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**A PRACTICAL GUIDE TO EMPLOYMENT-BASED IMMIGRATION  
THE STATE OF EMPLOYMENT-BASED IMMIGRATION IN THE  
WAKE OF THE ILLEGAL IMMIGRATION REFORM AND  
IMMIGRANT RESPONSIBILITY ACT OF 1996**

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# A PRACTICAL GUIDE TO EMPLOYMENT-BASED IMMIGRATION

## THE STATE OF EMPLOYMENT-BASED IMMIGRATION IN THE WAKE OF THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996

By: Helen L. Konrad, Mark B. Rhoads, and Eliot Norman<sup>1</sup>

Every five years or so, Congress feels compelled to rework the immigration law in the United States, and last year was one such substantial revision. As the title of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRA-IRA") suggests, the goal of this legislation was to tighten controls on illegal immigration in hopes of deterring those who enter or overstay illegally. However, many of the revisions that were intended to impact only illegal immigrants have had a serious impact on legal immigration.

### I. FAMILY-BASED V. EMPLOYMENT-BASED IMMIGRATION

This article is intended to give employers and practitioners a general overview of U.S. immigration laws, focusing primarily on employment-based immigration options available and the impact of IIRA-IRA on employment-based immigration.

As a preliminary matter, foreign nationals (aliens) seeking to immigrate to the U.S. have two general paths available: (1) family-based visas; or (2) employment-based visas. Under the family-based immigration, an intending immigrant must have a family relationship to a U.S. citizen or U.S. permanent resident already legally in the United States. Although this form of legal immigration accounts for several hundred thousand people entering the United States each year, it is not the focus of this article. Rather, this article focuses on "employment-based" immigration, where intending immigrants enter the United States, not based on family, but based on their education, experience, and/or job opportunities. This immigration can take the form of temporary work visas (for periods of between six months to seven years or longer), or permanent resident "green cards."

The following is a general summary of employment-based visa options, followed by a discussion of the impact of IIRA-IRA on this form of legal immigration.

### II. EMPLOYMENT-BASED IMMIGRATION

#### A. Temporary Work Visas

Like many countries, the United States has a complicated scheme of temporary visas denoted by various letters of the alphabet. Some of the most common temporary visas are discussed below.

##### 1. *Short-Term Business Visitors*

Citizens of certain countries enter the U.S. as tourists or business visitors without a visa under the so-called Visa Waiver Pilot Program (VWPP). As of January 1997, nationals of the following countries do not need visas to visit the U.S.A. for ninety (90) days or less:

Andorra	Germany	Netherlands
Argentina	Iceland	New Zealand
Australia	Ireland	Norway
Belgium	Italy	San Marino
Bruenei	Japan	Spain
Denmark	Liechtenstein	Sweden
Finland	Luxembourg	Switzerland
France	Monaco	United Kingdom

Each year several million travelers use this "no visa" program. The visitor simply shows his round trip ticket and fills out the Waiver Application on the airplane.

Lawful business activities on a visa waiver are very limited, generally consisting of attending conferences, trade shows, business meetings, etc. A visa waiver cannot be used to engage in "hands-on" productive labor. The Visa Waiver is also used by company representatives or individual investors to explore making an investment or choosing a site for

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U.S. operations. No B-1 or Visa Waiver Pilot Program visitor can receive a salary from a U.S. company. These visitors must remain on the payroll of a foreign firm, although they can be advanced expenses by a U.S. affiliate.

A foreign national should not use the Visa Waiver to enter the U.S. if he/she needs to stay for more than ninety (90) days. No extensions or changes to another visa category are allowed in the U.S. and the employee must return abroad before reentering the U.S. again for 90 days on the Visa Waiver or in another visa category.

2. *Temporary Transfers of Service, Managerial and Technical Personnel: One (1) Year or Less*

**B-1 Business Visitor Visa:** The B-1 visa is designed for temporary business activities which promote international trade, commerce or investment. Examples: the B-1 visa holder can train, consult with business associates, take orders, participate in meetings, negotiate contracts, or look for sites for investments. The B-1 visa can be issued for an initial six (6) months with one or more six (6) month extensions.

As with a visa waiver, business visitors on a B-1 visa cannot be paid a salary by a U.S. company and cannot engage in skilled or unskilled labor (productive employment). However, unlike a Visa Waiver, a visitor on a B-1 must obtain a visa in his/her passport at a U.S. Embassy overseas before entering, so the B-1 is somewhat more complicated than a Visa Waiver. One advantage of the B-1 is that a B-1 visa holder can change to a longer-term visa while in the U.S.

3. *Trainees: Up to 24 Months*

U.S. and foreign companies often wish to provide training on new or existing technologies to foreign workers. Several visas exist which allow for the training of foreign employees who do not have college degrees or specialized knowledge or cannot otherwise enter under E, H-1B or L-1B visas (discussed in more detail below):

- A J-1 trainee visa can be obtained through an international exchange program authorized by the United States Information Agency (U.S.I.A.). This category allows the trainee to work for a U.S. firm and engage in productive employment as part of her training for up to 18 months. Unlike many of the other visa options, the spouse of the J-1 trainee can be granted work authorization.

- An H-3 training visa requires a detailed training curriculum set up by the employer. This visa allows the trainee to engage in productive employment only if it is incidental to the training. The H-3 is valid with extensions for up to two years. Specialized immigration law advice is usually needed to establish and obtain approval for an H-3 training program. Spouse and children (under 21) can enter with an H-4 but cannot work.

