# An Overview of United States Immigration Law

*Compliments of*

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# Introduction

This article provides a synopsis of the types of visas available under United States immigration laws. It does not list every type of visa available such as diplomatic, agricultural or media visas. It is general in nature and provides basic information on the visas most commonly used by aliens entering the United States for business and personal reasons. It is not a substitute for proper legal counsel.

*Nonimmigrants* are aliens who enter the United States for a temporary period of time and are restricted to the activity consistent with their visa. The Immigration and Nationality Act establishes a presumption that all aliens, with few exceptions, are intending immigrants. Therefore, the burden is on the alien to convince the consular officer that his or her stay will be temporary in nature. The majority of this article provides information on some of the more popular nonimmigrant visas. A nonimmigrant visa can often be obtained much faster than an immigrant visa.

*Immigrants* are aliens who desire to reside in the United States permanently. Prior to commencing permanent residence, an alien must obtain an immigrant visa. In most cases, an alien obtains an immigrant visa (permanent residence or the "Green Card" as is it more commonly known) through either a family relationship or an offer of full-time employment. Information on obtaining permanent residence can be found in the sections entitled *Family Based Immigration* and *Employment Based Immigration*. Obtaining an immigrant visa usually takes much longer than obtaining a nonimmigrant visa. Strategically, it is often helpful to obtain a nonimmigrant visa first in order to allow lawful entry into the United States, then to obtain an immigrant visa while in nonimmigrant status in the U.S.


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# Temporary Visitors
## (B-1, B-2, Visa Waiver)

An alien (other than a student, one performing skilled or unskilled labor, or a representative of foreign information media) may be issued a visitor's visa for business (B-1) or pleasure (B-2). The B classification is not meant to be a catch all classification available to all who wish to come to the United States temporarily for whatever purpose.

The alien must have a residence in a foreign country which he has no intention of abandoning and must demonstrate his intent to depart at the expiration of the requested stay. The alien must also show the availability of sufficient financial resources since employment in this category is prohibited.

A B-1 visa for business may be issued for aliens involved in commercial transactions not involving gainful employment, e.g. negotiating contracts, litigation, consulting with clients or business associates. A B-2 visa for pleasure may be issued to tourists and persons accompanying B-1 aliens. "B" aliens are usually admitted for a period of 6 months, though the exact period of admission is at the discretion of the inspector at the port of entry. An additional extension of up to 6 months can often be obtained.

Citizens of certain countries applying for entry as a visitor for business (WB) or pleasure (WT) for a period not to exceed 90 days may be admitted to the United States without a visa under the Visa Waiver Program. The alien must be in possession of a return ticket and will be admitted for a period of 90 days which cannot be extended. Additionally, aliens admitted under this program cannot change their status to another nonimmigrant classification. Countries currently participating in the program include Andorra, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Italy, Ireland, Japan, Liechtenstein, Luxembourg, Monaco, Netherlands, New Zealand, Norway, San Marino, Spain, Sweden, Switzerland and the United Kingdom.


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# Treaty Traders
# (E-1)

Section 101(a)(15)(E)(i) of the Immigration and Nationality Act provides that aliens who are nationals of countries with which the United States maintains a treaty of friendship, commerce and navigation may be admitted to the United States to carry on substantial trade, including trade in services or technology, principally between the United States and the foreign state in which the alien is a national. A list of countries with qualifying treaties may be found in Appendix A at the end of this article.

In order to be eligible for an E-1 visa, there must be an exchange of qualifying commodities such as goods, monies, or services to constitute transactions considered to be trade. An exchange of a good or service for consideration must flow between the two treaty countries and must be traceable or identifiable. As the purpose of the treaties which give rise to E-1 status is to develop international commercial trade between the two countries which are parties to the agreement, development of a domestic market without an international exchange does not constitute trade in the E-1 visa context.

While the Act does not require a specific dollar amount of trade between the United States and treaty country, the amount of trade must nonetheless be "substantial". The definition of "substantial" applies to the overall volume of trade, not the size of each transaction. Thus, numerous small transactions are generally sufficient.

Unlike a Treaty Investor (E-2) visa, no minimum investment or showing of other assets is required. Even when the income derived from the trade may only be sufficient to support the alien and his family, it is still considered to be substantial under the Act. However, it is important to understand that the term "substantial" is not defined in the Immigration and Nationality Act and that its application will vary from consular officer to consular officer within a general frame.

Finally, over fifty percent (50%) of the total volume of trade conducted by the alien must be between the United States and the treaty country of the alien's nationality. The remainder of the trade may be international in nature with other countries or domestic within the United States.

An E-1 visa will be issued for a period of 2 to 5 years. The greater the amount of international trade, the longer the period of issuance. The principal alien's spouse will also be issued an E-1 visa and may apply for employment authorization upon his or her arrival in the United States. Dependent children are also issued E-1 visas, but it is unlawful for them to seek employment.


