

“Sponsoring” Foreign National Employees: The Lawful Permanent Residency Processes

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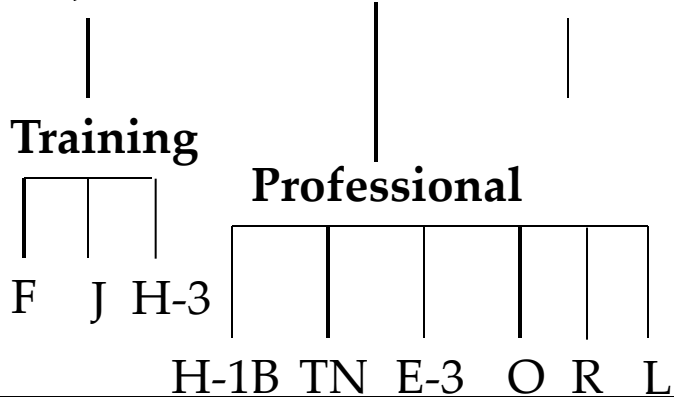
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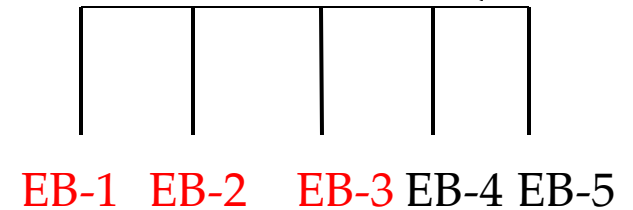
Two “Arms” of Employment Based Immigration Law



Nonimmigrant



Immigrant



Employment-Based LPR Options

Options for Scientists/Researchers – NO recruitment:

- **EB-1** Scientist of “Extraordinary Ability”
- **EB-1** Outstanding Researchers
- **EB-2** National Interest Waiver
- **EB-2** Schedule A, Group II: Scientist of Exceptional Ability

Options for Professionals/Teaching Faculty – recruitment required:

- **EB-2 PERM** for positions requiring Advanced Degree (or Bachelor’s + 5 years of experience).
- **EB-3 PERM** for positions requiring a Bachelor’s Degree

Typical Process for Obtaining LPR Status Through Employment

EB-2/EB-3 PERM Route (RECRUITMENT)

1. Employer files a “PERM” Application with the DOL - ***Upon filing, foreign national gets PD***



2. Employer files an I-140 Immigrant Petition with USCIS



3. ***IF foreign national is in U.S. and PD is current: FN (& family) file*** I-485 Application for LPR status (plus EAD/AP Applications) with USCIS.

How do I know if PD is current?

EB-1 & EB-2 NIW Route

1. Employer files an I-140 Immigrant Petition with USCIS – ***Upon filing, foreign national gets PD***



2. ***IF foreign national is in U.S. and PD is current: FN (& family) file*** I-485 Application for LPR status (plus EAD/AP Applications) with USCIS.

How do I know if PD is current?

Introducing the Visa Bulletin...



The Visa Bulletin: Impact of Quotas

The Visa Bulletin tells how long it takes to become a LPR (and how long it will take for derivatives to obtain EAD)

May 2013 Visa Bulletin

http://travel.state.gov/visa/bulletin/bulletin_1360.html

Employment -Based (category)	All Chargeability Areas Except Those Listed	CHINA	INDIA	MEXICO	PHILIPPINES
1 st EB-1	Current	Current	Current	Current	Current
2 nd EB-2	Current	05 MAY 2008	01 SEP 2004	Current	Current
3 rd EB-3	01 DEC 2007	01 DEC 2007	22 DEC 2002	01 DEC 2007	15 SEP 2006

IMPACT OF QUOTAS:

- **EB-2: Indian** and **PRC Nationals** must wait to file I-485 application or consular process (**everyone else can file I-140 Petition and I-485 Application concurrently!**)
- **EB-3: EVERYONE** must wait to file I-485 application or consular process

IMPORTANT: Those subject to quota backlogs can extend H-1B (as long as they have approved I-140 Petition)!!!

EB-2 & EB-3 PERM/Labor Certification:

The “Recruitment-Based” Process for (Non-Teaching) Professionals

PURPOSE: To preserve/safeguard job opportunities for (job seeking) U.S. Workers. For this reason:

The University of Delaware is required to test the labor market and prove, via extensive **recruitment**, that during the past **SIX MONTHS** it was unable to hire a U.S. worker with the **MINIMUM** required skills and expertise...despite the fact that the University was willing to pay the higher of the Actual or the DOL determined **prevailing wage**.