- A B-1 visa can be used for short term training of less than one year. The trainee must be an employee of a foreign company. The employee must be compensated (except for expenses) by the foreign firm. Spouses and children of B-1 trainees can accompany the trainee but cannot work in the United States.

4. *Hiring of Degreed Professionals: One (1) to six (6) Years*

- H-1B Visas: Professional employees (for example, computer programmers, engineers or researchers) who have at least a four (4) year U.S. college degree, can usually qualify for the H-1B visa if they will work in a position requiring a college degree.

H-1B visas are available to persons with (1) 4 year Baccalaureate Degrees or the foreign equivalent; or (2) persons who can show by expert affidavits that their combination of education and qualifying experience is the equivalent of a U.S. four year B.A. or B.S. degree in the field. An H-1B visa is good initially for up to three (3) years and can be extended an additional three (3) years.

There are many technical requirements for this popular type of visa, including payment of a prevailing wage and the filing of a Labor Condition Application, for successful processing of an H-1B. Failure to comply with all of the H-1B regulations can result in fines and the offending company being disqualified for one year from hiring any additional H-1B specialty occupation workers. The overlap of Labor Department and INS Regulations warrants expert advice in establishing your company's H-1B program. The spouse and children of H-1B employees receive H-4 visas and cannot work under that category.

- F-1 Practical Training: Another option for hiring degreed professionals is the use of Optional Practical Training (F-1) for foreign graduates of U.S. colleges and universities. In the scientific fields there are many foreign graduates of U.S. universities seeking employment. These students can be hired for a

period of one year under an F-1 student visa and later change to an H-1B visa. All that is required is permission for one year's practical training from the university's Foreign Student Advisor. F-1 Optional Practical Training is an excellent way to recruit top foreign graduates of U.S. colleges and universities with a minimum of delays and paperwork. Like an H-4, the spouse of an F-1 practical trainee can obtain an F-2 visa, but cannot work.

5. *L-1 Visas: Temporary Intra-Company Transfers of Managers, Executives and Specialized Knowledge Personnel*

Where a foreign company has a related U.S. company (branch, parent, subsidiary or affiliate), U.S. immigration law allows *temporary* transfers (no longer than 5-7 years) of (1) managers, (2) executives and (3) persons with specialized knowledge to the related U.S. company under the L-1 visa category.

To qualify as an L-1A manager or executive, the employee must show that the employee supervises other personnel of the company or manages an important function of the business. An L-1 manager or executive can be transferred to the U.S. subsidiary for up to seven years. In addition, an L-1A manager or executive may be eligible for an expedited green card. Multi-national managers and executives may obtain a special permanent resident green card in as little as a few months, as opposed to several years required for typical green card processing.

To qualify as an L-1B employee with "specialized knowledge," the employee must show that s/he has specialized knowledge of the company's "product, service, research, equipment, techniques, management or other interests" as it applies to international sales and markets. A specialized knowledge employee can be transferred for up to five years, and is not eligible for the expedited multi-national manager green card.

To speed up L-1A and L-1B transfers, the law requires that decisions on L-1 visas be made in thirty (30) days or less. Individual petitions are filed with the Immigration and Naturalization Service Center in the U.S. by the U.S. subsidiary or branch office. Approval is cabled to the U.S. Consulate in your home country for your employees to pick up their visas.

"Blanket Petitions" can also be filed for large organizations or those having transferred at least ten (10) employees under the L-1 program during the previous year. Blanket Petitions further streamline the process by allowing the company to issue its own

certificate of eligibility which the employee takes directly to the U.S. Consulate, allowing L-1A and L-1B visas to be issued in 1-4 days.

6. *E-1 Treaty Trader & E-2 Treaty Investor Visas*

Citizens of certain countries may gain entry to the United States using E-2 Treaty Investor and E-1 Treaty Trader visas. Because these visas can be renewed for 10, 20 or even 30 years or longer, they remain excellent options for many foreign businessmen:

**E-2 TREATY INVESTOR VISAS**

The E-2 Treaty Investor Visa allows you to: (1) move your entire business to the U.S., or (2) start a new business in the U.S. if you are not now in business, or (3) establish or expand a U.S. branch, affiliate or subsidiary of your foreign company.

Unlike the Investor "Green Cards" discussed later in this article, there is no \$500,000 or \$1 million minimum investment. In the case of small businesses, as a general guideline, an owner investor can usually obtain E-2 status if he will (1) actively manage the small business; (2) put at risk, including borrowed funds, at least \$100,000 in capital and equipment; and (3) plan to employ at least several U.S. workers. Investments of greater or lesser amounts may be acceptable depending upon the nature of each investment. U.S. State Department guidelines suggest that the smaller the business, the greater percentage of its value must be invested to qualify. The key is that the business cannot be "marginal," that is, designed just to provide a living for the owner and his family.

