

**Volume 10, Number 1**  
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**AN IMMIGRATION LAW PRIMER  
FOR THE  
CORPORATE EXECUTIVE**

**PAUL W. VIRTUE  
NATALIE S. TYNAN**

## PREFACE

The debate over immigration policy is again at the forefront of the nation's political agenda and the subject of extensive media coverage. The issues are complex, with far-reaching implications for a growing number of businesses of all types and sizes; yet there is no clear consensus or resolution in sight.

This publication, however, is not a discussion about policy; rather, its authors, Paul W. Virtue and Natalie S. Tynan, intend it to be a useful guide for the corporate executive to navigate the maze of U.S. immigration law. We trust that this Briefly . . . will prove a valuable tool.

The authors first provide a synopsis of the executive branch structure for the administration and enforcement of immigration law. They continue by detailing the essential elements for understanding the law.

As with all other publications of the National Legal Center, this monograph is presented to encourage a greater understanding of an important public policy issue with a significant impact on the law and its processes. The views expressed in this monograph are those of the authors and do not necessarily reflect the opinions of the advisors, officers, or directors of the Center.

**Richard A. Hauser**  
President  
National Legal Center

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# **AN IMMIGRATION LAW PRIMER FOR THE CORPORATE EXECUTIVE**

PAUL W. VIRTUE  
NATALIE S. TYNAN

The Immigration and Nationality Act of 1952, as amended, and its implementing regulations have been likened to the Internal Revenue Code in terms of complexity and difficulty in interpretation. The purpose of this publication is to provide the busy corporate counsel or executive with a quick reference to those provisions of immigration law that are most relevant in the corporate setting. We will cover the obligations of employers to verify employment authorization of employees; visas for business visitors and employer-sponsored nonimmigrant workers; employer-sponsored immigrant, or “green card,” status; and rules governing the “deemed export” of restricted technology.

First, a brief summary of the executive branch organization for the administration and enforcement of U.S. immigration law. From 1940, when the Immigration and Naturalization Service (“INS”) was transferred from the Department of Labor (“DOL”) to the Department of Justice (“DOJ”), until 2003, the Attorney General was primarily responsible for administration and enforcement of the Immigration and Nationality Act (“INA”). On March 1, 2003, the INS was disbanded and its functions were transferred to the Department of Homeland Security (“DHS”). The responsibility for providing immigration-related services and benefits such as naturalization and work authorization were transferred from the INS to the new DHS bureau, U.S. Citizenship and Immigration Services (“USCIS”). Investigative and enforcement responsibilities for enforcement of federal immigration laws, customs laws, and air security laws in the interior of the United States were transferred to the U.S. Immigration and Customs Enforcement (“ICE”) bureau of the DHS. Finally, U.S. Customs and Border Protection (“CBP”) assumed responsibilities for protecting our borders within the DHS. In addition to the DHS, the U.S. Department of State (“DOS”), with its responsibility for visa issuance abroad, and the DOL, responsible for regulation of alien labor and protection of U.S. workers, play major roles in the administration and enforcement of U.S. immigration law.

## **EMPLOYER OBLIGATIONS UNDER THE**

## **IMMIGRATION REFORM AND CONTROL ACT OF 1986**

### **In General**

The Immigration Reform and Control Act's ("IRCA") so-called "Employer Sanctions" provisions prohibit the knowing hire, or continued employment of, any person who is without proper employment authorization. The law vests the DHS with broad investigative and enforcement authority, and provides for civil monetary fines as well as criminal penalties for knowing violations. The law requires an employer to verify the identity and employment eligibility of any new employee within three days of hire. IRCA preempts all state immigration-related employer sanctions laws, but does not affect state laws relating to license revocation for those employing unauthorized aliens.

### **Knowingly Employing Unauthorized Aliens**

Section 274A of the INA, 8 U.S.C. 1324a, makes it unlawful for an employer to hire, or continue to employ, an alien knowing that the alien is unauthorized to be employed in the United States. Demonstrating compliance in good faith with the verification requirements discussed below can serve as an affirmative defense that an employer has not violated the hiring provision. However, administrative decisions under section 274A have incorporated the notion of "constructive knowledge" where reasonable diligence should have led the employer to the knowledge that the person was not employment authorized. The prohibition against knowing employment of an unauthorized alien requires the employer to terminate an alien employee who is unauthorized to work in the United States within a reasonable time after learning of the alien's unauthorized status. It also prohibits the use of a contract to circumvent the hiring restrictions.

### **Civil and Criminal Penalties**

Violations of the hiring provision may result in civil and criminal penalties as well as debarment from federal government contracts. For a violation of the hiring provision, an employer may be subject to civil fines of \$250-\$2,000 for each unauthorized alien. An employer that previously violated these provisions can face fines ranging from \$2,000-\$5,000 for each alien. Where the agency finds that the

employer has engaged in a pattern or practice of the hiring or “continuing to employ” provisions, the employer may also be subject to a fine of \$3,000 for each unauthorized alien and imprisonment for up to six months. The term “pattern or practice” means regular, repeated, and intentional activities, but does not include isolated, sporadic, or accidental acts.

#### **Debarment from Federal Government Contracts**

In addition to the civil and criminal penalties discussed above, an employer found to have violated the hiring provision may be debarred from participating in federal government contracts for a period of one year pursuant to an Executive Order issued in 1996. Responsibility for enforcement of the Executive Order (E.O. 12989, February 13, 1996) rests with the Attorney General. If the Attorney General determines, ordinarily through sanctions enforcement proceedings, that a contractor is not in compliance with the hiring provisions of INA section 274A, he will transmit that determination to the appropriate federal contracting agency for consideration for debarment or other appropriate action, in accordance with the procedures set forth in the Federal Acquisition Regulation. The debarment is for one year and may be extended for additional one-year periods if noncompliance continues.

#### **Verification Requirements**

INA section 274A(b) requires the employer to attest under penalty of perjury on Form I-9 that it has examined an employee’s employment authorization and identity documentation and has verified the person’s ability to work in the United States. This requirement is typically referred to as the “paperwork” requirement and must be completed within three business days of the date of hire. The Form I-9, and accompanying manual, lists the types of acceptable documents that prove identity and work authorization in compliance with the paperwork requirement. The Form I-9 must be retained for the duration of an employee’s employment, plus one year, or for a minimum of three years from the date of hire, whichever is longer.

Fines of \$100-\$1,000 for each individual may be imposed against an employer for paperwork violations. INA section 274A(a)(3) limits liability for certain technical violations of paperwork requirements, provided a good faith attempt was made to comply, unless the

employer fails to correct the failure after notice, or is engaging in a pattern or practice of paperwork violations. Examples of technical violations include: (1) address or date missing from the form; (2) employee's attestation missing; and (3) expiration date missing from an identity document. The INS considers any violation that could have led to the hiring of an unauthorized employee to be more than a technical violation.

### **Prohibition on Immigration-Related Discrimination**

Because Congress was concerned that the enactment of employer sanctions might result in discrimination against minorities and ethnic groups, IRCA has antidiscrimination provisions that reach areas beyond the current jurisdiction of civil rights laws. These provisions make it unlawful for an employer to discriminate against an individual, other than an unauthorized alien, in hiring, discharging, or recruiting or referring for a fee because of such individual's national origin; or because of such individual's citizenship status, if the individual is a citizen or an intending citizen. An intending citizen is an alien who is a lawful permanent resident alien, a temporary resident alien, a refugee, or an asylee. This provision of law is enforced by the Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC") within the DOJ.

