

Siskind's Immigration Bulletin, Special Issue: 2009 Immigration Overview

An Overview of the US Immigration System - 2009

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INTRODUCTION:

There are five (5) Major Immigration Status/ Visa Categories and for the purposes of this paper, the first three will be discussed.

1. Non-Immigrant Visas – temporary visitors (work, student, visitor, etc.)
2. Immigrant Visas – lawful permanent residents (green card holders)
3. Asylees and other special groups – Asylum, refugee, and TPS status holders
4. Citizens
5. Undocumented – illegal immigrants

1. Non-Immigrant Visas

There are several types of non-immigrant visas. Non-immigrant visas are usually designated by letters. Below are brief summaries of the most common ones:

B-1/B-2 Visas – Available to Short term visitors for pleasure or business

1. Do you have a job that pays well and which you can leave for a few weeks on a vacation?
2. Do you have close relatives who will be remaining in your home country when you come to the US?
3. Are you coming for a short visit?
4. Do you have assets in your home country?
5. Do you own property in your home country?
6. Do you have a set itinerary for your trip to the US?
7. Do you have a roundtrip plane ticket?
8. Do you have close community ties in your home country?

9. Do you have money or proof of support from friends or relatives in the US to show adequate financial arrangements to carry out purpose of trip?
10. If you are coming for business, is the work you are doing work that would typically be done by an American worker?
11. If you are coming for business, is the main place where profits are earned outside the US?
12. If you are coming to the US on business, is your payment going to be made abroad rather than in the US?
13. If you are coming as a B-2 visitor for pleasure, are you coming for one of the following purposes?:
 - a. Tourist
 - b. Social visits to friends/relatives
 - c. Health purposes
 - d. Participants in conventions of social organizations
 - e. Participants in amateur musical, sports or similar events with no pay
 - f. Spouses and children of people in the US armed forces
 - g. People accompanying B-1 business visitors
 - h. Coming to marry a US citizen but the person plans on departing after the wedding
 - i. Coming to marry someone on a non-immigrant visa
 - j. Non-spouse partners (regardless of gender) that accompanies an E, H or L visa holder
 - k. Parent seeking to accompany an F-1 student visa holder
 - l. Language students in course of short duration when the course of study is under 18 hours per week
14. If you are coming on a B-1 business visitor visa, are you coming for one of the following purposes?:
 - a. Engaging in commercial transactions not involving employment (negotiating contracts, litigation, consulting with clients or business associates)
 - b. Participating in scientific, educational, professional, religious or business conventions
 - c. Religious workers coming to do missionary work in the US, ministers exchanging pulpits but who are paid by their own church abroad, and ministers on evangelical tours
 - d. Domestic servants accompanying returning US citizens temporarily assigned to the US or who permanently reside in a foreign country
 - e. Domestic servants accompanying non-immigrant visa holders if the applicant has worked for the employer for a year or more
 - f. Professional athletes only receiving tournament money
 - g. Foreign medical students seeking to take "elective clerkship" without pay
 - h. Serving on a board of directors of a US company
 - i. Coming to the US to set up a US subsidiary and explore investment opportunities
 - j. Installing equipment as part of a contract
 - k. Participating in a volunteer service program if religious only
 - l. Attending an executive seminar
 - m. Observing the conduct of business
 - n. Domestic partner of a person on a non-immigrant visa.

General Notes: Usually can get an authorized stay of up to six months; chances improve if a shorter trip is requested; no USCIS approval required before consulate issues visa; not allowed to work while on a visitor visa; visa must be granted by consular officer except in

most cases if the national is from one of more than two dozen countries granted Visa Waiver status allowing such persons to enter the US for up to 90 days. Visa Waiver entrants cannot have their status extended and cannot change to other non-immigrant categories while in the US. Nationals of the following countries are eligible for the Visa Waiver Program: Andorra, Australia, Austria, Belgium, Brunei, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, the Republic of Korea, San Marino, Singapore, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.

H-1B Visas – Available to people in “specialty occupations”

1. Do you have a university degree?
2. Do most people in your field in the US have university degrees?
3. If you lack a degree, do you have several years of work experience in your field?
4. Do you have an employer in the US willing to hire you?
5. Does the job pay as much as similarly employed American workers?
6. Does the employer typically only hire people with university degrees for the job?
7. Does the employer guarantee that they will have continuous work available to you?
8. If the occupation requires a license, do you have the necessary license?