As of January 1, 1997, the E-2 visa is available to citizens of the following countries under U.S. bilateral treaties or treaties of commerce and navigation:

Argentina	Czech Republic	Kazakhstan
Armenia	Egypt	Korea
Australia	Estonia	Kyrgyzstan
Austria	Ethiopia	Latvia
Bangladesh	Finland	Liberia
Belarus	France	Luxembourg
Belgium	Georgia	Macedonia
Bosnia	Germany	Mexico
Bulgaria	Grenada	Moldova
Cameroon	Honduras	Mongolia
Canada	Iran	Morocco
Colombia	Ireland	Netherlands
Congo	Italy	Norway
Costa Rica	Jamaica	Oman
Croatia	Japan	Pakistan

Panama	Slovakia	Thailand
Paraguay	Spain	Togo
Philippines	Sri Lanka	Tunisia
Poland	Suriname	Turkey
Romania	Sweden	United Kingdom
Senegal	Switzerland	Ukraine
Slovenia	Taiwan	Zaire

The E-2 visa is usually issued for an initial 4-5 years. There is no limit to the number of renewals. The spouse and children of an E-2 investor or employee also receive E-2 visas but cannot legally work in the United States under that category.

Note that the E-2 visa is not limited to businesses involved in international trade. Purely local businesses such as retail sales, construction, service industries, or manufacturing can qualify.

For larger companies, the E-2 should be the first choice for quickly transferring key managers, executives and persons with essential skills to your U.S. operations. However, it is key that the employee and company have the same nationality and must be from one of the qualifying treaty investor countries. Nationality of the foreign firm is usually determined by the citizenship of at least fifty percent (50%) of its stockholders.

No college degree is required to obtain an E-2 visa.

Small business loans are available from the U.S. government and agencies of the Commonwealth of Virginia for the purpose of qualifying for E-2 investor visas. Prospective investors should contact either State Department of Economic Development or the local development officials where s/he plans to locate the business for more details about starting or moving a part of the business operations to the U.S. under the E-2 Treaty Investor Program.

#### E-1 TREATY TRADER VISAS:

There is a companion visa to the E-2 investor visa—the E-1 Treaty Trader. To qualify, the following requirements must be met:

(1) The investor's U.S. office must engage in substantial trade with the foreign country of its shareholders. "Substantial trade" is not measured just in dollars. Frequent and continuous trade in goods or services of small dollar value may also qualify for E-1 visa treatment.

(2) At least 50% of the trade must be between the U.S. business applying for the E-1 visa and the foreign country of which the employee is a citizen.

(3) The U.S. business must be at least 50% owned by persons holding the same nationality as the visa applicant.

**Eligible Countries:** Only citizens of the following countries with bilateral treaties with the U.S. as of January 1, 1997 qualify for E-1 visas:

Argentina	Greece	Oman
Australia	Honduras	Pakistan
Austria	Iran	Philippines
Belgium	Ireland	Slovenia
Bolivia	Israel	Spain
Brunei	Italy	Suriname
Canada	Japan	Sweden
Columbia	Korea	Switzerland
Costa Rica	Latvia	Paraguay
Denmark	Liberia	Taiwan
Estonia	Luxembourg	Thailand
Ethiopia	Macedonia	Togo
Finland	Netherlands	Turkey
France	Norway	United Kingdom
Germany		

#### Types of Trade:

- Export and import firms can qualify, as do manufacturing companies purchasing most of their equipment and parts from their parent firms.
- The trade does not need to be in goods. Technical knowhow, blueprints, accounting advice or software engineering services, just to name a few, can qualify as trade in services for E-1 visa purposes.

#### E-1 Examples:

- A Virginia lumber firm which is owned by Israelis and exports at least 51% of its timber products from the U.S.A. to Israel can obtain E-1 visas for its key traders and managers who are Israeli nationals.
- A French employee of the Israeli lumber firm cannot qualify for an E-1 visa because he must have the same nationality as its owners. (Note: Other visas may be available to the French employee).
- A Virginia electronics firm owned by Germans which buys most of its parts from Holland for sale in the U.S.A. cannot qualify for an E-1 because the majority of its trade is not with the country of its shareholders (Germany). (Note: Again, other visa options may be available.)

For many employees and business owners, the E-1 visa can be as valuable as a Green Card. The E-1 can usually be obtained in less than thirty (30) days from most U.S. Consulates, will be valid for four to five years and can be renewed indefinitely. The immediate family members of the holder of an E-1 visa can come to the U.S., but cannot work in the United States unless they can independently qualify as key employees of the business.

Proper use of E visas requires mastery of a number of technical rules and usually requires expert assistance. Documentation requirements for E-1 and E-2 visas can vary from U.S. consulate to U.S. consulate and can change without notice.

Joint ventures with established U.S. companies can be used to qualify foreign firms and their employees for E visas as long as the foreign venture partner can exercise veto control over key business decisions. A small, family-owned business engaging in frequent trade with the country of its foreign owners may qualify for an E-1 even if no U.S. workers are employed.

Unlike the E-2, the *investment* for an E-1 does not have to be "substantial"; only the trade must be substantial. Many key employees enter the U.S.A. on E visas and later adjust their status to permanent residence (Green Card holders). However, a new visa category, discussed below, now permits managers and executives of U.S. affiliates, subsidiaries, parents, or branches of foreign companies to apply directly for Green Cards.

#### 7. *Special Visa Advantages for Canadian and Mexican Investors and Businesses under the North American Free Trade Agreement (NAFTA)*

A number of special procedures apply only to Canadian and Mexican Investors and Professionals under NAFTA. This important treaty, which liberalized trade by creating a North American Common Market, also eliminated many barriers to the transfer of personnel.

