The Global Employer: Focus on US Immigration & Mobility 2022
The Global Employer: Focus on US Immigration & Mobility
2022 edition
This publication is copyrighted. Apart from any fair use for the purposes of private study or research permitted under applicable copyright legislation, no part may be reproduced or transmitted by any process or means without prior written permission of the editors.

Unless otherwise indicated, the law is as stated on 31 December 2021.

IMPORTANT DISCLAIMER. The material in this manual is of the nature of general comment only. It is not offered as advice on any particular matter and should not be taken as such. The Firm, the editors and the contributing authors disclaim all liability to any person in respect of anything and the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this volume. No client or other reader should act or refrain from acting on the basis of any matter contained in the manual without taking specific professional advice on the particular facts and circumstances in issue.
Table of Contents

Introduction..................................................................................... 2

Major issues.................................................................................... 4
   Overview of the US immigration system.................................4
   Employment law concepts .........................................................8
   Compensation and employee benefits ....................................11
   Income tax and social security ................................................11
   Global equity compensation ....................................................13
   Export control ...........................................................................14
   Mergers and acquisitions .........................................................15

Nonimmigrant visa guide ............................................................. 18
   Business travel .........................................................................18
   Study and training ....................................................................22
   Employment assignments .......................................................26

Immigrant visa guide ................................................................. 46
   Aliens of extraordinary ability .................................................49
   Outstanding professors or researchers ....................................50
   Certain multinational managers and executives .....................51
   Aliens of exceptional ability and professionals with advanced
     degrees ..................................................................................51
   Aliens whose work is in the national interest ..........................52
   Professionals, skilled workers and other workers ....................52
   Special immigrants ...................................................................52
   Investors ...................................................................................53
   Diversity Visa Program .........................................................53
   Retention of permanent residence status ...............................54
   Preservation of residence for naturalization purposes .............54

Employer responsibilities............................................................. 55
   Introduction ...............................................................................55
   Employment eligibility verification (I-9) requirements .............55
   E-Verify and IMAGE ................................................................58
   Employment discrimination based on citizenship or national
     origin .....................................................................................59
   Civil and criminal sanctions for document fraud ...................60
   Liabilities and penalties for employers of H-1B workers ............61
Editor's note

I am thrilled to share with you our newest edition of the "Global Employer: Focus on US Immigration & Mobility." This publication is the result of collaborative efforts of many lawyers in Baker McKenzie's North American Employment and Compensation Law Practice Group, who routinely advise multinational companies in the areas of global immigration and mobility, compensation and employment and labor.

This publication provides guidance on options and strategies for hiring and moving employees into the US on business, training and short- and long-term employment assignments. However, we recognize that moving and managing talent is not just about getting visas.

Understanding the broader context and compliance issues is critical. Therefore, we have incorporated information into this edition to highlight the multidisciplinary legal issues to consider, as well as important employer and employee responsibilities under US immigration law.

We hope you find this publication useful. We encourage you to visit our website, www.bakermckenzie.com, for updates on changes to US immigration law and policy and other legal insights. We also invite you to contact us directly with your questions and comments, so that we can continually improve this publication. The contact information for our US-based team members is located at the end of this book.

Ginger Solon Partee
Editor-in-Chief
Tel.: +1 312 861 2970
ginger.partee@bakermckenzie.com
Introduction

International commerce depends on the fluid mobility of workers throughout the globe. The local hire or transfer of an executive or other professional employee who is not a US citizen or lawful permanent resident requires the management of a number of key issues, including structuring the employment relationship, analyzing business, tax and global benefits offerings and, of course, addressing immigration requirements. It is essential that the employer considers these issues as interdependent aspects of the hiring process.

Under US immigration law, employers are responsible for verifying that all employees are authorized to work in the US. Employers that hire or employ persons without authorization to work in the US can be subject to civil and criminal sanctions.

Additionally, employees who work without proper authorization can be subject to removal from the US. Therefore, when hiring or transferring persons who are not US citizens or lawful permanent residents, employers need to develop a management system to obtain the required visa and work authorization for each foreign worker, monitor the visa and work permit renewal needs for each such worker, and meet the compliance and verification obligations under US immigration laws.

To determine the type of employment authorization appropriate for an executive or professional, it is necessary to examine many factors, including (i) the nature of the work to be performed in the US, (ii) the expected length of stay, (iii) the person's educational and professional credentials, and (iv) the employer's long-term business plans. The immigration process will work most effectively when it is aligned with the realities of the business need and when it is analyzed in conjunction with the employment, tax and benefits consequences of each particular situation.
Among the types of nonimmigrant visas available for executives and professionals are: B (for business visitors); E (for treaty traders, treaty investors and Australian citizens in specialty occupations); F (for academic students); H (for temporary trainees or professional workers); I (for foreign media representatives); J (for exchange visitors, including corporate trainees); L (for intracompany transferees); O (for aliens of extraordinary ability in the sciences, arts, education, business or athletics, or with a record of extraordinary achievement in the motion picture or television industry and accompanying aliens providing essential support); and TN (for Canadian or Mexican business persons entering the US pursuant to the work authorization provisions of the United States-Mexico-Canada Agreement). These visas vary in terms of purpose, eligibility, permitted length of US stay and renewability.

The US immigration system thus includes a variety of work-authorization options. However, quota limitations and frequently changing policies on standards of proof for establishing eligibility can make it challenging for employers to navigate the US immigration system. A close evaluation of the specific facts and circumstances, and the development of an effective immigration strategy at the initiation of the hiring or relocation process, will facilitate the seamless onboarding of the employee.
Major issues

Overview of the US immigration system

Key government agencies

Three key federal agencies implement and enforce US immigration laws: the Department of Homeland Security (DHS), the Department of State (DOS) and the Department of Labor (DOL).

The DHS includes US Citizenship and Immigration Services (USCIS), US Immigration and Customs Enforcement (ICE) and US Customs and Border Protection (CBP). The USCIS is responsible for adjudicating immigration benefits, such as petitions for work authorization and for permanent resident status or US citizenship. ICE is responsible for investigating immigration violations, including those made by US employers, and enforcing the removal of foreign nationals who are unlawfully present in the US. CBP is responsible for inspecting and admitting all persons and goods arriving through US ports of entry.

The DOS is responsible for processing visa applications at US embassies and consulates outside of the US, as well as managing immigrant visa quotas.

The DOL is responsible for protecting the US workforce by ensuring that US employers (when required by US immigration law) (i) offer the same wages and working conditions to certain foreign workers as to US workers; (ii) comply with all US wage and hour laws applicable to any worker in the US, regardless of visa status; and (iii) conduct a fair test of the labor market before sponsoring certain types of foreign workers for permanent residence status.

The US Department of Justice (DOJ) is also involved in the enforcement of the anti-discrimination provisions of the Immigration and Nationality Act (INA).
Nonimmigrant vs. immigrant visas

There are two broad categories of US visas: (i) nonimmigrant and (ii) immigrant. Nonimmigrant visas are designed for individuals who intend to visit, work or study in the US on a temporary basis, whereas immigrant visas are designed for individuals who intend to live and/or work in the US indefinitely as lawful permanent residents. Both nonimmigrant and immigrant visas are issued by US embassies and consulates. Under the US immigration system, visas are travel documents that allow a person to enter the US in a particular nonimmigrant or immigrant status. The issuance of a visa does not guarantee admission to the US and it does not function as an individual's work or residence permit after entering the US. The documents issued at the port of entry or by the USCIS after entering the US instead serve as the work and residence permit.

Application process

With very limited exceptions, before an individual can apply for an employment-based visa, a US employer must request approval for a particular type of nonimmigrant or immigrant status on the individual's behalf based on the job offered to the individual. In most cases, the request is made in the form of a "petition" that is filed with the USCIS. In other cases, the request is made in the form of an application that is filed directly with the US embassy or consulate. For some types of visas (both nonimmigrant and immigrant), the DOL must also grant its approval for the employer to sponsor the foreign worker. In those cases, the DOL’s approval is needed before the USCIS (or US embassy or consulate) will process the sponsoring employer's petition or application. The complexity of the preliminary approval process and the time required for the US employer to receive the approval can vary greatly depending on (i) the particular type of nonimmigrant or immigrant status sought and (ii) the quota-based restrictions imposed on certain types of visa classifications. In general, the approval process for a nonimmigrant status that includes work authorization takes at least two months and the approval process for an immigrant
status often takes more than one year. Employment-sponsored individuals can enter the US initially on a nonimmigrant visa and then convert to an immigrant category yielding permanent residency while in the US. In this manner, their work and residency authorization may continue without interruption, provided certain key time lines and eligibility criteria are met.

Once the USCIS (or US embassy or consulate) approves the employer's request, the individual can proceed with applying for a visa. Visa applicants usually must appear at a US embassy or consulate for a personal interview. Prior to the interview, the visa applicant must complete certain application forms, obtain passport-style photographs and pay the relevant application fees. During the interview, the visa applicant is fingerprinted as part of a mandatory security clearance. For immigrant visas, medical examinations and Certificates of Good Conduct are required, while these requirements do not apply to nonimmigrant visas. In most cases, visas are issued within one to five business days after the interview. However, delays can occur if the individual was ever arrested or had a criminal conviction anywhere in the world (even if the criminal record has been expunged).

**Post-entry formalities**

When an individual is admitted to the US with a nonimmigrant visa, an arrival/departure record, also known as a Form I-94, is generated by a CBP officer at the port of entry. The Form I-94 lists the person's nonimmigrant status and the period of stay granted. If entering through an airport or seaport, the Form I-94 will only be generated electronically and it can be printed by the individual from CBP's website (https://i94.cbp.dhs.gov/). Individuals entering the US through a land port of entry may receive a paper Form I-94 that is stapled onto the person's passport. The Form I-94, regardless if issued in electronic or paper format, serves as the individual's temporary work and residence permit.
Individuals who are admitted to the US with an immigrant visa receive an endorsement in their passport confirming that they have been admitted to the US as a lawful permanent resident. Shortly after arriving in the US, the person receives a permanent resident card (commonly referred to as a green card) from the USCIS. The permanent resident card serves as the person's permanent work and residence permit.

Individuals who are admitted to the US under a nonimmigrant or immigrant visa are not required to register their residence with local police authorities. However, both nonimmigrants and lawful permanent residents are required to notify the USCIS in writing within 10 days of any change in address after entering the US. Failure to do so can result in removal from the US.

**Extensions**

Most employment-based nonimmigrant visa classifications are approved for an initial two- or three-year period and have maximum time limits ranging between five and seven years. An employer can extend a foreign worker's nonimmigrant status within the US by filing an extension petition with the USCIS in a timely manner. If approved, the USCIS will issue a new Form I-94 to evidence the extended authorization to work and reside in the country, but the individual must separately renew the visa through a US embassy or consulate to travel internationally and reenter the US in the relevant nonimmigrant classification.

