Chapter Twenty-Eight
IMMIGRATION

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Table of Contents

I. IMMIGRATION LEGISLATION 985
- A. Introduction: Immigration Law History 985
- B. Visa Waiver Permanent Program Act (VWPPA) 986
- C. Homeland Security Act fo 2002 986
- D. Supreme Court Decision Overriding the Federal Defense of Marriage Act Impacts Immigration Benefits 986
- E. Comprehensive Immigration Reform Stalled in Congress 986
- F. Executive Actions Impacting Immigration 986

II. GENERAL TERMINOLOGY 987

III. EMPLOYMENT-BASED TEMPORARY VISAS 988
- A. Business Visitors (B-1) and Visa Waiver (WB) 989
- B. Treaty Trader or Investor Visas (E-1, E-2) 991
- C. Treaty Alien in Specialty Occupation Visa (E-3) 991
- D. Foreign Students (F-1) 992
- E. Temporary Worker or Trainee Visas (H-1B, H-2B, H-3) 994
- F. Exchange Visitors (J-1) 1002
- G. Intracompany Transferees (L-1) 1003
- H. Aliens of Extraordinary Ability in the Sciences, Arts, Education, Business, or Athletics (O-1, O-2) 1004
- I. Performing Entertainers and Athletes (P-1, P-2, P-3) 1005
- J. Religious Workers (R) 1006
- K. Canadian and Mexican Professionals (TN) 1006
- L. Spouses and Children of Permanent Residents (V) 1007
- M. Nonimmigrant Classification Summary 1007

IV. EMPLOYMENT-BASED IMMIGRATION 1009
- A. Preference System Overview 1009
- B. Labor Certification 1010
- C. VisaScreen for Certain Health Care Workers 1012
- D. First Preference: Priority Workers (EB-1) 1013
- E. Second Preference: Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability (EB-2) 1013
- F. Third Preference: Skilled Workers, Professionals, and Other Workers (EB-3) 1014
- G. Fourth Preference: Special Immigrants 1015
- H. Fifth Preference: Employment Creation (Investors) (EB-5) 1015
- I. Other Employment-Based Immigration Information 1015

Chapter Twenty-Eight

V. ALIEN EMPLOYMENT AUTHORIZATION AND EMPLOYER SANCTIONS 1016

A. Scope 1016
B. Independent Contractors 1016
C. Definition of "Unauthorized Alien" 1017
D. Actual Knowledge or Constructive Knowledge 1017
E. Regulations Addressing Social Security Administration "No Match" Letters 1017
F. Defenses to Allegations of Employing Unauthorized Aliens 1018
G. Employment Verification System 1018
H. Verification and Completion of the I-9 1020
I. Retention of I-9 and Underlying Documentation 1021
J. Reliance on Facially Genuine Documents 1022
K. Government Searches and Inspections 1022
L. Reliance on State Employment Agency Documentation 1022
M. Continuing Employment After Breaks in Active Service 1023
N. Enforcement and Penalties for Noncompliance with IRCA 1024

VI. UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES (INA § 274B, 8 U.S.C. § 1324B) 1029

A. Unfair Practices 1029
B. Enforcement Provisions 1030

Chapter Twenty-Eight

IMMIGRATION

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I. IMMIGRATION LEGISLATION AND RECENT DEVELOPMENTS

A. Introduction: Immigration Law History. Prior to 1921, the United States allowed virtually unrestricted immigration. Only criminals, the diseased, and the insane were excluded. In 1921, Congress enacted a quota system, setting an annual limit on the number of aliens allowed to immigrate. The 1921 law limited immigration from each country to a fixed percentage of the number of foreign-born persons of that nationality already residing in the U.S. as of the 1910 census. The next significant immigration legislation, the Immigration and Nationality Act (INA), was enacted in 1952. This Act substantially revised, clarified, and codified previous immigration laws and has remained the cornerstone of the U.S. immigration policy.

Since then, the immigration laws in the U.S. have been characterized primarily by constant change. Several immigration bills with particular significance to employers have been enacted in recent years, including:

1. Immigration Reform and Control Act of 1986 (IRCA). IRCA made comprehensive changes in three areas: employer sanctions, legalization of existing illegal aliens, and enforcement. Pub. L. 99-603, 8 U.S.C. § 1324a, et seq.

Title I of IRCA consists of three parts. Part A addresses employment; Parts B and C concern other enforcement methods designed to control illegal immigration. Part A, § 101 (8 U.S.C. § 1324a) makes it unlawful to recruit and/or employ unauthorized aliens or to fail to follow the prescribed procedures for screening aliens unauthorized to work. Section 102 (8 U.S.C. § 1324b) makes it unlawful to discriminate against citizens or aliens who are authorized to work. Section 103 (8 U.S.C. § 1324c) prescribes penalties for fraud or the misuse of documents.

2. Immigration Act of 1990 (IMMACT '90). IMMACT '90 substantially altered the number of temporary visa categories, expanded and reorganized the categories and quota allocations for permanent immigration (especially in the employment-sponsored categories), redefined and broadened laws concerning criminal aliens, and expanded anti-discrimination provisions. IMMACT '90 also created the requirement that employers intending to sponsor foreign professional workers for H-1B visas attest to compliance with the specified Labor Condition Application (LCA) requirements interpreted and enforced by the U.S. Department of Labor (DOL). Should the Secretary of Labor investigate a complaint of LCA noncompliance and determine that an employer failed to comply with one or more attestation requirements, the employer could be ordered to pay civil money penalties and back wages to aggrieved workers, and could be debarred from participation in all immigration sponsorship programs for up to two years.

3. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). In addition to restricting public assistance and benefits for aliens, the 1996 law improved border control procedures, enhanced penalties for alien smuggling and document fraud, changed procedures for inspection, apprehension, detention, adjudication, and removal of inadmissible and deportable aliens, modified the IRCA procedures and penalties affecting employers, and imposed penalties on aliens who overstay their authorized period of stay.

4. American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) and American Competitiveness in the Twenty-first Century Act (AC21). Increased annual H-1B visa allocation; increased obligations of employers of H-1B status workers; provided for "recapture" of certain unused immigrant visas in order to reduce lengthy waiting periods for employment-based green cards; and established greater employment portability for H-1B workers and beneficiaries

of employment-based green card applications under certain circumstances. ACWIA also modified and expanded the LCA requirements under DOL enforcement jurisdiction, including a per se prohibition on benching and the creation of more onerous notice and recruitment requirements for dependent H-1B employers and employers found guilty of willful LCA violations.