General Notes: Valid for up to six years; can simultaneously have green card application pending; spouses and children not allowed to work; do not need to maintain ties to your home country; limited to 65,000 people per year (but many H-1B workers are exempt from this cap and there is an additional quota of 20,000 for people holding masters degrees or higher granted by a US university); can change employers quickly, but need new visa approval for each new employer; self-employment permitted in limited circumstances; if applicant lacks appropriate degree, equivalent work experience must be demonstrated and evaluation from expert obtained; companies employing many H-1B workers may be subject to additional requirements; USCIS must approve before consulate can issue visa; filing fees are expensive and vary significantly depending on the employer and the need for expedited processing; employers with a large number of H-1B workers in proportion to US workers may be considered “H-1B dependent” and have additional restrictions on their ability to hire and employ H-1Bs. NOTE: over the past few years, H-1B visas have been used up very quickly and advanced planning is always advisable. Also, from 2009 to 2011, companies that received TARP federal bailout funds are considered H-1B dependent even if they employ only a small number of H-1B workers compared to total US workers.

F-1 Visas – Available to Students

1. Do you have a residence in your home country you don't intend to abandon?
2. Have you been admitted to study full-time in a degree program or an English language program?
3. Is the school where you intend to study approved for students to attend on student visas?

4. Do you have proof of adequate financial resources to attend school full-time without the need to work in the US?
5. If you are not going to the US an English language program, are you proficient in English?
6. Will the education you obtain in the US improve your career prospects in your home country?

General Notes: Must be enrolled full-time; has limited on-campus work eligibility; off-campus employment is prohibited unless the student fits under limited exceptions and the employment authorization is granted by the school or the USCIS; can get up to a year of work authorization upon completion of program and up to an additional 17 months for certain students in science, technology, engineering and mathematics fields; can remain in the US for a period needed to complete the educational program; spouses and children not entitled to work; children can enroll in K-12 education, spouse cannot study unless he or she has a separate student visa; no USCIS approval required before consulate can issue visa.

J-1 Visas – Exchange Visitors

1. Are you coming to the US to participate in an exchange program designed by the US State Department?
2. Do you have fluency in English and sufficient funds to live here if the program does not pay J-1 visa holders?
3. If you are looking at the au pair program, have you registered with one of the eight designated au pair programs in the US?
4. If you are a doctor seeking to train in the US, are you admitted into a medical residency or fellowship program and have you obtained sponsorship from the Educational Commission on Foreign Medical Graduates?
5. If you are coming for a business trainee or intern visa, have you found an employer to provide you with a training opportunity?
6. If you have found a training opportunity, have you found a program sponsor?

General Notes: Available to trainees, interns, professors or research scholars, short term scholars, foreign doctors, camp counselors, au pairs and students in work/travel programs in the US; often requires person to return home for two years before switching to another visa; time limits vary depending on type of program (training – 18 months; interns – 12 months; scholars and professors – up to three year; au pairs – 12 months; medical residents – up to seven years; students are not limited); students eligible for up to 18 months (36 if post-doctoral work) of post-graduate work authorization; students must be enrolled full-time; spouses and children entitled to work authorization; no USCIS approval required before consulate can issue visa.

O Visas – People with extraordinary ability in the sciences, arts, crafts, education, business, athletics or any field of “creative endeavor”

1. Are you one of the top people in your field in your country?
2. Do you have an employer, manager or agent in the US who can sign your application?
3. Is there a peer organization willing to say that they have no objection to your being granted an O-1 visa?
4. Can you show that you have won a major international award OR at least three of the following?:
 - a. Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
 - b. Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
 - c. Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;
 - d. Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;
 - e. Evidence of the alien's original scientific, scholarly or business-related contributions of major significance in the field;
 - f. Evidence of the alien's authorship of scholarly articles in the field, in professional journals or other major media;
 - g. Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;
 - h. Evidence that the alien has commanded and now commands a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

General Notes: Can be admitted for up to three years at a time; no need to maintain residence abroad; can have green card application pending while on O-1 status without problems; USCIS approval required before the consulate can issue visa.