**Spouses, children and other dependents**

All the nonimmigrant work visa categories provide for the issuance of dependent visas to (i) legally married spouses (heterosexual and same sex) and (ii) unmarried minor children (under 21 years of age) of the foreign worker. This visa enables the family to accompany the employee during their US assignment. The E and L visa categories and, in limited circumstances, the H-1B visa category, allow the accompanying spouse (but not children) to obtain work authorization.
Legally married spouses and unmarried minor children may also derive lawful permanent resident status from a foreign worker, as long as the family relationships existed at the time the foreign worker obtained lawful permanent resident status. The spouse and children can apply for lawful permanent resident status at the same time as the foreign worker or may elect to "follow to join" later.

Other extended family members, such as parents or siblings, do not qualify for dependent nonimmigrant visas and cannot derive lawful permanent resident status from a foreign worker as part of an employment-based application.

Domestic personnel, such as nannies and household workers, may qualify for a B-1 visa to accompany a nonimmigrant foreign worker to the US if the domestic worker does not intend to immigrate to the US and has an established employment relationship with the foreign worker. However, domestic personnel cannot accompany a lawful permanent resident to the US, as there is a presumption that the domestic worker also intends to immigrate with the foreign worker.

**Employment law concepts**

**At-will employment**

Most workers in the US, including temporary foreign workers, have an employment relationship that is "at will." This means that the employer or the employee can terminate the employment relationship at any time, for any reason, with or without notice or cause. Statutory exceptions are limited and include certain large or mass terminations and business closures, unionized workers covered by a collective bargaining agreement, and nondiscrimination and whistleblower protections. Except for such limited situations, US employers may unilaterally change the terms and conditions of employment and are not obligated by federal law to provide any severance pay to terminated employees. Because of the at-will employment doctrine, employees in the US are often viewed as having limited individual rights in the context of the employment relationship compared to
employees in most other countries. Even though employed at will, some visas require the US employer to pay certain return home transportation costs upon termination, or to continue wages or other benefits of employment while the employee is working in the US under a particular visa status.

**Employment contracts**

In the US, it is rare for employers to enter into written employment contracts setting forth the employee's rights during or upon termination of the employment relationship. Employment contracts create a significant exception to the employment-at-will doctrine and, therefore, are typically reserved for corporate executives or employees with highly specialized or technical knowledge relating to a company's proprietary interests.

Even when sponsoring temporary or permanent work authorization for a foreign worker, US employers are not required to enter into a written employment contract with the sponsored worker. However, the petition or application for work authorization that is filed on the foreign worker's behalf must specify certain terms and conditions of employment. Some courts have held that the petition or application can create contractual rights owed to the employee or limit the at-will nature of the employment relationship. In addition, employers cannot place certain visa holders on unpaid leave or furlough due to the wage requirements for the employee's work authorization.

**Employees vs. independent contractors**

The appropriate classification of a worker as an "employee" or an "independent contractor" has many legal ramifications for US employers — from compensation and tax filing obligations, to family and medical leave and unemployment insurance coverage, to employment eligibility verification requirements. In the immigration context, there are two key concepts that employers must be mindful of with respect to worker classification.
First, a US employer is typically not obligated to verify the employment eligibility of someone engaged as an independent contractor. However, if the employer hires someone on a contract basis to perform services in the US, with knowledge that the individual is not authorized to work in the US, the employer can still be subject to fines and other penalties for knowingly "employing" an unauthorized worker. Thus, classifying a foreign worker as an independent contractor will not necessarily shield an employer from liability under US immigration law, and it is not a prudent strategy for minimizing immigration-related employer obligations.

Second, to sponsor a foreign worker for work authorization, there generally must be a lawful employer-employee relationship. This means that the employer must have the right to control when, where and how the worker performs their job, for the benefit of the employer. In light of this, it is very difficult for a US employer to directly engage a foreign worker as an independent contractor to perform services in the US, unless the individual is already a US permanent resident or green card holder.

**Protection from discrimination**

The US has an extensive collection of federal and state labor and employment laws that (i) prohibit discrimination based on race, religion, age (40 or over), gender, disability, veteran status, national origin and citizenship, among other protected categories; (ii) afford protections with respect to wages, working hours and workplace health and safety; and (iii) secure the right to be represented by a union. Temporary foreign workers generally receive the same protections as US citizens and lawful permanent residents under federal and state employment laws. US citizens working for US companies outside the country are typically protected under many US federal laws while abroad.
Compensation and employee benefits

When sponsoring foreign workers for certain types of nonimmigrant visas (e.g., H-1B or E-3), US employers must attest that they will pay the foreign worker at least the local prevailing wage or the employer's actual wage, whichever is higher, and pay for nonproductive time.

Additionally, the employer must attest that it is offering the foreign worker benefits on the same basis as offered to US workers. Similar requirements also apply when obtaining a labor certification for sponsoring a foreign worker for US lawful permanent residence. In these circumstances, the DOL must grant its approval for the employer to sponsor the foreign worker for temporary or permanent work authorization. These requirements are designed to prevent employers from disadvantaging US workers by offering lower compensation or fewer benefits to foreign workers. Employers that violate these requirements can be subject to fines, among other penalties. In egregious situations, US employers can be barred from sponsoring foreign workers.

Income tax and social security

The principal concern for an employee who comes to work in the US (and who is not a US citizen or does not want to become a US citizen) is whether the employee will be taxed as a "resident alien" or a "nonresident alien." A resident alien is taxed in the same manner as a US citizen, namely, that all of their worldwide income, including any compensation paid or earned outside of the US, will be subject to US federal income tax. A nonresident alien is also taxed on compensation at the same rate and in the same manner as US citizens and residents (with some limitations and exceptions) but will only be taxed on US income that is "effectively connected" with the conduct of a US trade or business. An employee's performance of services in the US will be deemed the conduct of a US trade or business. The compensation they receive, therefore, will be "effectively connected" with a US trade or business. Income that is not "effectively
connected," but is considered fixed or determinable annual or periodic income from US sources, will also be subject to US federal income tax but at a flat rate of 30% absent an income tax treaty exemption or other applicable exception under the Internal Revenue Code.

In general, an employee will be deemed a resident alien for tax purposes if the employee is either:

- Lawfully permitted to reside permanently in the US (i.e., the green card test)
- In the US for a substantial amount of time (i.e., the "substantial presence" test)

The green card test, much as its name suggests, covers foreign nationals who are granted permanent resident cards or green cards.

The substantial presence test is satisfied if, in general, the following conditions apply:

- The employee is present in the US for at least 31 days during the current calendar year.
- The sum of the days they are present in the US during the current calendar year, plus one-third of the days they were present in the preceding year, plus one-sixth of the days they were present in the second preceding year, equals or exceeds 183 days.

There is an exception to the substantial presence test, which is if a foreign national is present in the US for fewer than 183 days during the year and has a tax home in and a closer connection to a foreign country.

The US federal income tax liability of a resident or nonresident alien may also depend on whether the US has an income tax treaty with the individual's country of tax residence.
Each US state's laws must also be examined to determine whether the employee becomes a resident for US state income tax purposes. In those US states where the individual becomes a resident, US state income tax may be imposed on worldwide income. On the other hand, in those US states where the individual is a nonresident, US state income tax would generally be imposed only on compensation for services performed within that US state.

Given the complexity of tax-related issues for employees who spend time working inside and outside the US, obtaining appropriate tax counseling is critical for both employers and employees.

Both resident and nonresident aliens working in the US will be subject to US social security coverage (commonly referred to as Federal Insurance Contributions Act (FICA) taxes) unless the performance of services does not come under the definition of "employment" for social security purposes. This concern arises from the employer's standpoint as well, since in the US, FICA taxes imposed on an employee's compensation are imposed on the employer as well. There is also a specific exemption for nonresident aliens who are present in the US under the F or J visa categories.

Resident and nonresident aliens working in the US who do not qualify for an exemption from US social security will be subject to FICA tax withholding on compensation unless an exemption under a Totalization Agreement in effect with the country of origin can be claimed. A Totalization Agreement is an international agreement between two countries that provides a set of rules to determine which jurisdiction will cover the individual's employment under its own social insurance tax system.

Global equity compensation

Increasingly, employers motivate and retain executive and highly qualified employees by offering equity-based compensation, such as stock options. Not surprisingly, US and other global tax authorities are becoming increasingly aware that significant taxes may be owed on
income derived from stock options and other forms of equity compensation awards held by (i) foreign workers on assignment in the US and (ii) business travelers who may be subject to US federal income tax as nonresident aliens. A particular challenge in this area is that equity award income is usually earned over a period of one or more years, during which the equity award holder may have been employed and resident in the US and a number of different countries, each of which may assert taxable jurisdiction over the award.

In the context of a business traveler who regularly visits the US, if US federal income tax applies to wages paid to the individual during a US business trip, it will also apply to any income the individual received because of a portion of the equity award vested while on business travel in the US (usually based upon a ratio of US workdays to total workdays during the vesting period). In a few cases, periods other than the vesting period of the equity award may be used. These same considerations would also be more likely to apply to foreign nationals working on an employment assignment in the US. In addition to the US tax obligations, the tax and employer withholding obligations of the home country need to be addressed for both of these groups of employees. In some countries, even where the employee has ceased tax residency, there may be taxation on a source basis of a proportionate amount of the equity income considered to be earned in the employee’s home country.

Given the complexity of these issues, it is critical for US employers to mitigate risk by implementing procedures that will enable them to track and calculate the amount of equity award income subject to US and foreign taxation, and to comply with applicable withholding and reporting obligations.

**Export control**

Transfers of certain controlled US technology to certain foreign nationals are subject to US export controls and may implicate licensing requirements. Employers should consider export licensing
requirements whenever they obtain a visa for a foreign national who will have access to controlled US technology. Under the "deemed export" rule, an export of a controlled US technology is deemed to occur when the technology is released to a foreign national in the US, whether through visual inspection of facilities and equipment, oral communications or through the conveyance of personal knowledge or technical experience acquired in the US. If an export license is required for the release of the technology, an employer failing to obtain a license may be subject to civil and/or criminal liabilities. Moreover, the foreign national accessing the controlled US technology without an export license may be subject to removal from the US. To comply with employment anti-discrimination provisions, export compliance must be limited to covered technology in the US, and related inquiries to applicants and employees must be carefully crafted.

Mergers and acquisitions

The ongoing validity of a foreign worker's employment authorization in the US can be compromised if there is a "material change" in the terms and conditions of employment, as described in the petition or application filed with a US government agency to secure the particular work authorization held by the worker.

