OVERVIEW OF THE U.S. IMMIGRATION SYSTEM FOR BUSINESSES

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The U.S. immigration system is highly complex and is constantly changing. At the same time, companies are becoming increasingly global. Companies that employ foreign workers must have a basic understanding of the various immigration classifications that enable a foreign national to legally work in the U.S. and the procedures that must be followed to obtain the appropriate visa status for an employee. They must also know when an individual is not authorized to work in the U.S. Companies that do not have this knowledge face significant financial penalties and, possibly, criminal penalties, as well.

The following materials are intended to provide an overview of the primary types of temporary and permanent visa categories that are used by businesses, as well as the government agencies that are responsible for processing visas and enforcing violations of the law with regard to the employment of foreign workers.

U.S. Governmental Agencies and Departments Involved in the Immigration Process

On November 25, 2002, President George W. Bush signed into law the Homeland Security Act of 2002. This law transferred the functions of the Immigration and Naturalization Service (INS) to the new Department of Homeland Security (DHS). As a result of this law, on March 1, 2003, the former INS was dismantled and its functions were separated into three components within the Department of Homeland Security:

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United States Citizenship and Immigration Services (USCIS), Immigration and Customs [1]Enforcement (ICE) and Customs and Border Protection (CBP).

- **United States Citizenship and Immigration Services (USCIS)** is the agency that oversees lawful immigration to the United States and processes most temporary and permanent petitions for work visas. USCIS performs many of the administrative functions formerly carried out by the INS.
- **Immigration and Customs Enforcement (ICE)** handles immigration enforcement inside the U.S., including investigations of unauthorized employment by employers.
- **Customs and Border Protection (CBP)** oversees border security functions, including the admission of foreign nationals at airports and land borders.

In addition to the Department of Homeland Security, the State Department is responsible for issuing temporary or permanent visas to any foreign nationals who require a visa in order to enter the U.S. The Department of Labor also has responsibility for processing various aspects of the immigration process for certain types of visas and also has enforcement authority to conduct certain investigations into wages and working conditions relating to the employment of foreign nationals at employer worksites.

Working in the U.S.

It is important to understand that, in most cases, there is no such thing as a one-size-fits-all temporary "work permit" that authorizes employment in the U.S. by a foreign national. There are, however, numerous temporary visa classifications or mechanisms for acquiring a lawful temporary status that may enable an individual to legally work or enter the U.S. for legitimate business purposes. In addition, there are various routes to

obtaining permanent residence through family, asylum, or other circumstances that may be available to a particular individual. We are not attempting to address all of the possible visa categories or routes to temporary or permanent residence in the U.S., but only some of the categories that are most frequently used by businesses.

Temporary Work Visas

The following are some of the most commonly used business-related visa categories for which an applicant may be eligible:

B-1 Visas/Business Visitors

The B-1 nonimmigrant visa is designated for foreign nationals who wish to enter the U.S. for business purposes. In order to qualify for a B-1 visa, an applicant must prove that he will be in the U.S. to perform business activities that include, but are not limited to the following:

- Consulting with business associates
- Participating in scientific, educational, professional or business conventions or conferences
- Settling an estate
- Negotiating a contract
- Participating in short-term training
- Attending Board Meetings[2]

Limited training or work in the U.S. *on behalf of a foreign employer* may also be permissible. However, B-1 visas may not normally be used to fill a position for a U.S. company that would regularly filled by a U.S. worker.

[2] 22 C.F.R. §41.31; 9 FAM 41.31.