### **Compliance Program**

Form I-9 and other relevant documents, including payroll records, must be made available upon three days' notice by the DHS, the DOL, or the OSC. An established company policy for completion, storage, and reverification of Form I-9 will help an employer weather an I-9 audit and serve to demonstrate *good faith* compliance with the verification procedures. In addition, a uniform policy reduces the chance of verification practices being viewed as arbitrary or discriminatory. The office or individual with responsibility for completion of the Form I-9, typically the office with responsibility for ensuring that the Form W-4 is completed for payroll withholding purposes, should be clearly identified and trained. While the statute does not require the employer to maintain photocopies of the documents presented by the employee, it is a good practice to do so. It is also important to maintain the I-9 forms and photocopies of the employment authorization and identity documents in a file or binder that is separate from other

personnel records, so that the records are easily segregated when needed in response to an audit request. Finally, a tickler system should be developed to ensure compliance with re-verification requirements for those employees whose work authorization is scheduled to expire.

#### **EMPLOYMENT-BASED NONIMMIGRANT VISA CATEGORIES**

The Immigration and Nationality Act (“INA”) permits certain classifications of aliens to enter the United States as nonimmigrants for a temporary period of time and for specific purposes. Generally, a U.S. employer must obtain authorization from the USCIS prior to employing the foreign national. In most cases, an employer must file an appropriate nonimmigrant petition on behalf of the foreign national.

If the foreign national is in valid nonimmigrant status in the United States the employer can file for a change of status for the employee in the underlying petition. If the foreign national is abroad, upon approval of the petition, he or she must apply for a visa at a U.S. consulate or embassy prior to applying for admission to the United States. A visa indicates that the foreign national’s application has been reviewed by a U.S. consular officer and that the officer has determined that the foreign national is eligible to enter the United States for a specific purpose. Visa issuance is the joint responsibility of the U.S. Department of State (“DOS”) and the DHS.

If granted admission to the United States, the foreign national will be issued a Form I-94, Record of Arrival and Departure. This document, stapled in the foreign national’s passport, governs the individual’s period of stay while in the United States. If the foreign national remains in the United States beyond the expiration of Form I-94, absent the filing of a change or extension of status petition on his or her behalf, the foreign national may begin to accrue unlawful presence. If a foreign national accrues six months or more of unlawful presence, he or she could become subject to a bar to readmission to the United States.

#### **BUSINESS VISITOR (B-1)**

##### **In General**

A business person employed outside the United States may be admitted as a business visitor to engage in such activities as conducting business on behalf of an overseas employer, engaging in or conducting training seminars, and attending meetings and conferences; however, a B-1 visitor may not engage in productive employment in the United States. The validity period of the B-1 visa and the number of times it may be used are determined on the basis of reciprocity between the United States and the visitor's home country. For example, a visitor from Brazil is eligible for a five-year, multiple entry visa, while a B-1 visa for a visitor from Afghanistan is limited to three months and a single entry. Generally, a B-1 visitor is admitted for a six-month period, which may be extended for as long as an additional six months.

### **Application Process/Requirements**

A foreign national must apply for a B-1 visa at a U.S. consulate or embassy abroad on Form DS-156; a filing with the DHS in the United States is not required. The applicant must demonstrate that he or she is entering the United States for a limited duration; intends to depart the United States at the expiration of his or her stay; maintains a foreign residence, which he or she has no intention of abandoning; has adequate financial means to travel to and depart the United States and will engage only in legitimate activities related to business while in the United States.

The DOS has enumerated legitimate business activities as including: (1) attending conferences and seminars; (2) consulting with U.S. business associates; (3) performing installation or service pursuant to a service or sales contract already undertaken by the person's company; (4) purchasing raw goods or materials for use in assembling products outside the United States; (5) arranging employment in the U.S; and (6) taking steps to establish a branch office of a foreign company or to set up an investment in the United States; for example, identifying office space, negotiating contracts, purchasing supplies. The foreign employer should provide a letter describing the nature of the proposed activities in the United States and stressing that the foreign national will not engage in employment for a U.S. employer. It should also state that the foreign company will continue to pay the employee's salary.

### **Visa Waiver Program**

The Visa Waiver Program (“VWP”) enables citizens of certain countries to travel to the United States for business or pleasure for 90 days or less without obtaining a visa. Individuals admitted under this program may not extend their stay and cannot change their status while in the United States. As with the B visa classification, foreign nationals entering the United States as VWP travelers cannot engage in gainful employment in the United States. They can, however, participate in commercial business transactions and scientific, educational, professional, or business conventions, conferences, or seminars.

Currently, the following 26 countries participate in the VWP on the basis of reciprocity with the United States: Andorra, Australia, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Lichtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.

In order to enter the United States pursuant to the VWP, the foreign national must: (1) demonstrate that he or she is a citizen of a VWP country; (2) present a valid passport issued by a VWP country; (3) seek admission to the United States for 90 days or less; and (4) possess a nonrefundable return ticket for a destination outside the United States. In making an application for admission to the United States, the VWP visitor waives his or her right to contest, in immigration court, a decision to deny admission or to remove the visitor from the United States, except on the basis of refugee status.

## **TREATY TRADERS AND INVESTORS (E-1 AND E-2)**

### **In General**

The Immigration and Nationality Act (“INA”) provides nonimmigrant visa status for a national of a country, with which the United States maintains a treaty of commerce and navigation, who is coming to the United States to: carry on substantial trade, including trade in services or technology, principally between the United States and the treaty country; or to develop and direct the operations of an enterprise in which the national has invested, or is in the process of investing a substantial amount of capital. Spouses and unmarried children under age 21 can accompany the principal in E-1 or E-2 visa status. Spouses in E status may apply for employment authorization.

The U.S. Department of State (“DOS”) has authority to adjudicate E visa applications and does not defer to determinations made by the USCIS. Therefore, an applicant may apply for an E-1 or E-2 visa directly through a U.S. consulate or embassy abroad. If the applicant is in the United States in another valid nonimmigrant status, he or she may apply to the USCIS for a change of status to E-1 or E-2.

### **Treaty Trader (E-1)**

To qualify for E-1 status, the applicant must be a national of a treaty country and the trading firm that the applicant is joining in the United States. must have the nationality of the treaty country. The international trade must be “substantial” in the sense that there is a sizable and continuing volume of trade principally between the United States and the treaty country. “Principally” is defined to mean that more than 50 percent of the international trade involved must be between the United States and the country of the applicant’s nationality. Trade means the international exchange of goods, services, and technology. Title of the trade items must pass from one party to the other. The applicant must be employed in a supervisory or executive capacity, or possess highly specialized skills essential to the efficient operation of the firm.

### **Treaty Investor (E-2)**

The investor, either a real or corporate person, must be a national of a treaty country. The investment must be substantial and 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. 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 just to provide a living to the investor and family, or it must have a significant economic impact in the United States.

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 United States to develop and direct the enterprise. If the applicant is not the principal investor, he or she must be employed in a supervisory, executive, or highly specialized skill capacity.

### **SPECIALTY OCCUPATIONS (H-1B)**

#### **In General**

The statute defines “specialty occupation” as “an occupation that requires (a) a theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor[’s] or higher degree in the specific specialty (or its equivalent) as a minimum for entry in the occupation in the United States.” Under USCIS regulations, the job must meet one or more of the following criteria: (1) a bachelor’s or higher degree or its equivalent is normally the minimum entry requirement for the position; (2) the degree requirement is common to the industry or, in the alternative, the position is so complex or unique that it can be performed only by an individual with a degree; (3) the employer normally requires a degree or its equivalent for the position; or (4) the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor’s or higher degree.