B. Visa Waiver Permanent Program Act (VWPPA). The VWPPA, H.R. Pub. L. 106-396 (2000), amended the INA by making permanent the visa waiver pilot program. Under the visa waiver program, aliens who are nationals of certain qualifying countries may enter the U.S. as visitors for business or pleasure without first having to apply for a visa.

C. Homeland Security Act of 2002. The Homeland Security Act was passed in response to increased threats of terrorism, creating a new Department of Homeland Security (DHS). In accordance with this Act, on March 1, 2003, the responsibility for providing immigration-related services and benefits such as naturalization and work authorization were transferred from the Immigration and Naturalization Service (INS) to the U.S. Citizenship and Immigration Services (USCIS) bureau of DHS. Investigative and enforcement responsibilities for enforcement of federal immigration laws, customs laws, and security laws were transferred to the bureau of Immigration and Customs Enforcement (ICE). The bureau of Customs and Border Protection (CBP) assumed responsibility for protecting U.S. borders. Although INS has been extinguished, in this Chapter we retain the acronym where it most accurately describes the actions taken by that agency prior to the inception of USCIS.

D. Supreme Court Decision Overruling the Federal Defense of Marriage Act (DOMA) Impacts Immigration Benefits. On June 26, 2013, the U.S. Supreme Court held that § 3 of DOMA was unconstitutional. *See U.S. v. Windsor*, 133 S. Ct. 2675 (2013). DOMA, enacted in 1996, is a U.S. federal law that allows states to refuse to recognize same-sex marriages performed under the laws of other states. Section 3 of the Act codified the nonrecognition of same-sex marriages for all federal purposes, including insurance benefits for government employees, Social Security survivors' benefits, immigration, and the filing of joint tax returns. In *Windsor*, the Supreme Court held that § 3 of DOMA is unconstitutional "as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment." The Court's decision in *Windsor* has had an impact on immigration law. Following the Court's decision, DHS announced that same-sex couples could apply for immigration benefits immediately if they were married in a state that recognizes the relationship. Additionally, the State Department has begun adjudicating visa applications of same-sex spouses in the same manner as opposite-sex spouses. USCIS has instructed U.S. embassies and consulates to adjudicate visa applications based on same-sex marriage in the same way it adjudicates applications for opposite-sex spouses. Only a relationship legally considered to be a marriage establishes eligibility as a spouse for immigration purposes. Therefore, same-sex couples in a civil union or domestic partnership will not have the same privileges as married couples. USCIS will reopen all petitions and/or applications previously denied on account of DOMA on or after February 23, 2011. There will likely be further developments in this area as USCIS and DHS issue regulations.

E. Comprehensive Immigration Reform Unlikely to Go Forward. Although the Senate passed comprehensive immigration reform in June 2013 (the "Border Security, Economic Opportunity, and Immigration Modernization Act" (S.744)), similar legislation introduced in the House of Representatives stalled. In light of House Speaker Paul Ryan's statement that "the House of Representatives will not vote on comprehensive immigration legislation as long as President Obama is in office," Paul Ryan, "Get Serious About Enforcing Our Laws," *USAToday.Com,Opinion,* Nov. 3, 2015, it appears unlikely that comprehensive immigration reform will be enacted in the near future.

F. Executive Actions Impacting Immigration. After the immigration reform legislation died in the House of Representatives, President Obama began to review changes he could accomplish through his executive powers, without the cooperation of Congress. *See* Laura Meckler, "Obama Weighing Business-Friendly Immigration Actions," *Wall S. J.* Aug. 14, 2014, http://www.wsj.com/articles/obama-weighing-business-friendly-immigration-actions-1408405057. On November 19, 2014, President Obama announced a package of proposed reforms that the administration plans to implement through executive actions, some of which require publication of proposed regulations subject

to notice and comment. In addition to expanding the class of childhood arrival cases eligible for deferred action and work authorization (DACA), the President also announced a new deferred action program for undocumented immigrants who have U.S. citizen and lawful permanent resident children who have been in the U.S. since January 1, 2010 (DAPA). The President also announced an intent to issue regulations that would expand the availability of optional practical training for science, technology, engineering and mathematics (STEM) graduates and permit spouses of intending immigrants in the H-1B category with approved visa petitions to obtain work authorization. Finally, the President promised new guidance clarifying the meaning of the term "specialized knowledge" in the context of the L-1b international transfer visa program.

Subsequently, lawsuits were filed in federal court in Washington D.C. and Texas challenging the reform of the DACA and implementation of DAPA. The Washington D.C. lawsuit was dismissed for lack of standing. In the Texas lawsuit, 26 states sought to prevent implementation of the DAPA and to prevent expansion of the DACA program. The federal district court granted a preliminary injunction based on the likelihood of success of the claim that the DAPA's implementation would violate the notice-and-comment requirements of the Administrative Procedures Act (APA). *See Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015), *aff'd*, 2015 WL 6873190 (5th Cir. Nov. 9, 2015), as revised (Nov. 25, 2015). The government appealed this decision and filed a motion to stay the preliminary injunction or narrow its scope pending appeal. The Fifth Circuit denied the motion to stay and affirmed the lower court's preliminary injunction, finding the states had standing, had established a likelihood of success on the merits of their procedural and substantive APA claims and had satisfied the other elements required for an injunction. *Texas v. United States*, 2015 WL 6873190, at *3 (5th Cir. Nov. 9, 2015), as revised (Nov. 25, 2015). The government has filed a petition for certiorari with the U.S. Supreme Court. Petition for cert. filed (No. 15-674), Nov. 20, 2015.

In February 2015 DHS published regulations allowing certain H-4 spouses of H-1B workers who are pursuing permanent residence ("green cards") to apply for work authorization. Subsequently, an organization of former technology workers sued, claiming DHS violated the APA in promulgating these regulations. *See Save Jobs USA v. U.S. Department of Homeland Security,* 2015 WL 2454274 (D.D.C. May 24, 2015) (denying motion for preliminary injunction to keep rule from taking effect until a decision is made on the merits of the plaintiffs' claims).