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# Treaty Investors
# (E-2)

Section 101(a)(15)(E)(ii) of the Immigration and Nationality Act provides that aliens who are nationals of countries with which the U.S. maintains a treaty of friendship, commerce and navigation (FCN), bilateral investment treaty (BIT) or free trade agreement (NAFTA) may be admitted to the United States to develop and direct the operations of an enterprise in which he or she has invested, or in which he or she is actively in the process of investing a substantial amount of capital. An Treaty Investor (E-2) visa can be renewed indefinitely, so long as the investment remains qualifying and active. Once the subject investment terminates, however, the alien must depart the United States. A list of countries with qualifying treaties may be found in Appendix A at the end of this article.

In order to be successful in obtaining an E-2 visa, the alien must demonstrate that he has possession and control of the funds invested. Funds may be acquired by any legitimate means as, for example, savings, gifts, inheritance, contest, etc.

As an investment connotes the placing of fund or other capital assets at risk in the commercial enterprise in the hopes of generating a return, the funds must be subject to partial or total loss if business fortunes reverse. The investment capital may be the investor's unsecured personal business capital or capital secured by personal or business assets and may not be in the form of loans secured by the assets of the enterprise itself. The enterprise must be a real and active commercial or entrepreneurial undertaking, producing some service or commodity for profit.

While the Immigration and Nationality Act does not define the term “substantial”, the Department of State has taken the position that a substantial investment does not require a minimum dollar figure. Rather, the amount necessary will fluctuate depending upon the type of enterprise and the amount normally believed necessary to make such an enterprise viable. The larger the investment, the more likely the chance for success. The following examples have been provided by the Department of State to demonstrate the concept of the proportionality test and are not to be viewed as bright line requirements:

- A newly created business, e.g., a consulting firm, might only need a $50,000 investment to be set up and become fully operational. As this cost figure is relatively low, a higher percentage of investment is anticipated. An investment approaching 90–100% would easily meet the test;


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- A business costing $100,000 might require an investment of 75–100% to meet the test;
- A small business costing $500,000 would demand generally upwards of a 60% investment, with a $375,000 investment clearly meeting the test;
- In the case of a million dollar business, a lesser percentage might be needed, but 50–60% investment would qualify;
- A business requiring $10 million to purchase or establish would require a much lower percentage. A $3 million investment might suffice in view of the sheer magnitude of the dollar amount invested; and
- An investment of $10 million in a $100 million business would qualify based on the sheer magnitude of the investment itself.

Consular officers have been directed to use judgment that takes into account the totality of the factors involved, and not undertake simple arithmetic exercises in assessing proportionality. Additionally, in order for the investment to qualify for Treaty Investor status, the investor must control it, i.e. own at least 50% of the outstanding stock.

Moreover, the investment cannot be marginal even if substantial. The applicant must demonstrate that the enterprise is capable of generating income greater than what is necessary for the applicant and his family to live. When purchasing an existing business this is often established by looking at the net income reported on the seller's tax returns. Start-up enterprises can satisfy this requirement with a detailed business plan establishing that the enterprise will generate significant profits within a five (5) year period.

A Treaty Investor (E-2) visa will generally be issued for a period of 2 to 5 years. The stronger the investment, the longer the validity period. The principal alien's spouse will also be issued an E-2 visa and may apply for employment authorization upon his or her arrival in the United States. Dependent children are also issued E-2 visas and may attend school, but it is unlawful for them to seek employment.


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# Academic Students
# (F-1, F-2)

An alien who has no intention of abandoning his foreign residence and is a bona fide student qualified to pursue a full-time course of study at an academic institution may be issued an Academic Student (F-1) visa for post secondary education. An F-1 visa may not be issued for public elementary or secondary school studies. The alien must demonstrate that he has the intent to depart the United States at the conclusion of his or her studies. Further, an F-1 student may only study at institutions approved by the United States Citizenship and Immigration Services.

An F-1 student must provide evidence of sufficient financial support to cover expenses associated with his or her schooling and room and board. A student is generally admitted for the duration of the educational program. Examples of an educational program include, but are not limited to: 1) Associate Degree then Bachelor's Degree; 2) Bachelor's Degree then Master's Degree. However, a change of program (major) may generally be made at any time with the consent of the school's Foreign Student Advisor.

An F-1 student is prohibited from obtaining employment during the first academic year (i.e. 9 months) except for on-campus work. On-campus work includes student services on campus or at an off-campus location which is educationally affiliated with the school.

Off-campus employment authorization may be obtained after the first year due to economic hardship or in cases where the prospective employer has certified to the U.S. Department of Labor that it has unsuccessfully recruited 60 days for the position and that it will pay the student prevailing wages. In either situation, off-campus employment is limited to 20 hours per week.

*Curricular Practical Training* (CPT) is available to full-time students in attendance for at least one year. The proposed employment must be related to the alien's course of study and is defined to be alternate work/study, internship, cooperative education or any other type of required internship or practicum.