L Visas – Intra-company Transfers

1. Are you coming to the US to work for a company that has offices both in the US and outside the US?
2. Have you worked for the company abroad full-time for at least one year of the last three?
3. Are you coming to the US as an owner, executive, manager or an employee with special knowledge of the company's operations?

General Notes: Seven year stays for owners, executives and managers; five year stay for special knowledge employees; easy to get green card for owners, managers and executives; spouses are allowed to work; USCIS must approve before consulate can issue visa; difficult for workers working on a contract basis at other employers.

E Visas – E-2 Treaty Investors and E-1 Treaty Traders

1. If you are seeking an E-1 Treaty Trader visa, are you currently working for a business that has a substantial volume of trading business with the United States (more than 50%)?
2. Are you a national of a country that has a bi-lateral trade treaty with the United States?
3. Are you coming to the US to work as an owner, executive, manager or “essential skills” employee?
4. Is at least 50% of the business owned by foreign nationals who are not US citizens or permanent residents?
5. For E-2 visas, are you investing a “substantial amount” of money in a commercial investment in the US?

General Notes: No limit on total time in E visa status; spouses can work; no initial USCIS approval required; permanent residency applications do not adversely affect E visas. More information about the E visas and a list of treaty countries may be found at:

<http://www.visalaw.com/abcs.html>

R Visas – Religious Workers

1. Are you coming to the US to work as a minister or work in a religious vocation or occupation?
2. Have you been a member of the religious denomination for at least two years?
3. Is the employer a “nonprofit” organization (most churches, synagogues and mosques qualify as well as institutions affiliated with them)?

General Notes: Valid for up to five years; convertible to a green card after two years of work in R-1 status unless the applicant has worked in the job for two years prior to entering the US; USCIS approval now required for consulate to issue visa and a site visit is required.

TN Visas – NAFTA Visas for Canadians and Mexicans

1. Are you coming to the US to work in an occupation listed within the NAFTA occupation schedule? <http://www.visalaw.com/03dec3/2dec303.html>
2. Are you a citizen/ national of Canada or Mexico?
3. Do you meet the minimum job requirements for that position as listed in the TN NAFTA Schedule?

General Notes: Valid for a year; can be extended in one year increments; is a non-immigrant visa, therefore the beneficiary cannot have immigrant intent; is employer specific; there are no prevailing wage requirements; experience cannot be used as a substitute for the degree requirement; there is no annual limit to the visas issued; Canadians can apply for the status at the port of entries with "TN offer letters" and Mexicans can apply directly at the US Consulates; extensions and change of status applications may be filed in the US (only at the USCIS' Nebraska Service Center). Note that most jobs require a degree in the field; management consultants do not, but these cases are closely scrutinized.

E-3 Visas for Australians

1. Are you Australian?
2. Do you have a university degree?
3. Do most people in your field in the US have university degrees?
4. If you lack a degree, do you have several years of work experience in your field?
5. Do you have an employer in the US willing to hire you?
6. Does the job pay as much as similarly employed American workers?
7. Does the employer typically only hire people with university degrees for the job?
8. Does the employer guarantee that they will have continuous work available to you?
9. If the occupation requires a license, do you have the necessary license?

General Notes: The new E-3 visa for Australians combines elements of the H-1B and the E-2 and E-1 visas. Like the E-1 and E-2, E-3 applications can be filed directly at a US consulate abroad and do not require advance USCIS approval. Also, spouses of E-3s can obtain an employment authorization document when they accompany the E-3 to the US. Like the H-1B, the visa is only available to people in specialty occupations. Also, a Labor Condition Application is required and the prevailing wage must be paid. And like the H-1B, E-3s are limited in number. However, the quota of 10,000 per year has not been reached in the past. Unlike the H-1B (and like the E-1 and E-2) there is no limit on the number of years an E-3 can hold E-3 status. Note that premium processing is not yet available for those seeking to change to E-3 status from within the US.

This list is not an exclusive list of all the non-immigrant visas. Currently there are over 25 major non-immigrant visa classifications and the above discussion includes only the most common ones. More information about these and other non-immigrant visas may be found at our website <http://www.visalaw.com/abcs.html>.