Additionally, a labor union representing STEM workers sued DHS challenging the agency's regulation that authorized the optional practical training (OPT) program. *See Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247, 254 (D.D.C. 2014) (granting motion to dismiss in part and denying it in part). These regulations were amended in 2008 to provide for 29 months of work authorization (as opposed to the 12 months previously provided) for F-1 student visa holders who have completed STEM degrees. President Obama's November 2014 actions called for further expansion of this program to include additional degree programs and lengthen the period of work authorization. A federal trial court vacated the 2008 regulations in August 2015, finding the agency failed to comply with the APA's notice-and-comment requirements when it promulgated them. *See Washington Alliance of Technology Workers v. Department of Homeland Security,* Case 1:14-cv-00529-ESH (D.D.C. Aug. 12, 2015); *District Court Vacates 2008 Interim Final Rule Extending Period of OPT for STEM Students, But Orders Stays to Allow DHS to Submit Rule for Notice and Comment,* 92 NO. 32 Interpreter Releases 1518 (Aug. 24, 2015). The court stayed the vacatur for six months so DHS could conduct rulemaking, and the agency issued a notice of proposed rulemaking in October 2015 that responded to the court's decision and effectuated the President's November 2014 directive. *Id.*

II. GENERAL TERMINOLOGY

Lawful Permanent Resident (LPR). LPRs have been accorded the privilege of permanently residing in the U.S. as an immigrant (for example, foreign nationals intending to make a permanent residence in the U.S.). 8 U.S.C. § 1101(a)(20). The majority of foreign nationals obtain LPR status based upon a qualifying

offer of employment or a qualifying relationship with a family member who is an LPR or a U.S. citizen. (Requirements and procedures for attaining LPR status through employment are discussed in detail below.) Upon attaining LPR status, foreign nationals are issued a Form I-551 ("green card").

U.S. Citizen (USC). U.S. citizenship is conferred automatically on persons born in the U.S. and its incorporated territories or persons born abroad where one or both parents are USCs. 8 U.S.C. § 1401. Additionally, in certain circumstances, a foreign national may obtain citizenship through naturalization (a petition filed with the USCIS to confer citizenship). 8 U.S.C. § 1421, *et seq.*

Alien. An alien is defined as anyone who is not a U.S. citizen or national. 8 U.S.C. § 1101(a)(3).

Nonimmigrant. A nonimmigrant is an alien who enters the U.S. for a temporary period of time and intends to depart from the U.S. following the period of admission. 8 U.S.C. § 1184. Nonimmigrants include those who enter in B (visitor), H-1B (professional), E (treaty trader/investor), or L (intracompany transferee) status.

Visa. Visas are issued by U.S. consular posts abroad and can be either temporary (nonimmigrant) or permanent (immigrant). The visa is a stamp placed in the individual's passport and does not guarantee entry into the U.S. A visa allows an individual to present him or herself to a CBP inspecting officer at a U.S. port of entry and seek permission to enter.

Admission. Admission is defined as the lawful entry of a foreign national into the U.S. after inspection by an immigration officer. 8 U.S.C. § 1101(a)(13)(A). LPRs who are re-entering the U.S. after traveling abroad generally are not deemed to be seeking admission, unless they have abandoned their LPR status, remained abroad for more than 180 days, or committed crimes or offenses that would render them inadmissible. 8 U.S.C. § 1101(a)(13)(C).

Maintenance of Status. Maintenance of status is the act of ensuring that a foreign national remains in lawful status during his or her period of stay in the U.S. and does not remain in the U.S. longer than allowed. CBP records each foreign national's arrival/departure data by issuing either a hard copy paper Form I-94 or by making an electronic record of the I-94 Arrival/Departure data in an online database found at www.cbp.gov/i94. The I-94 Arrival/Departure record that is made for each foreign national upon entry determines the lawful period of stay granted to that foreign national. It, rather than the alien's visa, controls an alien's lawful status while in the U.S. The I-94 may have a different expiration date than the individual's visa, so it is critical to be aware of when the I-94 will expire. There can be serious consequences for those who overstay the period allowed by the I-94. All air and sea ports of entry record I-94 data within the electronic database, and paper I-94 cards are no longer issued unless the foreign national specifically requests it. Aliens can access their I-94 Arrival/Departure record at www.cbp.gov/i94. It is in the best interest of the alien to keep a printed copy of the I-94 record with his/her passport in case various benefit-granting agencies in the U.S. and other stakeholders request it.

Removal. Removal is the denial of a foreign national's application for admission following a hearing or the deportation of a foreign national previously admitted into the U.S. In some cases, where the inspecting officer refuses an alien's application for admission into the U.S. at a port of entry, the alien may be removed on an expedited basis, without the benefit of a removal hearing.

III. EMPLOYMENT-BASED TEMPORARY VISAS

Temporary Visas. A number of nonimmigrant visa categories are available to aliens who desire to come temporarily to the U.S. Most aliens who wish to work in the U.S. must have a job offer and be "sponsored" by a U.S. employer. Temporary work visas are normally employer-specific, authorizing employment only by the sponsoring employer.

Consequences of Overstaying Temporary Visa. Overstaying the time allowed on an alien's I-94 card by even one day means that the individual's visa and those of accompanying dependents will be invalidated automatically. The individual and his or her dependents are subject to removal (or deportation) proceed-

ings and to being taken into custody by ICE's Office of Detention and Removal (DRO). In addition, if an individual overstays and accrues more than 180 days of unlawful presence but leaves before one year elapses, he or she can be barred from the U.S. for three years. Overstays of more than a year of unlawful presence can mean a 10-year bar. Finally, overstays can also create other complications if the individual later seeks LPR status.

Employment Visas. The following categories of visas can be used by foreign businesses to send employees to the U.S., or by domestic employers who wish to hire foreign employees:

A. Business Visitors (B-1) and Visa Waiver (WB).

Basic Requirements.

1. The alien must be entering the U.S. to engage in business activities on behalf of a business located abroad. These activities include conventions, conferences, consultations, and other legitimate activities of a commercial or professional nature. 22 C.F.R. § 41.31(b). Legitimate activities do not include local employment by the alien or labor for hire.

2. The alien must maintain an unabandoned foreign residence. INA § 101(a)(15)(B); 8 U.S.C. § 1101(a)(15)(B).

3. The alien must intend to leave the U.S. at the end of the temporary stay. 22 C.F.R. § 41.31(a)(1).

4. The alien must have permission to enter a foreign country at the end of the temporary stay. 22 C.F.R. § 41.31(a)(2).

5. Adequate financial arrangements must have been made to enable the alien to carry out the purpose of the visit to and depart from the U.S. 22 C.F.R. § 41.31(a)(3).

Duration of Stay. The initial period of stay is only granted for the period necessary to conduct the particular business activities, usually no longer than three to six months, with extensions available for up to one year.

