

The Application for United States Permanent Resident Status

By: Donald W. Parker

This Memorandum will discuss the process involved in applying for United States permanent resident status based upon employer sponsorship. Generally, the process involves three steps: (i) the Application for Alien Employment Certification, (ii) the Immigrant Visa Petition and (iii) the Adjustment of Status Application (or alternatively Consular Processing of an Immigrant Visa).¹

1. The Application for Alien Employment Certification

The Application for Alien Employment Certification (the “LC Application”) involves a test by the United States employer of the labor market in order to determine whether there are qualified United States workers who are available to perform the duties required in the position for which the foreign national is being sponsored.

The LC Application is filed with the US Department of Labor (the “DOL”) after a period of pre-filing recruitment conducted by the employer. This recruitment customarily includes newspaper advertisements and a variety of online job postings. Assuming that no qualified American workers are found during this period of recruitment, the employer files the application with the DOL through an online application system. The LC Application contains a number of attestations concerning the nature and results of the recruitment, the job opportunity and the credentials of the foreign employee.

Within up to 6 months of filing the LC Application, the DOL will either (i) certify and approve the application; (ii) select the application for a formal audit process; or (iii) deny the application. Cases may be selected for audit both randomly and due to certain identified factors. We are seeing audits in less than 10% of all filed cases. If the case is audited, the DOL will request from the employer evidence of the recruitment process – copies of the various advertisements and a written report from the employer explaining why each applicant for the position was not qualified. Based on this additional information, the DOL will either certify and approve the case, deny the case or refer the case for an additional period of “supervised recruitment.” If referred for a period of supervised recruitment, the DOL will instruct the employer to engage in additional recruitment as determined by the DOL and the employer will then have to submit written evidence to the DOL detailing the recruitment and its results. If a case is selected for audit, the overall processing time could be as long as an additional year.

In preparing an LC Application it is important to develop a job description and set of job requirements that are specific enough to ensure that United States workers that apply for the position can be

¹ This Memorandum discusses the Green Card process for persons qualified in the EB-3 category as “Professionals” or “Skilled Workers” and in the EB-2 category as “Advanced Degree Aliens”. It does not discuss the special rules that apply within the EB-1 category for “Aliens of Extraordinary Ability”, “Outstanding Professors and Researchers” and “International Managers”.

rejected for job-related reasons, but that are not so specific (and so specifically tailored to the credentials of the sponsored alien) that the DOL has grounds for rejection. We will work with you to develop the appropriate job description and set of requirements for this process.

2. The Immigrant Visa Petition

Once the Application for Alien Employment Certification has been certified and approved by the Department of Labor, the employer can file an Immigrant Visa Petition with the Citizenship and Immigration Service (“CIS”). The purpose of the Immigrant Visa Petition is to establish the eligibility of the sponsored foreign national within one of several employment-based immigrant visa categories. The Immigrant Visa Petition currently takes between four and six months to be processed.²

There are a range of employment-based immigrant visa categories that run the spectrum from unskilled workers to outstanding researchers and aliens of exceptional ability in their field. One of these categories is for foreign nationals with at least a Bachelor’s degree who are being sponsored in a position that requires a Bachelor’s degree (the “Professional” or “EB-3” category) and another of the categories is for foreign nationals with at least a Master’s degree who are being sponsored in a position that requires a Master’s degree (the “Advanced Degree” or “EB-2” category).

These categories are relevant for purposes of applying the “per-country limitation” rules. Under the per-country limitation rules, Immigrant Visas (or permanent resident status) are available in a set number on an annual basis within each employment-based category. In addition, within each category, again determined on an annual basis, the nationals of any single country cannot account for more than a set percentage of the Immigrant Visas allocated to that category. In the event that in any year, the nationals of a particular country account for more than the per-country limitation within a category, a backlog develops for nationals of that country who are applying within that category. The position of an applicant for permanent resident status in this backlog is determined according to the date on which his LC Application was filed (the “Priority Date”). Although the Immigrant Visa Petition can be filed and approved for these applicants, they may not proceed to the third and final stage of the overall permanent resident application process until their Priority Date is current and an Immigrant Visa is available to them. Thus, the Immigrant Visa Petition both establishes the eligibility of a foreign national for an employment-based Immigrant Visa as well as whether the foreign national’s case will be subject to a delay in processing because of this backlog.