2. IMMIGRANT VISAS (“GREEN CARD”)

There are four (4) basic categories of immigrant visas:

1. Family sponsored immigrants
2. Employment based immigrants
3. Diversity immigrants
4. Refugees and Asylees

Family Sponsored Immigrants

1. Immediate relatives – no quotas, faster processing
 - a. Are you a spouse of a US citizen?
 - b. Are you a child under 21 years old of a US citizen?
 - c. Are you the parent of a US citizen over the age of 21?
2. Preference categories*
 - a. First Preference – Are you the adult unmarried child of a US citizen? Wait: five to seven years (or more for the nationals of Mexico and Philippines)
 - b. Second Preference A – Are you the under 18 child of a green card holder or the spouse of a green card holder?
Wait: Five to seven years (or more for the nationals of Mexico and Philippines)
 - c. Second Preference B – Are you the adult unmarried child of a green card holder?
Wait: Nine years (or more for the nationals of India, Mexico and Philippines)
 - d. Third Preference – Are you a married child of a US citizen?
Wait: Eight years (or more for the nationals of Mexico and Philippines)
 - e. Fourth Preference – Are you a brother or sister of a US citizen?
Wait: Eleven years (or more for the nationals of China, India, Mexico and Philippines)

*The above waiting periods are based on the US Department of State’s Visa Bulletin published on March 2009. The US DOS publishes the Bulletin monthly and announces the current waiting periods therein. The above periods should be considered as estimates and for accurate waiting periods, the current Visa Bulletin must be checked.

General Notes: Must file petition with the USCIS to get a place in the queue; marriage to a US citizen is scrutinized to make sure the marriage is genuine; petitions based on green card holder automatically switch to higher preference category when the green card holder becomes a citizen; cases may convert automatically from one category to another when a person's age and marital status change; certain rights and priority dates may be retained for children when they turn 21. The Visa Bulletin can be found at:

[http:// travel.state.gov](http://travel.state.gov).

DV Visas – Green Card Lottery

The US government allocates 50,000 visas a year for people to receive through a random computer drawing. Information on the green card lottery can be found at <http://www.dvlottery.state.gov>. Entry applications are submitted online.

1. Are you a high school graduate?
2. Do you work in a field typically requiring two years of work experience and you have at least two years of work experience in the field?
3. Were you born in an eligible lottery country?

General Notes: Very low odds (fewer than 1 in 40 applicants will succeed); easy to enter; entry period is limited and usually is in the last quarter of the calendar year (October to December); must have job available in US or proof of ability to support self financially.

Employment-Based Green Cards

EB-1-1 – Persons of Extraordinary ability in the sciences, arts, education, business or athletics

1. Are you one of the top people in your field?
2. Can you show that you have won a major international award OR at least three of the following?:
 - a. Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
 - b. Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
 - c. Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date and author of such published material, and any necessary translation;
 - d. Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;
 - e. Evidence of the alien's original scientific, scholarly or business-related contributions of major significance in the field;

- f. Evidence of the alien's authorship of scholarly articles in the field, in professional journals or other major media;
- g. Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;
- h. Evidence that the alien has commanded and now commands a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

General Notes: No employer required, but you'll need to show you intend to pursue work in your field; fast category except there are multiyear backlogs for Indian and Chinese nationals (and all other nationals likely to face backlogs soon).

EB-1-2 – Outstanding Professors and Researchers

1. Are you recognized internationally as outstanding in a specific academic area?
2. Do you have three years experience in teaching or research in your area?
3. Are you coming to the US to work in a tenure or tenure-track teaching position or a long term research position?
4. Can you present evidence that you are recognized internationally in your academic field by presenting evidence of at least two of the following?:
 - a. Receipt of major prizes or awards of outstanding achievement
 - b. Membership in an association which requires outstanding achievement
 - c. Published material in the professional publications written by others about your work
 - d. Evidence of your participation as a judge of the work of others
 - e. Evidence of original scientific research
 - f. Authorship of scholarly books or articles in the field

General Notes: Fast category but there are multiyear backlogs for Indian and Chinese nationals and all other nationals likely to face backlogs soon.