Mergers and acquisitions commonly result in such material changes because they often affect the (i) identity, ownership or structure of a sponsoring employer; and (ii) duties, title, compensation or location of the job held by a sponsored foreign worker. When dealing with foreign workers with nonimmigrant visas (e.g., H-1B, L-1, E-3, etc.), material changes generally require notice to the relevant government agencies. Notice may include (i) filing an amendment petition or application with the USCIS or a US embassy or consulate, (ii) confirming prevailing wage obligations with the DOL, and (iii) reverifying the worker's employment eligibility.
When dealing with foreign workers who are in the process of being sponsored for US lawful permanent residence, the analysis is often focused on whether the employing entity at the end of the transaction is considered the same employer, or otherwise qualifies as a "successor-in-interest." The USCIS evaluates the following three factors to determine if the new employer qualifies as a successor-in-interest:

- Whether the job offered by the resulting entity is the same as the job offered by the original employer (i.e., the job duties, location, compensation and title should generally be unchanged from the original employer's filing)

- Whether the new employer can prove its eligibility to petition for the benefit sought (including the ability to pay the wage offered by the original employer), as of the date of the original employer's filing

- Whether the new employer can sufficiently document the transfer and assumption of ownership of the original employer

In asset transactions, the new employer must have acquired not only the assets, but also the essential rights and obligations of the original employer to carry on the business and must continue to operate the same type of business as the original employer. The new employer need not have assumed liabilities that are unrelated to the job opportunity that is the subject of the immigrant or nonimmigrant visa. Note that the transaction can be in whole or in part. The new employer can qualify even if it acquired only an operational division or business unit of the original employer.

In the worst-case scenario, material changes resulting from a merger or acquisition may result in the loss of the right to live and work in the US. Therefore, it is important to consider the immigration consequences as part of the initial due diligence process. Assembling a list of impacted employees, their current work authorization (type and validity) and indicating where they are in the immigration process
are key to starting a thorough due diligence review. Reviewing compliance with immigration-related record-keeping requirements is also critical. Some requirements may be related to employee-specific visa benefits (e.g., PERM records or Labor Condition Attestation records), while others are required of all employers (e.g., employment eligibility verification I-9 records).
Nonimmigrant visa guide

Business travel

Business travel refers to entries made to the US pursuant to a B-1 business visa or with an Electronic System for Travel Authorization (ESTA) approval under the Visa Waiver Program.

B-1 visas

A common misconception is that the B-1 visa or ESTA approval is used appropriately for all trips to the US for business-related purposes, as long as the period of stay is 90 days or less. Although business travel must be for a specifically limited duration, it is the nature of the activities to be performed in the US that determines whether business visitor status is appropriate or whether a work visa is required.

Typically, business activities are limited to services provided in the US on behalf of a non-US employer, where the profits resulting from those services accrue to the non-US employer, and any compensation received by the business traveler for those services (beyond an expense allowance or per diem) is paid directly or indirectly by the non-US employer.

Common types of legitimate business activities include:

- **Meetings and professional conferences.** This includes consulting with business associates; visiting customers to take orders for goods manufactured outside the US; and attending scientific, educational, professional or business conventions, conferences or seminars. Individuals who are members of the board of directors of a US entity may also enter the US as a business visitor to attend board meetings or perform other functions relating to board membership.

- **Start-up business activities.** This includes conducting independent market research, meeting with potential business
partners and negotiating contracts (i.e., for professional services, office space and equipment). This does not include performing productive services for a start-up venture or actively managing the business.

- **After-sales service.** This includes individuals coming to the US to install, service or repair commercial or industrial equipment or machinery purchased from a company outside the US or to train US workers to perform such services, provided (i) the contract of sale specifically requires the seller to provide such services or training, (ii) the visa applicant has the specialized knowledge essential to the seller's contractual obligation to perform the services or training, and (iii) the visa applicant will not receive any remuneration from a US source.

**Example:** A Brazilian company is setting up a subsidiary in the US. Alexandre, the COO of the Brazilian company, needs to make a series of trips to the US to speak with real estate agents, look at potential manufacturing and/or office space, commence contract negotiations with regard to that space and meet with potential subcontractors. As long as Alexandre remains on the payroll of the Brazilian company, these activities would be consistent with the terms of the B-1 visa.

Alternatively, if Alexandre is sent to the US by their Brazilian employer to provide on-site services at an established US company, their activities may not be permitted under the B-1 visa. Even if Alexandre remains on the Brazilian payroll and the US company transfers funds to the Brazilian company for Alexandre's services, the B-1 visa would still not be appropriate because their services would be directly benefiting the US company.
B-1 visas are applied for directly at a US embassy or consulate. B-1 visas are commonly valid for a 10-year period; however, the visa holder is normally admitted to the US for up to six months. Once in the US, B-1 visa holders may apply to the USCIS for an extension of stay for an additional six months.

**Visa Waiver Program – ESTA**

The Visa Waiver Program allows individuals from certain countries to enter the US for legitimate business or personal purposes without first obtaining a B-1 or B-2 visa in their home country. The program presently includes the following countries, which provide reciprocal benefits to US citizens:

<table>
<thead>
<tr>
<th>Andorra</th>
<th>Hungary</th>
<th>Poland</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>Iceland</td>
<td>Portugal</td>
</tr>
<tr>
<td>Austria</td>
<td>Ireland</td>
<td>San Marino</td>
</tr>
<tr>
<td>Belgium</td>
<td>Italy</td>
<td>Singapore</td>
</tr>
<tr>
<td>Brunei</td>
<td>Japan</td>
<td>Slovakia</td>
</tr>
<tr>
<td>Chile</td>
<td>Latvia</td>
<td>Slovenia</td>
</tr>
<tr>
<td>Croatia</td>
<td>Liechtenstein</td>
<td>South Korea</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Lithuania</td>
<td>Spain</td>
</tr>
<tr>
<td>Denmark</td>
<td>Luxembourg</td>
<td>Sweden</td>
</tr>
<tr>
<td>Estonia</td>
<td>Malta</td>
<td>Switzerland</td>
</tr>
<tr>
<td>Finland</td>
<td>Monaco</td>
<td>Taiwan</td>
</tr>
<tr>
<td>France</td>
<td>The Netherlands</td>
<td>The UK</td>
</tr>
</tbody>
</table>
Citizens or nationals of the above countries are currently eligible to travel to the US under the Visa Waiver Program, unless the citizens of one of these countries (i) are also a national of the Democratic People's Republic of Korea, Iraq, Iran, Syria or Sudan; or (ii) have traveled to or been present in the Democratic People's Republic of Korea, Iran, Iraq, Libya, Somalia, Sudan, Syria or Yemen on or after 1 March 2011 (with limited exceptions).

**Important note:** All travelers seeking to enter the US under the Visa Waiver Program must have "e-Passports," which include an integrated computer chip capable of storing biographic data and a digital photograph.

E-passports have the following symbol: 🏛️

All Visa Waiver Program travelers must obtain an electronic travel authorization prior to boarding any air, land or sea carrier to the US. To apply, travelers must log into the ESTA website at [https://esta.cbp.dhs.gov](https://esta.cbp.dhs.gov), complete an online application and pay a fee. In most cases, a response will be received within seconds. However, travelers are encouraged to apply at least 72 hours prior to travel.

The electronic authorization is valid for up to two years or until the traveler's passport expires, whichever occurs first. If authorization is not granted, the traveler must obtain a nonimmigrant visa at a US embassy or consulate before traveling to the US. For example, individuals who have traveled to certain countries that are designated as state sponsors of terrorism may be deemed ineligible to use the
Visa Waiver Program. Individuals who apply for a US visa and are denied will not be able to apply for an ESTA under the Visa Waiver Program. If individuals that are denied a visa already have an ESTA, they will be able to continue using it until it expires.

ESTA approval establishes a person's eligibility to travel to the US under the Visa Waiver Program, but does not guarantee admission to the US. Upon arrival in the US, a CBP officer will inspect the traveler at a port of entry and may determine that the traveler is inadmissible under the Visa Waiver Program or for any reason under US law.

Travelers admitted under the Visa Waiver Program are authorized to stay in the US for up to 90 days and cannot extend or change their visa status in the US. Travelers who overstay the 90-day period will be permanently barred from using the Visa Waiver Program and must thereafter apply for a B visa to visit the US.

**Practical pointer:** Individuals entering the US with a B-1 visa or under the Visa Waiver Program may wish to carry a letter from their non-US employer that confirms (i) the nature of the activities to be performed in the US, (ii) the limited duration of the trip, (iii) the direct benefit of the trip to the non-US employer, (iv) the continuation of the traveler's direct and indirect compensation from the employer abroad, and (v) the traveler's other ties to their home country. A travel itinerary and the traveler's return ticket to their home country can also be helpful. If the traveler is questioned by a border officer, such a letter showing the ties to the company abroad can ease a difficult examination at the port of entry.

**Study and training**

**F visas**

The F-1 visa is available to foreign students pursuing a full-time course of study in the US at an approved educational institution. Once
a student is accepted into a qualifying academic program, the school will issue a Certificate of Eligibility for Nonimmigrant Student Status (Form I-20), which the student must present at a US embassy or consulate to obtain an F-1 visa. If the student is already in the US in a valid nonimmigrant status, they may also apply to the USCIS for a change of status to F-1.

Applicants for an F-1 visa must demonstrate to the consular officer at a US embassy or consulate abroad that they have a present intent to depart from the US upon conclusion of their study or Optional Practical Training (OPT). These applicants may also need to provide evidence or an explanation of their current plans following completion of their study or OPT. An individual applying for an F-1 visa must also establish that they have a residence outside the US that they do not intend to abandon.

Spouses and minor children of F-1 visa holders may receive dependent F-2 visas.

**Practical pointer**: Foreign nationals who decide to study at a US institution after entering the US as a visitor may not begin that course of study until the USCIS approves a change of status request from B-1 or B-2 to F-1. The USCIS will deny a request to change the status from B-1 or B-2 to F-1 unless the change-of-status applicant has advised the officers at the port of entry of their intention to begin a course of study in the US. In this case, the officer should note on the admission stamp that the alien is a prospective student.

F-1 visa holders are permitted to accept employment under limited circumstances and only with approval from the educational institution. For example, on-campus employment may be permitted full-time during vacations and holidays, but for no more than 20 hours per week during the academic year. Off-campus employment pursuant to Curricular Practical Training (CPT) may also be permitted if the visa
holder is in good academic standing and obtains the approval of a designated school official. As with on-campus employment, the visa holder may not work more than 20 hours per week during the academic year, but may work full-time during holidays and vacations.

Employment that qualifies as OPT may also be permitted during the student's curricular program and immediately afterward. To qualify, the student must be enrolled full-time for at least nine months at an approved post-secondary institution, and the training position must be directly related to the student's major field of study.

OPT is normally limited to a maximum of 12 months and must be completed within 14 months of completing the curricular program. However, students granted OPT after completing a science, technology, engineering or mathematics (STEM) degree may apply for a 24-month extension.

To qualify for the STEM OPT extension, the student's employer must be registered with the E-Verify program. Before the F-1 student can apply for the STEM OPT extension, the employer must develop and implement a formal work-based training plan with the F-1 student, designed to supplement the student's academic background with practical STEM experience. Employers must also offer terms and conditions (i.e., duties, hours and compensation) to the F-1 student that are commensurate with those provided to similarly situated US employees. To ensure the employer's compliance, the DHS may conduct worksite visits (typically with notice) during the STEM OPT extension period.