If we understand the purpose of PERM, the following questions are answered

- Why can't we pursue this process for all Foreign National Employees (**FNE**)?
- What is the effect if we don't go through this process?
- Why do we have to advertise and interview U.S. applicants when the FNE is presently employed in the job (and more than qualified)?
- Why do we have to request a Prevailing Wage Determination, rather than rely on the Class and Compensation pay scale?
- Why is there a problem if the FNE is qualified for the job based on his/her previous experience with the University?
- Will we be required to hire a U.S. worker if one is identified?

Understand the Difference:

Actual University Practice	Labor Certification Requirements
Recruit to fill open position	Test of labor market for filled position
Subjective requirements	Objective and quantifiable requirements
Do not readvertise for filled position	Must readvertise
Advertising done online only	Must use print and other required sources
University selects best applicants to interview	Must interview if minimally-qualified
Hire best-qualified	Hire minimally-qualified
Pay based on department's scale and/or market	Pay based on DOL Prevailing Wage

Before you Advertise: Identifying Minimum Requirements

Why are job requirements critical?

- U.S. workers must meet ALL job requirements to qualify
- Determines preference category (EB-2 vs. EB-3) and, thus, quota wait time.
- Determines the Prevailing Wage (PWD).

What is included in minimum requirements?

- Level of degree and field of study
- Training or certification, if applicable
- Months or years of **SPECIFIC** work experience
- Hard-to-find skills such as: Software, research techniques, specific knowledge

Before you Advertise: Identifying Minimum Requirements

Important to Understand:

- DOL has very specific rules on job requirements that may be counter-intuitive to an employer
- Requirements must be objective and quantifiable
- Requirements should **not** be tailored to the FNE
- FNE must have met **all** requirements **BEFORE** beginning at the University of Delaware
 - Exception if FNE promoted or will be promoted to 50% dissimilar position
- “Business Necessity” – Needed for any requirements beyond “normal” as defined by DOL
- All job requirements must be in ads

Before you Advertise: Request a PWD

Prevailing Wage Determination/Wage Level— is based on:

- Job Title/Position (per DOL's O*NET)
- Required Education and Years of Experience (and Job Zone)
- Other factors 'add' to level—such as supervisory experience
- **Area of employment**

Hypo: Position: Software Developer (University of Delaware); Requirements: BS + 5 yrs exp; Salary: \$70k/yr; FN possess MS + 5 yrs exp.

Level 1 Wage: \$53,352 year

Level 2 Wage: \$61,402 year

Level 3 Wage: \$69,430 year

Level 4 Wage: \$77,480 year



Advertising Requirements

Ads can be no older than 6 months and must include:

- Job title;
- Job location;
- Name of employer;
- Job description;
- Minimum requirements
 - Education;
 - Experience; and
 - Hard-to-find and essential skills;
- Application instructions/contact information.

Advertising Requirements

1. **SWA Job Order – 30 days**
2. **2 Sunday Newspaper Ads – Must be in print**
3. **3 Additional Sources, chosen from the following list:**
 - * University's Website - FREE
 - * Job Search Website - such as Careerbuilder.com – usually FREE
 - Employee Referral Program with Incentive(s) – FREE
 - Campus Placement - FREE
 - * Local and Ethnic Newspaper
 - Job Fairs
 - On-campus Recruiting (only for jobs **not** requiring exp.)
 - Trade or Professional Organizations/Journal
 - Private Employment Firm
 - Radio and Television Advertisement
- * - Most frequently used by University of Delaware
6. **Notice of Filing** - “Legal Notice” posted for **10 business days**

Other Recruitment Requirements

- Timely contact U.S. applicants that appear minimally qualified;
- If potentially qualified applicant does not respond to you, you must follow up via email (with read receipt request) and, if still no response, with a certified letter;
- Disqualification of U.S. applicants: can only be based on lawful job-related reasons---lacks 1 or more minimum requirement;
- Must document all communications with U.S. applicants – (recruitment report/chart) .

Interview FAQs

- Can we choose FNE if he is the most qualified?
- Can we reject a U.S. applicant for subjective reasons—such as lack of eye contact?
- Can we reject a U.S. applicant if he is over-qualified?
- Can we reject a U.S. applicant if he wants more money?
- Can we reject an applicant if she is a Foreign National?
- Do we have to hire the qualified U.S. applicant AND fire the FNE?

Message: only can reject for job-related reason--for lacking requirements contained in your advertisements!

“Special Recruitment” Labor Certification:

The “Recruitment-Based” Process for Teachers

Different (Real World) Standard:

The University of Delaware is expected to pursue a **competitive and selective recruitment** process and select the **most qualified candidate** for the position.

Different Timeline:

The University has **18 months** from the date the FN is selected to file the Special Recruitment/PERM application.

Same Prevailing Wage Requirement:

The University must pay the higher of the Actual or the DOL determined **prevailing wage**.

NOTE: If salary is determined by a CBA,
CBA wage = Prevailing Wage!!