Traditionally, nationals of certain countries, such as India and China, have been subject to the per-country limitation within the EB-3 and EB-2 categories. In addition, some categories are no heavily subscribed for that there is a backlog across the board that applies to the nationals of all countries.

3. The Application for Adjustment of Status

Once the Immigrant Visa Petition has been approved by the CIS and assuming that the foreign national is not subject to a backlog as a result of the per-country limitation (discussed above), then the foreign national may proceed to the last stage in the process of applying for permanent resident status, which is the Application for Adjustment of Status. In the event that the foreign national is subject to the per-country limitation, then he can advance to this third and final stage in the process only once his Priority Date becomes current and an Immigrant Visa number has become available to him (see the discussion above). Please note that if there is no backlog in availability of visa numbers within a particular visa

² Until August of 2007, it was possible to pay the CIS an expedite filing fee of \$1,000 and have the case processed within 2 weeks. Expedited processing of Immigrant Visa Petitions was temporarily suspended in August of 2007 and has not yet been reinstated.

category, then the Application for Adjustment of Status may be filed at the same time as the Immigrant Visa Petition.

The Application for Adjustment of Status is currently being processed in approximately 4 to 8 months. At the end of the application process, the foreign national is admitted in the United States to status as a permanent resident.

The Application for Adjustment of Status is filed with the CIS and is composed of a number of forms containing personal information about the foreign national. The purpose of the Application for Adjustment of Status is to determine whether the foreign national falls within one of a number of categories of people who are not permitted to become permanent residents of the United States. Thus, for instance, the foreign national is required to be fingerprinted and her fingerprints run through various security programs in order to determine whether she has a prior criminal record. In addition, the foreign national is required to undergo a medical examination in order to determine whether she has any communicable diseases. In the vast majority of cases, the foreign national does not fall within any of these categories and the Application for Adjustment of Status is approved.

As an alternative to the Adjustment of Status process, the foreign national is permitted to apply for his Immigrant Visa at the United States Consulate in his country of nationality. The advantage of applying for an Immigrant Visa at a Consulate abroad is that the entire application process can be completed within about three to six months. The primary disadvantage of applying abroad is that the foreign national must return to his country of nationality for an interview at the end of the application process and possibly during the application process in order to collect and process the necessary application materials. In addition, a foreign national who has filed an Application for Adjustment of Status will often have greater flexibility with respect to his or her immigration status in the event that their employment with the sponsoring company is terminated. Although providing a shorter alternative, careful consideration needs to be given to deciding to pursue the Immigrant Visa through a United States Consulate abroad.

4. Timing Issues in General

Foreign nationals in H-1B status in the United States are permitted to remain in H-1B status, taking all of their employers together, for a total of six years. With the exceptions discussed below, at the end of this six year period, a foreign national who continues to remain in H-1B visa status must return to his country of nationality for at least one full year before he can reapply for an H-1B visa in the United States.

One exception to this six-year rule applies if the foreign national has filed an Application for Adjustment of Status before the end of his sixth year in H-1B visa status. In this event, the foreign national may remain in the United States in valid legal status until the Application for Adjustment of Status is approved. In addition, the foreign national may apply for employment authorization and for travel authorization as part of the Application for Adjustment of Status in order to continue to work with his United States employer and to travel in and out of the United States.

A second exception applies to foreign nationals who are subject to the per-country limit on Immigrant Visa availability. If a foreign national in this situation has an Immigrant Visa Petition approved prior to the expiration of his six year period of stay, he may receive three-year extensions of his H-1B visa status after the end of the six-year limitation period until a decision has been reached in his Application for Adjustment of Status.

A third exception applies to any foreign national who has a pending LC Application, Immigrant Visa Petition or Application for Adjustment of Status and with respect to which 365 days have elapsed since the filing of an underlying LC Application. Again, a foreign national in this situation will be able to obtain one year extensions of his H-1B visa status until a decision has been reached in his Application for Adjustment of Status.

For more information...

Should you have any questions concerning the process of applying of United States permanent residence, please contact:

Donald W. Parker
781-622-5930 ext. 236
dparker@mbbp.com

John J. Gallini
781-622-5930 ext. 256
jgallini@mbbp.com