*Optional Practical Training* (OPT) is available to full-time students after completion of the alien's course of study. It is limited to 12 months and must be directly related to the student's major area and commensurate with the student's educational level. An alien may apply for OPT from 90 days prior to completion of the academic program to 30 days past graduation. If an F-1 student obtained one year or more of Curriculum Practical Training (CPT) then OPT is not available.

The spouse and children of an F-1 student are issued F-2 visas so they may accompany the F-1 student. They may attend school if they so desire, but may not seek employment.


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# Specialty Workers
## (H-1B, H-4)

Section 101(a)(15)(H)(I)(b) of the Immigration and Nationality Act provides for the issuance of Specialty Worker (H-1B) visas to individuals who are employed in a specialty occupation and desire to temporarily come to the United States for the purpose of performing professional services on behalf of a United States employer. An H-1B visa may be granted initially for up to three years and renewed for a maximum validity of six years. Extensions beyond a sixth year are possible under certain circumstances. H-1B visas are often utilized by academic students who have completed their education and optional practical training.

United States Citizenship and Immigration Services defines the term "specialty occupation" as an occupation which requires the theoretical and practical application of a body of specialized knowledge and the attainment of a baccalaureate or higher degree in the specific specialty (or its equivalent) as the minimum entry requirement for the position. However, obtaining a college degree in business or liberal arts, without further specification, does not in and of itself establish eligibility.

However, an alien can still qualify for an H-1B visa even though he does not hold a university degree equivalent to a U.S. Bachelor's degree. As a general rule, an alien my substitute three (3) years of progressive work experience in his field of endeavor for each year of post secondary education lacking. For example, a computer systems analyst has two (2) years of university education in computer science, two (2) years work experience as a computer operator, three (3) years work experience as a programmer/analyst, and two (2) years work experience as a systems analyst for a total of seven (7) years of work experience. As this example involves progressive positions (i.e. more responsible duties), the alien would most likely qualify for an H-1B visa notwithstanding his lack of a four (4) year university degree.

Some common positions which USCIS has deemed to be professional in nature and are therefore specialty occupations include, but are not limited to: Accountants, Acupuncturists, Architects, Chiropractors, Computer Programmers, Dietitians, Electronic Specialists, Engineers, Fashion Designers, Financial Managers, Journalists, Librarians, Medical Technologists, Pharmacists, Social Workers and Vocational Counselors.

The spouse and dependent children of H-1B aliens may be issued an H-4 visas. Aliens granted H-4 status may reside and study in the United States, but may not seek gainful employment.


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# Temporary Workers
## (H-2B, H-4)

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act provides for the issuance of Temporary Workers (H-2B) visas to individuals who, having a residence in a foreign country which he or she has no intention of abandoning, is coming temporarily to the United States to perform temporary services or labor, other than agricultural services or labor, provided unemployed persons capable of performing such service or labor cannot be found in the United States. For H-2B visa purposes, the term "temporary" refers to any job in which the employer's need for the duties to be performed by the alien is temporary, regardless of whether the underlying job may be described as permanent or temporary.

As a general rule, the period of the employer's need must be one year or less, although there may be extraordinary circumstances in which the temporary services or labor might last longer than one year. Additionally, the need for the services or labor must be:

- A one-time occurrence where the employer must establish that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent but a temporary event of short duration has created the need for a temporary worker; or

- A seasonal need where the employer must establish that the services are, or the labor is, traditionally tied to a season of the year by an event or pattern, and is of a recurring nature; or

- A peak load need where the employer must establish that it regularly employs permanent workers to perform the services or labor at the place of employment, but that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand, and that the temporary additions to staff will not become a part of the petitioner's regular operation; or

- An intermittent need where the employer must establish that it has not employed permanent or full-time workers to perform the services or labor,


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but occasionally or intermittently needs temporary workers to perform services or labor for short periods of time.

Procedurally, the processing of an H-2B visa application involves obtaining a temporary labor certification from the United States Department of Labor and thereafter filing a nonimmigrant visa petition with United States Citizenship and Immigration Services (USCIS). The labor certification process is designed to establish that:

- There are not sufficient U.S. workers who are willing, able, qualified, and available for employment; and

- The employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

The process of applying for a temporary labor certification begins with the filing of the prevailing wage request with the U.S. Department of Labor and a job order with the State Department of Labor establishing a 10 day recruitment period. Thereafter, two advertisements are published in the newspaper or journal of general circulation at the location of employment seeking U.S. workers to fill the subject position. At the end of the recruitment period, the recruitment results will be compiled and returned to the Department of Labor as evidence of the lack of qualified U.S. workers. Upon completion of the foregoing, the decision of whether to issue the temporary labor certification will ultimately come from the U.S. Department of Labor along with its particular findings.