**Note:** E-Verify is an online system operated jointly by the DHS and the Social Security Administration (SSA). Participating employers must check the work authorization status of new hires online by comparing information from an employee's Form I-9 against DHS and SSA databases. With limited exceptions, E-Verify is a voluntary program for employers.
H-3 visas

The H-3 visa is available for individuals who will be participating in training programs in the US. The training may be in any field, including agriculture, commerce, communications, finance, government, transportation or professions, as well as training in an industrial establishment. The training program must be well structured with defined goals and include a system for evaluating the trainee's progress.

The employer sponsoring the training program must file a petition with the USCIS demonstrating that (i) the training is unavailable in the person's home country, (ii) the person will not be placed in a position in which US citizen and permanent resident workers are regularly employed, (iii) the training will include no productive employment unless it is incidental and necessary to the training, and (iv) the training will benefit the person in pursuing a career outside the US.

The maximum period of stay under an H-3 status is two years. There is an expectation that the trainee will return to their home country to apply the skills gained, making it difficult for the trainee to change to a work visa without first leaving the US.

Spouses and minor children of H-3 visa holders may receive dependent H-4 visas, but they are not eligible to apply for employment authorization based on their H-4 status.

J visas

The J-1 visa is another type of visa commonly used by corporations for temporary business trainees. The J-1 program was designed to provide educational exchange programs for students, teachers, professors, research scholars and other professionals. The DOS administers the program. Applications are submitted to organizations that are authorized by the DOS, rather than the USCIS, which typically makes the application process faster. Most sponsoring organizations are professional associations and third-party organizations. However,
corporations that routinely use J visas to accommodate trainees may also register as sponsoring organizations to facilitate the issuance of J visas to their trainees.

The host employer must provide a structured training plan as part of the application process, and the sponsoring organization may conduct site visits during the program to ensure the trainee is receiving the intended training experience.

A drawback of the J-1 visa is that the trainee, depending on their skill set and country of citizenship, may be required to return to their home country for two years after the program is completed. Although there are limited exceptions, individuals subject to this "home stay" requirement may not change their visa status or return to the US to work until the two-year period has elapsed.

The duration of the J visa is normally the length of time needed to complete the program plus 30 days. However, there are general limitations on the duration of visas held by certain categories of persons, such as (i) graduate nurses (two years), (ii) graduate medical professionals (seven years), (iii) teachers, professors and research scholars (three years), (iv) business interns (one year), (v) business trainees (18 months), and (vi) specialists (one year). These are maximum limitations only and do not extend the period for which the person's visa would otherwise be valid.

Spouses and minor children of J visa holders may receive dependent J-2 visas. J-2 spouses and minor children may also apply for employment authorization from the USCIS. However, the request for employment authorization will not be approved if income is needed to support the principal J-1 visa holder.

**Employment assignments**

The US immigration system provides a wide range of employment-based visa options to accommodate executives and managers, highly skilled workers, artists and athletes, investors, media professionals
and seasonal workers, among others, who will be working in the US on temporary employment assignments. The underlying work authorization is sponsored by an employer and requires the filing of a petition or application with the USCIS or a US embassy or consulate. All foreign workers, with the exception of Canadian citizens, must also obtain a visa that allows them to enter the US in the particular type of work-authorized status. These visas can be broadly grouped into three categories: intracompany transfers, specialty and skilled workers and treaty-based professionals. The visas within each of these categories vary in terms of purpose, eligibility, permitted length of stay and renewability.

**Intracompany transferees**

**L-1 visas**

The purpose of the L visa is to permit a qualifying organization to transfer certain types of employees from a non-US location to perform services in the US for the same organization or its parent, branch, subsidiary or affiliate. To qualify, the non-US sending company and the US receiving company must have at least 50% common ownership, or alternatively, one must effectively control the other.

To obtain an L-1 visa, a qualifying organization must submit a petition to the USCIS. Generally, a qualifying organization is any firm, corporation or legal entity (including a partnership) that continues to conduct business both in the US and in at least one other country during the L visa holder’s entire US assignment. However, the qualifying organization need not be a US firm.

The petition submitted on behalf of the employee must indicate that the employee has been employed with the organization abroad for at least one of the past three years as a manager, an executive, or in a position that requires specialized knowledge. It is not necessary that the employee performs the same function while working in the US, as long as the employee performs one of the above three permitted functions.
Generally, a manager is defined as someone who (i) manages the organization, a function or some part thereof; (ii) supervises other managerial, supervisory or professional employees, or manages an essential function, department or subdivision; (iii) has the power to hire and fire employees, or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and (iv) has day-to-day discretion with respect to the operation of the organization or a part thereof. An executive is a person who (i) directs the management of the organization, (ii) establishes policies and goals, (iii) has discretionary decision-making capacities, and (iv) is only supervised by higher-level executives or the organization's board of directors. A person with specialized knowledge is someone who has (i) uncommon knowledge of the organization's products, services, research, equipment, techniques, management or other interests and its application in international markets; or (ii) an advanced level of knowledge or expertise in the organization's processes and procedures that is not commonly found in the relevant industry.

Generally, the L-1 visa is granted, at the outset, for a maximum of three years, and can be renewed in two-year increments. For individuals who are transferred to the US to work for a new entity, the USCIS will approve L-1 status for only one year at the outset. The maximum duration of stay for executives and managers (L-1A) is seven years; the maximum duration permitted for specialized knowledge professionals (L-1B) is five years.
Example: A Mexican company and its wholly owned US subsidiary have been engaged in business for over 10 years in each country. The Mexican company seeks to transfer one of its executives, Eduardo, to the US to develop and direct the activities of the US company. Eduardo has worked with the Mexican company for seven years and will hold executive positions in both Mexico and the US during their US stay. Because Eduardo has been employed as an executive by the Mexican company for at least one of the past three years and will continue to perform as an executive in the US, they should be eligible for an L visa.

The Mexican company also has a manager, Francesca, who has worked with the Mexican company for only three months, although they have been an executive with another unrelated company for the prior 10 years. The Mexican company would like Francesca to hold an executive position at the US company. Because Francesca does not have the sufficient length of qualifying experience with their Mexican employer, they will not qualify for an L visa.

However, after they have been employed by the Mexican company for one year, they should qualify for an L visa.

A third Mexican employee, Oscar, has production responsibilities in Mexico, but their knowledge and experience do not qualify as "specialized knowledge." For this reason, Oscar will not be eligible for an L visa to perform services in the US for the US company.

Note: If the US company is only 20% owned by the Mexican company and the Mexican company does not otherwise control the US company, none of these persons would qualify for the L visa.
In certain circumstances, a company may file an L-1 blanket petition seeking continual approval of itself, its parent and some or all of its branches, subsidiaries and affiliates as qualifying organizations for the purposes of sponsoring individuals for L-1 intracompany transferee status. To qualify, the company and each of its related entities must be engaged in commercial trade or services. Additionally, the company must have an office in the US that has been doing business for more than one year and at least three domestic and foreign branches, subsidiaries and affiliates. The US company must also have (i) obtained approvals for at least 10 L-visa professionals in the previous 12 months, (ii) US subsidiaries or affiliates with combined annual sales of at least USD 25 million, or (iii) a US workforce of at least 1,000 employees.

Once the L-1 blanket petition is approved, the company does not have to file individual petitions with the USCIS for each employee. Rather, an employee who meets the requirements for intracompany transferee status may obtain an L-1 visa at the US consulate or embassy with jurisdiction over their residence abroad. Once an employee is admitted under an approved L-1 blanket petition, they may be reassigned to any organization listed within the approved petition without notifying the USCIS or US consulate or embassy, as long as they are performing the same job duties.

Spouses and minor children of L-1 visa holders may receive L-2 dependent visas. L-2 spouses are eligible for employment authorization incident to status. Spousal employment authorization does not carry any minimum education or experience requirements and allows the spouse to work for any employer in the US.

**Specialty and skilled workers**

*H-1B visas*

The primary purpose of the H-1B visa is to admit foreign workers employed in "specialty occupations" to perform services in the US. To obtain an H-1B visa, the US employer or the employer's agent must
file a petition on behalf of the worker. The employer must have a Federal Employer Identification Number issued by the IRS and must be a person, corporation, contractor or other association or organization with a place of business in the US.

The employer must show that the position the worker will fill is a "specialty occupation." A specialty occupation is one that requires (i) the theoretical and practical application of a body of highly specialized knowledge and (ii) a bachelor's degree or higher in the specialty (or its equivalent) as a minimum for entry into the occupation in the US. Specialty occupations include those in the fields of (i) architecture, (ii) engineering, (iii) mathematics, (iv) physical sciences, (v) social sciences, (vi) medicine and health, (vii) education, (viii) business specialties, (ix) accounting, (x) law, (xi) theology, and (xii) the arts.

The employer's petition must demonstrate why the position is a specialty occupation by submitting evidence that (i) a bachelor's or higher degree is normally the minimum entry requirement and that the degree is commonly required in the industry in parallel positions, (ii) the duties to be performed are so complex or unique that only a degree-holder can perform them and that the employer normally requires a degree or equivalent for the position, or (iii) the specific duties are so specialized and complex that the knowledge required to perform them is usually associated with having attained a degree.

Additionally, the employer must prove that the worker is qualified to engage in that specialty occupation. This is done by demonstrating that the person is licensed in the state of employment, if necessary, and has obtained the required degree. Where the worker lacks the required degree, the employer may show that the worker has obtained special training and/or experience in the specialty through progressively responsible positions directly related to the specialty.

The employer may also demonstrate that the worker's experience is equivalent to a required degree by providing (i) an evaluation from an official at a college or university that normally grants credit based on
such training or work experience, (ii) the results of a recognized college equivalency examination or certification, or (iii) registration from a nationally recognized professional association that is known to grant certification or registration to persons qualified in the specialty.

Before filing the petition with the USCIS, the employer must first receive an approved Labor Condition Application (LCA), Form ETA-9035, from the DOL regarding the position to be filled. Employers file the LCA with the DOL online. On this form, the employer must provide, among other things, the job title, location and salary offered. The employer must also make certain attestations regarding the wage and working conditions of the position. Notice of the filing must be made publicly available to the employees at the intended place of employment for at least 10 business days. If the employer violates the terms of the LCA, the DOL may enforce civil monetary penalties against the employer, or temporarily or permanently bar the employer from applying for permission to hire other workers under the H-1B program.

Additionally, the employer must attest that if the worker is dismissed before the expiration of their H-1B status, the employer will be liable for the reasonable costs of the worker's return transportation abroad. If the worker voluntarily terminates the employment relationship, the employer is not obligated to pay the return transportation costs. If the validity period granted by the government expires, the employer is not obligated to pay the return transportation costs.