Visa Waiver. Nationals of certain designated countries may enter the U.S. as visitors for business or pleasure without first having to apply for a visa from the appropriate American consulate. To be eligible, the alien must present a valid passport from one of the designated countries and must possess a return trip ticket that is valid for one year. 8 C.F.R. § 217.2. Visa waiver status is granted for a maximum of 90 days. It cannot be renewed, and those in the U.S. under visa waiver cannot apply to change to another immigration status. When visa waiver status expires, the alien must exit the U.S. and all contiguous territories and adjacent islands, unless the alien is a national of such a territory or island. The government has implemented security enhancements to the Visa Waiver Program (VWP) recently. One such enhancement is the introduction of additional data fields to the Electronic System for Travel Authorization (ESTA) application in 2014 (ESTA is discussed below). DHS also introduced new traveler screening and information sharing requirements for VWP countries in August 2015. In November 2015, following terrorist attacks in Paris, the White House announced additional security measures for the VWP including directing DHS to immediately take steps to modify ETSA applications to capture information from VWP travelers regarding any past travel to countries constituting a terrorist safe haven. Citizens from VWP countries who have traveled to countries designated as terrorist safe havens will be required to obtain a visa before travelling to the U.S. The White House has also announced it is considering possible pilot programs designed to assess the collection and use of biometrics (fingerprints and/or photographs) in the VWP to effectively increase security. *See FACT SHEET, Visa Waiver Program Enhancements,* Nov. 30, 2015, https://www.whitehouse.gov/the-press-office/2015/11/30/fact-sheet-visa-waiver-program-enhancements. Additionally, bills have been introduced in the House of Representatives (HR 158) and Senate (S. 2337) that would increase security measures for the VWP, including requiring that citizens of VWP countries who have recently traveled to Syria, Iraq or certain other countries go through the regular visa approval process.

VWP Designated Countries. Visa waiver designated countries are Andorra, Australia, Austria, Belgium, Brunei, Chile, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Taiwan, and the United Kingdom. The United Kingdom refers only to British citizens who have the unrestricted right of permanent abode in the United Kingdom (England, Scotland, Wales, Northern Ireland, the Channel Islands, and the Isle of Man); it does not refer to British overseas citizens, citizens of British dependent territories, or citizens of British Commonwealth countries.

ESTA Requirement. Travelers from VWP countries are required to obtain approval through the ESTA before traveling to the U.S. ESTA is an internet-based system that determines preliminary eligibility of visitors to travel under the VWP prior to boarding a carrier to the U.S. Generally, each ESTA is valid for a period of two years, unless an alien's passport expires in less than two years, in which case the ESTA will be valid until the passport's expiration date. Each ESTA permits multiple entries to the U.S.

Visitors may apply for travel authorization via the ESTA Web site at: https://esta.cbp.dhs.gov/.

Electronic Passports (E-Passports). Effective July 1, 2009, all VWP emergency or temporary passports must be e-Passports to be eligible for travel to the U.S. under the VWP. This includes VWP applicants who present emergency or temporary passports to transit the U.S.

If a member of a VWP country does not meet the VWP requirements, that person must apply for a visa. Additionally, a visa must be requested if the traveler:

- Wants to remain in the U.S. for longer than 90 days, or envisions that they may wish to change their status (from tourism to student, etc.) once in the U.S.;
- Wants to work or study in the U.S., travel as a working foreign media representative, come to the U.S. for other purposes not allowed on a visitor visa, or intends to immigrate to the U.S.;
- Is a national of the Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Malta, the Republic of Korea, or the Slovak Republic AND DOES NOT HAVE an electronic passport with an integrated chip;
- Is a national of one of the VWP countries not listed above AND DOES NOT have a machine-readable passport (MRP) (depending on the date the MRP was issued, renewed, or extended, it may also need to contain a digital photograph or an integrated electronic chip);
- Intends to travel by private aircraft or other non-VWP approved air or sea carriers to the U.S.;
- Has a criminal record or other condition making them ineligible for a visa; or
- Has been refused admission to the U.S. before, or did not comply with the conditions of previous VWP admissions (90 days or less stay for tourism or business, etc.).

Nationals of the Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Malta, the Republic of Korea, and the Slovak Republic must have MRPs with an integrated chip containing the information from the passport data page (e-Passport). Nationals of Taiwan must have a MRP with an integrated chip containing the informing from the passport data page (e-passport) and must also have a national ID number. For nationals of other VWP countries who have MRPs issued or renewed/extended on or after October 26, 2006, the passports must have integrated chips with information from the passport data page (e-Passport). If they have MRPs issued or renewed/extended between October 26, 2005 and October 25, 2006, the passports must have digital photographs printed on the data page or integrated chips with information from the data page. If they have MRPs issued or renewed/extended before October 26, 2005, there are no further requirements.

B. Treaty Trader or Investor Visas (E-1, E-2). Treaty visas are available only to citizens of countries that have a Treaty of Commerce and Navigation (E-1) or Bilateral Investment Treaty (E-2) with the U.S. Countries having both a Treaty of Commerce and Navigation and a Bilateral Investment Treaty with the U.S. include: Argentina, Australia, Austria, Belgium, Bolivia[1], Bosnia & Herzegovina, Canada, Chile, China (Taiwan), Colombia, Costa Rica, Croatia, Denmark, Estonia, Ethiopia, Finland, France, Germany, Honduras, Iran, Ireland, Italy, Japan, Jordan, Kosovo, Latvia, Liberia, Luxembourg, Macedonia, Mexico, Montenegro, Netherlands, Norway, Oman, Pakistan, Paraguay, Philippines, Poland, Serbia, Singapore, Slovenia, South Korea, Spain, Suriname, Sweden, Switzerland, Thailand, Togo, Turkey, the United Kingdom, and Yugoslavia[2].

Countries having only a Treaty of Commerce and Navigation include: Brunei (Borneo), Greece, and Israel.

Countries having only Bilateral Investment Treaties include: Albania, Armenia, Azerbaijan, Bahrain, Bangladesh, Bulgaria, Cameroon, Democratic Republic of the Congo (Kinshasa), Republic of the Congo (Brazzaville), Czech Republic, Ecuador, Egypt, Georgia, Grenada, Jamaica, Kazakhstan, Kyrgyzstan, Lithuania, Moldova, Mongolia, Morocco, Panama, Romania, Senegal, Slovak Republic, Sri Lanka, Trinidad & Tobago, Tunisia, and Ukraine.

The purpose of these visas is to enhance or facilitate economic and commercial interaction between the U.S. and the treaty country.

E-1 Treaty Traders. Aliens entering the U.S. to carry on "substantial trade" between the U.S. and their home country can obtain E-1 status. Substantiality of the trade is not measured by a standard amount of sales or revenue, but by the frequency and number of trade transactions. Employees of treaty traders can also qualify for E-1 status. Generally, such employees must be citizens of the treaty country and must be employed in an executive or supervisory capacity or have special qualifications essential to the efficient operation of the enterprise. 22 C.F.R. § 41.51(c).

