

# **Employer Based Immigration Sponsorship 101**

**Loyola Marymount University**

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# INTRODUCTION

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While there are numerous non-immigrant VISA and PERM options acceptable for employment, we will focus on two categories –

1. Introduction - Basics
2. Non-Immigrant Visas: H-1B Specialty Occupation, and
3. Immigrant Visas: PERM Labor Certification

# INTRODUCTION – Basics

## Common Issues Impacting Immigration Eligibility:

- **Salary** being offered does not meet the required minimum. The DOL via the Labor Certification Attestation (LCA) process for H-1B and a Prevailing Wage Determination for PERM sets the minimum salary required for sponsorship. The process does not always track with “real workforce” salaries.
- The position offered does not meet the **requirements** for sponsorship.
- The candidate/employee does not meet the educational and/or **qualifications** for the position being offered.

# INTRODUCTION – Basics

- Delays in obtaining the candidate/employee's documentation.
- In some instances, foreign degrees need to be validated by a third party.
- Candidates/employees who are required to use Counselor processing. In some instances, the candidate/employee may need to leave the U.S. and re-enter.
- Unforeseen delays with processing at any step (DOL, USCIS).
- The processes are subject to government oversight and change from time-to-time.

# INTRODUCTION – Basics

## Status v. Visa

Important distinctions between “Status” and “Visa”

Status - references a foreign national’s ability to “lawfully” remain in the U.S. An individual who has changed status from F-1 to H-1B is legally authorized to remain in the U.S. in H-1B “status.” However, a departure from the U.S. for any reason requires the “status” holder obtain a “visa” at a U.S. Consulate before re-entry.

# INTRODUCTION – Basics

## Status v. Visa

Unlike “status,” visas refer to permissions to travel to the U.S. and are issued at U.S. Embassies and Consulates abroad.

- In-person interview is required
- Visa issuance can take a few days to a few months
- A valid visa allows unrestricted travel in and out of the U.S. through its expiration date.

Note: A visa or status do not necessarily confer “work authorization.” Obtaining “work authorization” may require additional steps.

# **Non-Immigrant Visas: H-1B ‘Specialty Occupation’**

# H-1B Visas

## H-1B “Specialty Occupation” Visa requirements:

- “Specialty occupation” – requires theoretical and practical application of a body of specialized knowledge and attainment of a bachelor’s or higher degree in the specific specialty as a minimum for entry into the occupation
- There must be a nexus between Job’s requirements & Candidate’s degree
  - Must hold bachelor’s degree or foreign equivalent in a specific specialty (e.g., Biology, Engineering, Accounting, Economics, Mathematics, etc.)
  - Job must require at least bachelor’s degree in specialized field to perform the duties of the position (E.g., *Engineer, Computer Scientist, Software Engineer, Graphic Designer, etc.*)
- Employer must pay “required wages” and attest to DOL on a Labor Condition Application (LCA)
- **PROCESS:**
  - **Employer e-files LCA w/DOL – 7-10 days; &**
  - **Employer files Petition w/USCIS/DHS – 3 weeks to 4-6 months**

# H-1B Visas - Process

## Step 1 -

Employer submits a Labor Certification Application (LCA) to the Department of Labor (DOL) for certification. The purpose of the LCA is to confirm that the employer will pay the candidate/employee the same wage as other similarly qualified workers in the same geographic area and that the working conditions will not affect other employees.

## Step 2 -

All required documentation is collected from the candidate/employee by HR/ legal and reviewed.

## Step 3 -

Once the LCA is approved, the H-1B petition may be submitted to USCIS for adjudication. Processing time is currently between 4-6 months. The Petition may be "Premium Processed" - adjudicated in 2-3 weeks - for an additional fee of \$2,500.

# H-1B Visas

- Employer-specific visa - may only work for sponsoring employer (fraud investigations/site visits)
- Validity period: **6 years (“max”)**
  - 3 years + 3-year extension
  - May extend beyond 6-year maximum if:
    - Green card (e.g., PERM) started more than 1 year before H-1B expiration (will get 1-year extensions)
    - Immigrant visa (I-140) approved, but employee may not file adjustment application (I-485) because subject to visa retrogression (will get 3-year extensions)
- Spouse/children: H-4 visa (may obtain work authorization with principal’s I-140 approval)

# H-1B Visas

- **Sponsoring H-1B Professionals**
  - Hire H-1B professionals from other employers
    - Requires sponsorship / new petition
    - Candidate may begin working upon filing
  - Change status of current eligible Employees to H-1B
    - Requires sponsorship / new petition
    - Applies to current F-1 OPT/STEM and J-1 employees
    - Petition must be approved to “activate” H-1B status

# H-1B Visas

## “Lottery” Exemptions

- **Entities exempt from H-1B cap:**

- Institutions of higher education (universities, colleges, or other degree-granting entities)
  - Must be public & non-profit
- Non-profit organizations affiliated with institutions of higher education (must have affiliation agreement)
- Non-profit research organizations (approved for research or education)
- Government research organizations

