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ATTORNEYS AT LAW

## WHAT IS FAST-TRACK EMPLOYMENT-BASED IMMIGRATION?

There are two basic procedures for attaining an employment-based immigrant visa. The first, and most common procedure is the Alien Employment Certification (AEC) Process, which requires a certification from the U.S. Department of Labor (DOL) prior to filing an immigrant visa petition. We have prepared separate memoranda on this type of employment-based immigration for your reference. The second general procedure for employment-based immigration we refer to as the Fast-Track Classifications (FTCs). These classifications do not require certification from the DOL and thus attaining an immigrant visa is usually faster than through the AEC process.

The employment-based immigrant visa categories are commonly referred to as EB-1, EB-2, and EB-3. These categories are broken down as follows:

EB-1: Priority Workers

EB-2: Workers with Advanced Degrees or of Exceptional Ability

EB-3: Professionals, skilled workers, and other workers.

The FTCs are in the EB-1 and EB-2 categories. The EB-1 FTCs are: 1) workers with extraordinary ability; 2) outstanding professors and researchers; and 3) multinational executives and managers. The EB-2 FTCs are workers with advanced degrees or of exceptional ability in the sciences, arts or business who can establish that a waiver of DOL certification would be in the national interest (generally referred to as a National Interest Waiver).

### **WORKERS OF EXTRAORDINARY ABILITY (EB-1)**

Workers of extraordinary ability are defined as those who can show that they have "extraordinary ability in the sciences, arts, education, business or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation." These are individuals who are of "that small percentage who have risen to the very top of the field of endeavor."

One of the key advantages to qualifying as an EB-1 worker of extraordinary ability is that neither a job offer nor a labor certification is required. The usual course, however, is for an employer to petition for an EB-1 worker, although the foreign national can self-petition for him or herself.

The following documentation must be submitted in conjunction with an extraordinary ability petition:

- 1. Documentation that the foreign national continues to work in the field in which they have extraordinary ability.**
  - a.** Letters from prospective employers; **or**
  - b.** Evidence of prearranged commitments such as contracts; **and**

- c. A statement from the individual detailing their plans to continue work in the field upon admission to permanent residence.

## **2. Documentation to establish extraordinary ability.**

An extraordinary ability petition must be accompanied by evidence of receipt of a major, internationally recognized award, such as the Nobel Prize or Academy Award; *or* absent receipt of such as an award, must include **at least three** of the following types of evidence showing that the individual has been recognized as having extraordinary ability in the given field:

- a. Documentation of receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor and criteria for the prizes or awards;
- b. Documentation of membership in associations in the field of endeavor which require outstanding achievements of their members, as judged by recognized international experts in their fields. Example: Peer-reviewed presentations at academic symposia;
- c. Published material in professional, major trade publications or major newspapers written by others about your work in the field. Published materials must include the title, date, and author, and be translated if necessary. Example: entries in a citation index that cite the individual's work as authoritative;
- d. Evidence of participation, on a panel or individually, as the judge of the work of others in the same or related field of specialization. Example: participation as a reviewer for a peer reviewed scholarly journal, or in thesis direction (particularly of a Ph.D. thesis);
- e. Evidence of original scientific, scholarly or artistic contributions of major significance in the field of endeavor. Example: testimonials from scholars describing your contributions to the field;
- f. Evidence of authorship of scholarly books or articles in the field, in professional or scholarly journals or other major media. Example: peer-reviewed articles in scholarly journals;
- g. Evidence of the display of the individual's work in the field at artistic exhibitions in more than one country;
- h. Evidence that the individual has performed in a lead, starring or critical role for organizations or establishments that have a distinguished reputation;
- i. Evidence of having commanded a high salary or other significantly high remuneration for services in relation to others in the field;
- j. Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disc or video sales; and/or
- k. Other comparable evidence if those listed above do not readily apply to the individual's occupation.

### **OUTSTANDING PROFESSORS AND RESEARCHERS (EB-1)**

The second category of priority workers is outstanding professors and researchers. This category is for professors and researchers who are internationally recognized for their outstanding achievements. In order to qualify as an outstanding professor or researcher, a foreign national must meet the following three requirements:

1. **International recognition as outstanding in a specific academic field;**
2. **At least three (3) years of experience researching in that field; and**
3. **Offer of employment for a permanent research position.**

The following documentation must be submitted in conjunction with an outstanding researcher petition:

**1. Documentation of international recognition as outstanding in a specific academic field.**

An outstanding researcher petition must be accompanied by **at least two** of the following types of evidence showing that the individual has gained international recognition as outstanding:

- a. Documentation of receipt of major international prizes or awards for outstanding achievement in the academic field;
- b. Documentation of membership in associations in the academic field which require outstanding achievements of their members. Example: Peer-reviewed presentations at academic symposia;
- c. Published material in professional publications written by others about the individual's work in the field. Published materials must include the title, date, and author, and be translated if necessary. Example: entries in a citation index that cite the work as authoritative;
- d. Evidence of participation, on a panel or individually, as the judge of the work of others in the same or related academic field. Example: participation as a reviewer for a peer-reviewed scholarly journal;
- e. Evidence of original scientific or scholarly research contributions of the academic field. Example: testimonials from scholars describing your contributions to the academic field; **or**
- f. Evidence of authorship of scholarly books or articles in scholarly journals with international circulation. Example: peer-reviewed articles in scholarly journals.