B-1 visa applications are generally made at a U.S. Consulate outside the U.S. When applying for the B-1 visa, the foreign national must provide evidence that:

- The purpose of his or her trip is to enter the United States for business of a legitimate nature, rather than for employment
- He/she plans to remain for a specific limited period of time
- He/she has the funds to cover the expenses of the trip and stay in the United States
- He/she has a residence outside the United States which he/she has no intention of abandoning, as well as other binding ties which will ensure the person's return abroad at the end of the visit
- He/she is otherwise admissible to the United States[3]

With the B-1 visa, Consulates often assume that applicants will try to use this visa as a way to begin the immigration process and remain permanently in the U.S. As a result, the applicant should provide detailed information to satisfy the requirements listed above, so that the application has the best chance of approval. Although the B-1 visa itself may be valid for many years, admissions in B-1 status are usually limited to a maximum of six months. If needed, an extension request may be filed and approved for an additional period of up to six months.

Some countries are exempt from obtaining a visa in order to travel to the U.S. for temporary business and pleasure purposes through a program called the Visa Waiver Program. In these cases, admission is limited to three months and extensions of stay are not possible. However, the U.S. government now requires that even VWP travelers

[3] *Id.*

obtain advance permission to enter the U.S. through the Electronic System for Travel Authorization (ESTA).[4]

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

The Treaty Trader (E-1) and Treaty Investor (E-2) nonimmigrant visas are for foreign nationals whose home country is one with which the U.S. maintains a treaty of commerce and navigation. These visas allow an individual to enter and work in the U.S. in order to carry on substantial trade, primarily between the U.S. and the treaty country, or to develop and direct the operations of an enterprise in which the foreign national has invested, or is in the process of investing, a substantial amount of capital. (A substantial investment is one that is large enough in proportion to the overall cost of the business venture and one that will contribute to the U.S. economy.) The complete list of participating Treaty Countries can be found on the U.S. Department of State's website at: http://travel.state.gov/visa/frvi/reciprocity/reciprocity_3726.html. Specific requirements for each visa are listed below.

Requirements for Treaty Trader Visa (E-1)[5]

- The applicant must be a national of a treaty country.
- The trading firm for which the applicant is coming to the U.S. must have the nationality of the treaty country.
- The international trade must be "substantial" in the sense that there is a sizeable and continuing volume of trade.

[4] Information about the ESTA program is available at *https://esta.cbp.dhs.gov/.*
[5] *See* 8 USC §1101(a)(15)(E)(i); 22 CFR §214.2(e); 9 FAM § 41.51.

- The trade must be principally between the U.S. and the treaty country, which is defined to mean that more than 50 percent of the international trade involved must be between the U.S. and the country of the applicant's nationality.
- Trade means the international exchange of goods, services, and technology and the passing of title from one party to the other.
- The applicant must be the primary trader, employed in a supervisory or executive capacity, or possess highly specialized skills essential to the efficient operation of the firm. Ordinary skilled or unskilled workers do not qualify.

Requirements for Treaty Investor Visa (E-2)[6]

- The investor, either a real or corporate person, must be a national of a treaty country.
- The investment must be substantial. It must be sufficient to ensure the successful operation of the enterprise. The percentage of investment for a low-cost business enterprise must be higher than the percentage of investment in a high-cost enterprise.[7]
- The investment must be a real operating enterprise. Speculative or idle investment does not qualify. Uncommitted funds in a bank account or similar security are not considered an investment.
- The investment may not be marginal. It must generate significantly more income than that needed to provide a living to the investor and family, or it must have a significant economic impact in the U.S.

[6] *See* 8 USC §1101(a)(15)(E)(ii); 22 CFR §214.2(e); 9 FAM § 41.51.
[7] E-2 temporary visas should be distinguished from EB-5 investor visas which lead to permanent residence and require a minimum initial investment of at least $500,000.

- The investor must have control of the funds, and the investment must be at risk in the commercial sense. Loans secured with the assets of the investment enterprise are not allowed.
- The investor must be coming to the U.S. to develop and direct the enterprise or be employed in a supervisory, executive, or highly specialized skill capacity. Ordinary skilled and unskilled workers do not qualify.