E-2 Treaty Investors. Aliens entering to develop and direct the operations of an enterprise representing a "substantial investment" or capital in the U.S. may qualify for E-2 status. While there is no standard amount of money that the USCIS will consider "substantial," the investment must be sufficient to allow the enterprise to thrive. In addition, the investment must be made at the alien's personal risk, not supplied or secured by others. As with treaty traders, employees of the treaty investor also may qualify for E-2 status, so long as they share the nationality of the treaty trader and will be employed in an executive or supervisory position, or possess skills that are "essential" to the operation of the enterprise.

Family of Treaty Traders or Investors. The spouse and unmarried children under age 21 of a treaty trader or investor are entitled to the same E-1 or E-2 classification as the principal alien. The nationality of the spouse or child is not material. 22 C.F.R. § 41.51(d). An E-1 or E-2 spouse may receive employment authorization.

Departure from U.S. The alien must intend to depart upon termination of the E-1 or E-2 status. 22 C.F.R. § 41.51(a)(1)(ii)), 22 C.F.R. § 41.51(b)(1)(iii).

Duration of Stay. The initial period of stay is usually granted for two years. Extensions of up to two years at a time are available indefinitely, as long as there is an ultimate intention to depart.

C. Treaty Alien in Specialty Occupation Visa (E-3). Aliens entering the U.S. to perform services in a specialty occupation in the U.S. may qualify for E-3 status if the alien is national of the desig-

1 On June 10, 2011, the Government of Bolivia notified the U.S. that it was terminating the "Treaty Between the Government of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment." As of June 10, 2012 (the date of termination), the treaty ceased to have effect, except that it will continue to apply for another 10 years to covered investments existing at the time of termination.

2 The U.S. view is that the Socialist Federal Republic of Yugoslavia (SFRY) has dissolved. The successors that formerly made up the SFRY – Bosnia, Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Slovenia, Serbia and Montenegro (formally the Federal Republic of Yugoslavia) continue to be bound by the treaty in force with the SFRY at the time of dissolution. U.S. Department of State Foreign Affairs Manual Volume 9; 9 FAM 41.51 Exhibit I.

nated country (currently the only designated country is Australia) and files a labor attestation. The term "specialty occupation" means an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the U.S. The definition is the same as the INA definition of an H-1B specialty occupation. 10,500 E-3 visas are available each fiscal year. E-3 visa recipients are required to provide a LCA and prevailing wage determination.

On April 11, 2008, the DOL published a final rule on E-3 Visa LCA Requirements and Filing Procedures. *See* 73 Fed. Reg. 19943; 20 CFR Part 655. Generally, the rule extends the H-1B visa procedures to E-3 visas, although there are some exceptions. For example, certain procedures for obtaining a visa and entering the U.S. after the DOL attestation process apply only to H-1B nonimmigrants.

Family of Australian in Specialty Occupation. The spouse and children of a treaty alien in a specialty occupation accompanying the E-3 principal are entitled to the same E-3 classification as the principal. The nationality of the spouse or child is not material. 22 C.F.R. § 41.51(c)(2). Spouses are eligible for employment authorization. Immigration and Nationality Act § 214(e)(6).

Departure from the U.S. The alien must intend to depart upon termination of E-3 status. 22 C.F.R. § 41.51(1)(iv).

Documentation Required by Consulate. The E-3 alien must present to a consular officer a copy of the LCA signed by the employer and certified by the DOL. 22 C.F.R. § 41.51(1)(iii). In addition, the E-3 alien must present evidence of his/her academic or other qualifying credentials, a job offer letter or alternate documentation from the employer establishing that the applicant will be engaged in qualifying work upon entry into the U.S., and will be paid the prevailing wage. 22 C.F.R. § 41.51(1)(iv).

Duration of Stay. The initial period of stay is usually granted for the validity period of the LCA. Extensions of stay may be granted indefinitely in increments not to exceed the LCA. AFM § 34.6(a)(3). The period of authorized employment must not exceed two years for an LCA issued on behalf of an E-3 nonimmigrant. *See* 20 CFR Part 655.

Visa Number. The E-3 must have an allocated visa number. 22 C.F.R. § 41.51(1)(v).

D. Foreign Students (F-1). A foreign student entering the U.S. to attend a college, university, seminary, conservatory, academic high school, elementary school, other academic institution, or language-training program may obtain F-1 status. Aliens are ineligible for F-1 status, however, if they will attend a *public* elementary school or a publicly funded adult education program. In addition, an alien may not attend a public secondary school in F-1 status, unless the aggregate time spent in F-1 status does not exceed one year and the alien reimburses the school for the full cost of his or her education. 8 U.S.C. § 1101(m)(1)(A), (B). The alien is admissible for the length of time during which he or she is engaged in a full course of study. Additionally, the alien may be eligible to remain in the U.S. to engage in OPT related to his or her course of study for a maximum of one year following completion of course work.

1. New Proposed OPT Regulation. As discussed in section I(F)above, the DHS regulation extending the OPT period to a maximum of 29 months for certain F-1 students has been invalidated. In October 2015 DHS promulgated a new regulation that responded to the court's concerns that the 2008 regulation was not properly promulgated. The new regulation also implements revisions to the program directed by President Obama. *See* 80 Fed. Reg. 63375 (Oct. 19, 2015).

The proposed regulation would increase the OPT extension period for STEM OPT students from the 2008 regulation's 17 months to 24 months. The proposal would also make F-1 students who subsequently enroll in a new academic program and earn another qualifying STEM degree at a higher educational level eligible for one additional 24-month STEM OPT extension. Additionally, the proposed rule would more clearly define which fields of study may serve as the basis for a STEM OPT extension.

The proposed rule would permit an F-1 student participating in post-completion OPT to use a prior eligible STEM degree from a U.S. institution of higher education as a basis to apply for a STEM OPT extension, as long as the student's most recent degree was also received from an accredited educational institution. Additionally, in order for such a student to be eligible for the STEM OPT extension, the employment opportunity must be directly related to the previously obtained STEM degree.

The proposed regulation also would require employers to implement formal mentoring and training programs to augment students' academic learning through practical experience. Additionally, the proposed rule would require terms and conditions of a STEM practical training opportunity (including duties, hours, and compensation) to be commensurate with those applicable to similarly situated U.S. workers. In addition to requiring a related attestation in the Mentoring and Training Plan, an employer would also be required to attest that: (a) The employer has sufficient resources and trained personnel available to provide appropriate mentoring and training in connection with the specified opportunity; (b) the employer will not terminate, lay off, or furlough any full- or part-time, temporary or permanent U.S. workers as a result of providing the STEM OPT to the student; and (c) the student's opportunity assists the student in attaining his or her training objectives.

The proposed rule would also generally limit program eligibility to students with degrees from schools that are accredited by an accrediting agency recognized by the Department of Education and clarifies DHS discretion to conduct employer on-site reviews at worksites to verify whether employers are meeting program requirements, including that they possess and maintain the ability and resources to provide structured and guided work-based learning experiences.