EB-1-3 – Multinational Executives and Managers

1. Category is virtually identical to L-1 intracompany transfer non-immigrant visa
2. Key differences
 - a. Not available to specialized knowledge employees
 - b. US branch must be operating for at least a year

General Notes: Current for all nationals, but backlogs for China and India are not unusual.

EB-2 – Members of the Professions Holding Advance Degrees or People With Exceptional Ability

1. Do you have a degree beyond a bachelors degree or do you have a bachelors degree plus five years of work experience in your field?
2. Or do you meet the definition of exceptional ability by showing three of the following:
 - a. Degree relating to the area of exceptional ability
 - b. Letter from current or former employer showing at least 10 years of experience
 - c. License to practice profession
 - d. Person has commanded a salary or remuneration demonstrating exceptional ability
 - e. Membership in professional association
 - f. Recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organization
3. Do you have a job offer and labor certification or are you basing your green card application on benefiting the nation's interest?
4. If you are planning on basing your green card application on a labor certification, do you work in a field where there is a shortage of American workers in the local area where you intend to work?
5. If your claim is based on a labor certification, are you going to be paid the prevailing wage for similarly employed workers in the city where you are going to work?
6. If your claim is based on a labor certification, has your employer attempted to recruit workers to fill the position?
7. If your claim is based on a national interest waiver, do you meet the following tests?:
 - a. The person seeks employment in an area of substantial intrinsic merit
 - b. The benefit will be national in scope
 - c. The national interest would be adversely affected if a labor certification were required

General Notes: Processing times vary but labor certification cases typically take one to two years and national interest cases take six months to a year and a half; Employer not required in national interest waiver cases; multiyear backlogs for Indian and Chinese nationals and all other nationals likely to face backlogs soon.

EB-3 – Skilled Workers, Professionals and Other Workers

General Notes: Available to university graduates and people working in jobs requiring a worker with at least two years experience can file this category if the employer gets a labor certification (see above). There is a sub-category for unskilled workers that does not have a work experience or education requirement, but still requires a labor certification. The EB-3 category is backlogged for multiple years for all nationalities.

EB-4 – Special Immigrants – Religious Workers

General Notes: Basically the same requirements as the R-1 religious worker non-immigrant category except that the applicant must have been working in the field for at least a two year period. No backlogs in this category as of March 2009 and none are predicted. However, the program expires on September 30, 2009 and must be extended by Congress.

EB-5 – Investor Employment Creation Visa

1. Are you investing in a business in the US?
2. Is the business new or are you buying into a restructured business?
3. Are you investing at least \$500,000 if the business is in a rural, high unemployment area or designated target investment area or \$1,000,000 if located elsewhere?
4. Is your investment in the form of cash, equipment, inventory, other tangible property, cash equivalents and indebtedness secured by assets owned by the entrepreneur?
5. Is the investment "at risk"?
6. Can you document that the source of the funds is legitimate?
7. Will the investment result in the creation of at least ten full-time jobs for American workers?

General Notes: The USCIS scrutinizes these cases carefully. While technically the investment and job creation need not take place until after granting the green card, in practice, the USCIS will deny unless the investment and job creation take place before the application was submitted. Applicants can avoid having to show direct job creation by investing in a pre-approved regional investment center. Applicants applying through regional centers also do not need to show they are involved in management. Note that the regional center part of the EB-5 category expires on September 30, 2009 and Congress must extend the program.

More information about immigrant visas may be found at our website
<http://www.visalaw.com/abcs.html>

3. ASYLEES AND REFUGEES

There are certain protected groups of aliens in the US. Most common are the asylee and refugees. Under the 1980 Refugee Act, a refugee is defined as “any person who is outside of any country of such person’s nationality . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”

Both refugees and asylees must satisfy this definition. Indeed, in almost every way, the requirements for refugee status and asylum are the same. The most important difference is that an asylee makes their application while in the US, while the refugee applies outside of their home country, but also outside of the US.

Asylees and refugees are eligible for employment authorization and have special paths to permanent residency.

There are other protected groups like the TPS (temporarily protected status) aliens, and more information about these special groups and others may be found at our website <http://www.visalaw.com/abcs.html>

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