated by the DHS in conjunction with the Social Security Administration which allows employers to electronically verify the employment eligibility of new hires. Certain federal contractors and subcontractors are required to use the E-Verify system, and some states have mandated participation for certain entities. Employers who want to hire F-1 students utilizing STEM Optional Practical Training (OPT) are required to use E-Verify.

Disclaimer/Wrap-Up

While this article barely skims the surface of the complex, and often confounding, area of immigration, it should provide most attorneys with a basic education on legal immigration statuses. Please note that I have not addressed most aspects of immigrants living in the U.S. illegally (including deportation or removal of those immigrants) nor have I discussed any humanitarian (refugee, asylee, Temporary Protected Status (TPS)) status in any detail or spent any time on the various investment visas, as each of these subjects warrant their own articles. 

Endnotes

- 1 U.S. Dep’t of State, NONIMMIGRANT VISA CATEGORIES, https://ais.usvisa-info.com/en-cm/niv/information/visa_categories.
- 2 U.S. Dep’t of State, IMMIGRANT VISA CATEGORIES, https://ais.usvisa-info.com/en-cm/niv/information/visa_categories.
- 3 U.S. Dep’t of Homeland Sec., LAWFUL PERMANENT RESIDENTS (LPR), [https://www.dhs.gov/immigration-statistics/lawful-permanent-residents#:~:text=Lawful%20permanent%20residents%20\(LPRs\)%2C,permanently%20within%20the%20United%20States](https://www.dhs.gov/immigration-statistics/lawful-permanent-residents#:~:text=Lawful%20permanent%20residents%20(LPRs)%2C,permanently%20within%20the%20United%20States).