The proposed rule would reinstate the 2008 rule's reporting and compliance requirements and would allow an additional 60 days of unemployment for students who obtain a 24-month STEM OPT extension (the proposed rule would retain the initial 90-day unemployment limit during the initial period of post-completion OPT).

The proposed rule does not change the employer's obligation to register and participate in E-Verify in order to employ an F-1 during the STEM OPT extension period. Other provisions of the 2008 rule (including the reporting requirements for STEM OPT students and the cap-gap extension for F-1 nonimmigrants with timely filed H-1B petitions and requests for change of status) remain unchanged.

2. Employment as F-1 Student. There are a number of potential avenues for employment as an F-1 student:

a. On-Campus Employment. F-1 students may accept on-campus employment in an enterprise operated on or behalf of the school if a U.S. citizen will not be displaced as a result. Locations suitable for on-campus employment may be physically separate but must be educationally affiliated with the established curriculum and the employment must be an integral part of the student's educational program. F-1 students generally may only be engaged in employment on campus for a maximum of 20 hours per week while school is in session and 40 hours per week while school is out of session.

b. Off-Campus Employment. An F-1 student may not engage in off-campus employment at any time during the first academic year of study. (The "first academic year of study" means the first nine months in student status.) A student in a program longer than one academic year must seek authorization from the designated school official (DSO) for off-campus employment of not more than 20 hours per week. This employment authorization is automatically terminated if the student fails to maintain status. The DSO must certify that:

- The student has been in F-1 status for one full academic year;
- The student is in good standing and carrying a full course of study;

- The student has established that acceptance of employment will not interfere with the full course of study; and
- The prospective employer has submitted a labor and wage attestation or the student has established a severe economic necessity for employment due to unforeseen circumstances beyond the student's control.

If a student who has been granted off-campus employment authorization temporarily leaves the country during the period of time in which employment is authorized, such employment may be resumed when the student returns. The student must, however, be returning to the same school.

c. Curricular Practical Training. A student who has been enrolled in full-time studies for a minimum of nine months may engage in Curricular Practical Training, which is defined as alternate work/study, internship, cooperative education, or any other type of required internship or practicum that is offered by sponsoring employers through cooperative agreements with the school.

d. OPT. Upon completion of the course of study, a student may engage in a maximum of 12 months of employment for practical training purposes. (See the discussion above of the proposed rule extending the OPT period for qualified F-1 students with STEM degrees.) The student must apply for an Employment Authorization Document from the USCIS to engage in OPT.

3. Spouses and Children. The spouse and minor children of an F-1 student are eligible to receive F-2 status for the duration of the F-1 student's course of study and OPT.

E. Temporary Worker or Trainee Visas (H-1B, H-2B, H-3).

1. General. The H visa category is available to temporary workers and trainees. The H-1B category applies to persons qualified to perform services in "specialty occupations"; the H-2B category is available to temporary workers in short supply; and the H-3 category permits trainees to enter and work in the U.S.

Spouses and Children. Spouses and children of a principal H worker or trainee are eligible to accompany the H worker or trainee in H-4 status. With certain exceptions, they are not eligible to accept employment. However, as discussed in section I(F) above, DHS has published regulations allowing certain H-4 spouses of H-1B workers who are pursuing permanent residence ("green cards") to apply for work authorization. This regulation has been challenged by an organization of former technology workers who claim DHS violated the APA in promulgating these regulations. *See Save Jobs USA v. U.S. Department of Homeland Security,* 2015 WL 2454274 (D.D.C. May 24, 2015) (denying motion for preliminary injunction to keep rule from taking effect until a decision is made on the merits of the plaintiffs' claims). Spouses and children may pursue academic studies in H-4 status that might otherwise require F-1 student status.

2. Workers in Specialty Occupations (Professionals) (H-1B). Aliens are eligible for H-1B classification if they qualify as members of a "specialty occupation." To qualify as a specialty occupation position under the USCIS regulations, 8 C.F.R. § 214.2(h)(4)(iii)(A), one or more of the following criteria must be met:

- A bachelor's degree or higher (or its equivalent) is normally the minimum entry requirement for the position;
- The degree requirement is common in the industry or, alternatively, the position is so complex or unique that it can be performed only by an individual with a degree;
- The employer normally requires a degree or its equivalent for the position; or
- The nature of the specific duties is so specialized and complex that the knowledge required

to perform the duties is usually associated with attainment of a baccalaureate or higher degree.

a. Qualifying for the Specialty Occupation. To qualify to perform services in a specialty occupation, the alien must hold a minimum of a U.S. bachelor's degree or its equivalent in education and/or progressively responsible work experience. If a license is required to practice in the specialty occupation field, the alien must also hold the relevant license. In addition, if the alien holds an unrestricted license to practice in the specialty occupation, he or she may qualify for H-1B status without having a bachelor's degree or its equivalent.

b. LCA. The law requires that the employer file an LCA for certification by the DOL before the H-1B petition may be filed with the USCIS. INA §§ 101(a)(15)(H)(i)(b), 212(n). *See also* 20 C.F.R. § 655.730. In the LCA, the employer must assert:

- That it will pay the alien the greater of the actual wages paid to others with similar experience and qualifications for the job or the prevailing wage for the occupation in the area of employment;
- That it will pay for nonproductive time;
- That it will offer the alien the same benefits on the same basis as U.S. workers;
- That employment of the alien will not adversely affect wages and working conditions of U.S. workers similarly employed;
- That notice has been provided to the employees and that there is no strike or lockout ongoing at the facility; and
- That the employer will maintain documents supporting the attestations for public inspection.

c. LCA Notice Requirement. An employer seeking to employ H-1B nonimmigrants must state on the LCA form that it has provided notice of the filing of the labor condition application to the bargaining representative of the employer's employees in the occupational classification in which the H-1B nonimmigrants will be employed or, if there is no such bargaining representative, that it has posted notice of filing in conspicuous locations in the employer's establishment(s) in the area of intended employment. *See* 20 C.F.R. § 655.734.

Notice to the bargaining representative must be provided on or within 30 days before the date the LCA is filed. The notice must state that a LCA is being filed and must identify the number of H-1B nonimmigrants the employer is seeking to employ; the occupational classification in which the H-1B nonimmigrants will be employed; the wages offered; the period of employment; and the location(s) at which the H-1B nonimmigrants will be employed. The notice must include the following statement: "Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of the U.S. Department of Labor."