In addition, the job must require a degree in a specialty field; a general degree, absent specialized work experience, will not satisfy the

statutory criteria for H-1B status. For example, the position of software engineer would ordinarily require a degree in computer science, engineering, or equivalent technical degree. Specialty occupations in the business field include accounting, marketing, and finance. Positions that may be staffed by employees possessing a variety of liberal arts degrees are not considered specialty occupations. Spouses and unmarried children under age 21 can accompany the principal in H-4 visa status. Dependent family members may attend school and perform voluntary services, but are not eligible for employment authorization.

### **H-1B Petition**

A U.S. employer seeking to employ a foreign national in a specialty occupation must file a nonimmigrant visa petition (Form I-129) on behalf of the foreign national with the USCIS Service Center having jurisdiction over the place of intended employment. The H-1B petition may be granted for a period of three years. With certain limited exceptions discussed below, a nonimmigrant may remain in the United States in H-1B status for up to six years, and any time spent in H or L (intracompany transferee) status counts against this six-year period.

The principal questions considered by the USCIS in adjudicating H-1B petitions are whether the position qualifies as a specialty occupation and whether the beneficiary meets the requirements of the position. The concept of “dual intent” applies to the H-1B classification, meaning that an employee may maintain valid H-1B nonimmigrant status while at the same time pursuing permanent resident “green card” status.

### **Required Wage Rate**

Before filing the Form I-129, the employer must submit a labor condition application (“LCA”) on Form ETA 9035 to the Department of Labor (“DOL”). The LCA contains attestations by the employer with respect to wages and working conditions. It must be certified by the DOL and then filed with the Form I-129. If filed online, a properly completed LCA is approved instantaneously. The employer must then maintain a public access file (“PAF”) to document compliance with the LCA requirements. The following materials must be included in the PAF file: (1) a copy of the LCA; (2) a memorandum summarizing how the actual wage was determined; (3) a copy of the prevailing wage

source; (4) a summary of the benefits offered to U.S. workers; (5) a copy of the posting notice; and (6) a copy of the beneficiary's statement indicating that he or she received a copy of the LCA. Pursuant to DOL regulations, the H-1B employer must pay the greater of the actual wage rate or the prevailing wage for the position. The prevailing wage for the position may be obtained through a variety of published wage surveys applicable to the metropolitan statistical area in which the position is located. The actual wage is the wage paid by the employer to all other individuals in the same position who possess similar experience and qualifications. The system for determining the employer's actual wage rate must be based on legitimate business factors. The documentation of the system used to determine the actual wage for a position must only be detailed enough that a third party can "understand how the employer applied its pay system to arrive at the actual wage for its H-1B nonimmigrant(s)." The DOL also states that the description included in the PAF should, at a minimum, contain the business-related factors that are used in setting wages and the manner in which they are implemented (e.g., the wage/salary range for the position and the pay differentials for various factors such as education and job experience). The DOL has established by regulation a procedure for accepting and investigating complaints against employers for failures relating to the LCA. The DOL may assess back pay, civil penalties, and disqualification from USCIS approval of employment-based immigrant or nonimmigrant visa petitions.

#### **Return Transportation Costs**

If an H-1B nonimmigrant is dismissed for any reason (including "for cause") before the end of the period of authorized stay, the employer is liable for the reasonable costs of transportation to the beneficiary's last place of foreign residence. There is no penalty specified for a failure to pay the costs, but a complaint by the beneficiary that costs were not paid may be considered by the USCIS in adjudicating future visa petitions filed by the employer. The employer is not obligated to pay return transportation costs for any dependent family members present in the United States.

#### **Numerical Limitations**

When the H-1B category was enacted in 1990, Congress established that a maximum of 65,000 H-1B visas may be issued to foreign workers during each fiscal year (October to September). H-1B workers

employed by a college or university or governmental or nonprofit research organization are exempt from the annual limits. That number proved adequate to meet demand until fiscal year (“FY”) 1997, when the cap was reached in late August, some six weeks before the end of the fiscal year. In 1998, the cap was reached in June, prompting Congress to increase the annual cap to no more than 115,000 new admissions in FY 1999 and 2000, 107,500 in FY 2001, and 65,000 in FY 2002 and thereafter. Despite the increase in the numbers of available new visas, the FY 1999 cap was reached in April 1999, and in 2000, the cap was reached in March 2000. In response, Congress once again increased the number of available H-1B visas to 195,000 for three fiscal years, beginning in FY 2001. The cap reverted to 65,000 in FY 2004, and that cap was reached in February 2004, less than six months into the fiscal year.

When the FY 2005 cap was reached on October 1, 2004, the first day of the fiscal year, Congress added 20,000 numbers for H-1B workers with advanced degrees from U.S. universities. Once again, demand exceeded supply, and the cap for FY 2006 was reached on August 10, 2005, nearly two months before the start of the fiscal year. The message for those employers that may have a need for H-1B workers is to identify your needs and file the necessary documentation as early as possible. The petition for an H-1B worker may be filed no earlier than six months in advance of the requested starting date. Accordingly, employers should plan to file starting April 1 for workers who will be commencing employment on October 1.

#### **Limit on Period of Authorized H-1B Admission**

Generally, an H-1B nonimmigrant is limited to a six-year maximum period of stay. If a labor certification application or immigrant visa petition has been filed on behalf of the foreign national and remains pending for at least 365 days, the foreign national may be eligible for an extension of H-1B status beyond the six-year period. The foreign national’s H-1B status may continue to be extended in one-year increments until his or her green card application has been adjudicated (approved or denied). In addition, the beneficiary of an approved immigrant visa petition who would be eligible to apply for a green card but for the effect of the per country ceiling on immigrant visas, described later in the employment-based immigration discussion, may have his or her H-1B status extended beyond the six-year limit.

## **TEMPORARY NONAGRICULTURAL WORKERS (H-2B)**

### **In General**

The H-2B visa category allows U.S. employers with peak load, seasonal, intermittent, or one-time needs to augment their existing labor force with temporary workers. The job must be for less than one year and the employer must demonstrate that there are no qualified and willing U.S. workers available to fill the position(s). According to the USCIS, H-2B workers typically fill temporary labor needs in health care, landscaping, lumber, manufacturing, food service/processing, and resort/hospitality services. There is a 66,000 per year limit on the number of foreign workers who may receive H-2B status during each fiscal year. The process for obtaining H-2B labor certification is similar to, but less extensive and time consuming than, permanent labor certification (a process described in further detail later in this monograph).

### **Labor Certification**

The certification request is made by the employer to the State Workforce Agency (“SWA”) in the state of proposed employment using Form ETA 750. Multiple openings of the same job and rate of pay may be on the same application. The SWA instructs the employer on recruitment requirements, the appropriateness of the wages and working conditions offered and refers qualified candidates to the employer for interviews. The employer prepares a recruitment report summarizing the results, including the names and addresses of applicants and lawful reasons for not hiring them. Following evaluation by the SWA, the ETA-750 is forwarded to the appropriate regional DOL office for a determination. The DOL regional certifying officer will grant certification if the officer finds that qualified persons in the United States are not available and that the terms of employment will not adversely affect the wages and working conditions of workers in the United States similarly employed. Because the DOL certification is only advisory to the USCIS, there is no appeal from a determination by the DOL that a certification cannot be issued. If the employer believes the certification was wrongly denied, it must submit counter-vailing evidence to the USCIS with its visa petition.

To allow time for processing delays and correction of application errors, the DOL recommends that the employer file for H-2B labor

certification at least 60 days, but not more than 120 days, before the worker is needed. The DOL certification will be valid for up to one year.