**2. At least three (3) years of experience researching in that field.**

Letters from current or former employers, documenting at least **three (3) years of research experience in that field** must be submitted. Experience in research while working on an advanced degree will only be acceptable if the degree was actually acquired and the research conducted toward the degree has been recognized within the academic field as outstanding. In addition, teaching experience gained while working on an advanced degree is acceptable if the individual had full responsibility for the course taught. Though one would normally expect outstanding researchers and professors to have a Ph.D., the law does not require possession of a doctorate. Nothing in the statute or regulations precludes relying on experience gained at the petitioning employer. Therefore, any combination of teaching or research totaling three years will serve to meet the experience requirement.

The letter(s) from employers should include:

- a. The name, address, and title of the writer;
- b. A specific description of the duties performed by the individual;

- c. A statement supporting the assertion that the individual has been involved in outstanding research;
- d. A statement of the writer's background and ability to evaluate the individual; and
- e. A statement of the writer's basis of knowledge of the individual's work.

### **3. Offer of employment for a permanent research position.**

The employer must also submit a letter along with the petition setting out the terms of employment. This letter must offer **either** of the following:

- a. A research position having no fixed term and in which there is ordinarily an expectation of permanent employment; **or**
- b. A comparable position with a private employer accompanied by proof that the employer employs at least three (3) full-time persons in research positions and has achieved documented accomplishments in this field. Documented accomplishments in this field may be demonstrated by patents or articles by the company's employees in recognized journals in the academic field.

### **MULTINATIONAL EXECUTIVES AND MANAGERS (EB-1)**

The final EB-1 classification is for executives and managers of foreign companies who are transferred to the United States. The requirements for this classification closely track those for L-1A intracompany transferees. A multinational manager or executive is eligible for priority worker status if:

- he or she is employed outside the United States with an affiliate, parent, subsidiary or branch of the U.S. petitioning organization in a managerial or executive capacity for at least one of the three years immediately preceding the filing of the petition; **or**
- if the foreign national is already present in the United States, he or she has been employed with an affiliate, parent, subsidiary or branch of the U.S. petitioning organization in a managerial or executive capacity during one of the three years preceding entry to the United States as a nonimmigrant; **and**
- the foreign national is or will be employed in a managerial or executive capacity by the petitioning organization in the United States.

#### **1. The Qualifying Corporate Relationship**

The U.S. petitioning company must be a branch, subsidiary, parent, or affiliate of the foreign company and the U.S. petitioner must have been doing business for at least one year. The immigration laws define the various qualifying corporate relationships as follows:

- "Parent" means a firm, corporation, or other legal entity which has subsidiaries.
- "Branch" means an operating division or office of the same organization housed in a different location.
- Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; *or* owns, directly or indirectly, half of the entity and controls the entity; *or* owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; *or* owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

- Affiliate means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

## 2. Managerial Capacity

An employee is considered managerial under the immigration laws where he or she:

1. manages the organization or department, subdivision, function or component of the organization;
2. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department, or subdivision of the organization;
3. has the authority to hire, fire, or recommend similar personnel actions (such as promotion or leave authorization) if another employee or other employees are directly supervised; and
4. exercises discretion over the day-to-day operations of the activity or function for which the employee.

## 3. Executive Capacity

An employee is considered executive under the immigration laws where he or she:

1. directs the management of the organization or a major component or function of the organization;
2. establishes the goals and policies of the organization, component, or function;
3. exercises wide latitude in discretionary decision-making; and
4. receives only general supervision or direction from higher level executives.

### **WORKERS WHO ARE MEMBERS OF THE PROFESSIONS HOLDING ADVANCED DEGREES OR ARE OF EXCEPTIONAL ABILITY IN THE SCIENCES, ARTS, OR BUSINESS (EB-2)**

#### **1. Workers who are members of the Professions Holding Advanced Degrees**

Any U.S. employer may file a petition in this category when the job requires an advanced degree and the foreign national possesses such a degree. An advanced degree is defined as any degree beyond a bachelors degree; generally this means a masters degree or greater. In addition, a bachelor's degree *plus* five years of related experience can serve as the equivalent of a masters degree. The "professions" include any occupation for which a bachelors degree or equivalent is the minimum requirement for entry.

#### **2. Workers of Exceptional Ability in the Sciences, Arts, or Business**

Foreign nationals "who because of their exceptional ability in the sciences, arts, or business will substantially benefit the national economy, cultural, or educational interests or welfare of the United States" are also accorded special consideration for immigrant visas.