- **Individuals exempt from H-1B cap:**

- “Concurrent employment”
  - E.g.: 10 hrs/exempt + 30 hrs non-exempt (20x20, 5x35, etc.)
  - Cannot be longer than exempt approval
- “Employed at”
  - Working at a qualifying institution
  - Duties “directly and predominately further the essential purpose, mission, objectives or functions of the qualifying institution”

# **Immigrant Visas: PERM Labor Certification**

# Immigrant Visas a.k.a. “Green Cards”

- Immigrant Visa - path to permanent residence (two- or three-step process)
- Options depend on job, employee’s qualifications, employer’s involvement
- Each case is analyzed individually to determine the best strategy
- Common LMU ‘green card’ paths: PERM, **Special Recruitment PERM**, EB-12, or NIW

# Immigrant Visa Categories

- **EB-2 (Second Preference)**
  - PERM for Advanced Degree Holders
    - Master's or higher degree or foreign equivalent
    - BA/BS plus five (5) years of progressive experience
  - National Interest Waiver (NIW) – if working in a field that is in the “national interest”
- **EB-3 (Third Preference) – PERM**
  - Professionals with BA/BS degree or foreign equivalent
  - Skilled Workers with 2 years of experience
  - Other Workers

# Immigrant Visa Categories

LMU, generally, sponsors employees in the EB-2 or EB-3 categories depending upon the job offered, employee's education and experience.

EB-1	EB-2	EB-3
Extraordinary ability in sciences, arts, education, business, or athletics	Members of the professions holding advanced degrees	Skilled workers, professionals, or other workers
Outstanding professors and researchers	Exceptional ability	

# Immigrant Visas – PERM

- **PERM Labor Certification**
- Competing goals:
  - Shields U.S. labor from unfair competition from foreign labor
  - Allows U.S. employers (limited/orderly) access to foreign labor
- Process:
  - Case Summary – Employment Verification – Wage Determination
- Case Strategy:
  - Requires employer/business approval
  - Once approved, remains constant through green card approval
  - Any change after PERM filed may cause a re-start of GC process

# Immigrant Visas - PERM

- **PERM Labor Certification Process:**
  - Obtain Prevailing Wage Determination (PWD)
  - Test local labor market for *available* U.S. workers, *able, willing and qualified* for the job
  - If no able, willing and qualified U.S. workers, file PERM to obtain DOL certification
  - If minimally qualified U.S. worker found, PERM may not be filed/may be denied

# Immigrant Visas - PERM

- **PERM Labor Certification Process:**

- Pre-Filing Timeline:

- 6-12 months for Prevailing Wage Determination (PWD); &
- 3-4 months for recruitment (labor market test)

- Application filed electronically

- Processing Time: 12-14 months

- DOL may audit application (requesting hard copies of recruitment)

- Employer must maintain DOL Compliance File for 5 years from date of filing PERM

# Immigrant Visas – PERM

- **PERM Labor Certification Process:**
  - All recruitment must be done 30-180 days prior to filing with DOL
  - All potentially qualified U.S. applicants must be considered to test their qualifications
  - U.S. applicants: U.S. citizens, permanent residents, refugees or asylees
  - Non-U.S. applicants – e.g., H-1B, TN, etc., visa holders – need not to be considered
  - **All laid off workers must be considered (within 6 months of PERM filing)**

# Immigrant Visas - PERM

- Recruitment for “professional” positions:
  - Takes at least 2+ months
  - Two print ads in Sunday paper (may post ad in professional journal instead of 1 Sunday ad)
  - 30-day Job Order with State Workforce Agency
  - Employer must post [Internal Notice](#) for 10 business days or provide to CBA
  - Three (3) additional venues from DOL list:

# Immigrant Visas - PERM

- Three (3) additional venues, including:
  - Job fairs
  - Employer's website
  - Job search website other than the employer's
  - On-campus recruiting
  - Trade or professional organizations
  - Private employment firms
  - Employee referral program with incentives
  - Campus placement offices
  - Local or ethnic newspapers
  - Radio and television advertising

# PERM Notes

Important to note about the PERM process –

- It is a “prospective” guarantee of employment. LMU is attesting that when the process successfully ends the individual will have the position described and compensated at least at the PDW approved by the DOL.
- It is “employer” specific and should employment end the process stops with no further action available to the employee.
- Work experience gained with the sponsoring employer cannot be used to demonstrate qualifying experience.

# PERM Notes

- Timely review of and response to qualified applicants is critical to the process.
  - Using a standardized set of criteria for reviewing candidates and careful documentation for each is a must. Candidates who appear qualified or whose resumes suggest that the employer should inquire further will merit additional attention. Those candidates who clearly lack the qualifications required for the advertised job will not need to be contacted nor will they need to be interviewed.
  - Employers must consider as qualified any U.S. worker who can acquire the skills necessary to perform the job during a reasonable period of on-the-job training.