### **Visa Petition and Application**

The approved labor certification is submitted by the employer to the USCIS along with a visa petition, Form I-129, and the appropriate fee. Unlike the H-1B petition, multiple beneficiaries may be included in an H-2B petition and, in cases involving emergent circumstances, the requirement to name the beneficiaries in the petition may be waived. The USCIS will evaluate the petition to determine whether the qualifying criteria have been met and, if satisfied, will approve the petition with validity for up to one year. The USCIS approval notice and a copy of the labor certification are submitted, along with a nonimmigrant visa application (Form DS-156) to a U.S. embassy or consulate outside the United States by the H-2B worker.

### **Period of Admission**

The H-2B worker may be admitted for a period of stay up to the validity period of the visa petition. A worker who has spent three years in the United States in H-2B status may not extend or change status or be readmitted until he or she has been physically present outside the United States for the immediate preceding 6 months.

### **Return Transportation Costs**

As with the H-1B nonimmigrant described above, if an H-2B nonimmigrant is dismissed for any reason (including “for cause”) before the end of the period of authorized stay, the employer is liable for the reasonable costs of transportation to the beneficiary’s last place of foreign residence. There is no penalty specified for a failure to pay the costs, but a complaint by the beneficiary that costs were not paid may be considered by the USCIS in adjudicating future visa petitions filed by the employer.

## **INTRACOMPANY TRANSFEREE (L-1)**

### **In General**

L-1 status is available for individuals who have worked abroad for one continuous year within the preceding three years in an executive, managerial, or specialized knowledge capacity and who are being transferred temporarily to the United States to work in a similar capacity for a qualifying, related business entity (parent, branch, affiliate, or subsidiary) or for the same business. An employee transferred to the United States as a manager or executive is eligible for a seven-year authorized period of stay, and an employee transferred in a specialized knowledge capacity is eligible for a five-year authorized period of stay. The concept of “dual intent” applies to the L-1 classification, meaning that an employee may maintain valid L-1 nonimmigrant status while at the same time pursuing permanent resident status. Three basic questions must be answered in assessing whether an individual qualifies as an intracompany transferee: (1) whether there is a qualifying relationship between the foreign employer and the prospective U.S. employer; (2) whether the individual has worked abroad for the requisite period of time in a position that was managerial, executive, or involved specialized knowledge; and (3) whether the individual will serve in an executive, managerial, or specialized knowledge capacity in the United States. Spouses and unmarried children under age 21 can accompany the principal in L-2 visa status. Children and spouses in L-2 status may attend school, and spouses in L-2 visa status may apply for employment authorization.

### **Organizational Requirements**

The intracompany transferee category is restricted to legal entities that actively conduct business in the United States and abroad. The employer that files the L-1 visa petition with the USCIS may be a “United States or foreign firm, corporation or other legal entity.” Such entities may include partnerships, sole proprietorships, and nonprofit entities such as organized religious, charitable, and service organizations. The petitioning employer must continue to do business as an employer in the United States and at least one other country, either directly or through a parent, branch, affiliate, or subsidiary during the period of the beneficiary’s stay. USCIS regulations define “doing business” as the regular, systematic, and continuous provision of goods and/or services. It does not include the mere presence of an agent or office of the qualifying organization in the United States or abroad.

The petitioning entity must be either a branch or the parent, subsidiary, or affiliate of the foreign organization that employed the prospective transferee for at least one of the three years preceding the date of her or his application for admission into the United States. The key factors for establishing a qualifying relationship are ownership and control. "Ownership" refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control them. "Control" means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity.

A *parent* is defined as a firm, corporation, or other legal entity that has subsidiaries. A *branch* is an operating division or office of the same organization housed in a different location. A *subsidiary* is 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; owns, directly or indirectly, half of the entity and controls the entity; 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. An *affiliate* is: (1) one of two subsidiaries, both of which are owned and controlled by the same parent or individual; (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; or (3) a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization.

### **Individual Qualifications**

The beneficiary must have worked for an L-1 qualifying entity abroad for at least one of the three years preceding the date of his or her application for admission into the United States, and the beneficiary must be seeking to enter the United States temporarily to render services to a qualifying L-1 entity. Brief trips to the United States for business or pleasure are not deemed to interrupt the one year of continuous employment abroad, but any period spent in the United States cannot be counted toward the fulfillment of this L-1 visa requirement. The USCIS has taken the position that time spent in the United States in excess of three years in another visa status (e.g., as an

E-1 treaty trader, E-2 treaty investor, or H-1B specialty worker) does not interrupt the one-of-the-past-three-years requirement, as long as the foreign entity that employed the individual overseas and the current U.S. employer have a qualifying L-1 relationship.

The petitioner must also prove that the qualifying foreign employment was, and the prospective employment in the United States will be, in positions that are managerial, executive, or involve specialized knowledge. The intracompany transferee category is divided into two subcategories: the L-1A category for managers and executives, and the L-1B category for persons with specialized knowledge.

#### **L-1A. Manager or Executive**

“Managerial capacity” means an assignment in which an individual primarily: (1) manages the organization or a 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 and fire, or recommend those, as well as other personnel actions if the individual directly supervises one or more supervisory, professional, or managerial employees; or, if the individual directly supervises no such employees, functions at a senior level within the organizational hierarchy or with respect to the functions managed; and (4) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of carrying out supervisory duties. Supervisors who plan, schedule, and supervise the day-to-day work of non-professional employees typically do not qualify for managerial capacity, even if they carry the title “manager.” An exception is made for supervisors of employees who qualify as “professional” pursuant to the H-1B temporary specialty worker visa regulations. The CIS also recognizes the concept of a “functional” manager, where an employee manages an essential function of an organization without having direct supervisory authority over other personnel.

“Executive capacity” is defined to be an assignment in which the employee primarily: (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, the board of directors, or stockholders of the organization.

In recognition of the problems encountered by petitioners in proving the need for a manager or executive for a start-up office, the USCIS permits individuals who are coming to set up a new office in the United States to enter on a one-year L-1A visa, provided there is evidence to establish that the organization will, within one year, support a managerial or executive position. The USCIS will consider the total amount of investment, the intended personnel structure, and the product or service to be provided. The USCIS recognizes that a manager or executive who opens a new business or office will be actively engaged in day-to-day operations during the initial phases of the business. In addition to carrying out routine day-to-day operations, the manager or executive must have the authority and intention to hire staff, manage contracts, and to have discretion in making decisions about the goals and management of the organization.

### **L-1B. Specialized Knowledge**

An employee serves in a specialized knowledge capacity if he or she possesses specialized knowledge of the petitioning organization's products, services, research, equipment, techniques, management, or other interests and its application in international markets, or an individual's advanced level of knowledge of, or expertise in, the organization's processes and procedures. Knowledge is "specialized" only in the sense that it is not ordinary. The term does not apply to persons who have only general knowledge or expertise that enables them merely to produce a product or provide a service. The USCIS has instructed its adjudicators that specialized knowledge should be found where the individual: (1) possesses knowledge that is valuable to the employer's competitiveness in the marketplace; (2) is uniquely qualified to contribute to the U.S. employer's knowledge of foreign operating conditions; (3) has been a key employee abroad and has been given significant assignments that have enhanced the employer's productivity, competitiveness, image, or financial position; and (4) possesses knowledge that can only be gained through extensive prior experience with that employer.

### **Petitions for Individual L-1 Transferees**

Except for blanket L visa petitions and Canadian beneficiaries who are entitled to process L-1 petitions at the U.S.-Canada border, all petitions seeking to classify individuals as intracompany transferees must be filed with the USCIS Service Center that has jurisdiction over the area where the individual beneficiary will be employed. If the petition is approved, the USCIS will issue a Form I-797, approval notice. The USCIS will cable the approval notice to the designated U.S. consular post overseas or, if the beneficiary is in the United States and has requested a change of nonimmigrant status, the USCIS notice will authorize the change. The beneficiary can obtain the new L-1 visa stamp in her or his passport by applying through a U.S. consulate or embassy using Form DS-156.