The H-1B visa is subject to a maximum six-year duration, with some exceptions for persons for whom employment-based permanent residence applications are pending. Unless the H-1B worker qualifies for one of these exceptions, once the H-1B worker has been in the US for six years under an H-1B (or L) visa status, they must spend at least one year outside the US before becoming eligible for a new H-1B visa.
No more than 65,000 new H-1B visas may be issued annually. Generally, this cap applies to first-time H-1B visa holders, with some exceptions for (i) persons seeking employment with institutions of higher education, nonprofit research organizations and governmental research organizations; and (ii) certain physicians changing from J-1 to H-1B status.

The H-1B program is administered through a lottery system, which requires petitioners to electronically register prospective H-1B beneficiaries during a specified period. If a beneficiary's registration is selected in the lottery, a petitioner is permitted to file an H-1B Cap Petition with the USCIS on behalf of the individual.

Part of the 65,000 annual allotment is also set aside for citizens of Chile and Singapore pursuant to treaties between the US and the respective countries.

An additional 20,000 new H-1B visas are available each fiscal year to individuals who have a master's or higher degree from a US institution of higher education. This 20,000 pool for advanced degree holders augments the annual cap of 65,000 H-1B visas.

Spouses and minor children of H visa holders may receive dependent H-4 visas. H-4 children are not authorized to work in the US. However, H-4 dependent spouses of H-1B employees only may apply for work authorization in the US. To be eligible, the principal H-1B employee must be the beneficiary of an approved immigrant petition or must otherwise qualify for an extension of H-1B status beyond the six-year limit based on meeting certain milestones in the permanent residence process.
**Example:** Hitomi, a Japanese biochemist, receives an offer from a US pharmaceutical company to manage a research project relating to the development of new drugs. The position requires someone with a bachelor's degree in biochemistry, so it qualifies as a specialty occupation. Because Hitomi has a graduate degree in biochemistry, they are qualified for the position and should be eligible for an H-1B visa.

**H-2B visas**

The H-2B visa category is for temporary nonagricultural workers hired by US employers to cover seasonal or peak-load needs.

To obtain an H-2B visa, two documents must be submitted to the USCIS: (i) an employer petition and (ii) a DOL certification. The prospective US employer or the authorized representative of a foreign employer with a US location must prepare the petition.

The petition must state that the person who will perform temporary services in the US will not displace any US workers capable of performing the same services and that the employment of the person will not adversely affect the wages or working conditions of US employees (this must also be stated in the DOL certification). Additionally, the employer must explain in the petition that the need for the worker's services is truly temporary, meaning that the need is for no more than one year, including one-time occurrences, seasonal changes or peak-load needs.

Although there are no special educational requirements to obtain an H-2B visa, the petition should explain what qualifications the person has that enable them to perform the services needed by the employer. The employer must also certify that it is liable for the person's transportation costs home if dismissed before the period of authorized stay has ended. The employer does not have this liability if the person voluntarily terminates their employment.
A maximum of 66,000 H-2B visas may be issued annually. Of the 66,000 H-2B visas available each year, only 33,000 may be used during the first six months of the fiscal year. The H-2B visa is issued for periods up to one year, but extensions are available. However, no H-2B visa holder may remain in the US for more than three years.

**Example:** A US construction firm wishes to install a particular type of stained glass in a hotel it is constructing, but no one in the US knows how to make it. The construction firm wishes to hire Bruno, an Italian glassmaker who is an expert in crafting this particular kind of stained glass, to make the glass for the hotel. Assuming the other requirements are satisfied, Bruno should be eligible for the H-2B visa because they will not displace any US workers in this job and the construction firm needs their expertise for this one-time occurrence.

**I visas**

The I visa category is designed to facilitate the admission of certain representatives of the foreign media. Individuals are eligible for the I visa if they (i) represent a foreign information media outlet (press, radio, film or other foreign information media); (ii) are going to the US to engage solely in this profession; and (iii) have a home office in a foreign country.

Occupations under this category include reporters, film crews, editors and similar occupations. Any spouses and children under the age of 21 may accompany or follow to join an I nonimmigrant. Dependents of an I nonimmigrant may not obtain work authorization.

Individuals must apply for an I visa at a US embassy or consulate with jurisdiction over their place of permanent residence. The applicant need not file a separate petition with the USCIS. I visas are generally issued for one year. Extensions are typically granted in one-year increments and there is no limit to such extensions.
O-1 visas

The O-1 visa category is reserved for individuals who have (i) extraordinary ability in the fields of science, art, education, business or athletics as demonstrated by sustained national or international acclaim; or (ii) a demonstrated record of extraordinary achievement in the motion picture or television industry.

The employer or an agent must file the O-1 visa petition. If the individual will work for more than one employer, each employer must file a petition on their behalf. However, an agent can file a petition on behalf of an individual that covers an itinerary of events with multiple employers. The petition must show that (i) the individual will work in the area of extraordinary ability while in the US and (ii) the individual has extraordinary ability.

To establish that someone has extraordinary ability in science, education, business or athletics, the petition must provide evidence of (i) the individual's receipt of a major internationally recognized award, such as the Nobel Prize; or (ii) at least three of the following:

- Documentation of the individual's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor
- Documentation of the individual's membership in associations in the field that require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields
- Published materials in professional or major trade publications or major media about the person, relating to the individual's work in the field
- Evidence of the individual'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
Evidence of the individual's original scientific, scholarly or business-related contributions of major significance in the field

Evidence of the individual's authorship of scholarly articles in the field, in professional journals or other major media

Evidence that the individual has been employed in a critical or essential capacity for organizations and establishments that have distinguished reputations

Evidence that the individual has commanded and now commands a high salary or other remuneration for services evidenced by contracts or other reliable evidence

The evidentiary standards for establishing extraordinary ability in the arts and extraordinary achievement in the motion picture or television industry are similar to those listed above. However, they are tailored to these particular fields. For example, extraordinary ability or achievement may be demonstrated by being nominated for or receiving an Academy Award, an Emmy, a Grammy or a Director's Guild Award.

In addition to the petition, the employer must submit an advisory opinion from a "peer group" regarding the individual's eligibility for the visa. The peer group can be a professional organization or an association of persons in the same field. The advisory opinion should describe the individual's ability and achievements in the field, describe the duties to be performed and state whether the position requires the services of a person with extraordinary ability.

The O-2 visa category is designed to facilitate the admission of persons providing essential support to artists and athletes of extraordinary ability and aliens of extraordinary achievement. Although a separate petition must be filed for someone seeking O-2 status, the classification does not allow the individual to work separate and apart from the O-1 alien to whom they provide support.
To accompany an alien of extraordinary ability, the individual must (i) assist in the performance of the O-1 alien, (ii) be an integral part of the actual performance, and (iii) have critical skills and experience with the O-1 alien that are not general in nature or possessed by a US worker. To accompany an alien of extraordinary achievement, the individual must have skills and experience with the O-1 alien that are not of a general nature and that are (i) critical based on a preexisting long-standing working relationship with the O-1 alien or (ii) continuing and essential participation in a significant production that will take place in and outside the US. As with the O-1 category, the employer must submit an advisory opinion from a "peer group" regarding the person's eligibility for an O-2 visa.

The O-1 and O-2 visas are normally issued at the outset for the duration of the event or activity to be pursued in the US, with a maximum length of three years. The O-1 visa can be extended in one-year increments as necessary to complete the event or activity. For the purposes of the O visa, an "event" is defined as a science project, conference, convention, lecture series, tour, exhibit, business project, academic year or engagement.

Spouses and minor children of O-1 and O-2 visa holders may receive dependent O-3 visas. However, O-3 spouses and children are not authorized to work in the US.

**Treaty-based professionals**

**TN visas**

Trade NAFTA or "TN" status is issued to Canadian and Mexican citizens who seek temporary entry into the US to engage in professional business activities pursuant to the United States-Mexico-Canada Agreement, which replaced the North American Free Trade Agreement (NAFTA). The United States-Mexico-Canada Agreement effected no substantive changes to the TN visa classification requirements.
Mexican citizens may apply for TN status directly at a US embassy or consulate in Mexico, and Canadian citizens may apply for TN status at a US port of entry. To qualify for TN status, the Canadian or Mexican national must be engaged in one of the following occupations or professions:

<table>
<thead>
<tr>
<th>Accountant</th>
<th>Industrial designer</th>
<th>Research assistant (post-secondary educational institution)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Architect</td>
<td>Interior designer</td>
<td>Scientific technician/technologist</td>
</tr>
<tr>
<td>Computer systems analyst</td>
<td>Land surveyor</td>
<td>Social worker</td>
</tr>
<tr>
<td>Disaster relief insurance claims adjuster</td>
<td>Landscape architect</td>
<td>Sylviculturist (including forestry specialist)</td>
</tr>
<tr>
<td>Economist</td>
<td>Lawyer</td>
<td>Technical publications writer</td>
</tr>
<tr>
<td>Engineer</td>
<td>Librarian</td>
<td>Urban planner</td>
</tr>
<tr>
<td>Forester</td>
<td>Management consultant</td>
<td>Vocational counselor</td>
</tr>
<tr>
<td>Graphic designer</td>
<td>Mathematician (including statistician)</td>
<td></td>
</tr>
<tr>
<td>Hotel manager</td>
<td>Range manager/Range conservationist</td>
<td></td>
</tr>
<tr>
<td>Medical professions</td>
<td></td>
<td></td>
</tr>
<tr>
<td>-----------------------------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dentist</td>
<td>Occupational therapist</td>
<td>Psychologist</td>
</tr>
<tr>
<td>Dietitian</td>
<td>Pharmacist</td>
<td>Recreational therapist</td>
</tr>
<tr>
<td>Medical laboratory technologist</td>
<td>Physician (teaching or research only)</td>
<td>Registered nurse</td>
</tr>
<tr>
<td>Nutritionist</td>
<td>Physiotherapist or physical therapist</td>
<td>Veterinarian</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Science professions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculturist</td>
</tr>
<tr>
<td>Animal breeder</td>
</tr>
<tr>
<td>Animal scientist</td>
</tr>
<tr>
<td>Apiculturist</td>
</tr>
<tr>
<td>Astronomer</td>
</tr>
<tr>
<td>Biochemist</td>
</tr>
<tr>
<td>Biologist</td>
</tr>
<tr>
<td>Chemist</td>
</tr>
</tbody>
</table>
Most occupations on the above list require either a baccalaureate degree from a US or Canadian university, or a licenciatura degree from a Mexican university. For certain occupations, such as a lawyer or a teaching or research physician, a state license will be accepted in lieu of a degree.

Additionally, some occupational categories permit a person to qualify based on three years of experience and a two-year post-secondary degree, such as the computer systems analyst, graphic designer, industrial designer and technical publications writer categories. Professionals in the management consultant and scientific technician/technologist categories can qualify based on experience alone.

Canadian and Mexican citizens may be admitted to the US for up to three years at a time. There is no limit on the number of years that a Canadian or Mexican citizen can hold TN status. However, individuals holding TN status must not have an intent to establish permanent residence in the US.