Applications for E visa status are typically filed directly with a U.S. Consulate and may take up to 12 weeks to process from the date of filing. If approved, E-1 and E-2 visas are frequently issued for up to five years, but admissions are limited to two years at each entry. There is no limit to how many times an applicant can renew his or her visa. Upon conclusion of the business, however, the foreign national must return to his/her country of origin, or change his/her visa status.

H-1B Visas/Specialty Occupations

The H-1B temporary visa allows employers to sponsor certain foreign workers who are to be employed in "specialty occupations" in the U.S. for a specific amount of time. These specialty occupations must require theoretical and practical application of a body of highly specialized knowledge *and* attainment of a U.S. Bachelor's degree or equivalent work or education in the specific specialty.[8] Examples of the types of qualifying occupations for H-1B status include accountants, engineers, pharmacists, computer programmers, and teachers. The H-1B visa is the most commonly used visa for employers hiring recently graduated foreign students or individuals outside the U.S. who are not part of a multinational organization for which a transfer may be possible.

[8] 8 CFR §214.2(h)(4)(ii).

Although the quota of H-1B visas that may be issued each year is capped at 65,000 visas per fiscal year (commonly referred to as the "H-1B Cap"), this amount is reduced by the number of Free Trade Visas specifically allocated to Chile and Singapore, resulting in 58,200 H-1B visas per year.[9] H-1B petitions are usually issued for up to three years but may be extended for an additional three years, for a total maximum stay of six years in H-1B status. The six year limit is counted as total time in the U.S. in H-1B *or L-1* status for *any* employer. The H-1B worker's status may be extended beyond the sixth year in some situations in which the permanent residence process has been initiated for that worker.

Petitions for H-1B status are filed with USCIS. With limited exceptions, the petition must be approved before the worker is eligible to begin employment with the company. Processing can take anywhere from 2-4 months, but expedited processing is permissible upon the payment of an additional fee to USCIS. If the worker is outside the U.S., he/she will also generally need to apply for a visa at a U.S. Consulate.

H-1B visas are employer specific. H-1B workers are restricted to the specific job, specific location, and specific wage set forth on the H-1B petition with very limited exceptions. Deviations from these terms may result in a finding of unauthorized employment and the imposition of penalties against the employer.

H-3/Training Visas

The H-3 nonimmigrant visa is available for companies seeking to bring an individual to the U.S. to participate in a training program. The training can be in any field or profession, but it is inappropriate to use an H-3 visa for purposes of hiring for a full-time position.

[9] INA § 214(g)(a)(A); INA § 214(g)(8)(B)(iv).

In order to obtain H-3 classification, a U.S. employer or organization must provide:

- A detailed description of the structured training program in which the foreign national will participate.
- A summary of the foreign national's prior training and experience
- An explanation of why the training is needed
- An explanation of why the training is unavailable in the foreign national's home country
- An explanation of how the training will benefit the foreign national in pursuing his/her career abroad
- An explanation of how the foreign national will support him/herself while in the U.S.[10]

A petition for an H-3 visa must first be filed with USCIS. Processing typically takes about 2 months from the date of filing. Once approved, the H-3 visa may be issued for up to 2 years. Requests for extensions of stay are not allowed.

J-1/Training and Internship Visas

The J-1 visa category is designated for educational and cultural exchange programs that have been approved and administered by the Department of State's Bureau of Consular Affairs and the Bureau of Educational and Cultural Affairs. In order to carry out the Exchange Visitor Program, the Department of State designates public and private entities to act as the exchange sponsors. A complete list of eligible applicants, sponsors, program requirements and regulations can be found at the Exchange Visitor Program website at: http://exchanges.state.gov/jexchanges/designation.html.

[10] 8 USC § 1101(a)(15)(H)(iii); 8 CFR §214.2(h)(7).

