

CHAPTER 28 UNITED STATES IMMIGRATION LAW

This chapter is intended to provide a brief overview of the law and practice relating to immigration into the United States.

Overview of current immigration policy Since the terrorist attacks on the World Trade Center and other locations on September 11, 2001, United States immigration policy has become increasingly shaped by national security concerns, as opposed to the traditional concerns of family unification, attracting highly educated and skilled workers, attracting investment, and humanitarian concern for displaced or persecuted persons.

Whilst many types of visas remain, for better or worse, largely self-help projects, sweeping reform of U.S. immigration law, particularly in 1996 and again following the September 11 events, has made U.S. immigration procedures progressively more difficult to negotiate on one's own and the price of mistakes has become progressively higher.

Types of visa

B1 and B2 Visas (Visitors for business or pleasure) Tourist and business visitor visas represent the largest number of visas issued. Applying for such visas remains largely a self-help endeavor.

The most common basis for refusal to issue a B1 or B2 visa is the applicant's failure to overcome the legal presumption that the applicant intends to remain in the United States (i.e., that they have immigrant intent). This legal presumption can only be overcome with substantial evidence of the applicant's strong ties to his home country. In general, applications are made directly to the United States Consulate with jurisdiction over the applicant's residence. Note that it is very difficult for young, single, unemployed or marginally employed applicants to successfully overcome the presumption of immigrant intent, and to obtain the issuance of a B-2 or B-1 visa.

Employment based Non-Immigrant Visas These visas give no right of permanent residence but do allow the visa holder to live and work in the United States for, in some cases, as long as 6 or 7 years.

Predictably, these visas are for well-educated and/or highly skilled applicants as well as senior managers and executives of multinational corporations. The H1-B visa is generally reserved for professionals with a university degree or above, in such occupations as: IT professionals, teachers, and persons engaged in architecture, engineering, physical sciences, etc.

Senior managers and executives of companies with offices both in the United States and abroad may qualify to L1/L2 visas. The advantage of both H1-B and L1/L2 visas is that the legal presumption of immigrant intent does not apply, and therefore cannot constitute grounds for a visa refusal. Many

people live and work in the United States in H1-B or L1/L2 status while their permanent residence petitions are pending (a process that may take years).

Employment based immigration (Permanent Residence) In order to attract employees with valuable skills in areas for which there is a shortage of American employees, various avenues are available. The petitioning party is the United States employer who wishes to sponsor the foreign national for Permanent Residence. An offer of employment must be tendered to the foreign national prior to commencing the immigration process.

Prior to 2005, a complicated process of “Labor Certification” through the U.S. Department of Labor was required prior to the filing of an Employment based immigrant petition with USCIS. This process often took up to 3 years, an impractical period in a business context. Following years of protest by business interests, a major overhaul of the employment based immigrant worker system is now occurring. Referred to as PERM, the new system of certifying workers for immigrant petitions should now take much less time than before. However, at time of writing the enacting regulations are still being promulgated in the entire employment based process is in a state of flux. Most practitioners, as well as governmental agencies are still finding their way through the new regulatory changes. If you are interested in an employment based petition, please contact our office for the latest information.

Notwithstanding, the promised improvements of PERM, employment based immigrant cases are, and are likely to remain for the foreseeable future, time consuming, burdensome and highly technical but, do offer a viable immigration alternative for those with no family connections to the United States.

Family based immigration (Permanent Residence) Despite increased emphasis on security concerns, family reunification remains an important objective in United States immigration policy, giving priority to family members of United States citizens and Legal Permanent Residents (LPRs or “green card” holders). Family sponsored immigration falls into two primary categories.

1. **Immediate relatives of United States citizens**

Highly favored under U.S. law, there is no numerical limit or quota on how many may become LPRs in any given year:

1. Spouses of United States citizens.
2. Minor children (being unmarried and under 21 years of age) of United States citizens. Note that “child” is strictly defined in law and may exclude some persons considered by the citizen to be their child.
3. Parents of a United States citizen. The sponsor must be over 21 years of age to sponsor his/her parents.

4. Spouses of deceased United States citizens. They must have been married for at least two years at the time of death.

1. **Close relatives of United States citizens and legal permanent residents:**

These categories are subject to quotas or limits in the numbers of visas made available each year. Since only limited numbers of visas are available each year, Congress has divided these groups of relatives into "Preference" categories, ranking them in the order for which they are given priority for immigration to the United States. The higher the preference, the more quickly a visa can be allotted to the applicant. In addition to the broad preferences set out below, a complex "priority date" system based upon the date of filing and the applicant's country of origin can further influence his place in the visa queue. After gathering all the relevant facts of the case, it is often possible to provide a reasonable estimate of how long the applicant relative must wait for a visa. The preference categories are:

1. First Preference:

Unmarried sons or daughters (21 years of age or older) of US citizens.