**Note:** Traditionally, the above-listed categories have provided for some flexibility. For instance, most IT professionals may enter the US under the TN categories of computer systems analyst, management consultant or engineer. Other categories are construed very narrowly. For example, the economist category does not include individuals entering as financial analysts.
## E-1 and E-2 visas

The E-1 and E-2 visa is available for individuals and their dependent family members pursuant to commerce and navigation treaties between the US and the individuals' home country. Generally, these treaties provide reciprocal benefits to US citizens in the other treaty country. Such treaties are currently in place between the US and the following countries:

<table>
<thead>
<tr>
<th>Country</th>
<th>Country</th>
<th>Country</th>
</tr>
</thead>
<tbody>
<tr>
<td>Albania</td>
<td>France</td>
<td>Oman</td>
</tr>
<tr>
<td>Argentina</td>
<td>Georgia</td>
<td>Pakistan</td>
</tr>
<tr>
<td>Armenia</td>
<td>Germany</td>
<td>Panama</td>
</tr>
<tr>
<td>Australia</td>
<td>Greece</td>
<td>Paraguay</td>
</tr>
<tr>
<td>Austria</td>
<td>Grenada</td>
<td>Philippines</td>
</tr>
<tr>
<td>Azerbaijan</td>
<td>Honduras</td>
<td>Poland</td>
</tr>
<tr>
<td>Bahrain</td>
<td>Ireland</td>
<td>Romania</td>
</tr>
<tr>
<td>Bangladesh</td>
<td>Israel</td>
<td>Senegal</td>
</tr>
<tr>
<td>Belgium</td>
<td>Italy</td>
<td>Serbia</td>
</tr>
<tr>
<td>Bolivia</td>
<td>Jamaica</td>
<td>Singapore</td>
</tr>
<tr>
<td>Bosnia &amp; Herzegovina</td>
<td>Japan</td>
<td>Slovak Republic</td>
</tr>
<tr>
<td>Brunei</td>
<td>Jordan</td>
<td>Slovenia</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>Kazakhstan</td>
<td>South Korea</td>
</tr>
<tr>
<td>Cameroon</td>
<td>Kosovo</td>
<td>Spain</td>
</tr>
<tr>
<td>Canada</td>
<td>Kyrgyzstan</td>
<td>Sri Lanka</td>
</tr>
<tr>
<td>Chile</td>
<td>Latvia</td>
<td>Suriname</td>
</tr>
<tr>
<td>Colombia</td>
<td>Liberia</td>
<td>Sweden</td>
</tr>
<tr>
<td>Congo (Brazzaville)</td>
<td>Lithuania</td>
<td>Switzerland</td>
</tr>
<tr>
<td>Congo (Kinshasa)</td>
<td>Luxembourg</td>
<td>Taiwan</td>
</tr>
<tr>
<td>Costa Rica</td>
<td>Macedonia</td>
<td>Thailand</td>
</tr>
<tr>
<td>Croatia</td>
<td>Mexico</td>
<td>Togo</td>
</tr>
</tbody>
</table>
To qualify for an E-1 or E-2 visa, the following four requirements must be met:

- A commerce and navigation treaty must exist between the US and the country in question.

- The person or entity must qualify as either a "Treaty Trader" or "Treaty Investor." A Treaty Trader must demonstrate that they engage in "substantial" trade, principally between the US and the treaty country. Under immigration regulations, "trade" is defined broadly to encompass the exchange, purchase or sale of goods and/or services. Relevant "services" include banking, insurance, transportation, communications and data processing, advertising, accounting, design and engineering, management consulting, tourism and technology transfer. Alternatively, a Treaty Investor is someone who has invested a substantial amount of capital in a US enterprise, which the investor develops and directs. There is no fixed amount of capital required to qualify. However, the investment must be considered "substantial" for the industry involved. In addition, the amount invested must be subject to some kind of risk. Because the investor must develop and direct the investment, the investment must be active, not passive.

- The employee must either act in an executive or supervisory capacity, or have special, essential skills or qualifications.
The Treaty Trader or Treaty Investor must have the same nationality as the treaty country. If the Treaty Trader or Treaty Investor is a person, they cannot be a US permanent resident alien. If the Treaty Trader or Treaty Investor is an organization, it must be at least 50% owned by those with the treaty nationality.

E visa holders are usually admitted to the US for two years upon each entry, although the underlying E visa stamp may be valid for up to five years. There is no limit on the number of years that someone can hold E status.

Spouses and minor children of Treaty Investors and Treaty Traders may receive derivative dependent E-1 or E-2 visas, even if they are not citizens of the treaty country. Additionally, spouses of Treaty Traders and Treaty Investors are eligible for employment authorization incident to status.

**Example:** A British company sets up a new enterprise in the US by investing a substantial amount of money in the new enterprise (i.e., purchasing/renting a warehouse and office space and hiring US employees) and qualifies as a Treaty Investor. The investing British company wishes to send two of its employees, Eva, a German national, and Michael, a British national, to work at the US enterprise as general managers. Both Eva and Michael have managerial qualifications, which they obtained while working for the British company. Assuming the US entity has been registered as a qualified sponsoring entity, Michael, as a British national, could qualify for an E visa to perform services as a general manager in the US.

However, Eva, who has the same professional qualifications as Michael, will not qualify for an E visa because she does not have the same nationality as that of the investing British company.
E-3 visas

The E-3 visa is available solely to Australian citizens who will work in the US in a specialty occupation. Currently, 10,500 E-3 visas may be issued each year.

The E-3 visa category is a hybrid of the H-1B and E-1/E-2 visa categories. Like the H-1B visa, the E-3 category is limited to occupations that require (i) the theoretical and practical application of a body of highly specialized knowledge and (ii) the attainment of a bachelor's degree or higher (or the equivalent) in the specialty field. Additionally, the US employer must make attestations about the wage and working conditions in an LCA, which is submitted to the DOL. The certified LCA and other necessary evidence for the classification are presented directly to a US consulate abroad for review and approval.

Like other E visas, the E-3 category does not require a petition to be filed with and approved by the USCIS prior to visa issuance. In addition, the E-3 visa is generally issued in two-year increments and can be renewed indefinitely. Spouses and minor children may receive dependent E-3 visas without counting toward the numerical limitation even if they are not Australian citizens, and E-3 spouses are eligible for employment authorization incident to status.
Immigrant visa guide

There are five employment-based immigrant visa preference categories under which a person may qualify for US permanent resident status (i.e., a green card). The most appropriate preference category for someone largely depends on (i) the requirements for the position sought in the US and (ii) the individual's education and experience. The individual's citizenship can also play an important factor in developing a permanent residence strategy. A limited number of green cards are allocated to applicants within each preference category per year based on the applicant's nationality. The quota for each preference category is filled on a first-come, first-served basis. Therefore, individuals within certain categories from countries with high US immigration rates may experience delays during the application process.

The procedure for obtaining a green card based on employment generally involves three consecutive steps: (i) filing a Labor Certification Application with the DOL, after testing the labor market to verify that there are no qualified and interested US workers for the position offered; (ii) filing the Form I-140, Immigrant Petition, with the USCIS to request that the person be found qualified for US permanent residence; and (iii) filing the Form I-485, Application to Adjust Status, or Form DS-230, Application for an Immigrant Visa, to confirm that the person and their accompanying family members meet the minimum health, financial and government-determined moral standards for obtaining US lawful permanent residence. In certain circumstances, as outlined below, the employer may bypass the Labor Certification Application step and immediately proceed with the Immigrant Petition. Additionally, if the applicant is not subject to a quota-based backlog, the Application to Adjust Status can be submitted to the USCIS concurrently with the Immigrant Petition.
Labor certifications

The DOL's system for filing Labor Certification Applications is called the Program Electronic Review Management (PERM). PERM allows an employer to file online after the employer has conducted a mandatory test of the labor market through "sources normal to the occupation and industry."

Prior to filing a PERM application, the employer must (i) obtain a prevailing wage determination from the DOL's Office of Foreign Labor Certification and (ii) conduct the necessary recruitment steps. The recruitment steps required for a position vary according to whether the occupation is classified as "professional" or "nonprofessional." For all occupations, the employer must (i) place a 30-day job order with the appropriate State Workforce Agency, (ii) place advertisements on two different Sundays in the newspaper with the largest circulation in the area, and (iii) post a notice of the job opportunity for 10 consecutive business days at the location where the person will be employed. For professional occupations (with some exceptions for certain college or university teachers), the employer must also select at least three of the following alternative recruitment methods:

- Job fairs
- Employer's website
- Job search website
- On-campus recruiting
- Trade or professional organizations
- Private employment firms
- Employee referral program
- Campus placement offices
- Local and ethnic newspapers
Radio and television advertisements

The recruitment efforts must be conducted at least 30, but no more than 180, days prior to filing the PERM application. For professional occupations, one of the alternative recruitment methods may be completed within the 30-day period prior to filing the PERM application.

During the recruitment efforts, the employer must evaluate all CVs as they are received and determine whether applicants meet the minimum education and work experience requirements for the position offered. The employer must then prepare a recruitment report that includes the number of US workers rejected, categorized by the lawful, job-related reasons for rejecting each applicant.

The employer does not need to submit documentation of the recruitment efforts with the PERM application. However, the employer is required to retain documentation of its recruitment efforts, including all CVs received and the recruitment report, in an audit file to be kept on the employer's premises for five years from the date of filing the PERM application. The audit file must also contain the prevailing wage determination obtained from the DOL and any other documentation verifying the information provided in the application. The audit file must be made available to the DOL upon request, if an audit request is triggered before reaching a decision on the PERM application or at any time during an unannounced on-site visit.

If the employer has had layoffs in the same geographic area during the six-month period prior to filing the application, and the layoffs have involved the same or a related occupation for which certification is being sought, the employer must notify and consider potentially qualified laid-off US workers before filing the PERM application. Layoffs are broadly defined in the PERM context as any "involuntary separation involving one or more employees without cause or prejudice."
The PERM application requires the employer to make numerous attestations regarding the status of the company (including layoff activities within the past six months), the specifics of the job offer and the details of the recruitment steps taken. The DOL reviews an application based on various selection criteria, allowing more problematic applications to be identified for an in-depth audit.

If a PERM application is selected for an audit, the employer must submit documentation verifying the information in the application. The DOL will then either certify the application, deny the application or require the employer to undergo supervised recruitment.

Employers may bypass the PERM application process if their foreign national employee can qualify in one of the first preference, employment-based immigrant visa categories. These categories include (i) aliens of extraordinary ability, (ii) outstanding professors and researchers, and (iii) certain multinational managers and executives.

**Aliens of extraordinary ability**

The immigrant category for aliens of extraordinary ability is similar to the O nonimmigrant visa category. The individual must have sustained national or international acclaim in the sciences, arts, education, business or athletics. Additionally, the individual must seek to enter the US to continue working in the area of extraordinary ability and their entry must "substantially benefit prospectively" the US.