Once a determination is obtained from the Department of Labor, it is presented to USCIS in conjunction with a petition requesting that the alien be classified eligible to receive an H-2B visa based upon the offer of employment. The Service will review the record in order to determine whether the alien maintains the requisite employment experience as stated in the labor certification application and that the subject position meets one of the temporary requirements listed above.

The spouse and dependent children of H-2B aliens may be issued an H-4 visas. Aliens granted H-4 status may reside and study in the United States, but may not seek gainful employment.


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# Exchange Visitors (J-1, J-2)

An alien who has a foreign residence which he has no intention of abandoning and is taking part in a recognized exchange program may be issued an Exchange Program (J-1) visa. In general, the program must provide for training and/or education in an area not available in the alien's home country. Once accepted into such a program, the alien is issued certificate of eligibility (form DS-2019) from the sponsoring agency/organization which is used in conjunction with a nonimmigrant visa application at the American Embassy or Consulate.

A J-1 alien must be sponsored by an exchange visitor program sponsor designated by the Department of State. A prospective sponsor must be a local, state or federal government agency; an international agency or organization of which the United States is a member and which has an office in the United States; or a reputable organization that is a "citizen of the United States". The citizenship requirement precludes organizations controlled by foreign corporations or individuals.

A prospective program sponsor may apply for designation of a J-1 training program in any combination of specialty and/or non-specialty occupations, and may provide training within any occupation within a designated occupational category. However, the prospective program sponsor must provide evidence of its competence to provide the specified training. In addition, the sponsor must certify that: (1) there is sufficient space, equipment and trained personnel; (2) the training program is not designed to recruit and train foreign nationals for employment in the U.S.; and (3) trainees will not be placed in positions that displace full-time or part-time employees.

The prospective program sponsor must also submit either a training plan for each occupational division in which designation is sought indicating that a structured training plan has already been designed, or that the entity previously, either directly or indirectly, has been engaged in such training, or a hypothetical training plan. The Department of State requires the following of all J-1 designated programs:

- The program must have no less than five exchange visitors per calendar year. The Department of State may in its discretion and for good cause shown reduce this requirement;


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- The program must provide each exchange visitor, except short-term scholars, with a minimum period of participation in the United States of three weeks and no more than 18 months. Training in certain areas is limited to less than 18 months;

- In the conduct of their exchange programs, sponsors shall make a good faith effort to achieve the fullest possible reciprocity in the exchange of persons;

- Offer or make available to exchange visitors a variety of appropriate cross-cultural activities. The extent and types of the cross-cultural activities shall be determined by the needs and interests of the particular category of exchange visitor. Sponsors will be responsible to determine the appropriate type and number of cross-cultural programs for their exchange visitors. The Department of State encourages sponsors to give their exchange visitors the broadest exposure to American society, culture and institutions; and

- Encourage exchange visitors to voluntarily participate in activities which are for the purpose of sharing the language, culture, or history of their home country with Americans, provided such activities do not delay the completion of the exchange visitors' programs.

The primary objectives of J-1 training, as stated by the Department of State, is to enhance the exchange visitor's skills in his or her specialty or non-specialty occupation through participation in a structured training program and to improve the participant's knowledge of American techniques, methodologies, or expertise within the individual's field of endeavor. Such training programs are also designed to enable the exchange visitor trainee to understand better American culture and society and to enhance American knowledge of foreign cultures and skills by providing the opportunity for an open interchange of ideas between the exchange visitor trainees and their American counterparts.

Use of the Exchange Visitor Program for ordinary employment or work purposes is strictly prohibited. For this reason the applicable regulations are designed to distinguish between receiving training, which is permitted, and gaining experience, which is not permitted unless as a component of a bona fide training program. Thus, it is incumbent upon an employer to show that the J-1 alien will be “trained” in the area of endeavor, not “employed”.

Unfortunately, it can be prohibitively expensive and time consuming to prepare a new program from scratch. The application process is rigorous and the Department of State is not known for its expeditious adjudication of program designation requests. Notwithstanding, there are a


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number of third party organizations have numerous programs in such areas as agriculture, business, and information technology, that can be utilized for a fee.

An alien should carefully evaluate all other immigration options before applying for a J-1 visa. Many J-1 programs subject the alien to what is known as the "two-year foreign residence requirement" at the conclusion of their authorized stay in the United States. This prevents the alien from changing his or her status to other nonimmigrant classifications (H-1B, L-1) or obtain permanent residence in the United States until he has spent two (2) years outside the U.S. in their country of citizenship or last lawful permanent residence prior to entering the U.S. with the J-1 visa. Virtually all programs which are paid for in full or in part by the United States or a foreign government carry this restriction.

The two-year foreign residence requirement may only be waived in certain circumstances: 1) The alien has obtained a "No Objection" letter from the alien's native government; 2) A waiver request is filed on the alien's behalf by an interested United States government agency; or 3) Upon a showing of extreme hardship to the alien or his United States citizen or lawful permanent resident spouse or child. It should be noted that waivers of the two-year foreign residence requirement are only granted under exceptional circumstances.