New office petitions must be accompanied by evidence that the entity has secured sufficient physical premises to house the new office. A copy of a deed, commercial lease, or commercial sublease for at least one year's duration is generally adequate to satisfy the premises requirement. A lease or sublease of shorter duration may be presented if there is also evidence that the office will be moving to more permanent quarters within the foreseeable future.

At the end of the one-year period permitted for the establishment of a new office, the petitioner must file a Form I-129 petition to extend the L-1 visa status of the individual transferee(s). The petition must be accompanied by evidence that the U.S. and foreign entities are still qualifying organizations, and that the U.S. entity has been doing business for the previous year. The petitioner must submit evidence of the financial status of its U.S. operations. The petitioner must also describe the duties that the beneficiary performed in the United States during the preceding year, and the duties that he or she will perform during the period of the extended petition. A statement describing the staffing of the new operation, including the number of employees and types of positions held, must be included. If the beneficiary serves as a manager or executive, this statement must also include evidence of wages paid to the employees.

### **Special Rules for Canadian Citizens**

Canadian citizens are not required to obtain a visa before seeking admission to the United States. They may proceed directly to a preclearance/preflight inspection station in Canada or a Class A port of entry along the U.S.-Canada land border and file the L-1 petition with the CBP there in conjunction with the application for admission.

Alternatively, Canadians may follow the standard procedure by filing an L-1 petition with the USCIS Service Center.

### **Blanket L Visa Petitions**

USCIS regulations permit the approval of a blanket L-1 petition under certain circumstances. The petitioner must have an office in the United States that has been doing business for one year or more and three or more domestic and foreign branches, subsidiaries, or affiliates. Each entity named in the petition must be engaged in commercial trade or services. Nonprofit organizations may file individual L visa petitions, but they cannot use the L blanket process. Finally, the petitioner, together with the other qualifying organizations, must satisfy one of the following criteria: (1) have received approvals for at least 10 L managers, executives, or specialized knowledge professionals during the previous 12 months; (2) have U.S. subsidiaries or affiliates with combined annual sales of at least \$25 million; or (3) have a U.S. workforce of at least 1,000 employees.

The L blanket specialized knowledge category is restricted to “professionals” as that term is defined under the H-1B specialty occupation regulations. Skilled and unskilled workers who do not satisfy these criteria must be the beneficiary of an individual petition.

To obtain approval for an L blanket program, the petitioning entity must first file a Form I-129 petition and L supplement with the USCIS Service Center that has jurisdiction over the petitioner’s main U.S. office. Once the blanket petition is approved, prospective transferees may submit a visa application directly to the U.S. consulate for the issuance of an L-1 visa. Consular officers are directed to approve only clearly approvable cases. Others will be required to submit an individual petition to the USCIS for approval.

## **ALIENS OF EXTRAORDINARY ABILITY (O-1)**

### **In General**

The O-1 visa classification applies to individual aliens who can demonstrate extraordinary ability in the sciences, arts, education, or athletics. In addition, certain aliens accompanying the principal beneficiary and family members are eligible for O-1 status. The alien must be coming to the United States to work in his or her area of extraordinary ability, and an alien admitted to the United States in O-1

status can extend his or her status indefinitely, provided that the alien continues to perform in the field of achievement. An alien of extraordinary ability does not have to be performing in an O-1 level position in the United States as long as the position is in the field of achievement. If the position in the United States meets the O-1 standards, it will be considered as persuasive evidence by the USCIS in adjudicating the petition.

### **Visa Petition**

By law, the USCIS must adjudicate O-1 petitions based on one of three different standards of review. The most rigorous standard of review applies to O-1 petitions filed on behalf of aliens in the sciences, education, business, and athletics. The nature of the individual alien's achievements will determine whether he or she is adjudicated as an alien of extraordinary achievement. Absent evidence of national or international acclaim, extraordinary ability is becoming increasingly more difficult to demonstrate.

An O-1 petition will only be approved by the USCIS after the employer consults with a peer group, labor organization, or management organization regarding the nature of the work to be done and the alien's qualifications. Generally, the appropriate peer group will provide a written advisory opinion.

### **Evidentiary Criteria**

An alien of extraordinary ability in the fields of science, education, business, or athletics must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of:

Receipt of a major, internationally recognized award, such as the Nobel Prize; or

At least three of the following forms of documentation:

- Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

- Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
- Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;
- Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;
- Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;
- Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media;
- Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation; or
- Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

#### **ATHLETES AND ENTERTAINERS (P)**

##### **In General**

The P category is available for those artists, entertainers, and athletes who do not qualify under the O-1 extraordinary ability standard. P-1 classification applies to an alien who is coming temporarily to the United States:

- (1) To perform at a specific athletic competition as an athlete, individually or as part of a group or team, at an internationally recognized level of performance, or
- (2) To perform with, or as an integral and essential part of the performance of, an entertainment group that has been recognized internationally as being outstanding in the discipline for a sustained and substantial period of time, and who has had a sustained and substantial relationship with the group (ordinarily

for at least one year) and provides functions integral to the performance of the group.

P-2 classification applies to an alien who is coming temporarily to the United States to perform as an artist or entertainer, individually or as part of a group, or to perform as an integral part of the performance of such a group, and who seeks to perform under a reciprocal exchange program between an organization or organizations in the United States and an organization or organizations in one or more foreign countries, and which provides for the temporary exchange of artists and entertainers, or groups of artists and entertainers.

P-3 classification applies to an alien artist or entertainer who is coming temporarily to the United States, either individually or as part of a group, or as an integral part of the performance of the group, to perform, teach, or coach under a commercial or noncommercial program that is culturally unique.

### **Visa Petition**

A P-1 petition for an athlete or entertainment group must be filed by a U.S. employer, a U.S.-sponsoring organization, a U.S. agent, or a foreign employer through a U.S. agent. A foreign employer is defined in USCIS regulations as any employer who is not amenable to service of process in the United States. Foreign employers seeking to employ a P-1 alien may not directly petition for the alien but must use a U.S. agent. A P-2 petition for an artist or entertainer in a reciprocal exchange program must be filed by the U.S. labor organization that negotiated the reciprocal exchange agreement, the sponsoring organization, or a U.S. employer. A P-3 petition for an artist or entertainer in a culturally unique program is filed by the sponsoring organization or a U.S. employer. Essential support personnel may be accorded the same visa classification as the principal alien, but must file a separate petition.

A P-1 petition will only be approved by the USCIS after the employer consults with a labor organization having expertise in the alien's field of endeavor. Evidence of such consultation typically takes the form of a written advisory opinion from the labor organization.

## **PROFESSIONALS UNDER NAFTA (TN)**

### **In General**

The North American Free Trade Agreement enacted in November 1993, and implemented on January 1, 1994, provides for expedited admission of business persons and professionals from Canada and Mexico. Under the NAFTA, a designated group of professionals may apply for temporary admission to the United States under the TN category. TN professionals can either work directly for U.S. employers; or, if self-employed, may provide services to a U.S. employer under a services contract; or, may provide services on behalf of their Canadian employer under contract to a U.S. company (employees of Mexican companies are not eligible for TN status). Dependent family members are admitted to the United States in “TD” status.