##### a. Canadians

###### Special Rules:

- Canadian citizens do not need to carry with them a valid Canadian passport when entering the U.S. However, a passport is advisable to help obtain a U.S. social security card and driver's license after arriving in the U.S.
- Canadian citizens do not need to obtain a visa from the U.S. Consulate to enter as business visitors. A business visitor can be admitted for up to a year for many commercial activities, such as after-sales service or marketing, consultations with business associates, or selection of sites for investment.
- Canadians also do not need visas to enter the U.S. to work as professionals, intracorporate transferees or to receive training. The only classification for which application must be made at a U.S.

Consulate is for the E-1 Treaty Trader and E-2 Treaty Investor Visa.

- The same benefits also apply to Landed Canadian Immigrants who are citizens of the United Kingdom, Ireland or of another British Commonwealth Country. Under these procedures a Landed Canadian Immigrant will have his passport stamped at the border or at the airport "admitted B-1" etc. and will be issued an I-94 "arrival-departure" card but will not need a visa to enter the U.S.

TN Visas for Canadians: NAFTA has also created a new visa category, the Treaty NAFTA (or "TN Visa") for Canadians seeking temporary entry for business activities at a professional level. The TN is valid for one year and requires that the TN holder work as an employee or under contract for a U.S. employer. Recent changes have eliminated self-employed professionals from eligibility under TN status. Unlike the H-1B visa for professionals (6-year maximum), the TN can be renewed indefinitely.

Application for entry under the TN is made to an INS officer at the border or at the preclearance stations at an international airport in Canada. There is no application form for TN status. The approval process should take no more than a couple of hours. Canadians are admitted upon proof of Canadian citizenship and of qualifications meeting the criteria of the TN visa. Typical documentation includes educational, licensing and/or experience credentials (in the case of Management Consultants), an offer of employment or contract from a U.S. based company and proof of Canadian citizenship.

The TN is available to members of the professions and other specialty occupations, similar but not identical to occupations qualifying for H-1B Visas. Some of the more common occupations on NAFTA's list of TN occupations are: architect, computer systems analyst, librarian, dentist, physical therapist, medical technologist, scientific technician, statistician, registered nurse, veterinarian, horticulturist, teacher and social worker. For many of these occupations, a 3 year Canadian college degree will qualify the beneficiary for TN status. A very useful TN occupation is management consultant. This occupation does not require a college degree if the applicant can demonstrate equivalent professional experience, as shown by five years experience as a management consultant or five years experience in a field of specialty related to the consulting agreement.

###### Special TN Rules:

- For nearly all TN professional occupations (other than management consultant), experience

cannot be substituted for education in meeting the TN educational requirements.

- Some occupations such as architect, lawyer, and physician include licensing requirements.
- The spouse and children of the TN receive TD status and cannot work under that category in the U.S.
- Canadian Landed Immigrants are not eligible for the benefits of TN status.

#### b. Mexicans

NAFTA also provides certain benefits to Mexican professionals, although not as extensive as the benefits provided to Canadians. One important benefit is that NAFTA expands the list of business activities allowable on a B-1 business visitor visa. Additional activities that can be undertaken in the U.S. by Mexican citizens on behalf of an enterprise located in Mexico are: research and design; supervising harvesting of agricultural crops; purchasing; production management; marketing research; attendance at trade conventions; order taking or contract negotiation; and certain distribution and after-sale service activities. A Mexican seeking entry for B-1 business activities on a temporary basis (not to exceed one year) must apply for and obtain a B visa, or obtain a Mexican border crossing card at a designated consulate in Mexico.

In addition, certain designated types of professionals (such as accountants, architects, computer systems analysts, management consultants, and others) are admissible to the United States on TN visa. However, Mexican TN visas are not as streamlined as Canadian TNs.

As a practical matter, a TN for a Mexican professional has only limited advantages over an H-1B visa (discussed elsewhere in this Handbook). In fact, Mexican professionals must first obtain an H-1B visa before obtaining TN status. A typical "non-TN" H-1B visa is valid for three years, with the potential for a three-year extension. A TN visa is valid for one year, with the potential for unlimited yearly extensions.

Two circumstances where a Mexican may wish to obtain a TN instead of an H-1B are:

- The applicant anticipates that the length of his/her stay may exceed the six-year limit of an H-1B, since a TN is eligible for *unlimited* one-year extensions; and
- If the applicant is currently on an H-1B which is due to expire, since INS regulations allow

an H-1B visa holder to change to a TN without the one-year departure from the United States normally required with an expired H-1B.

#### B. Permanent Resident "Green Cards"

In addition to temporary employment-based visas, the U.S. also has a number of options for employment-based permanent residency. A U.S. "permanent resident" ("green card" holder) is a foreign national who is still a citizen of a foreign country, but is allowed to remain permanently in the U.S. A permanent resident can travel freely overseas, can change jobs, and enjoys many of the benefits of U.S. citizens. However, permanent residents cannot vote, are not eligible for many public benefits, and are subject to deportation for violating the law.

The employment-based options are organized by "preferences," as discussed below.

##### 1. *First Preference (EB-1): Outstanding Researchers and Persons of Extraordinary Ability in Business and the Sciences; Multi-National Managers/Executives*

A small number of internationally recognized scientists and researchers, and persons of extraordinary ability in the arts, science or business can take advantage of "First Preference" Green Card status.

Persons who qualify for this preference category can obtain a Green Card without the lengthy delays (up to several years) involved in the normal Labor Certification process. Processing times are now averaging 3-5 months. Moreover, there is no requirement of prior work experience with a company abroad. Thus, a U.S. employer can make an offer to a famous professor at a university or to a preeminent researcher working for a competitor and immediately qualify him for permanent residence with the U.S. business.