A J-1 visa is the only visa available to physicians seeking to enter the United States for graduate medical training and they are automatically subject to the two-year foreign residence requirement irrespective of the source of funding for the program they seek to enter. Additionally, a physician may only obtain a waiver of the two year requirement upon the showing of extreme hardship to himself or his U.S. citizen or lawful permanent resident spouse or child. "No Objection" letter waivers are unavailable to physicians.

The spouse and children of J-1 aliens are issued J-2 visas so they may accompany the exchange visitor. A J-2 dependent may obtain employment authorization from United States Citizenship and Immigration Services during the pendency of their stay in the United States. If the J-1 alien is subject to the two year foreign residence requirement, the J-2 dependents are subject as well.


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# Fiancée or Fiancé Of a United States Citizen (K-1, K-2)

Section 101(a)(15)(K)(i) of the Immigration and Nationality Act provides for the issuance of a fiancée visa (K-1) to a fiancée or fiancé of a United States citizen. In order to obtain a K-1 visa, United States Citizenship and Immigration Services must be satisfied of the following:

- There is a *bona fide* intention to marry;
- The parties are legally able to enter into the marriage;
- The parties are willing to conclude the marriage within 90 days of the alien's arrival in the United States; and
- The parties have previously met in person within two years of filing the petition. This requirement may be waived in cases of extreme hardship or long established custom.

Upon arrival in the United States, a K-1 alien is admitted for a period of 90 days to consummate the marriage and is immediately eligible for employment authorization. Once the marriage is consummated, the alien is now the spouse of a United States citizen and is eligible to apply for permanent residence based upon a family relationship. Failure to consummate the marriage within 90 days of entry renders the subject to removal (deportation) from the United States.

The children of a K-1 alien under the age of 21 are issued K-2 visas so they may accompany the principal alien. They may attend school and after the parties' marriage, obtain employment authorization and permanent residence.


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# Spouse of a United States Citizen (K-3, K-4)

Section 101(a)(15)(K)(iii) of the Immigration and Nationality Act provides for the issuance of a temporary spousal visa (K-3) to the spouse of a United States citizen. There are three basic requirements that must be satisfied for an alien to obtain K-3 status:

- The alien must already be married to a U.S. citizen who has filed an immigrant visa petition on behalf of the alien with United States Citizenship and Immigration Services;

- The same U.S. citizen spouse who petitioned on behalf of the alien must file a petition on the alien's behalf to obtain a nonimmigrant visa; and

- The alien must be seeking to enter to the United States to wait the "availability of an immigrant visa".

If the marriage of the alien to the U.S. citizen occurred abroad, the Immigration and Nationality Act requires that the visa be issued in the country in which the marriage took place. In those countries in which there is no consular post, the Department of State has determined that the alien must apply at the consular post designated by the Department to accept immigrant visa applications from nationals of that country. In cases where the parties were married in the United States, the general rule is that the visa must be obtained in the alien spouse's country of residence.

It is important to note that a U.S. citizen parent cannot file a petition to accord K-4 status to a minor child. K-4 status is solely a derivative status and K-4's are dependent on the K-3 principal for their status, similar to the relationship between the K-1 and K-2 fiancé visas. Therefore, K-4 aliens must be under 21 years of age and unmarried in order to continue to meet the definition of "child" under the Immigration and Nationality Act.


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# Intracompany Transferees
## (L-1, L-2)

Section 101(a)(15)(L) of the Immigration and Nationality Act provides for the issuance of L-1 visas to aliens who seek to enter the United States temporarily to work in a managerial/executive capacity (L-1A) or in a position requiring specialized knowledge (L-1B) for the same employer, its affiliate or subsidiary. The visa is granted for an initial period of one to three years depending upon the viability of the United States enterprise with renewal provisions for a maximum of six years.

The alien must have been employed for one (1) year within the three (3) years preceding entry into the United States in either a managerial/executive or specialized knowledge position with the same firm, organization, affiliate or subsidiary which shall operate in the United States. First line supervisors are not considered managers unless the employees they supervise are professionals. These aliens are issued L-1A visas.

Additionally, companies seeking to transfer an employee with specialized knowledge to the United States may also obtain L-1B visas for the employee. “Specialized knowledge” is defined to include a person who has “special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company”. An L-1 visa under this provision will not be issued to an ordinary skilled worker. Rather, the alien must be someone whose advanced level of expertise and *proprietary knowledge* of the employer’s product, service, research, equipment, techniques, management or other activity is not readily available in the U.S. labor market. The maximum length of stay for an alien who obtains an L-1B visa due to specialized knowledge is five years. In general, characteristics of an employee with specialized knowledge include, but are not limited to:

- Possesses knowledge that is valuable to the employer’s competitiveness in the market place;

- Is uniquely qualified to contribute to the U.S. employer’s knowledge of foreign operating conditions;

- Has been utilized as a key employee abroad as has been given significant assignments which have enhanced the employer’s productively, competitiveness, image or financial position; and


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- Possess knowledge which can be gained only through extensive prior experience with that employer.