“Special Recruitment” Labor Certification: Advertising Requirements

Advertisement Content:

Same as regular labor certification

Advertising Sources:

- Print ad in a national professional journal OR 30 day **online** ad with website of a national professional journal; and
- Advertisements in any other recruitment sources typically used to recruit for such positions.

“Special Recruitment” Labor Certification: Other Recruitment Requirements

- Notice of Filing to Union Representative (or, if no CBA, Notice of Filing must be posted for 10 consecutive business days).
- Statement of the Hiring Official memorializing the recruitment and selection process and attesting to FN's qualifications.
- Recruitment Report documenting the number of applicants, the reasons why applicants were rejected, and the reasons why the FN was found to be the most qualified candidate for the position (NOTE: FN still must meet all advertisement requirements at the time of selection!).

How Long Does PERM/LPR Process Take?

PERM Application

- Pre-Recruitment (includes obtaining PWD): ~**60 to 90 days**
- Recruitment: at least **30 days** (regular PERM only)
- Quiet period: **30 days** (regular PERM only)
- Processing time: **60-180** days (currently 60 days)

I-140 (EB-2 or EB-3) Petition

- Regular processing: ~**120** days
- Premium Processing: within **15** days

I-485 Application for Lawful Permanent Residence

- If Priority Date is current: ~**60 to 180 days**
- If Priority Date is not current—per **Visa Bulletin: 4 to 11 years;**
BUT can extend H-1B (so long as you have approved I-140 Petition)!



EB-1 “Extraordinary” Researcher Option

Overview:

- **Category: EB-1 Extraordinary Ability in the Sciences, arts, education, business, or athletics**
- **One step process:** I-140 Petition & I-485 Application filed concurrently!
 - *PERM not required!*
 - *FN **can** self-petition!*

Requirements: Intended for those who already are “stars” in their field, who are considered among top 1% and have:

- Sustained national or international acclaim in the field & recognition for original contributions;
- Work will be in the area of extraordinary ability;
- Work will substantially benefit prospectively the US.; and
- **Regulatory Requirements:** One-time achievement or satisfaction of at least three of ten listed criteria **AND** **‘final merits’** criterion



EB-1 Outstanding Researcher (OR) Option

Overview:

- **Category: EB-1 Outstanding Researcher**
- **One step process:** I-140 Petition & I-485 Application filed concurrently!
 - *PERM not required!*
 - *FN **cannot** self-petition!*

Requirements:

- Three years of **qualifying** experience—expected to be Post-PhD;
- “Permanent” research position; and
- Evidence of **international Recognition** as outstanding—by satisfying at least **two** of 6 **regulatory criterion AND ‘final merits’** determination

EB-1 OR Regulatory Criteria

Criteria Typically Satisfied:

- **Original** scientific or scholarly research contributions
- Authorship of scholarly books or articles (in scholarly journals with international circulation—e.g. high impact, first/last author)
- Participation as a judge of the work of others

Other Enumerated Criteria:

- Published material written by others about the alien's work
- Receipt of major prizes or awards for outstanding achievement
- Membership in associations which require outstanding achievements

EB-2 “National Interest” Waiver Option

Review:

- **Category: EB-2 National Interest Waiver (NIW)**
- One Step process for all FNs other than those from India and PRC (I-485 step for India/PRC: 5-9 year wait!)
- In BOTH cases, PERM is not required (“waived”) AND FN can self-petition!
- Good option for temporary POST-DOC positions!

Threshold Requirements:

- Work is in an area of substantial intrinsic merit;
- The benefits of the work are national in scope; &
- The FN’s employment serves the national interest substantially more than would an available U.S. worker.

Hint: Satisfy as many OR criteria as possible!



EB-1/NIW Cases: How Long Does LPR Process Take?

I-140 Petition – EB-1

- Regular processing: ~**120** days
- Premium Processing: within **15** days

I-140 Petition – NIW

- Regular processing: ~**120** days
- Cannot file via Premium Processing

I-485 Application for Lawful Permanent Residence

- If Priority Date is current: ~**60 to 180** days
- If Priority Date is not current—per **Visa Bulletin: 4 to 11 years; but can extend H-1B (so long as have approved I-140 Petition)!**

EB-1 option: can be <6 months; certainly < 1year!!!!

EB-2 NIW option: same as above UNLESS from PRC or India. BUT Immigration Reform is in the pipeline!



The Future:

**Comprehensive
Immigration Reform and
what it means for your
Foreign Nationals!**



QUESTIONS



G & H offers free consultations:

- Over the phone
- Via Skype
- Or, preferably, at our offices!

Jenkintown office (by train stop):

Call 215-885-3600:

Philadelphia office: Breaking News!

G & H is opening an office for consultation purposes at **1818 Market Street**; still call: 215-885-3600

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