##### Qualifications:

a. **Individual of extraordinary ability:** To qualify s/he must:

- (1) Present evidence of a major internationally-recognized award (such as the Nobel Prize or other renowned award) *or*,
- (2) Present significant evidence that the individual is recognized internationally as one of the preeminent individuals in her field of endeavor. This evidence can include materials published by or about

the individual, evidence that she has judged others' work, lesser national or international awards or prizes, evidence of high remuneration, etc. For other detailed criteria consult your immigration attorney. This category can be used only by world renowned scientists, businessmen, artists, and researchers.

b. For universities, an outstanding professor or researcher is one who:

(1) Is internationally recognized as outstanding in a specific academic field,

(2) Has a minimum of three years of experience teaching or researching in the field, and

(3) Is entering the United States in a tenured or tenure track teaching or research position at a U.S. institution of higher education.

International recognition for this category can include evidence of major prizes or awards, membership in international associations requiring outstanding achievement, original scientific or scholarly research of international note, and materials published by or about the applicant.

The "outstanding professor or researcher" option is also available to non-university, private companies provided the company:

- Has at least three full-time research employees and
- Has documented accomplishments in the academic field in which the position is offered.

Unlike individuals of extraordinary ability, an "outstanding professor or researcher" applicant must have a job offer, but there is no requirement for the prolonged Labor Certification process. Accordingly, permanent residence for an outstanding researcher or professor can be obtained reasonably quickly.

### C. Multi-National Manager/Executive Green Cards

Multinational Manager and Multinational Executive Green Cards can be very valuable to existing and new companies doing business in the U.S.A. As many as 40,000 manager/executive visas or "Green Cards" can be issued annually. These permanent visas can be issued in as short as 3-5 months. The spouse and children under age 21 of the Multi-national Green Card manager or executive also re-

ceive Green Cards and can work and reside permanently in the United States.

Requirements to qualify for this "fast track" Green Card:

(1) The U.S. branch office, affiliate, parent or subsidiary of your foreign company must have been doing business for at least one year.

(2) The applicant/employee must have full-time managerial or executive experience with the foreign company for one (1) year during the three (3) years prior to their entry into the U.S.A.

(3) A new office consisting solely of sales representatives can qualify, provided that after one year the office will support the job duties of a manager based upon annual sales, numbers of employees or the importance of the function to be managed.

The advantage of this new visa category is that it should reduce the waiting time for Green Cards by 12 months or more over the typical "labor certification" process described below. (Labor Certification requires advertising the position in the U.S. and a showing that no U.S. applicants meet the minimum requirements of the position. The Labor Certification process can take up to two to three years to complete.)

The foreign company can be a joint venture with a U.S. company so long as your foreign company exercises "negative veto control" over its operations, which usually means at least 50% ownership. This strategy works well for new companies that need an established business partner in the U.S.A.

### 2. *Second Preference (EB-2): Exceptional Ability and Advanced Degree Employees. (National Interest Waivers)*

This green card category is reserved for persons holding advanced degrees (M.S., Ph.D., J.D., M.B.A., M.A.) or who can demonstrate exceptional ability in the sciences or business.

Examples:

- A chemist with a Ph.D.;
- An engineer with a B.S. in Mechanical Engineering and five (5) years of progressive experience equal to an M.S. in Engineering;
- A highly compensated business executive with ten (10) years experience, who has been recognized for significant contributions to his industry.



Green Cards in this preference category can be issued to employees of U.S. operations who have no prior experience with the parent company abroad.

#### a. Labor Certification

Before filing the Second Preference Petition, the employer must obtain Labor Certification, which requires advertising the position and showing that no U.S. workers meet the position's minimum qualifications. This step can delay issuance of the Green Card by up to two years.

Employees and practitioners should seek legal assistance in drafting the job description and in handling the process of advertising and recruiting applicants under complex Labor Department regulations. To obtain certification, the employer must show that no U.S. employees meet the minimum qualifications for the position; or in the case of university teachers, that the "alien is more qualified than each U.S. worker who applied for the job." Recent changes in technical rules at the Department of Labor have made it more difficult to obtain certification unless the employer can show a pattern of prior unsuccessful recruitment. This is an area where experienced counsel is needed. Average Visa Processing times are 18-24 months, including Labor Certification.

#### b. National Interest Waiver (NIW) Green Cards

There is an important exception to the requirement of labor certification for EB-2 applicants, called a "National Interest Waiver." This relatively new visa category can help new businesses, high technology firms, research laboratories and universities recruit "the best and the brightest" of the world's scientific and medical researchers and other professionals. A National Interest Waiver (NIW) can also be used by foreign business leaders who wish to establish or assist businesses that will have a substantial impact on the U.S. economy. An NIW is also available for Advanced Degree Professionals engaging in work or research in the national interest of the United States.

Qualifying for a National Interest Waiver allows foreign nationals to obtain a green card without a job offer and without the necessity of the lengthy Labor Certification process. Immigrant Visa Petitions based on individuals qualifying for a National Interest Waiver have been approved in as little as 2-10 days.

**Requirements:** For a National Interest Waiver, the applicant must first demonstrate either (a) that

the applicant has an advanced degree (master's degree or greater) or (b) that the applicant has exceptional ability. The applicant must then show that his/her skills are important to the national interests of the U.S.