In order to obtain a J-1 visa for a trainee or intern, the proposed J-1 trainee must apply at the U.S. Embassy or Consulate in his/her home country. The sponsoring agency is responsible for explaining the application process and should provide information on the documents needed for the application. Form DS-2019 is the basis of the J-1 visa application. An authorized official of the sponsoring agency will issue this form to the applicant upon his/her acceptance into a training program. Without this form, it is not possible to apply for the J-1 visa. Once the applicant has collected the required documents and attended the interview, the visa can be issued. J-1 visa holders are allowed to remain in the U.S. for the duration of the exchange program (normally, 18 months for a training program; 12 months for an internship). Once the program is complete, the trainee or intern must return to his/her home country.

As part of the exchange program process, some applicants are subject to a two year home country, physical presence requirement. After returning to their home country, those who have previously held J-1 visa status must remain there for two years before they are eligible to apply for certain visa statuses (e.g., H or L) or for permanent residence in order to reenter the U.S. to work or live.

L-1A and L-1B Visas/Intracompany Transferees

The L-1 nonimmigrant visa allows an international company to transfer certain employees to the U.S. in order to work.[11] The office in the U.S. must be a parent company, subsidiary, affiliate or branch office of a company located outside the U.S. for which the transferring employee worked on a full-time basis for at least one year in the preceding three years. According to USCIS regulations, in order to qualify for L-1 classification in this category, the employer must:

[11] *See* 8 CFR §214.2(l).

- Have a qualifying relationship with a foreign company (parent company, branch, subsidiary, or affiliate, collectively referred to as qualifying organizations); and
- Currently be, or will be, doing business as an employer in the United States and in at least one other country directly or through a qualifying organization for the duration of the beneficiary's stay in the United States as an L-1.[12]

The L-1 visa has two sub-categories: L-1A for Managers and Executives, and L-1B for Specialized Knowledge workers. L-1A visa status is valid for up to 7 years and L-1B visa status is valid for up to 5 years.

L-1A - Managers/Executives

Executive capacity generally refers to the employee's ability to establish policies and goals for the organization and to make decisions of wide latitude without much oversight. Managerial capacity generally refers to the ability of the employee to supervise and control the work of professional employees and to manage the organization or a department, subdivision, function, or component of the organization. It may also refer to the employee's ability to manage an essential function of the organization at a high level, without direct supervision of others.[13]

L-1B - Specialized Knowledge Workers

Specialized knowledge means special knowledge possessed by an individual of the petitioning organization's products, services, research, equipment, techniques, management, or other interests and their application in international markets, or an advanced level of knowledge of the organization's processes and procedures. Such knowledge must be beyond the ordinary and not commonplace within the industry or the

[12] *Id.*
[13] 8 CFR §214.2(l)(1)(ii).

petitioning organization. In other words, the employee must be more than simply skilled or familiar with the employer's interests.[14]

There are two ways in which L-1 petitions can be filed. For a regular L-1 visa, the company files a petition with USCIS for a specific individual and the petition is adjudicated for that person only. Some large companies, on the other hand, may benefit from the L-1 blanket petition process, which seeks to prequalify corporate relationships between multinational companies. When an L-1 Blanket Petition is approved by USCIS, an employer may transfer employees between the approved corporate entities upon the filing of an L-1 visa application at the U.S. Consulate. Blanket Petition approval does not guarantee that the employee will be granted L-1 visa status. The blanket petition approval simply allows a company to transfer an employee on short notice without waiting for the approval of a separate petition by USCIS. Once the Consulate approves an L-1 visa under either route, the foreign national will then be allowed to enter the U.S. to work.[15]

O-1 Visas/Aliens of Extraordinary Ability/

The O nonimmigrant visa is designed to allow those foreign nationals who possess extraordinary ability in the sciences, arts, education, business, or athletics to live and work in the U.S.[16] The O visa is designated for those individuals who have a demonstrated record of extraordinary achievement in one of these areas and have been recognized nationally or internationally for those achievements. In order to receive this visa status, the applicant must be coming to the U.S. to continue working in their area of