The principal alien's spouse will be issued an L-2 visa and may apply for employment authorization upon his or her arrival in the United States. Dependent children are also issued L-2 visas, but it is unlawful for them to seek employment.


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# Vocational Students
# (M-1, M-2)

An alien who has a foreign residence with no intention of abandoning it and is a bona fide student qualified to pursue a full-time course of study at a vocational institution may be issued a vocational student visa (M-1). The alien must demonstrate that he has the intent to depart the United States at the conclusion of his or her studies. Further, an M-1 student may only study at institutions approved by United States Citizenship and Immigration Services.

An M-1 student must provide evidence of sufficient financial support to cover expenses associated with his or her schooling and room and board and is generally admitted for the duration of the vocational program. Unlike an F-1 student, however, an M-1 student cannot change his or her educational objectives (change of major field of study).

M-1 students are prohibited from accepting employment at any time except for *Optional Practical Training* (OPT) after completion of studies. The prospective employment must be in the field of study. One month OPT will be issued for every 4 months an M-1 student pursued a full-time course of study. Like that of an F-1 student, M-1 students may apply for OPT from 90 days prior to completion of the course of study to 30 days past graduation.

The spouse and children of an M-1 student are issued M-2 visas so they may accompany the student. They may attend school if they so desire, but may not seek employment.


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# Persons of Extraordinary Ability (O-1, O-2, O-3)

A alien who has extraordinary ability in the sciences, arts, education, business or athletics which has been demonstrated by sustained national or international acclaim may be issued an O-1 visa. The term "extraordinary ability" in athletics is defined by United States Citizenship and Immigration Services as a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of their field of endeavor. The term "arts" is defined as including "any field of creative activity or endeavor such as, but not limited to, fine arts, visual arts, and performing arts". The legislative history makes clear that the term is meant to be defined expansively, demonstrating that O-1 status in the arts is available not only to performers, but other essential technical or creative personnel such as set designers, choreographers, music coaches and animal trainers.

In order to obtain an O-1 visa, the alien must establish that his or her achievements have been recognized in the field through nationally or internationally recognized awards or the satisfaction of at least three (3) of the following requirements:

- Have performed/will perform services as a lead/starring participant in productions/events with distinguished reputations as shown by critical reviews, advertisements, publicity releases, publications, contracts or endorsements;

- National/international recognition or achievement through critical reviews, other published materials in major papers, trade journals/magazines and the like;

- Has performed in a lead, starring or critical role for organizations and establishments that have a distinguished reputation evidenced by media articles, testimonials, etc;

- Has a record or major commercial or critically acclaimed success;

- Has achieved significant recognition from organizations, critics, government agencies, recognized experts; or


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- Has commanded or now commands a high salary or other remuneration in relation to others in the field.

The fact that an alien is able to meet at least three of the above criteria does not in and of itself, mandate approval. The Immigration and Nationality Act requires a consultation with an appropriate peer group, labor and/or management organization regarding the nature of the proposed employment and the alien's qualifications. The peer group must be an appropriate association or organization with expertise in the field of endeavor. While the consultation is not binding on USCIS, it is highly persuasive.

An alien accompanying and assisting the O-1 alien may be issued an O-2 visa. In order to be granted an O-2 visa, the alien must provide evidence that:

- He is an integral part of the actual performance by the O-1 alien;

- He has critical skills and experience that are not of general nature and which cannot be performed by other individual; and

- Has a foreign residence which he has no intention of abandoning.

The spouse and dependent children of O-1 and O-2 aliens may be issued O-3 visas. Aliens granted O-3 status may reside and study in the United States, but may not seek gainful employment.


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# Family Based Immigration
## (Permanent Residence)

Aliens who desire to reside in the United States permanently require immigrant visas. In most cases, an alien obtains an immigrant visa (permanent residence) through either a family relationship or an offer of full-time employment. The petitioning relative must be either a United States citizen over 21 years or age or a lawful permanent resident. Permanent residence is evidenced by a Permanent Resident Card. Even though the card is no longer the color green (it is currently white), it continues to be commonly referred to as the “Green Card”.

The United States operates on a quota system, called “preferences”. The number of family based visas is limited to approximately 226,000 per year. The family preferences subject to quotas are:

| Preference | Eligibility |
|---|---|
| 1st | Unmarried sons and daughters of U.S. Citizens 21 years or age or older; |
| 2nd | Spouse and unmarried sons and daughters of permanent resident aliens; |
| 3rd | Married sons and daughters of U.S. Citizens; and |
| 4th | Brothers and sisters of U.S. Citizens. |

Lawful permanent residents cannot petition for their parents or married children. Unfortunately, aliens subject to the preference system are subject to extensive backlogs of many years as immigrant visas are issued on a first come first served basis. A place in line or “priority date” is established upon the filing a petition with United States and Immigration Services. Special rules apply for stepparent/stepchild relationships as well as for adopted children.