Exceptional ability is shown by evidence of at least three of the following six criteria:

- Possession of a university degree;
- Membership in professional associations;
- Possession of a license to practice the profession;
- 10 years of experience in the field;
- High salary; or
- Recognition of exceptional ability by others in the field.

National Interest can be shown in many ways:

- In business cases it is important to show the key role that the alien will hold in a company that plays a significant role in the local or national economy. Often it is useful to include letters of endorsement from local economic development officials.
- In scientific or medical research fields, it is useful to explain how the alien's research will provide an economic or social welfare benefit, such as development of new telecommunications technologies, increasing the health of pre-mature infants, or advancements in the efficiency of drug-delivery systems.
- Waivers can also be granted for unique contributions which can be expected to improve wages and working conditions, provide affordable housing, improve the U.S. environment or otherwise benefit the U.S. as demonstrated by the endorsement of an interested government agency.
- Persons holding Ph.D.s or Master's Degrees may also be able to use their substantial contributions to scientific advancement to qualify for a national interest waiver.

National Interest Waivers may be subject to increased scrutiny by the INS due to the increased popularity of this exception to normal green card procedures. An exceptional ability or advanced degree alien should consult with an immigration expert to decide whether grant of the Waiver is likely, based upon the specific facts and circumstances of the particular case.

### 3. *Third Preference (EB-3): Managers and Skilled Workers*

This Category is reserved for employees whose positions require at least two (2) years training or experience. Many valuable managers, technicians, service engineers, sales managers and persons with specialized knowledge of a company's processes, procedures and equipment will qualify under this Preference Category. No college degree is required. However, labor certification is required and there is no option under this category for an NIW.

### 4. *Third Preference (EB-3) Professionals holding B.S. or B.A. Degrees*

These employees must hold a four (4) year college degree from a U.S. university or the equivalent degree from a foreign college. Years of experience cannot be substituted for the formal degree. Labor Certification is required, and there is no NIW option. Processing times are 12-24 months.

### 5. *Third Preference (EB-3 Unskilled Workers)*

Under current law, full-time employees in jobs not requiring two years experience or training can still qualify for Green Cards provided that a testing of the job market under Labor Certification procedures shows that there are no U.S. citizens or permanent residents meeting minimum qualifications for the job. Processing times are 2-3 years or more.

### 6. *Fifth Preference (EB-5) "Million Dollar" Investor Immigration Visas*

One of the most publicized new Green Cards is the Job Creation or "Million Dollar" Investment Visa.

**Requirements:** To be eligible for this important Permanent Visa, you must:

(1) Invest in and actively manage or establish policies for a "qualifying commercial enterprise" which will employ at least ten (10) U.S. workers; *and*

(2) Be in the process of investing or have invested a minimum of \$1,000,000. **Exception:** Certain "targeted areas" (rural or high unemployment) require an investment of only \$500,000. Your State or local economic development agency can provide you with a list of rural and urban areas qualifying for the lower \$500,000 investment rules.

A "qualifying commercial enterprise" can be any of the following:

(1) the creation of a brand new or original business; or

(2) the purchase of an existing business and "simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results;" or

(3) an investment in an existing business which increases its net worth and number of employees by 40%, resulting in at least ten new jobs and a new net worth which is 140% of the pre-expansion net worth; or

(4) an investment in a troubled business which has been in existence for at least two (2) years and has incurred a net loss equal to at least twenty percent (20%) of its prior net worth, and the investment saves at least 10 jobs.

The capital investment can be a combination of cash, inventory, equipment or loans, so long as borrowed funds are not secured by the assets of the new or existing enterprise. Qualified corporate/immigration counsel can assist you in properly structuring your investment and in reducing the amount of cash required. The investment capital can be from a U.S. source, such as a commercial bank, or from overseas.

The actual amount of cash required to qualify can be reduced by resorting to a number of corporate financing options. Immigrant Investor Visas will be of greatest benefit to residents of Hong Kong, China, Indonesia, Israel, South Africa, Saudi Arabia, Brazil, and other Asian, African, Middle Eastern and South American countries. Many nations from these areas do not have commercial treaties with the U.S.A. which qualify their nationals for other investment visas, such as the E-2, discussed below.

The investor can take up to two years to create the required ten (10) full-time employment positions if he submits a comprehensive business plan. A new Pilot Program liberalizes the job creation rules for investments in export related industries in "Regional Centers" approved by the Immigration and Naturalization Service ("INS").

A qualifying Investor and his spouse and children under 21 will receive Conditional Permanent Residence for two (2) years and then Permanent Residence (Green Card) based upon the continued viability of the investment.

## 7. Conclusion

All of the technical details, regulations and procedures regarding immigration cannot be explained in this brief article. However, the highlights discussed above show that workable strategies exist for establishing and expanding foreign business operations in the U.S. Current visa rules, labor and immigration laws, and bilateral trade and investment treaties offer many opportunities for employers to transfer essential foreign personnel to U.S. operations.

**Example:** Business operations can begin in Virginia with the opening of a sales office staffed by a manager under an L-1A visa. Once the market base is established for assembly or manufacturing operations, the full range of visas become available. The owner or executives of a foreign company can pursue L-1A or E-2 visas or apply for Green Cards under the multinational executive/manager or immigrant investor programs. Technical and professional employees can also qualify for L-1B, TN or H-1B visas or for Green Cards under Advanced Degree, Exceptional Ability, National Interest Waiver, Skilled Worker or Professional Visa Categories. Other workers can qualify for training opportunities under J-1, H-3 or B-1 options. The key to success is picking the right visa and taking advantage of treaties favoring investment and trade, including NAFTA.