If there is no collective bargaining representative, the employer must, on or within 30 days before the date the LCA is filed, provide a notice of the filing of the LCA. The notice must indicate that H-1B nonimmigrants are sought; the number of such nonimmigrants the employer is seeking; the occupational classification; the wages offered; the period of employment; the location(s) at which the H-1B nonimmigrants will be employed; and that the LCA is available for public inspection at the H-1B employer's principal place of business in the U.S. or at the worksite. The notice must also include the statement: "Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of the U.S. Department of Labor." 20 C.F.R. § 655.734. The notice must be posted in hard copy form in at least two conspicuous locations at every place of employment where the H-1B

nonimmigrant will be employed. The notice must be posted on or within 30 days before the date the labor condition application is filed and must remain posted for at least 10 consecutive working days. *Id.* Alternatively, the employer may provide electronic notification to employees in the occupational classification for which H-1B nonimmigrants are sought, at each place of employment where the H-1B nonimmigrant will be employed. Such notification must be given on or within 30 days before the date the labor condition application is filed and must be available to affected employees for a total of 10 days, except that if employees are provided individual, direct notice (such as by e-mail). Notification only need be given once during the required time period. Electronic notification may be provided through direct e-mail, notice on the employer's home page or electronic bulletin board if employees have direct access to these resources, or through an actively circulated electronic message such as the employer's newsletter. *See* 20 C.F.R. § 655.734.

d. Additional Attestations for H-1B Dependent and Willful Violator Employers. Statutory changes to the INA were implemented by the ACWIA. (Title IV of Pub. L. 105-277, Oct. 21, 1998; 112 Stat. 2681). ACWIA implemented additional requirements for certain H-1B employers that are considered "H-1B Dependent or Willful Violators." Regulations implementing these changes became effective on January 19, 2001.

The regulations require two additional attestations for H-1B dependent employers and other employers who have committed a prior willful violation of H-1B program rules. ACWIA defines an H-1B dependent employer as one who has more than 50 full-time equivalent employees in the U.S. and 15 percent or more of them hold H-1B status; 26-50 full-time equivalent employees who are employed in the U.S. and more than 12 of these hold H-1B status; 25 or fewer full-time equivalent employees who are employed in the U.S. and more than seven of these hold H-1B status. 8 U.S.C. § 1182 (n)(3)(A). Willful violators are defined as employers who have been found by the DOL or Department of Justice, after October 21, 1998, to have intentionally or recklessly failed to comply with wage and working condition obligations or to have made a misrepresentation of material fact within five years prior to filing a current LCA. 20 C.F.R. § 655.736(f); 655.805(c).

- **Recruitment.** The first attestation requires the employer to attest that it has made a good faith effort to recruit for the position in the U.S. using industry standard practices and offering the prevailing wage prior to hiring the H-1B worker. The employer must attest that it first offered the position to any U.S. worker who was equally or more qualified than the foreign national. 8 U.S.C. § 1182(n)(1)(G); 20 C.F.R. § 655.739.
- **Displacement.** The second attestation requires the employer to attest that it has not laid off a U.S. worker with similar qualifications as the foreign national from the same or essentially equivalent position within 90 days before and 90 days after it files the H-1B petition. In addition, the employer must attest that it will not place the H-1B nonimmigrant at another company without first confirming with that company that it has not laid off a U.S. worker from an equivalent position to the one the H-1B professional will be filling. 8 U.S.C. § 1182(n)(1)(F)(ii); 20 C.F.R. § 655.738.

Dependent employers and companies with willful violations who normally would be required to make these new attestations are not required to do so if the foreign national they are sponsoring for H-1B status holds a master's degree (or its foreign equivalent) in a field related to the position, or will earn at least $60,000 a year.

The H-1B Visa Reform Act of 2004 reinstates and makes permanent the ability of the DOL to initiate an investigation of an employer if there is reasonable cause to believe the employer is not in compliance with the subsection relating to the employment of nonimmigrants. *See* 8 U.S.C. § 1182(n)(2)(G). The investigation may be initiated for reasons other than completeness and obvious inaccuracies by the employer. *Id.*

Under this provision, the DOL can conduct an investigation if it receives credible information from a known source likely to have knowledge of an employer's practices or conditions. The information must provide reasonable cause to believe that the employer has committed a willful failure to meet a condition, or has committed a substantial failure to meet a condition that affects multiple employees. The revision directs the DOL to create procedures for providing information that may be used as the basis of an investigation. The Act also states that the DOL may withhold the identity of the source from the employer. An investigation will not be conducted unless the information is received within twelve months of the alleged failure to comply with the statute. With limited exceptions, the DOL must provide notice of an investigation to an employer. An investigation by DOL may last for 60 days, and if there is evidence of a violation, DOL shall provide the employer with notice of the determination and an opportunity for a hearing. The hearing must take place within 120 days of the determination and a finding must be made within 120 days of the hearing. This provision is retroactive and takes effect as if enacted on October 1, 2003. PL 108-447.

More recently, the USCIS Office of Fraud Detection and National Security (FDNS) has initiated an H-1B audit program to assess employer compliance with H-1B requirements. FDNS will make unannounced site visits under the Administrative Site Visit and Verification Program (ASVVP) to H-1B employers and their clients, whereby the investigator will collect information regarding the legitimacy of an employer's business and the accuracy of the representations made in filed H-1B petitions. The purpose of this audit program and the associated site visits is to detect, deter, and combat immigration benefit fraud. Since FY 2010, USCIS has sent tens of thousands of cases to FDNS. The ASVVP is discussed in more detail in section 2(i) below.

e. Good Faith Compliance. The 2004 amendment provides that an employer is deemed to have complied with the section, notwithstanding a technical or procedural failure to meet such requirements, if there was a good faith intent to comply with the requirements. This good faith clause shall not apply if the DOL has explained the basis of the failure or if the employer has been given time to correct the failure and has failed to do so. Under this subsection, an employer will not be assessed fines or penalties for failure to pay the prevailing wage if he can establish that the manner in which the prevailing wage was calculated was consistent with recognized industry standards and practices.

The Act also exempts aliens having a masters' or higher degree from a U.S. institution from the numerical limitations on the H-1B nonimmigrants. 8 U.S.C. § 1184(g)(5)(C).