# PERM Notes

- A detailed “grid” for screening of all candidates is prepared. The grid must reflect results of the application screen; dates and results of telephone conversations; dates and results of all interviews; if applicants do not respond then dates of contact must be recorded.
- When a qualified U.S. citizen is identified there are two options:
  - Offer the qualified U.S. citizen a job (create a second position)
  - Deem the search a failure and recruit again in a few months (delaying the process)
- Human resources facilitates the process and may enlist the department chair or department head to participate in the interview process for qualified U.S. citizens.

# Green Card Process

There are several steps to the process –

## **Step 1 –**

The Posting/ Advertisement - Formulate the job duties and minimum requirements for the position being offered.

## **Step 2 –**

Request the Prevailing Wage Determination from the DOL.

## **Step 3 –**

Conduct the recruitment.

# Green Card Process

## **Step 4 -**

Submit PERM to DOL for certification

## **Step 5 -**

File Employer's Immigrant visa petition with USCIS

## **Step 6 -**

Wait for priority date to become current.

## **Step 7 -**

File the Employee's Adjustment of Status Application (I-485) with USCIS

# Green Card Process

## **Step 8 -**

Complete medical clearance and attend biometrics appointment

## **Step 9 -**

Prepare for and attend interview with USCIS.

# Immigrant Visas -Special Recruitment PERM

- Special Recruitment PERM requirements:
  - Available to university/college teachers only
  - Definition of “teaching” has changed (more lenient)
  - Must file PERM within 18 months of selection for the job
  - Job must be advertised in national journal (one print ad or 30-day online ad)

# Immigrant Visas - Special Recruitment PERM

- Historically, Special Recruitment was available only to classroom teachers
- Now, all positions where there is a teaching component qualify (*Matter of Mercer University*)
- Teaching in less traditional settings (i.e., library instruction) qualifies
- Any amount of teaching will suffice

# Immigrant Visas (Special Recruitment PERM)

- Recruitment must include:
  - One (1) national professional journal print ad (e.g., *CHE*); or
  - 30 calendar day ad posting in an electronic or web-based national professional journal
  - The online ad posting must stem from (or be accessible from) an actual journal site, not a national association's online career portal

# Immigrant Visas - Special Recruitment PERM

- Contents of the journal ad:
  - Employer's name;
  - Location of the job;
  - Job title;
  - Brief job description;
  - job requirements; and
  - Contact information
- Avoid the use of “preferences” or unquantifiable requirements

# Immigrant Visas - Special Recruitment PERM

- DOL will certify application if:
  - University conducted competitive recruitment and selection process; and
  - Foreign worker is more qualified than any U.S. worker who applied for the job
- Employer must post notice for 10 days or provide to CBU
- Employer must pay prevailing wage

# Immigrant Visas - Special Recruitment PERM

- Timing considerations:
  - PERM Special Recruitment application must be filed within 18 months of selection for the job (i.e., the date of the offer letter)
  - Start permanent residence sponsorship/filing process no later than 12 months after hire
  - If more than 18 months since selection, can engage in re-recruitment/selection process to meet the 18-month deadline

# Immigrant Visas - Special Recruitment PERM

Challenges to using the special recruitment process –

- Ads contained too many “preferences” that may disqualify the successful candidate.
- Candidate offered position/hired ABD when the position requires the doctoral degree be conferred.
- Knowledge of needed sponsorship is not always evident; thus delaying the process.
- If the job description includes “Ph.D. preferred” and the sponsored employee did not have a Ph.D. at the time of hire, the employee will not be considered the best qualified for the position.

# **Thank you for attending today's immigration information session**

- Questions?

# Presenters

**Rebecca Chandler, Moderator**, known to many in the LMU community as the immediate past vice president for human resources. She brings more than 30 years of immigration experience working with immigration counsel for employer-based sponsorship. Her experience includes non-immigrant VISA processing (J, H, O visas) and permanent resident processing.

**Alexander Dgebuadze** is a founding partner at Sostrin Immigration Lawyers, LLP in Los Angeles. He represents clients in academic, engineering, entertainment, healthcare, and R&D/technology sectors. Mr. Dgebuadze has served as an editor and author for AILA's *Guide to PERM Labor Certification (2011, 2015-16, 2019 and 2023 Editions)*. He is currently a member of AILA's DOL Liaison and Business Section Steering Committees and is listed in *The Best Lawyers in America: Immigration Law and The International Who's Who of Corporate Immigration Lawyers as a Thought Leader*.

**Colleen Croal** is a senior case manager at Sostrin Immigration Lawyers, LLP in Los Angeles. She focuses on business immigration law, assisting clients in academic, automotive, entertainment, healthcare, R&D and high-technology sectors. Ms. Croal is an expert on PERM Labor Certifications, specializing in "special recruitment" PERMs for academic clients.