### C. Impact of IIRA-IRA

#### 1. Penalties for Being Out of Status

Having reviewed the various visa options available, it is also critical that whichever status an employee or employer chooses to pursue initially, s/he must maintain lawful status, seeking all of the appropriate extensions when necessary. IIRA-IRA imposes severe penalties on foreign nationals who fall out of status while in the United States, even inadvertently (i.e. fail to file for an extension when needed), or who misrepresent the purpose of their entry into the United States. For example, an employee who has been out of status for 180 days or more could be subject to being barred from entering the U.S. for three years and an employee who has been out of status for 12 months or more could be subject to a ten year bar to entry. Employees who misrepresent the purpose of their entry could be subject to a life-time bar to entry.

**EXAMPLE I:** Employee holds an H-1B visa for Employer A, which is good until the end of 1996. Employer B then sponsors that employee for a new H-1B visa, which is good until 1999. When the

employee travels outside of the country, he forgets to show the new approval notice to the border officer, who issues the I-94 card, which governs how long the employee is permitted to stay in the U.S. Therefore, the border officer limits the I-94 to the expiration of the old visa, December, 1996. The employee (thinking he is valid until 1999) never notices the shorter (erroneous) limitation on his I-94 card and overstays. Employer B thinks that everything is OK because of the approval notice. However, the employee's status expires 12/96, regardless of the approval notice valid until 1999 (since the I-94 governs validity of stay). If no one notices it for six months, nothing can be done to correct the situation and the employee is barred from the U.S. for three years.

**EXAMPLE II:** H-1B employee works for Employer A for three years. Employer A doesn't want to renew the H-1B visa. The applicant remains in the U.S. out of status for six months looking for a job. After six months of looking for a job, Employer B interviews him, wants to hire him and sponsor him for an H-1B visa. However, Employer B will not effectively be able to sponsor the applicant because the applicant will be barred from the U.S. for three years.

The effective date of this provision is 4/1/97, meaning that the soonest a three year bar could be enforced would be after 10/1/97 -- six months after 4/1/97 -- and the soonest a ten year bar could be enforced would be after 4/1/98, when twelve months would have lapsed. Given these draconian penalties, employers and foreign employees need to exercise extreme caution regarding visa validity.

#### 2. I-9 Compliance

Pursuant to the Immigration Reform Control Act of 1986 (IRCA), *all* employers are required to verify both the identity and work authorization for each and every employee hired (including sole proprietor/owners) by completing a form I-9. Employers may be subject to both civil fines and criminal penalties for failure to accurately complete Form I-9, as well as for the knowing hire or continuing employment of unauthorized aliens.

#### Changes in I-9 Procedures

Recent federal legislation changed a number of I-9 procedures. The new legislation:

- reduced the list of acceptable documents for I-9 purposes to evidence identity and work eligibility.

- reduced penalties for employers who commit “technical” I-9 paperwork violations. required that employers must have discriminatory intent to be liable for “document abuse” violations.
  - created new civil and criminal penalties to deter document fraud.
- increased number of investigators to enforce I-9 compliance.
- created a new “pilot program” to telephonically verify, based on government data bases, the work authorization of employees prior to hiring.
  - barred government contracts to employers who knowingly hire or continue to employ illegal aliens.

This section will review each of these changes in detail.

#### a. Acceptable I-9 Documents

First, the list of acceptable documents an employee can present for I-9 purposes to evidence identity and/or work eligibility has been reduced by the 1996 legislation in hopes of simplifying an employer’s compliance with these requirements. However, this change applies only with respect to hirings occurring on or after “a date” set by the INS, which can be no later than September 30, 1997. Currently, the INS has not set such a date. When a date is set, the following rules will apply:

With regard to List A Documents on the I-9 form, which evidence both employment eligibility *and* identity, the new law removes:

- The Certificate of US Citizenship (INS form N-560 or N-561);
- The Certificate of Naturalization (INS form N-550 or N-570); and
- An unexpired foreign passport containing an INS endorsement authorizing employment (i.e. a stamp indicating admission to permanent residence or an INS form I-94).

The law does permit INS to designate “other documents” not currently authorized as List A Documents, as long as they contain:

- A photograph of the individual and personal identifying information;
- Evidence the individual’s employment eligibility; and
- Have security features which make them resistant to tampering, counterfeiting and fraudulent use.

Under the old law, the description of “other documents” did not require that it have the security features which make them resistant to tampering, counterfeiting and fraudulent use. Given that limitation, it is expected that the new employment authorization document, INS form I-766, would be the only “other” document which could be designated as a List A Document.

As a result of all of these changes, the revised List A documents are:

- US Passport, expired or unexpired;
- Alien registration receipt card (green card) - INS form I-551;
- Unexpired (INS form I-688) temporary resident card. This card was given to aliens who were legalized under IRCA; and
- Other document designated by the INS which contains a photo of the individual and personal identifying information, establishes employment eligibility and contains security features.

Although no changes are formally made to List B Documents (documents which establish identity only), most of the List B Documents, other than drivers license or state issued ID card, were added by the INS Regulations and are anticipated to be removed by the pending INS Regulations. Therefore, such documents such as school ID cards, voter registration cards, U.S. military cards, draft records, military dependent ID cards, U.S. coast guard merchant marine cards and U.S. citizen ID cards (INS form I-197 or I-179), are likely to be removed, greatly simplifying the verification requirement targeted by the 1996 legislation.