[14] 8 CFR §214.2(l).
[15] Canadian employees may present the L-1 petition directly at the border without pre-approval from USCIS or a blanket petition.
[16] 8 CFR §214.2(o)(1).

extraordinary achievement. For business purposes, the O nonimmigrant classification that is most frequently used is the O-1A classification for individuals with extraordinary ability in the sciences, education, business, or athletics (not including the arts, motion pictures or television industry)

When applying for an O-1A visa, the petitioner must be able to provide documentation that supports the claim of sustained national or international acclaim by providing evidence of receipt of a major internationally recognized prize or award (e.g., the Nobel Prize) or at least three of the following:

- Receipt of nationally or internationally recognized awards
- Membership in organizations that require outstanding achievement
- Published materials about the applicant in professional or major trade publications
- Judgment of the work of others
- Original scientific or scholarly work of major significance
- Evidence of authorship of scholarly work
- Employment in a critical or essential capacity at an organization with a distinguished reputation
- Receipt of a high salary in relation to others in the field

O visa petitions are filed directly with USCIS and typically take two months to process from the date of filing. If approved, an O petition approval may be granted for up to three years. If the person is outside the U.S. at the time of filing, he/she will normally need to apply for a visa at a U.S. Consulate in order to be admitted in O status.

O status may be extended in one year increments. There is no limit as to the number of times an extension may be granted.

TN Visas/Trade NAFTA Professionals

The TN nonimmigrant visa is available only to citizens of Canada (TN-1) and Mexico (TN-2). The North American Free Trade Agreement (NAFTA) created special economic and trade relationships between the U.S., Canada and Mexico. The TN visa, a product of NAFTA, allows qualified citizens of Canada and Mexico to work in the U.S. in certain professional occupations designated by Appendix 1603.D.1 of NAFTA.[17]

To qualify for TN status, an individual must meet these requirements:

- Be a citizen of Canada or Mexico
- Be working in a profession that qualifies under the regulations
- Have a prearranged full-time or part-time job with a U.S. employer (but not self-employment)
- Have the necessary qualifications for the profession (in most cases, a baccalaureate or licenciatura degree or appropriate licensure)[18]

Although the base requirements for TN-1 and TN-2 visa applicants are the same, the application process is different for each country. For Canadian citizens, an applicant can apply to be admitted under TN-1 status directly at a U.S. Port of Entry by presenting qualifying documentation. If approved, the applicant will be issued a Form I-94 (Arrival/Departure Record) as evidence of TN status.

For Mexican citizens, although an approved petition from USCIS is not required, an applicant must first apply for the TN visa at a U.S. Consulate in Mexico. If approved,

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[17] 8 CFR §214.6(c).
[18] *Id.*

the applicant will receive a TN-2 visa stamp in his/her passport, which must be shown when applying for admission to the U.S. at the Port of Entry. Once the immigration officer at the Port of Entry has reviewed the visa and documentation, the applicant will be issued a Form I-94 (Arrival/Departure Record) as evidence of the TN-2 visa status.

TN status may be issued for up to 3 years, with no limit on the number of extensions. However, it must be noted that if the applicant continues to seek multiple extensions, the government may decide not to grant another extension.

In addition, TN status is not a "dual-intent" status like an H-1B or L-1 visa. By applying for TN status, the applicant is declaring that he/she does not wish to gain permanent residence in the U.S. and is only seeking truly temporary employment in the U.S. (The H-1B and L-1 visas, however, are considered to be "dual-intent" visas as they allow the applicant to declare that he/she might eventually seek permanent residence in the United States.)

Permanent Residence

Acquiring permanent residence (a "green card" in common usage) is often a goal for workers coming to the U.S. In the immigrant visa process, there are five Employment-Based (EB) categories for which an applicant may be eligible, although this paper will only address those most commonly used by employers, which are in the first three categories. In order to immigrate to the U.S. through an employment-based preference category, a foreign national's employer must be able to provide evidence that the employee's skills, work experience and education fall into one of these visa preference categories.