### **Eligibility**

The applicant for TN status must possess nonimmigrant intent, that is, the applicant must have a residence in Canada or Mexico that he or she has no intention of abandoning. The designated professional positions and minimum requirements are listed in USCIS regulations as follows:

- **Accountant**—Baccalaureate or Licenciatura Degree; or C.P.A., C.A., C.G.A., or C.M.A.
- **Architect**—Baccalaureate or Licenciatura Degree; or state/provincial license.
- **Computer Systems Analyst**—Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate and three years’ experience.
- **Disaster Relief Insurance Claims Adjuster** (claims adjuster employed by an insurance company located in the territory of a Party, or an independent claims adjuster)—Baccalaureate or Licenciatura Degree and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims; or three years’ experience in claims adjustment and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims.
- **Economist**—Baccalaureate or Licenciatura Degree.
- **Engineer**—Baccalaureate or Licenciatura Degree; or state/provincial license.
- **Forester**—Baccalaureate or Licenciatura Degree; or state/provincial license.

- **Graphic Designer**—Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate and three years' experience.
- **Hotel Manager**—Baccalaureate or Licenciatura Degree in hotel/restaurant management; or Post-Secondary Diploma or Post-Secondary Certificate in hotel/restaurant management and three years' experience in hotel/restaurant management.
- **Industrial Designer**—Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years' experience.
- **Interior Designer**—Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years' experience.
- **Land Surveyor**—Baccalaureate or Licenciatura Degree; or state/provincial/federal license.
- **Landscape Architect**—Baccalaureate or Licenciatura Degree.
- **Lawyer** (including Notary in the province of Quebec)—L.L.B., J.D., L.L.L., B.C.L., or Licenciatura degree (five years); or membership in a state/provincial bar.
- **Librarian**—M.L.S., or B.L.S. (for which another Baccalaureate or Licenciatura Degree was a prerequisite).
- **Management Consultant**—Baccalaureate or Licenciatura Degree; or equivalent professional experience as established by statement or professional credential attesting to five years' experience as a management consultant, or five years' experience in a field of specialty related to the consulting agreement.
- **Mathematician** (including Statistician)—Baccalaureate or Licenciatura Degree.
- **Range Manager/Range Conservationist**—Baccalaureate or Licenciatura Degree.
- **Research Assistant** (working in a post-secondary educational institution)—Baccalaureate or Licenciatura Degree.
- **Scientific Technician/Technologist**—Possession of (a) theoretical knowledge of any of the following disciplines: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology, or physics; and (b) the ability to solve practical problems in any of those disciplines, or the ability to apply principles of any of those disciplines to basic or applied research.
- **Social Worker**—Baccalaureate or Licenciatura Degree.

- **Silviculturist** (including Forestry Specialist)—Baccalaureate or Licenciatura Degree.
- **Technical Publications Writer**—Baccalaureate or Licenciatura Degree, or Post-Secondary Diploma or Post-Secondary Certificate, and three years' experience.
- **Urban Planner** (including Geographer)—Baccalaureate or Licenciatura Degree.
- **Vocational Counselor**—Baccalaureate or Licenciatura Degree.

### *Medical/Allied Professionals*

- **Dentist**—D.D.S., D.M.D., Doctor en Odontología or Doctor en Cirugía Dental or state/provincial license.
- **Dietitian**—Baccalaureate or Licenciatura Degree; or state/provincial license.
- **Medical Laboratory Technologist** (Canada)/Medical Technologist (Mexico and the United States)—Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years' experience.
- **Nutritionist**—Baccalaureate or Licenciatura Degree.
- **Occupational Therapist**—Baccalaureate or Licenciatura Degree; or state/provincial license.
- **Pharmacist**—Baccalaureate or Licenciatura Degree; or state/provincial license.
- **Physician** (teaching or research only)—M.D. Doctor en Medicina; or state/provincial license.
- **Physiotherapist/Physical Therapist**—Baccalaureate or Licenciatura Degree; or state/provincial license.
- **Psychologist**—state/provincial license; or Licenciatura Degree.
- **Recreational Therapist**—Baccalaureate or Licenciatura Degree.
- **Registered Nurse**—state/provincial license or Licenciatura Degree.
- **Veterinarian**—D.V.M., D.M.V., or Doctor en Veterinaria; or state/provincial license.

### *Scientist*

- **Agriculturist** (including Agronomist)—Baccalaureate or Licenciatura Degree.
- **Animal Breeder**—Baccalaureate or Licenciatura Degree.

- **Animal Scientist**—Baccalaureate or Licenciatura Degree.
- **Apiculturist**—Baccalaureate or Licenciatura Degree.
- **Astronomer**—Baccalaureate or Licenciatura Degree.
- **Biochemist**—Baccalaureate or Licenciatura Degree.
- **Biologist**—Baccalaureate or Licenciatura Degree.
- **Chemist**—Baccalaureate or Licenciatura Degree.
- **Dairy Scientist**—Baccalaureate or Licenciatura Degree.
- **Entomologist**—Baccalaureate or Licenciatura Degree.
- **Epidemiologist**—Baccalaureate or Licenciatura Degree.
- **Geneticist**—Baccalaureate or Licenciatura Degree.
- **Geochemist**—Baccalaureate or Licenciatura Degree.
- **Geologist**—Baccalaureate or Licenciatura Degree.
- **Geophysicist** (including Oceanographer in Mexico and the United States)—Baccalaureate or Licenciatura Degree.
- **Horticulturist**—Baccalaureate or Licenciatura Degree.
- **Meteorologist**—Baccalaureate or Licenciatura Degree.
- **Pharmacologist**—Baccalaureate or Licenciatura Degree.
- **Physicist** (including Oceanographer in Canada) Baccalaureate or Licenciatura Degree.
- **Plant Breeder**—Baccalaureate or Licenciatura Degree.
- **Poultry Scientist**—Baccalaureate or Licenciatura Degree.
- **Soil Scientist**—Baccalaureate or Licenciatura Degree.
- **Zoologist**—Baccalaureate or Licenciatura Degree.

### *Teacher*

- **College**—Baccalaureate or Licenciatura Degree.
- **Seminary**—Baccalaureate or Licenciatura Degree.
- **University**—Baccalaureate or Licenciatura Degree.

### **Application**

Canadian citizens, who are exempt from the requirement for a visa, may make application for TN status at the time of admission at a U.S. port of entry or U.S. preinspection facility in Canada, along with the required application fee. For Mexican professionals, the TN visa application can be made directly to the U.S. Embassy or consulate, with the required application fee. The application must be accompanied by a letter from the U.S. employer or company receiving the

professional services and evidence of any academic, licensure, and experiential requisites for the designated profession.

### **Period of Admission**

The TN professional is admitted for a one-year period, which may be extended. There is no limit on the number of extensions. One may extend his or her stay in TN status by having the employer file an extension petition with the Nebraska Service Center or simply by traveling to Canada or Mexico and then seeking readmission for a new one-year period of stay.

## **EMPLOYMENT-BASED IMMIGRATION**

In general, achieving permanent residence (“green card” status) in the United States depends on the sponsorship of a close family member or a prospective employer. Family-sponsored immigration is beyond the scope of this monograph; as is immigration based on refugee protection, investment in a new commercial enterprise in the United States, and immigration through the diversity lottery program. Instead, the purpose of this section is to describe the law and procedures for immigration to the United States in the first three employment-based (“EB”) immigrant visa categories: (EB-1) priority workers; (EB-2) professionals holding advanced degrees or individuals of exceptional ability in the sciences, arts, or business; and (EB-3) skilled workers, professionals, and other workers.

As the green card process is prospective in nature, the foreign national need not be physically present in the United States and, in the employment-based context, the foreign national need not be currently employed in the position that is the subject of the green card application. However, in the vast majority of cases, employees already are working for the petitioning employer. The petitioning employer must possess the intent to employ the foreign national in the position, and the foreign national must possess the intent to work in the position once he or she is granted lawful permanent resident status, a process that can take three to four years depending on the legal basis for sponsorship and the current processing backlogs.