The Department of State, which controls immigrant visa issuance, publishes monthly its *Visa Bulletin*[1] which details the various preference cutoff dates. Certain aliens are exempt from quota restrictions and are referred to as "immediate relatives". These include the spouse of a U.S. citizen, a U.S. citizen's unmarried child under 21 years of age, and the parent of a U.S. citizen 21 years of age or older.

[1] http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html


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# Employment Based Immigration
## (Permanent Residence)

An Alien who does not have a qualifying family relationship must look to employer sponsorship in most other cases. Prior to being issued an immigrant visa, most aliens must obtain a Labor Certification from the U.S. Department of Labor. The need for a Labor Certification evolves from the Immigration and Nationality Act. The Act provides that certain aliens may obtain immigrant visas for entrance into the United States to engage in permanent employment if it is first established to the satisfaction of the Secretary of Labor that:

1. There are not sufficient U.S. workers who are willing, able, qualified and available for employment; and

2. The employment of the alien will not adversely affect the wages and working conditions of U.S. workers similarly employed.

Once an approved Labor Certification is obtained, it is forwarded to United States Citizenship and Immigration Services along with a petition requesting that the alien be classified eligible to receive an immigrant visa based upon the offer of employment. The prospective employer must demonstrate the financial ability to pay the prevailing wage for the subject position and that the alien maintains the requisite employment experience as stated in the labor certification application.

An alien who applies for an immigrant visa by virtue of an offer of employment is also subject to a quota. There are five preferences for employment based immigration:

1. **Priority Workers**
   **(No Labor Certification Required)**

   a. Aliens with extraordinary ability in the sciences, arts, education, business or athletics demonstrated by "sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation". The requirements for this provision are very similar to the requirements necessary to obtain an O-1 visa.

   b. Outstanding professors and researchers, recognized internationally as outstanding in a specific academic area.


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c. Persons having at least one year of employment during the three years preceding application for classification and admission with a firm, corporation or other comparable qualified entity seeking to continue employment in the United States with the same employer in a managerial or executive capacity. The requirements for this provision are very similar to the requirements necessary to obtain an L-1A visa.

2. **Exceptional Ability and Advanced Degrees**
**(Labor Certification Required. The Labor Certification requirement is waived for those aliens who can demonstrate that their admission into the United States is in the National Interest)**

a. Members of the professions holding advanced degrees or their equivalent, or who, because of exceptional ability in the sciences, arts, the professions or business will substantially benefit the United States prospectively and are sought by a U.S. employer in their respective qualifying area.

An advanced degree is defined as any U.S. academic or professional degree or foreign equivalent "above that of a baccalaureate" or such a degree or foreign equivalent followed by at least five years progressive experience in the specialty. Furthermore, if a doctoral degree is customarily required, the person must have a doctorate or its foreign equivalent.

An alien seeking to qualify as a person of exceptional ability must present evidence of his exceptionality. This is done by documenting the alien's educational, employment and professional histories.

3. **Professionals, Skilled and Unskilled Workers**
**(Labor Certification Required)**

a. Professionals and skilled workers are defined as persons capable of performing skilled labor requiring a baccalaureate degree or at least two years training or experience for which qualified workers are not available.

b. Unskilled workers are defined as persons performing labor which requires less than two years experience. Since no more than 10,000 visas are allocated to this category in any fiscal year, obtaining an employment based immigrant visa in this category will take many years.


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4. **Special Immigrants**
**(No Labor Certification Required)**

a. Special immigrants include ministers and persons of equivalent status whose services are needed by religious organizations having a bona fide organization in the United States. Additionally, in order to address the national shortage of registered nurses and physical therapists, Congress has provided for their automatic labor certification.

5. **Certain Investors**
**(No Labor Certification Required)**

a. The Immigration Act of 1990 created a completely new immigrant category which is oriented towards stimulating investment and employment creation. The Act provides that approximately 10,000 conditional immigrant visas may be issued per year certain investors who will create at least 10 jobs in the United States for U.S. Citizens through investment of at least $1 million in a U.S. business enterprise, or $500,000 in the investment is made in a rural geographic area or an area designated by the Secretary of Homeland Security as being one of high unemployment.