Employment Based First Preference (EB-1)/Priority Workers

The First Preference EB-1 immigrant category is available to an applicant who has demonstrated extraordinary ability in his/her profession, is an outstanding professor or researcher, or is a multinational executive or manager.

Extraordinary Ability

When filing an Extraordinary Ability Petition, the applicant must be able to provide evidence that he or she has extraordinary ability in the sciences, arts, education, business or athletics. The standards and documentation required for extraordinary ability in the permanent residence context are similar to those in the O-1A visa context, which are set forth more fully above.[19]

Outstanding Professor or Researcher

A professor or researcher who is internationally recognized as outstanding in a specific academic area may apply for this classification. To qualify, an applicant must have the following:

- An offer of employment for a tenured or tenure-track position or a comparable permanent research position with a qualifying employer
- Three years of teaching and/or research experience in the academic field, generally beyond the Ph.D.
- National and international recognition as being "outstanding" in the academic field, as evidenced by at least two of the following six criteria:
    - Receipt of major prizes or awards for outstanding achievement
    - Membership in associations that require their members to demonstrate outstanding achievement

[19] 8 CFR §204.5(h)(3).

- Published material in professional publications written by others about the foreign national's work in the academic field
- Participation, either on a panel or individually, as a judge of the work of others in the same or allied academic field
- Original scientific or scholarly research contributions in the field
- Authorship of scholarly books or articles (in scholarly journals with international circulation) in the field[20]

Multinational Executives or Managers

For this classification, an employer must demonstrate that the foreign worker was employed outside the U.S. for at least one full year by the sponsoring employer in a managerial or executive capacity and that the foreign worker will continue to be employed in the same capacity once in the U.S. In addition, the U.S. employer must prove that it has been doing business for at least one year as an affiliate, subsidiary, or as the same corporation that employed the applicant abroad.

Petitions for EB-1 classification are filed directly with USCIS. Labor Certification, which involves a lengthy test of the labor market and is required for many permanent residence petitions, is not required for EB-1 petitions. In addition, since this is the highest preference category accorded to employment-based workers, immigrant visas are frequently immediately available or available with only a comparatively short wait. As a result, the process of acquiring permanent residence for a particular employee in one of the EB-1 categories can be significantly shorter than those in the other classifications.

Employment-Based Second Preference (EB-2)/Professionals with Advanced Degrees or Exceptional Ability

[20] 8 USC §1153(b)(1)(B).

The Second Preference EB-2 immigrant category is designated for individuals who are members of a profession holding an advanced degree or for individuals with exceptional ability in the arts, sciences or business. There are three sub-categories:

Professionals with Advanced Degrees

The applicant must be applying for a job that requires an advanced degree. The applicant must possess this advanced degree or the equivalent (a Bachelor's degree plus five years of progressive experience in the profession for which they are applying).[21] When applying for this classification, the company must normally first obtain a labor certification from the U.S. Department of Labor confirming that no qualified U.S. workers are available for the position. Once the labor certification is obtained, the petitioner has 180 days to file a Form I-140 with USCIS confirming that the foreign worker possesses the requirements for the position.

Exceptional Ability

For this sub-category, the applicant must be able to show that he/she has exceptional ability in the arts, sciences or business that is defined as a degree of expertise in these areas significantly above that ordinarily encountered. To qualify in this category, the petition to USCIS must include the Form I-140, an approved Foreign Labor Certification, and evidence of at least three of the following criteria:

- Official academic record showing that the worker has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability
- Letters documenting at least 10 years of full-time experience in the occupation
- A license or certification to practice the profession or occupation

[21] 8 CFR §204.5(k)(2).