### ***The Labor Certification Requirement***

Most employment-based immigrant petitions are based on an underlying certification by the U.S. Department of Labor (“DOL”) that there are no qualified, available, able and willing U.S. workers for the position. A U.S. employer may seek labor certification only for permanent, full-time positions located in the United States. On December 27, 2004, the DOL issued a final rule implementing a new system for filing and processing labor certification applications filed on or after March 28, 2005, for the permanent employment of foreign nationals in the United States (the “PERM” rule)

To obtain an approved labor certification application for a position, the employer must undergo a good faith recruitment effort that includes advertising in local newspapers and an online job posting. Applications by U.S. workers must be assessed using lawful, objective job-related criteria (e.g., the ability to meet the minimum requirements for the position as set forth in the advertisement). The employer must conduct the recruitment and may disqualify applicants on the basis of a review of the resumes and by conducting interviews, as necessary.

A labor certification application may be used to sponsor only one employee for permanent resident status. While the sponsored employee is included in the labor certification application, an approved application certifies that there are no qualified and available U.S. workers for the position. Therefore, if circumstances change such that the employer no longer wishes to pursue permanent resident status for that particular employee, the employer may use the labor certification application to sponsor another foreign national employee, so long as the employee met the minimum requirements for the position as set forth in the advertisement at the time the application was filed.

### ***Immigrant Visa Petitions***

The INA allocates approximately 120,000 immigrant visas per year to the first three employment-based categories. Within the categories, no more than seven percent (7%) may be provided to nationals of a single country. For purposes of this ceiling, the visa numbers are charged against the visa applicant’s country of birth, except where certain limited “cross-chargeability” exceptions allow the number to be charged to the country of birth of one’s parent or spouse. With the exception of summer of 2001, from October 1, 1991, when the current allocation provisions became effective, until October 2005, the visa numbers available for allocation in the three preference categories

were adequate to meet demand for immigrant visas. In October 2005, however, the EB-3 category was oversubscribed for nationals of all countries, and EB-2 and EB-1 were oversubscribed for nationals of India and China. This oversubscription was caused by the demand for visa numbers in these categories resulting from the clearance of visa and adjustment of status backlogs by the DOS and the USCIS, respectively. As a result, the DOS has had to establish “cutoff” dates for the oversubscribed categories. The cutoff date for an oversubscribed category is the priority date of the first applicant who could not be reached within the numerical limits. Only visa applicants who have a priority date earlier than the cutoff date may be allotted a number.<sup>1</sup>

### **FIRST PREFERENCE (EB-1 PRIORITY WORKERS)**

The INA allocates 28.6 percent of the total number of employment-based immigrant visas per year to priority workers in three sub-categories, which together comprise the EB-1 classification. These categories include the following:

#### ***Workers of Extraordinary Ability***

##### **In General**

Workers of extraordinary ability are defined by statute as those who 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. Approval of an EB-1 extraordinary ability visa petition requires a showing that the extraordinary worker will “substantially benefit prospectively the United States.”

##### **Basic Requirements**

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<sup>1</sup> The availability of immigrant visa numbers is summarized each month in the *Visa Bulletin*, published by the DOS, at <[http://travel.state.gov/visa/frvi/bulletin/bulletin\\_1360.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html)>.

Neither a job offer nor a labor certification is required for classifying an individual as an EB-1 worker of extraordinary ability. In addition, although an employer may petition for an EB-1 worker of extraordinary ability, the alien can petition for himself or herself. Whether the petitioner is an employer or the alien, the petition must include evidence that the individual will continue to work in the United States in the area of his or her expertise, typically in the form of: letters from prospective employers; evidence of prearranged commitments for employment; or a description of how the alien will continue to work in the field in the United States.

### **Criteria to Qualify for Extraordinary Ability Status**

As with the O-1 nonimmigrant, the petitioner must show that the beneficiary's accomplishments have been recognized in the field of endeavor, and that the individual has received acclaim for those accomplishments. An alien of extraordinary ability in the fields of science, education, business, or athletics must demonstrate sustained national or inter-national acclaim and recognition for achievements in the field of expertise by providing evidence of:

Receipt of a major, internationally recognized award, such as the Nobel Prize; or

At least three of the following forms of documentation:

- Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
- Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
- Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;
- Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;

- Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;
- Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media;
- Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation; or
- Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

## ***Outstanding Professors and Researchers***

### **Basic Requirements**

To qualify (1) as an outstanding professor or researcher, the foreign national must: be internationally recognized as outstanding in a specific academic field and (2) have a minimum of three years of experience in teaching and/or research in that field. Unlike aliens of extraordinary ability, the outstanding professor or researcher must have a job offer for a permanent position. A permanent position is defined as tenured, tenure-track, or for a term of indefinite or unlimited duration with the expectation of continued employment, unless there is good cause for termination. The employer must be a university or educational institution or a company that employs at least three full-time researchers. A nonacademic employer also must document accomplishments in an academic field. The outstanding professor or researcher must have at least three years' experience. However, the requisite three years can include pre-degree research experience gained while working on the advanced degree, so long as the alien's work is recognized as outstanding.

### **Criteria to Show International Recognition for Outstanding Achievement**

The petition for outstanding professor or researcher must satisfy at least two of the following evidentiary criteria:

- Receipt of major prizes or awards in the field;

- Membership in associations that require outstanding achievements;
- Published material in professional journals written by others about the alien's work;
- Participation as a judge of the work of others in the same or an alien field;
- Original scientific or scholarly research contributions to the field; or
- Authorship of scholarly books or articles in scholarly journals with international circulation in the field.

### ***Multinational Executives and Managers***

#### **In General**

To qualify as a multinational executive or manager, an individual must, within the three years preceding the time of his or her admission to the U.S. in nonimmigrant status, have been employed abroad continuously for one year by a parent, branch affiliate, or subsidiary of the U.S. employer as a manager or an executive. Three basic questions must be answered in assessing whether an individual qualifies as a multinational executive or manager: (1) whether there is a qualifying relationship between the foreign employer and the prospective U.S. employer; (2) whether the individual has worked abroad for the requisite period of time in a position that was executive or managerial; and (3) whether the individual will serve in an executive or managerial capacity in the United States.

#### **Organizational Requirements**

The multinational executive or manager category is restricted to legal entities that actively conduct business in the United States and abroad. The employer that files the immigrant visa petition with the USCIS may be a "United States or foreign firm, corporation or other legal entity." Such entities may include partnerships, sole proprietorships, and nonprofit entities such as organized religious, charitable, and service organizations.

The petitioning entity must be either a branch or the parent, subsidiary, or affiliate of the foreign organization that employed the prospective transferee for at least one of the three years preceding the manager's or executive's admission into the United States as a

nonimmigrant. The key factors for establishing a qualifying relationship are ownership and control. “Ownership” refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control them. “Control” means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity.

A *parent* is defined as a firm, corporation, or other legal entity that has subsidiaries. A *branch* is an operating division or office of the same organization housed in a different location. A *subsidiary* is 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; owns, directly or indirectly, half of the entity and controls the entity; 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. An *affiliate* is: (1) one of two subsidiaries, both of which are owned and controlled by the same parent or individual; (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; or (3) a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization.

### **Individual Qualifications**

The beneficiary must have worked for a qualifying entity abroad for at least one of the three years preceding the date of his or her admission into the United States as a nonimmigrant. The petitioner must also prove that the qualifying foreign employment was, and the prospective employment in the United States will be, in positions that are executive or managerial.