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# Appendix A
# Treaty Countries

| Country of Citizenship | Treaty Trader (E-1) | Treaty Investor (E-2) |
|---|---|---|
| Albania | No | Yes |
| Argentina | Yes | Yes |
| Armenia | No | Yes |
| Australia | Yes | Yes |
| Austria | No | Yes |
| Azerbaijan | No | Yes |
| Bahrain | No | Yes |
| Bangladesh | No | Yes |
| Belgium | Yes | Yes |
| Bolivia | Yes | Yes |
| Bosnia & Herzegovina | Yes | Yes |
| Brunei | Yes | No |
| Bulgaria | No | Yes |
| Cameroon | No | Yes |
| Canada | Yes | Yes |
| Chile | Yes | Yes |
| China (Taiwan)[1] | Yes | Yes |
| Colombia | Yes | Yes |
| Congo (Brazzaville) | No | Yes |
| Congo (Kinshasa) | No | Yes |
| Costa Rica | Yes | Yes |
| Croatia | Yes | Yes |
| Czech Republic[2] | No | Yes |
| Denmark[3] | Yes | No |


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| | | |
|---|---|---|
| Ecuador | No | Yes |
| Egypt | No | Yes |
| Estonia | Yes | Yes |
| Ethiopia | Yes | Yes |
| Finland | Yes | Yes |
| France[4] | Yes | Yes |
| Georgia | No | Yes |
| Germany | Yes | Yes |
| Greece | Yes | No |
| Grenada | No | Yes |
| Honduras | Yes | Yes |
| Iran | Yes | Yes |
| Ireland | Yes | Yes |
| Israel | Yes | No |
| Italy | Yes | Yes |
| Jamaica | No | Yes |
| Japan[5] | Yes | Yes |
| Jordan | Yes | Yes |
| Kazakhstan | No | Yes |
| Korea (South) | Yes | Yes |
| Kyrgyzstan | No | Yes |
| Latvia | Yes | Yes |
| Liberia | Yes | Yes |
| Lithuania | No | Yes |
| Luxembourg | Yes | Yes |
| Macedonia | Yes | Yes |
| Mexico | Yes | Yes |
| Moldova | No | Yes |
| Mongolia | No | Yes |
| Morocco | No | Yes |
| Netherlands[6] | Yes | Yes |
| Norway[7] | Yes | Yes |
| Oman | Yes | Yes |


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| Pakistan | Yes | Yes |
| --- | --- | --- |
| Paraguay | Yes | Yes |
| Philippines | Yes | Yes |
| Poland | No | Yes |
| Romania | No | Yes |
| Senegal | No | Yes |
| Singapore | Yes | Yes |
| Slovak Republic[2] | No | Yes |
| Slovenia[11] | Yes | Yes |
| Spain[8] | Yes | Yes |
| Sri Lanka | No | Yes |
| Suriname[9] | Yes | Yes |
| Sweden | Yes | Yes |
| Switzerland | Yes | Yes |
| Thailand | Yes | Yes |
| Togo | Yes | Yes |
| Trinidad & Tobago | No | Yes |
| Tunisia | No | Yes |
| Turkey | Yes | Yes |
| Ukraine | No | Yes |
| United Kingdom[10] | Yes | Yes |
| Yugoslavia[11] | Yes | Yes |

[1] Pursuant to Section 6 of the Taiwan Relations Act, (TRA) Public Law 96-8, 93 Stat, 14, and Executive Order 12143, 44 F.R. 37191, this agreement which was concluded with the Taiwan authorities prior to January 01, 1979, is administered on a nongovernmental basis by the American Institute in Taiwan, a nonprofit District of Columbia corporation, and constitutes neither recognition of the Taiwan authorities nor the continuation of any official relationship with Taiwan.

[2] The Treaty with the Czech and Slovak Federal Republic entered into force on December 19, 1992; entered into force for the Czech Republic and Slovak Republic as separate states on January 01, 1993.

[3] The Treaty which entered into force on July 30, 1961, does not apply to Greenland.

[4] The Treaty which entered into force on December 21, 1960, applies to the departments of Martinique, Guadeloupe, French Guiana and Reunion.

[5] The Treaty which entered into force on October 30, 1953, was made applicable to the Bonin Islands on June 26, 1968, and to the Ryukyu Islands on May 15, 1972.


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[6] The Treaty which entered into force on December 05, 1957, is applicable to Aruba and Netherlands Antilles.
[7] The Treaty which entered into force on September 13, 1932, does not apply to Svalbard (Spitzbergen and certain lesser islands).
[8] The Treaty which entered into force on April 14, 1903, is applicable to all territories.
[9] The Treaty with the Netherlands which entered into force December 05, 1957, was made applicable to Suriname on February 10, 1963.
[10] The Convention which entered into force on July 03, 1815, applies only to British territory in Europe (the British Isles (except the Republic of Ireland), the Channel Islands and Gibraltar) and to "inhabitants" of such territory. This term, as used in the Convention, means "one who resides actually and permanently in a given place, and has his domicile there". Also, in order to qualify for treaty trader or treaty investor status under this treaty, the alien must be a national of the United Kingdom. Individuals having the nationality of members of the Commonwealth other than the United Kingdom do not qualify for treaty trader or treaty investor status under this treaty.
[11] The U.S. view is that the Socialist Federal Republic of Yugoslavia (SFRY) has dissolved and that the successors that formerly made up the SFRY - Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Slovenia, and the Federal Republic of Yugoslavia continue to be bound by the treaty in force with the SFRY and the time of dissolution.


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