Lastly, the 1996 law removes the following List C Documents, which evidence employment eligibility only:

- Certificates of birth issued by local government authorities in the United States
- Other certificates establishing US nationality at birth (i.e. birth certificates issued by the department of state).

As revised, List C Documents establishing employment eligibility are limited to:

- Social security number card with no employment restriction; and
- Any “other document” designated by INS.

It is expected that the only "other document" recognized as a List C Document will be (1) Form I-94 indicating admission as a refugee or containing an unexpired employment authorization stamp; and (2) a Native American Tribal Document.

#### b. "Good Faith" Compliance Attempts

Second, the 1996 legislation adds a "good faith" defense for employers who have committed merely technical or procedural errors in completing the I-9 form. Under the change in the law, an employer cannot be fined for merely technical or procedural errors in completing the form, unless the INS or the Department of Labor has first explained the error to the employer and given the employer 10 business days to correct the error. Only if the error has not been corrected will INS or DOL be eligible to fine the employer. Please note that this revision to the law only applies to I-9 forms completed after September 30, 1996 and not to all I-9 forms completed prior to September 30, 1996, yet required to be retained under the law.

Examples of "technical" or "procedural errors" are critical to using this defense, but these have not yet been defined by the INS. These definitions are expected to be included in the regulations that should be released later this Spring. Examples of such errors *could be* (1) failing to date the application; (2) failing to complete the I-9 form on the date of hire; (3) failing to fill in the date of hire in the middle of the form. On the other hand, (1) failing to complete the employee attestation on the top of the form; (2) failing to sign the form; or (3) failing to complete the Section II list of documents, would very likely not be considered technical or paperwork violations precluding use of the "good faith" defense.

#### c. Requirement of "Discriminatory Intent"

A third revision made by the 1996 law amends the antidiscrimination statute. Now, for an employer to be liable for "document abuse" (asking for more or different documents than required for work authorization), the employee must show that the employer *intended* to discriminate based on national origin or citizenship status. This "intent" requirement only applies to employer requests for documents on or after September 30, 1996. The goal of this revision is to ensure that employers not be fined for document abuse violations if the employer's actions were motivated by a good faith effort to comply with IRCA's verification requirements.

#### d. Document Fraud

Fourth, despite the seemingly pro-employer revisions, you can now be found civilly liable for document fraud if you prepare, file or assist another person in preparing or filing an application for benefits with knowledge or in reckless disregard of the fact that such application or document was falsely made. This law would cover signing an I-9 form when you know that the documents presented are false or insufficient, or you know that the person is not authorized to work in the U.S. In fact, the law created a criminal penalty of up to 5 years in jail, on top of the civil penalty, if you fail to disclose your role as preparer of a false document. For example, if you as an employer, complete an I-9 for someone who does not speak English (or not very well), but fail to disclose your role as preparer by signing the certification, then you could be criminally liable if the I-9 is considered "falsely made."

#### e. Increased Enforcement

Fifth, the law also made it a priority to focus on work site enforcement initiatives and justified increasing the number of agents and support staff who investigated I-9 compliance exclusively from 317 to 701. Although most of the increased enforcement will focus on industries traditionally associated with illegal employment, including food processing, construction and agricultural production, this is still a substantial increase in the pressure by INS on employers to establish proper I-9 procedures.

#### f. Telephone Verification of Employment Authorization

Another program created by the new law establishes a pilot program to test electronic verification of employment eligibility through existing government data bases. Under this program, the Attorney General must establish a confirmation system through a toll free telephone line which responds to employer's inquires about the identity and employment eligibility of individuals. Essentially, the government would compare the name and social security number provided by an employer against its database. The program is intended to be operated in at least five of the seven states with the highest estimated population of illegal aliens in the United States (i.e. Illinois, California, New York and Florida).

Under the program, the employer must still complete the I-9 verification procedure but is au-

thorized to obtain two additional pieces of information from the new employees on the I-9 form, (1) their social security number and (2) their alien identification or authorization number, if they do not attest to US citizenship on the form. The hope is that the pilot program can reliably assess whether the person with the identity claimed by the individual is authorized to work in the United States and whether the individual is claiming the identity of another person.

*g. Government Contractors*

Finally, the last major change in this area is that President Clinton issued an executive order which places additional penalties on government contractors who violate IRCA's prohibitions against the knowing employment or continued employment of unauthorized aliens. Such employers will be barred from procuring government contracts for one year. Note that this bar doesn't apply to paperwork violations, only to hiring violations. Under the order, the knowing employment of even one unauthorized alien in a pool of several thousand employees would still be sufficient to trigger the bar.

### III. CONCLUSION

Immigration law involves a complex interplay of laws and regulations affecting the U.S. Department of Labor, INS, the Department of State (for consular processing overseas) and the Internal Revenue Service. Contrary to the politically-motivated misinformation being publicized by anti-immigration groups, current U.S. immigration law provides numerous protections for U.S. workers and imposes significant hurdles to hiring foreign workers.

Fortunately, however, U.S. laws recognize that it is in the best interests of U.S. business and industry to open our borders to the best and brightest talent available in the international employment marketplace. In addition, it is unquestionably beneficial to the U.S. economy to open our borders to foreign businesses and investors seeking to establish operations in the U.S.

Numerous visa and green card options exist for exactly these purposes, and U.S. law should continue to encourage the immigration of skilled professionals, investors and businessmen.