1. Second Preference:

- Spouses or children (under 21 years of age) of a Legal Permanent Resident.
- Unmarried child (21 years of age or older) of a Legal Permanent Resident.

1. Third Preference: Married sons and daughters (21 years of age and over) of U.S. citizens.

1. Fourth Preference: Brothers and sisters of US citizens. The US citizen must be over 21 years of age. Currently, very long waiting periods apply in this category.

While visas are available relatively quickly for immediate relatives of United States citizens, each applicant must qualify on his own merits. Conversely, although waiting periods apply to close relative preference cases, derivative beneficiaries (i.e., spouses and minor children of the principal beneficiary) are generally given permanent residence at the same time as the principal beneficiary and without additional, individual petitions being filed.

K Visas Technically a non-immigrant visa, a K visa is, in fact, a "hybrid" visa in that it permits temporary entry into the United States but, with the specific expectation that the holder will change their status to that of Permanent

Resident, after certain requirements are met. While K visas take longer to process than some other non-immigrant visas (such as B-2 tourist visas), they generally take much less time to process than most forms of direct immigrant visas.

1. K-1 and K-2 visas: These allow the fiancée of a United States citizen to enter the United States in order to marry the petitioning citizen within 90 days of entry. Provided that the parties marry within 90 days of the alien's entry, the alien may thereafter apply for adjustment to Legal Permanent Resident status while remaining in the U.S. If the alien fiancé fails to marry the petitioning citizen within 90 days of entry, she/he must either leave the country or face removal (deportation). He or she may not marry a different citizen and remain in the United States.

In order to be eligible for a K-1 visa the couple must:

1. have previously, physically met, in person, within the two year period preceding the date of filing the petition;
2. have a bona fide intention to marry within 90 days of the alien's entry into the US; and
3. be legally capable of entering into a valid marriage.

K-2 visas allow the alien fiancé's minor children to either accompany the alien fiancé to the United States or follow to join her. The alien fiancé's K-2 children will receive Permanent Resident status at the same time, and under the same conditions as the alien fiancé.

1. K-3 and K-4 Visas: The K-3 visa is a relatively new visa created by the LIFE Act of December 21, 2000. It allows the spouse of a United States citizen, and her/his children (under a K-4 visa) who is the beneficiary of a pending Immediate Relative petition, to be admitted in a non-immigrant visa category, whilst waiting for their principal case to be processed. Even though spouses of United States citizens are not subject to annual quotas, processing backlogs may delay approval on an Immediate Relative case for as long as one year. The K-3 (and K-4) visa was intended to partially remedy this delay in uniting families and to speed their entry into the United States. Similar to K-1 visas, they are a non-immigrant visa issued with foreknowledge that the person will subsequently be applying for Permanent Residence. **Author's note (May 2005):** Due to dramatic reductions in the backlog of processing spouse cases, K-3/K-4 visas have become largely redundant and, most practitioners have suspended filing these visa petitions at this time. Should backlogs in spousal petitions again arise, these visas may again be useful. **Author's note (November 2010):** In 2010, the National Visa Center administratively suspended processing of most K-3 visas, except in specific exceptional circumstances. At this

time, spousal petitions are proceeding only on the underlying Immediate Relative Petition (CR-1 or IR-1 visa category)

Diversity Immigration (The “Green Card Lottery”)

Popularly known as the “green card” lottery, approximately 50,000–55,000 visas are issued annually in a random drawing to individuals from countries judged to be under-represented in the total United States immigrant population.

Applications are accepted during a one-month application period each year, generally in October. Although many people do file Diversity Lottery applications each year without assistance, millions of applications are rejected (with no notice to the applicant) and are not included in the drawing, because of minor technical mistakes in the application or filing. There is no filing fee payable to the United States government and the application and filing is relatively straight forward, provided that the applicant understands the rules.

Although, no reliable statistics are available, most observers believe that an applicant’s chances of winning a green card in the Diversity Lottery is about 1 in 40. Many people prefer to obtain assistance in filing their applications because the cost of doing so is relatively low and the process is fairly straightaway when professional advice is sought. If a person is selected in the “green card lottery”, his spouse and minor children will generally be given Permanent Residence at the same time. The principal factor limiting eligibility is that the applicant must have at least completed high school education, or its equivalent.

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