The individual's extraordinary ability and achievements must be extensively documented and must indicate that they are part of a small percentage who have risen to the top of a field of endeavor. The individual can demonstrate their extraordinary ability in one of two ways, the first of which is by demonstrating the receipt of major prizes or awards for outstanding achievement (e.g., the Nobel Prize). Alternatively, the individual can provide evidence of at least three of the following: (i) receipt of lesser nationally or internationally recognized prizes or awards; (ii) membership in an association that
requires outstanding achievement as judged by recognized national or international experts; (iii) evidence of published material in professional or major trade publications written by others about the person's work; (iv) participation as a judge of the work of others; (v) original scientific research, scholastic, artistic or business-related contributions of major significance; (vi) authorship of scholarly books or articles in the field; (vii) artistic exhibitions or showcases; (viii) performance in a leading or cultural role for organizations or establishments that have a distinguished reputation; (ix) high salary or remuneration in relation to others in the field; or (x) commercial success in the performing arts.

**Outstanding professors or researchers**

The requirements for qualification as an outstanding professor or researcher are slightly less rigorous than for qualification as an alien of extraordinary ability. Outstanding professors or researchers are those who are internationally recognized in a specific academic area and who have at least three years of teaching or research experience in that area. The individual must also seek entry to the US to accept a tenure or tenure track position or to conduct research at a university or private employer for an indefinite period. Private employers must employ at least three individuals in full-time research activities and must have achieved documented accomplishments in an academic field. Additionally, the person must provide evidence of at least two of the following: (i) receipt of major prizes or awards for outstanding achievement, (ii) membership in an association that requires outstanding achievement, (iii) published material in professional publications written by others about the person's work, (iv) participation as the judge of the work of others, (v) evidence of original scientific research, or (vi) authorship of scholarly books or articles in the field.
Certain multinational managers and executives

The immigrant category for certain multinational managers and executives is comparable to the L-1A nonimmigrant visa classification. The person must have been employed outside of the US (i) for at least one continuous year during the three-year period prior to being transferred to the US; (ii) in an executive or managerial capacity; and (iii) by a firm, corporation or other legal entity, or an affiliate or subsidiary thereof. Additionally, the individual must be seeking entry to, or, in certain circumstances, remain in, the US to work for the same employer (or its affiliate or subsidiary) in a managerial or executive capacity. The prospective US employer must also have been doing business for at least one year.

Aliens of exceptional ability and professionals with advanced degrees

Individuals who fall within the second preference employment-based category include members of the professions who (i) hold advanced degrees; or (ii) because of their exceptional ability in the sciences, arts or business, will substantially benefit the national economy, cultural or educational interests or the welfare of the US. Additionally, a US employer must be seeking the individual's services in the sciences, arts, professions or business. To qualify as a member of the professions with an advanced degree, the position offered must require (and the person must have) either (i) a master's degree in a specialty area; or (ii) a bachelor's degree or a foreign equivalent, plus five years of progressively responsible experience in the area of specialty. To qualify as an alien of exceptional ability, the individual must be able to prove their rare or unusual talents by providing at least three of the following: (i) a degree relating to the area of exceptional ability; (ii) a letter from a current or former employer showing at least 10 years of experience; (iii) a license to practice a given profession; (iv) evidence that the person has commanded a high salary or remuneration demonstrating exceptional ability; (v) membership in a professional organization; or (vi) recognition for
achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

**Aliens whose work is in the national interest**

Aliens of exceptional ability and professionals with advanced degrees may receive a waiver of the job offer and the PERM application requirements if the USCIS deems such action to be in the national interest. Someone seeking to meet the "national interest" standard must provide a list of accomplishments that make a strong showing of prospective national benefit to the US. Specifically, (i) the proposed endeavor must have both substantial merit and national importance; (ii) the foreign national must be well-positioned to advance the proposed endeavor; and (iii) on balance, it would be beneficial to the US to waive the requirements of a job offer and thus of a labor certification.

**Professionals, skilled workers and other workers**

The third preference category includes professionals, skilled workers and other workers. An individual may qualify as a "professional" if the position offered requires (and the person has) at least a bachelor's degree (or the foreign educational equivalent). An individual may qualify as a "skilled worker" if the position requires (and the person has) two years of experience or education in a field that requires two years of training. "Other workers" are those with less than two years of education or expertise. PERM applications are required for all persons in the third preference category.

**Special immigrants**

The fourth preference category provides immigrant visas for special immigrants, including (i) legal permanent residents returning from a temporary visit abroad, (ii) individuals who previously held US citizenship and are applying for reacquisition of such citizenship, (iii) religious workers, (iv) employees of the US government or of the
American Institute in Taiwan for 15 years, (v) Panama Canal treaty employees, (vi) international medical graduates, (vii) retired G-4 officers, (viii) court-dependent special immigrant juveniles, (ix) US service members who honorably served on active duty for 12 years, (x) Victims of September 11, 2001 Terrorist Attack, (xi) NATO civilian employees, (xii) broadcasters entering the US to work for the International Broadcasting Bureau of the Broadcasting Board of Governors, (xiii) translators with the US armed forces, (xiv) Iraqis providing service to the US, and (xv) Afghans providing service to the US. Because these special immigrants would be atypical business professionals, a comprehensive discussion of the fourth preference category is outside the scope of this manual.

**Investors**

The fifth preference category provides immigrant visas for individuals making a qualifying investment in a new commercial enterprise in the US. With approximately 10,000 visas available annually, this program is for immigrant investors seeking to enter the US to engage in a commercial enterprise that will benefit the US economy and create at least 10 full-time jobs for qualified US workers. The immigrant investor must have invested or be in the process of investing USD 1.8 million in a US enterprise. The investment may be as low as USD 900,000 (starting 21 November 2019) if the investment is made in a governmentally certified "targeted employment area."

**Diversity Visa Program**

The Diversity Visa Program makes 55,000 immigrant visas available annually to persons from countries with low rates of immigration to the US during the previous five years. This program is commonly referred to as the "visa lottery" because a computer-generated random lottery drawing chooses applicants for diversity visas. Anyone selected by the lottery will be given the opportunity to apply for US permanent residence. Each year (usually in early October), the Department of State announces the instructions and the deadline for submitting
applications under the program. All applications must be submitted online at www.travel.state.gov.

Retention of permanent residence status

Once granted, permanent residence status can be lost in several ways. A US permanent resident can be deemed to have "abandoned" their permanent residence status by remaining outside of the US for six months or longer without maintaining adequate ties to the US. US permanent residents anticipating an extended absence from the US should seek to establish and maintain ties to the US and take actions to protect their permanent residence status, including filing an application for a Reentry Permit.

Preservation of residence for naturalization purposes

A US permanent resident may be eligible to apply for naturalization after having resided continuously in the US for at least five years after obtaining permanent residence. For individuals who were sponsored for permanent residence status by a US citizen spouse and have been living in marital union with the sponsoring US citizen leading up to the application for naturalization, the continuous US residence requirement is only three years. An absence of one year or more breaks this continuous residence, unless the permanent resident has obtained approval of an Application to Preserve Residence for Naturalization Purposes. An individual whose extended absence is for the purpose of employment with a qualifying US business abroad, and who later intends to file for naturalization, may wish to apply for this benefit.
Employer responsibilities

Introduction

The DHS has recently increased its focus on using civil and administrative tools to penalize and deter the employment of unauthorized workers through a significant increase in I-9 audits. The DHS has previously focused its immigration law enforcement efforts on employers that violate criminal statutes. The DHS and its enforcement bureau, ICE, are committed to using all civil and administrative tools to penalize and deter the employment of unauthorized workers, including I-9 audits, civil fines and debarment proceedings.

Additionally, the USCIS Office of Fraud Detection and National Security (FDNS) is continuing its review of the L-1 and H-1B Programs. As part of this initiative, FDNS officers are making unannounced worksite visits to L-1 and H-1B employers to verify the accuracy of the information contained in L-1 and H-1B petitions regarding the terms and conditions of L-1 and H-1B workers' employment.

It is imperative for employers to understand the full range of their responsibilities and potential liabilities under US immigration law and to include immigration compliance in their corporate compliance programs.

Employment eligibility verification (I-9) requirements

Employers are required to verify the employment eligibility of all employees within three days of hire. The mechanism for doing this is the I-9 (Employment Eligibility Verification) Form.

Each employee hired on or after 7 November 1986 must complete the designated portion of the I-9 Form. At the time of hire, the employee must attest, under penalty of perjury, that they are authorized to work in the US as a US citizen, lawful permanent resident or nonimmigrant...
with a time-limited form of work authorization. At the time of hire, the employee must also submit to the employer for review certain original documents that establish identity and employment authorization.

Within three days of hire, the employer must (i) review the employee's documents; and (ii) complete the second portion of the I-9 Form by registering the type of documentation provided, the document number and the expiration date (if any). If the employee has provided a document expiration date in the employee's section of the I-9 Form, the employer must also reverify the employee's employment eligibility before that date has passed. The employer must retain the completed I-9 Form for at least three years or one year after employment terminates, whichever is later. ICE may impose civil sanctions on employers that fail to comply with the employment eligibility verification requirement. Employers that do not complete and retain I-9 Forms for every employee hired on or after 7 November 1986 may face civil fines of USD 230 to USD 2,292 for each "paperwork" violation. The severity of the penalty will be determined by (i) the size of the business, (ii) the employer's good faith efforts to comply with the law, (iii) the number of unauthorized employees, and (iv) whether the employer has a history of violations.

In addition, if ICE determines that an employer has knowingly hired an unauthorized worker, the employer may face civil sanctions, which are assessed for each unauthorized alien employee and increase with each offense. The per-person fine for violations occurring before 27 March 2008 ranges from USD 275 to USD 2,200 for the first offense; USD 2,200 to USD 5,500 for the second offense; and USD 3,300 to USD 11,000 for subsequent offenses involving the same employee. The per-person fine for violations occurring on or after 27 March 2008 and on or before 2 November 2015 ranges from USD 375 to USD 3,200 for the first offense; USD 3,200 to USD 6,500 for the second offense; and USD 4,300 to USD 16,000 for subsequent offenses involving the same employee. The per-person fine for violations occurring after 2 November 2015 ranges from USD 559 to USD 4,473 for the first offense; USD 4,473 to USD 11,181 for the second offense;
and USD 6,709 to USD 22,363 for subsequent offenses involving the same employee. The per-person file for violations that occurred after 2 November 2015 but where the penalties were assessed after 5 April 2019 ranges from USD 573 to USD 4,586 for the first offense; USD 4,586 to USD 11,463 for the second offense; and USD 6,878 to USD 22,927 for subsequent offenses involving the same employee.

Employers are liable for both actual and "constructive" knowledge that an employee is not authorized to work.

**Note**: An employer may be deemed to have constructive knowledge that an employee is not authorized to work if the SSA notifies the employer that an employee's name and social security number on the Form W-2 do not match SSA records. The DHS has rescinded its "safe harbor" regulations, which outlined procedures to follow upon receipt of a "No-Match" letter. However, employers that receive a No-Match letter are still advised to check their records, inform the employee of the discrepancy and give the employee a reasonable amount of time to resolve the problem with the SSA.