An exceptional ability petition must be accompanied by **at least three** of the following types of evidence showing recognition of exceptional ability:

- a. Official academic record showing a degree, diploma, certificate or similar award for a college, university, school or other institution for the field of exceptional ability;

- b. Evidence in the form of letters from current or former employers showing at least ten years of full-time experience in the occupation for which employment is sought;
- c. A license to practice the profession or certification for a particular profession or occupation;
- d. Evidence that the foreign national has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
- e. Evidence of membership in professional associations;
- f. Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business associations; and/or
- g. Other comparable evidence if those listed above do not readily apply to the occupation.

### **3. The National Interest Waiver Exception to DOL Certification**

Generally, EB-2 petitions must be accompanied by an approved DOL certification. The law does not require DOL certification for individuals with advanced degrees or of exceptional ability if his or her presence in the United States will serve the "national interest."

To qualify for a National Interest Waiver, an individual must show that the work they are involved in, and will continue to be involved in, will be of benefit to the National Interest of the United States. There are no set rules in determining whether the work would benefit the national interest; however, there are certain guidelines that can be followed in order to show eligibility for a national interest waiver. The following sets of questions are intended to assist in establishing that the individual's work is indeed in the U.S. national interest. Please be advised that full and detailed answers and explanations to these questions enhance the chances for determining whether the individual might qualify for a national interest waiver and would increase the chances for getting the petition approved.

#### **A. Work pertaining to the national interest of the United States**

1. Letter from the petitioning company establishing that the individual was a significant contributor in the development of tools, products or services at the company which are cutting-edge and recognized in the industry. This letter should detail the individual's responsibilities and impact in the development and implementation of these products.
2. Letters from the company's major customers attesting as to how the company's tools, products or services increased their productivity and/or exports. To the extent that they can attest to the individual's personal contribution in developing the tools, products or services, or in helping them implement either in their company, then they should so state with detail and not immodest praise. They should also indicate whether the company's tool, product or service created any of the following results at their company:
  - new jobs
  - improved wages or working conditions
  - improved educational opportunities for children, under qualified workers or others
  - improvement of the environment

- increased conservation of U.S. resources
  - increased productivity
  - improvement of the quality of health care in the United States
3. The individual will also need to document with regard to the work at their company the following:
- How has the individual's work in his or her field improved the economy and/or competitiveness of the United States and will it continue to do so in the future?
  - Has the individual's in this field in the past and will it in the future - create any new jobs for US workers? If so, in what way?
  - Has the individual's work in this field in the past and will it in the future improve wages and/or working conditions for U.S. workers? If so, in what way?
  - Does the individual's work in this field in any way help improve education for U.S. children and training programs for under qualified U.S. workers?
  - Has the individual's work in this field in the past, and will it in the future, improve the U.S. environment in any way, and make more productive use of U.S. resources?
  - Would the individual's continued work in this field in any way improve the quality of health care in the United States?
  - Would the individual's continued work in this field in any way provide more affordable housing for U.S. citizens?

**B. Documentation of work pertaining to the national interest of the United States**

In addition to explaining how the individual's immigrating to the United States would be of national interest, it is crucial to provide supporting documentation showing the same. Such documentation may consist of the following:

1. Full and detailed description of the work and/or products the individual is involved with. This may consist of any product, product line, systems, or processes the individual is involved in; or any development, enhancement, maintenance or support the individual is responsible for. Company brochures, pamphlets, or annual reports may provide helpful information;
2. Evidence of the need and importance of the individual's work;
3. Articles, abstracts, or publications the individual authored or was involved with;
4. Any research work the individual was involved in;
5. Letters from university professors, government officials or agencies, and/or high ranking company officials who are familiar with the importance of the individual's work and the benefits to the national interests of the United States;
6. Any licenses, awards, honors, or recognition the individual received in relation to his or her work;
7. Evidence of professional membership in related associations and/or affiliations, and requirements for membership;

8. Evidence of related fellowships, grants, or scholarships;
9. Evidence of patents, trademarks, and copyrights;
10. Any other evidence that might show that the individual plays a significant role in his or her field of endeavor;
11. Any articles about the individual's industry or specialty field that would establish its importance to the future of America; and
12. Any evidence that the individual can provide that will show that he or she is an **essential** contributor to the project at their company which has a national impact. If the individual is merely a normal staff level employee or contributor the individual will not qualify for a National Interest Waiver even if the project itself is deemed to have the appropriate national impact or benefit. Conversely, if the individual is an essential, key contributor to a project at the company, but the project itself does not have a sufficient national impact or benefit, then the individual would also likely not qualify. The individual must be a **key** contributor to a project which is of **significant national benefit**. Please provide any available evidence which establish these points.

#### CONCLUSION

There is no "quick and easy" avenue to employment-based immigration in the United States. The various categories discussed above, however, can dramatically reduce the amount of time necessary for qualified foreign nationals to achieve permanent residence. Close coordination between the company, the employee and the attorney is also a key element to making these processes work.

*Please note that this memorandum provides general information and is not intended to be a substitute for specific legal advice regarding an individual matter. As the immigration laws are constantly changing, we strongly encourage you to work closely with legal counsel when pursuing any employment-based immigration benefits. If we can be of further assistance to you or your employees regarding this or any other area of Corporate Immigration Law, please contact our office directly at (650) 617-8888.*