*Executive capacity* is defined to be an assignment in which the employee primarily: (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, the board of directors, or stockholders of the organization.

*Managerial capacity* means an assignment in which an individual primarily: (1) manages the organization or a 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 and fire, or recommend those, as well as other personnel actions if the individual directly supervises one or more supervisory, professional, or managerial employees; or, if the individual directly supervises no such employees, functions at a senior level within the organizational hierarchy or with respect to the functions managed; and (4) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of carrying out supervisory duties. Supervisors who plan, schedule, and supervise the day-to-day work of nonprofessional employees typically do not qualify for managerial capacity, even if they use the title “manager.” An exception is made for supervisors of employees who qualify as “professional” pursuant to the H-1B temporary specialty worker visa regulations. Current law also recognizes the concept of a “functional manager” who manages an essential function, but no staff.

**SECOND PREFERENCE (EB-2 MEMBERS OF THE  
PROFESSIONS HOLDING ADVANCED DEGREES OR  
INDIVIDUALS OF EXCEPTIONAL ABILITY)**

**In General**

Twenty-eight percent of the total number of employment-based immigrant visas available each year (approximately 40,000) are allocated to second-preference workers. There are two subcategories within the EB-2 classification: (1) workers who are members of the professions holding advanced degrees or their equivalent; and (2) aliens of exceptional ability in the sciences, arts, or business. Generally, an approved labor certification application must be obtained for the position by the petitioning employer before a second-preference petition may be filed on behalf of an alien. In certain circumstances, this requirement may be waived through a national interest waiver.

## *Aliens of Exceptional Ability*

### **Basic Requirements**

To qualify for the second-preference classification as an alien of exceptional ability, the alien must possess a degree of expertise above that ordinarily encountered in the field.

### **Criteria to Qualify as an Alien of Exceptional Ability**

The regulations require that at least three of the following six criteria be presented to establish exceptional ability:

- an official academic record showing a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional liability; evidence demonstrating that the alien possesses at least 10 years of full-time experience in the occupation, documented by letters from current or past employers;
- a license to practice the profession or certification for the particular profession or occupation;
- evidence that the alien has commanded a salary or other remuneration for services demonstrating exceptional ability; membership in professional associations; or
- recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

### **Waiver of the Labor Certification Requirement**

Generally, a U.S. employer must sponsor the immigrant petition on behalf of the alien unless he or she is seeking an exemption to the job offer requirement, in which case the alien may file the petition. An exemption will only be granted if the alien demonstrates that he or she will serve the national interest. In such case, the labor certification application requirement will also be waived. The Administrative Appeals Office has provided the following three-prong test to determine whether the waiver of a job offer is in the national interest: (1) the area of intended employment must be one of intrinsic merit; (2) the proposed benefit must be national in scope; and (3) the petition must persuasively demonstrate that the national interest of the United

States would be adversely affected if a labor certification were required for the beneficiary.<sup>2</sup>

### ***Advanced-Degree Professionals***

#### **Basic Requirements**

Any U.S. employer can file a petition in this category on behalf of an alien who is a member of the professions holding an advanced degree or higher. "Profession" is defined by the applicable regulations to mean any occupation for which a U.S. baccalaureate degree or foreign degree equivalent is the minimum requirement for entry into the occupation. However, to qualify for the second-preference classification, the alien must possess either any degree above a baccalaureate or a bachelor's degree plus at least five years of progressive experience in the field.

The petitioner must file USCIS Form I-140, Immigrant Petition for Alien Worker, on behalf of the alien at the USCIS Service Center having jurisdiction over the place of employment. As a general rule, the petition must include a certified individual labor certification from the DOL, with evidence that the individual meets the requirements for the job set forth in the labor certification.

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<sup>2</sup> See *Matter of New York State Dep't of Transportation*, 22 I&N Dec. 215 (Comm. 1998).

### **Criteria to Qualify as an Advanced-Degree Professional Based on Progressive Experience**

For an alien to qualify as an advanced-degree professional based on a baccalaureate degree plus five years of progressive experience, the underlying labor certification application must expressly state that such an alternative combination of experience will be accepted by the employer. The alien must have gained the five years of experience after earning his or her baccalaureate degree and the experience must clearly demonstrate that the alien possesses increasing levels of responsibility and knowledge in the specialty.

### **THIRD PREFERENCE (EB-3 (BASIC) PROFESSIONALS, SKILLED WORKERS, AND OTHER WORKERS)**

#### **In General**

By statute, 28.6 percent of the total number of employment-based immigrant visas (approximately 40,000) per year are allocated to third-preference workers in three subcategories: (1) skilled workers holding positions that require a minimum of two years of training or experience; (2) professionals holding a baccalaureate degree or foreign degree equivalent; and (3) other (unskilled) workers, including those whose positions require less than two years of higher education, training, or experience. A job offer from a U.S. employer and an approved labor certification application are required for this preference classification.

### **EXPORT CONTROL REGULATIONS AND IMMIGRATION (“DEEMED EXPORT” RULE)**

Rules governing the “deemed export” of restricted technology require U.S. companies and federal agencies to treat access by a foreign national to controlled technology and software as an export to the foreign national’s home country, when the actual export of that same technology and software would require a license or other authorization if shipped to the foreign national’s home country. Failure to comply with these rules can cause the foreign national to become inadmissible or deportable and subject the company to monetary fines and the loss of export privileges. An individual who is not a U.S. citizen, lawful permanent resident, or “protected individual” (asylees

and refugees) is considered a foreign national for purposes of the deemed export rules.

### **In General**

An export is defined as the actual shipment or transmission of items subject to the Export Administration Regulations (“EAR”) out of the United States or the transfer of such items to a foreign national in the United States or working for foreign entities of U.S. companies. The deemed export rules apply to technology and software necessary to develop or produce, and not to finished products, because the information required to make products is considered far more valuable than the actual finished products. Generally, information that is publicly available is not subject to these rules.

### **Basic Requirements**

The deemed export rules require that companies obtain export licenses or take other steps before releasing controlled information to foreign nationals, a process that can take at least 90 days to complete. The release of controlled technology or information triggers the deemed export rules. Such a release can occur through virtually any means of communication to a foreign national, including when a company hires a foreign national, when a U.S. company works in collaboration with foreign nationals employed by other companies, or when a foreign national attends training sessions or visits a U.S. company.

## ABOUT THE AUTHORS

**PAUL W. VIRTUE** represents individual, business, and institutional clients in matters involving immigration law and policy. He has more than 18 years of experience in immigration law and related policy, regulatory, and legislative areas.

Prior to joining Hogan & Hartson, Mr. Virtue served as general counsel of the U.S. Immigration and Naturalization Service (“INS”). In this role, he was the agency’s chief legal officer providing legal and policy advice to the INS commissioner and senior officials, the Attorney General, the White House, and other federal agencies on a full range of issues under INS jurisdiction. He directed the regulatory implementation of the Nicaraguan and Central American Relief Act of 1997, represented the INS on the White House Interagency Working Group on Human Rights, and supervised a nationwide litigation staff of over 600 attorneys. For his efforts in directing the agency’s implementation of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Paul received an award from the U.S. Attorney General.

During his tenure with the INS, Mr. Virtue testified before the U.S. Congress on numerous occasions as an expert on immigration law and policy. He participated in drafting the immigration provisions of the North American Free Trade Agreement (“NAFTA”) and provided legal advice regarding their implementation. Paul represented the agency as media spokesperson on numerous complex legal and policy issues.

Mr. Virtue received his J.D. from West Virginia University College of Law 1982, and a B.S. from West Virginia University in 1978.

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