Employers that employ foreign nationals without work authorization may also face criminal sanctions. Any person who engages in a "pattern or practice" of employing unauthorized aliens may be fined up to USD 3,000 for each unauthorized alien and the responsible executive who condones the practice may be imprisoned for up to six months. Additionally, any employer that knowingly hires 10 or more unauthorized aliens during a 12-month period can be fined under Title 18 of the United States Code or imprisoned for up to five years, or both.
Note: Employers who have technical or procedural errors in their I-9 records may be considered to be in compliance if they have otherwise made a good faith attempt to comply with the employment verification requirements. Unfortunately, the terms "technical or procedural failure" and "good faith attempt" have not been statutorily defined and the DHS has yet to issue regulations regarding these terms. However, it is clear that ICE will not apply this "good faith" provision to employers either who have engaged in a pattern of violating employment verification requirements or who fail to correct errors within 10 business days after being notified of being noncompliant.

E-Verify and IMAGE

The DHS currently offers two programs to assist employers in complying with the employment eligibility verification requirements: E-Verify and ICE Mutual Agreement between Government and Employers (IMAGE).

E-Verify is an online system operated jointly by the DHS and the SSA. Participating employers must check the work authorization status of new hires online by comparing information from the person's I-9 Form against DHS and SSA databases. E-Verify is a voluntary program for most employers. Additionally, effective from 8 September 2009, E-Verify is mandatory for employers with federal contracts or subcontracts that contain the Federal Acquisition Regulation E-Verify clause. Additionally, some states require the use of E-Verify, while other states have placed limits on its use by employers unless required by federal law.

The IMAGE program is another voluntary program that is designed to assist employers in targeted sectors to reduce unauthorized employment and prevent the use of fraudulent identity documents by employees. Employers participating in the IMAGE program must enroll in E-Verify, undergo an I-9 audit conducted by ICE and adhere
to ICE's "Best Employment Practices," which include the development of a self-reporting procedure to notify ICE of any violations.

**Employment discrimination based on citizenship or national origin**

When Congress enacted the employment eligibility verification provisions, it was concerned that some employers would unfairly target certain persons in their compliance efforts. As a result, Congress added the anti-discrimination provisions, which generally prohibit employers from discriminating against certain protected classes with respect to hiring, recruiting and discharging from employment because of national origin or citizenship status.

The national origin discrimination provisions contained in the Immigration and Nationality Act apply to all individuals who are currently authorized to work in the US. In contrast, citizenship status discrimination provisions only apply to US citizens, lawful permanent residents, temporary residents, asylees and refugees. This means that the citizenship status discrimination provisions do not cover most nonimmigrants (e.g., H-1B or L-1 visa holders).

Although a finding of discrimination under US immigration law requires a finding of the employer's discriminatory intent, which can be a difficult burden to meet, employers should not disregard the importance of these anti-discrimination provisions. Activities such as (i) specifying documents that an employee must present during the verification process or (ii) inquiring about an applicant's immigration status during an interview can give rise to discrimination claims. Employers can face civil fines and other penalties for committing unfair immigration-related employment practices.
Civil and criminal sanctions for document fraud

Under US immigration law, it is unlawful for someone to prepare, file or assist another in the preparation or filing of any application or document for immigration benefits with knowledge or reckless disregard of the falsity of the application or document. Theoretically, this provision applies to employers that assist their employees in creating "falsely made" I-9 Forms, nonimmigrant or immigrant petitions filed with the USCIS, or LCAs filed with the DOL.

Furthermore, an employer can face criminal penalties for failing to disclose its role as a document preparer when sponsoring an employee for immigration benefits. Specifically, an individual who knowingly fails to disclose, conceals or covers up the fact that they have assisted in preparing a falsely made application for immigration benefits may be fined under Title 18 of the United States Code, imprisoned for up to five years, or both. An individual who receives a second conviction under this provision may be fined under Title 18 of the United States Code, imprisoned for up to 15 years, or both. In light of these harsh provisions, it is imperative that all documents filed by employers to procure immigration benefits for current or prospective employees should be thoroughly reviewed and be signed only after careful scrutiny.

Note: Title VII of the Civil Rights Act of 1964 also contains a national origin discrimination provision that protects persons regardless of employment authorization status. Therefore, potential national origin discrimination claims should be analyzed from both the immigration and employment law perspectives.
Liabilities and penalties for employers of H-1B workers

Penalties for failure to comply with LCA requirements

All employers filing H-1B petitions must first have an LCA certified by the DOL's Office of Foreign Labor Certification. The LCA requires employers to attest that (i) the H-1B nonimmigrant will be paid at least the local prevailing wage or the employer's actual wage, whichever is higher, and paid for nonproductive time; (ii) the H-1B nonimmigrant will be offered benefits on the same basis as US workers; (iii) employment of H-1B nonimmigrants will not adversely affect the working conditions of similarly employed workers; (iv) there is no strike, lockout or work stoppage; and (v) notice of the LCA filing has either been posted for at least 10 days or provided to the bargaining representative, if one exists.

The DOL's Wage and Hour Division (WHD) receives complaints regarding LCA violations and, in response, may conduct investigations and enforcement proceedings, and impose sanctions on employers that violate the LCA provisions. Violations may include (i) making a material misrepresentation on an LCA, (ii) willful failure to pay the required wage or to provide the required working conditions, (iii) filing an LCA during a strike, (iv) failing to provide notice of the LCA filing, (v) substantial failure to be specific on the application, (vi) charging an employee an "early-termination penalty", and (vii) failing to post notice of the filing of the LCA for at least 10 days.

In response to any of these violations, the WHD may (i) assess civil monetary penalties up to USD 52,641 per violation; (ii) require the employer to pay back wages to aggrieved workers; and/or (iii) bar the employer from filing LCAs, employment-based immigrant petitions and H, L, O or P nonimmigrant petitions for up to three years. The DOL may impose other administrative remedies including, but not limited to, reinstatement of workers who were discriminated against, reinstatement of displaced US workers and payment of back wages to
workers who have been displaced or whose employment have been terminated in violation of these provisions.

Additionally, criminal sanctions of USD 10,000 and imprisonment for up to five years, or both, may be imposed for the knowing submission of false statements to the federal government.

"Roving" H-1B employees

H-1B employees are permitted to work only in US locations listed on an LCA. H-1B employees who change their place of employment to a worksite location that is outside of the metropolitan statistical area (MSA) of the original job site must have an H-1B Amendment Petition filed on their behalf. A MSA is deemed to be a location that is within normal commuting distance of the place of employment. A new LCA for the new worksite location also needs to be filed. However, when H-1B employees change their place of employment to an area within the same MSA, an amendment petition does not need to be filed. Under certain circumstances, H-1B employees may work at a new location outside of the MSA of the original worksite for up to 30 to 60 days without obtaining a new LCA or filing an amendment petition.

Payment of transportation costs for terminated H-1B employees

An employer that terminates an H-1B nonimmigrant employee for any reason before the end of the period of authorized stay is required to pay the "reasonable costs of return transportation" to the terminated employee. This regulation requires that the employer pay the cost of an airplane ticket home for the employee. Employers are not statutorily required to pay for the return transportation of the H-1B employee's family or their household goods.
Payment of salary to H-1B employees in "inactive status"

Non-terminated H-1B employees who are placed in "nonproductive" or inactive status by the employer are entitled to receive their full, pro rata salary as listed on the approved LCA until their date of termination. This regulation applies even if the employee is not working because of a companywide temporary shutdown or furlough, or if they need training, lack the proper license, are not assigned work or for any other reason. Employers who do not pay non-terminated H-1B employees may face civil penalties of up to USD 7,520 per employee. Employers are advised, therefore, to pay an H-1B employee their salary as listed on the LCA for nonproductive time until that employee has been terminated and the USCIS has been notified of the request to withdraw the H-1B Petition.

Notification requirements relating to changes in terms and conditions of employment

Employers are required to immediately notify the USCIS of any change in the terms and conditions of employment of its H-1B workers that may affect eligibility for H-1B status. Such changes may include a significant change in position or work location, or termination of employment. If the H-1B employee will continue to be employed by the employer after the change occurs, the employer should file an amended H-1B petition with the USCIS. If the H-1B employee is terminated, the employer must send a notification letter to the USCIS. The USCIS will revoke a terminated employee's H-1B status upon receiving notification from the employer.

Note: The requirement to pay the reasonable costs of return transportation also applies when an employer terminates the employment of an O-1 visa holder before the end of the period of authorized stay.
Employee responsibilities

Compliance with entry and exit requirements

The Homeland Security Act of 2002 mandated the development of better systems to track and monitor the entry and exit of all nonimmigrants, including business travelers, to and from the US. The United States Visitor and Immigrant Status Indicator Technology (US-VISIT), now replaced by the Office of Biometric Identity Management (OBIM), is a system that processes all non-US citizen travelers as they enter the US. This technology uses scanning and photographic equipment to collect biometric identifiers (fingerprints and digital photographs) to verify the traveler's identity and their compliance with US visa requirements and immigration policies.

Change of address notification

Aliens residing in the US (including permanent residents) are required to notify the USCIS in writing within 10 days of any change of address. This requirement applies to permanent residents and most nonimmigrants. Only A and G nonimmigrant visa holders are exempt. Failure to comply is a misdemeanor that can result in fines or imprisonment and can serve as a basis for removal from the US. Address changes should be submitted to the USCIS on the AR-11 Form (or AR-11SR for nationals of certain countries). This form and filing instructions can be obtained online at www.uscis.gov.
Acknowledgements

This booklet was initially an adaptation, in part, from a chapter coauthored by Betsy Stelle Morgan entitled Inbound Executive Immigration, which appeared in Structuring International Transfers of Executives by David W. Ellis (RIA 1996), a retired partner in Baker McKenzie's Chicago office. A portion of this book is drawn from an article entitled "Corporate Bulletin: Employer Sanctions for Violations of Immigration Laws" by David M. Serwer, who was a partner in Baker McKenzie's Chicago office.

The 2022 edition of this publication is a collaborative effort of Baker McKenzie's North American Employment and Compensation Law Practice Group.
Contacts

If you need further information, please contact any of the following US members of our Global Immigration & Mobility Practice Group:

Betsy Stelle Morgan  
+1 312 861 8944 or  
betsy.morgan@bakermckenzie.com  

John Foerster  
+1 312 861 8288 or  
john.foerster@bakermckenzie.com  

Melissa K. Allchin  
+1 312 861 8661 or  
melissa.allchin@bakermckenzie.com  

Matthew Gorman  
+1 312 861 8666 or  
matthew.gorman@bakermckenzie.com  

Ginger Solon Partee  
+1 312 861 2970 or  
ginger.partee@bakermckenzie.com
Baker McKenzie helps clients overcome the challenges of competing in the global economy.

We solve complex legal problems across borders and practice areas. Our unique culture, developed over 70 years, enables our 13,000 people to understand local markets and navigate multiple jurisdictions, working together as trusted colleagues and friends to instill confidence in our clients.