- Evidence that the worker has commanded a salary or other remuneration for services that demonstrates his/her exceptional ability
- Membership in a professional association(s)
- Recognition for achievements and significant contributions to the industry or field by peers, government entities, professional or business organizations
- Other comparable evidence of eligibility is also acceptable.[22]

National Interest Waiver (NIW)

In order to file an NIW petition, the applicant must be able to demonstrate that he or she is seeking work in an area of substantial intrinsic merit to the U.S., that the benefit from his/her proposed activity will be national in scope, and that such national interest would be adversely affected if a Labor Certification were required for the applicant. Since the requirement of a job offer (Labor Certification) is waived, an individual may file an NIW petition on his/her own behalf, even if he/she does not have an employer. The applicant needs to file the Form I-140 petition and provide evidence that he/she possesses an advanced degree or that he/she meets at least three of the criteria listed in the "Exceptional Ability" category above.

In any of the above EB-2 sub-categories, the length of time that the foreign worker needs to wait to be able to apply for adjustment of status and obtain his/her green card is based on whether an immigrant visa is available to him/her. Whether an immigrant visa is available is based on quotas set by Congress for foreign immigration, as well as the foreign worker's priority date, which is the date that the labor certification or I-140 petition is filed with the appropriate governmental agency. However, once the foreign worker's priority date is current and an immigrant visa is available to him/her, an

[22] 8 CFR §204.5(k).

application to adjust the worker's status to permanent resident may be filed. The currency of a Priority Date can be found in the Visa Bulletin on the Department of State's website at: http://www.travel.state.gov/visa/frvi/bulletin/bulletin_1360.html.

Employment-Based Third Preference (EB-3)/Professionals, Skilled and Other Workers

The Third Preference EB-3 immigrant category is for those applicants that are skilled workers, professionals or other types of workers (unskilled workers). While the work experience and education requirements for each of the EB-3 sub-categories vary and are not as demanding as those for the EB-1 and EB-2 categories, all three EB-3 sub-categories require that the applicant has an approved Labor Certification (PERM) before the Form I-140 Immigrant Petition for Alien Worker may be filed.

Labor Certification / PERM

A Labor Certification application must be filed by an employer on the worker's behalf and certified by the Department of Labor (DOL). To file the labor certification, the employer must undertake a labor market test through a process of recruitment for the particular job opportunity. The certification by DOL must confirm based on the employer's application that there "are no qualified U.S. workers able, willing, qualified and available to accept the job at the prevailing wage for that occupation in the area of intended employment and that employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers."[23]

If approved, the Labor Certification/PERM is submitted with the Form I-140 Petition (among other documents) to USCIS, to complete the next step in the permanent residence process. The foreign applicant can complete the final step in the process, filing

[23] From the DOL website: http://www.foreignlaborcert.doleta.gov/perm.cfm.

the Form I-485 Application to Adjust Status, once his/her Priority Date is current. (As discussed above, Priority Dates also apply to other EB immigrant categories; however, the backlogs are frequently not as long as in the EB-3 category.)

Penalties for Unauthorized Employment of Foreign Workers

Unfortunately, there are numerous ways that employers may be punished for hiring foreign workers who do not possess appropriate work authorization. The most common violation is based on the employer's failure to complete or update the Form I-9/Employment Verification form.[24] The I-9 form helps employers determine whether the person who has been hired by a company is legally authorized to work in the U.S. Penalties for inappropriately completing the I-9 form range from $110-$1100 per violation. Penalties for "knowingly" employing an unauthorized worker (including one who is legally in the U.S., but is not authorized to work for a particular employer) range from $375-$16,000 per violation and may also lead to criminal charges against the employer.

[24] This form is currently available at www.uscis.gov under the "Forms" button.

Conclusion

This is a very brief overview of many of the most frequently used business-related nonimmigrant and immigrant visa categories for which foreign workers may be eligible. There are many additional rules and procedures that must be followed in each situation to have the best chance of a successful outcome. Appropriate, pro-active planning, competent guidance and a routine and non-discriminatory system for conducting the I-9 verification process are essential to keeping your company in compliance with immigration laws.