The Act imposes a $500 fraud fee on employers who file either an initial petition for H-1B or L status or for a change of status or change of employer petition. This fee is in addition to other fees. A $500 fee will also be charged for an alien filing a visa application abroad for an L blanket petition. Fees apply to petitions and visa applications filed 90 days after the enactment date (December 8, 2004). The FDNS budget is derived from the H-1B and L-1 fraud fees.

f. Benching Pay. An employer must continue to pay the H-1B employee during periods of inactivity resulting from a choice made by the employer. This includes work slow-downs, disciplinary suspensions, and layoffs (as distinguished from termination). If the inactivity is at the employee's request and for his or her convenience, however, the employer is not required to pay the employee during that time. An employer's obligation to pay the H-1B employee will not completely end until it has properly terminated the employee (see below).

g. Increase in Certain H-1B and L-1 Application Fees. The Consolidated Appropriations Act, 2016 (Public Law 114-113), signed into law by President Obama on December 18, 2015, increases fees for certain H-1B and L-1 petitioners. These petitioners must submit an additional fee of $4,000 for certain H-1B petitions and $4,500 for certain L-1A and L-1B petitions postmarked on or after December 18, 2015. The additional fees apply to petitioners who employ 50 or more employees in the United States, with more than 50 percent of those em-

ployees in H-1B or L (including L-1A and L-1B) nonimmigrant status. These petitioners must submit the additional fees with an H-1B or L-1 petition filed:

- Initially to grant status to a nonimmigrant described in subparagraph (H)(i)(b) or (L) of section 101(a)(15) of the INA; or
- To obtain authorization for a nonimmigrant in such status to change employers.

This fee is in addition to the base processing fee, Fraud Prevention and Detection Fee, ACWIA fee (when required), as well as the premium processing fee, if applicable. Public Law 114-113 fees will remain effective through September 30, 2025.

h. Certification of Compliance with Export Control laws for H, L and O Visa Petitioner. As of February 20, 2011, USCIS requires employers filing Form I-129 for H, L, and O visa status on behalf of foreign nationals to certify that they comply with certain federal export control laws that have long been in effect. U.S. law prohibits the "export" of controlled technology and technical data to certain foreign nationals located within the U.S. without a license to do so. This can include foreign employees on work visas.

U.S. law treats as an export the release of controlled technology or technical data to a foreign national working in the U.S., even if the company does not engage in any other exporting activities. Employers should consult with internal export control and compliance personnel or seek a consultation with a qualified customs or trade attorney. A determination must be made for each individual by type of technology and the worker's nationality.

Employers must certify the following, which is Part 6 of the I-129 form:

> With respect to the technology or technical data the petitioner will release or otherwise provide access to the beneficiary, the petitioner certifies that it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and has determined that:
>
> - A license is not required from either the U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign person; or
> - A license is required from the U.S. Department of Commerce and/or the U.S. Department of State to release such technology or technical data to the beneficiary and the petitioner will prevent access to the controlled technology or technical data to the beneficiary until and unless the petitioner has received the required license or other authorization to release it to the beneficiary.

(1) Employer Certification. The questions above mean that all petitioning employers must certify that they have reviewed the EAR and the ITAR and have made a determination as to whether an export control license is required to release any controlled technology or technical data to the foreign national. If an export license must be obtained before such release, the employer must attest that the worker will not be exposed to covered technologies without first obtaining an export license covering the foreign worker.

Even if these export laws initially seem inapplicable to your business, you should be sure that you do not make a misrepresentation on Form I-129, which in itself would be a violation of federal law. Read all of the forms you will sign for immigration purposes and know that you are signing under penalty of perjury.

(2) Controlled "Technology" and "Technical Data." "Technology" and "technical data" that are controlled for release to foreign persons are identified on the EAR Commerce Control List (CCL) and the ITAR U.S. Munitions List (USML). The Department of Commerce Bureau of Industry and Security (BIS) administers the EAR. The Department of State Directorate of Defense Trade Controls (DDTC) administers the ITAR. If an export license is

required to export EAR controlled technology or ITAR controlled technical data to a certain country, an export license or other authorization will be required to disclose or transfer the technology to a foreign national of that country who will work for you.

(3) The Applicable Regulations. BIS is responsible for issuing "deemed export" licenses for the release to foreign persons of EAR controlled technology. DDTC is responsible for issuing export licenses and authorizations for the release of ITAR controlled technical data to foreign nationals in the U.S. Information about the EAR and how to apply for a deemed export license from BIS can be found at: www.bis.doc.gov. Information about EAR's requirements pertaining to the release of controlled technology to foreign persons is at: http://www.bis.doc.gov/index.php/policy-guidance/deemed-exports/deemed-reexport-guidance1. Information about the ITAR and how to apply for a deemed export license from DDTC can be found at: www.pmddtc.state.gov. Information about ITAR's requirements pertaining to the release of controlled technology to foreign persons is at: www.pmddtc.state.gov/faqs/license_foreignpersons.html.

Before signing a Petition for Nonimmigrant Worker (Form I-129) you should consult your in-house compliance officer, review the applicable regulations, or consult a customs and trade attorney to accurately respond to Part 6.

i. Administrative Site Visit and Verification Program (ASVVP). The FDNS created and implemented the ASVVP in July 2009 as part of its ongoing enhancement to the integrity of the immigration benefit process. FDNS has been conducting site visits under the ASVVP for the last few years. In 2014, USCIS announced that it would extend the ASVVP to the L-1 visa program. Under the ASVVP, FDNS conducts unannounced pre- and post-adjudication site inspections to verify information contained in certain visa petitions. USCIS provides petitioners and their representatives of record (if any) an opportunity to review and address the information before denying or revoking an approved petition based on information obtained during a site inspection. FDNS may perform ASVVP site inspections on randomly selected applications and petitions, both pre- and post-adjudication. ASVVP site inspections are not performed in cases where fraud is suspected, and are generally performed without notice. ASVVP site inspectors do not make decisions on immigration benefit petitions or applications.

(1) What are the Site Inspector's Tasks? ASVVP site inspectors:

- Verify the information submitted with the petition, including supporting documentation submitted by the petitioner, based on a checklist prepared by USCIS;
- Verify the existence of a petitioning entity;
- Take digital photographs;
- Review documents;
- Speak with organizational representatives to confirm the beneficiary's work location, employment workspace, hours, salary and duties; and
- Report the results of their site inspections to FDNS, which will review the information to determine whether the petitioner and the beneficiary have met or continue to meet eligibility requirements.

(2) What Happens After an ASVVP Inspection? An FDNS officer will review the information gathered, and determine whether there is a need to conduct an administrative inquiry. If so, and following that inquiry, FDNS will provide an Immigration Services Officer (ISO) with a Summary of Findings (SOF). The ISO will use the SOF to determine whether the petitioning organization qualifies for the benefit sought. If FDNS cannot verify the information on the petition or finds the information to be inconsistent with the facts recorded during the site visit, the ISO may request additional evidence from the petitioner or initiate denial or revocation proceedings. When indicators of fraud are identified, the FDNS Of-

ficer may conduct additional administrative inquiries or refer the case to ICE for criminal investigation.

(3) Other Anti-Fraud Efforts. The ASVVP complements other USCIS anti-fraud efforts. In addition to ASVVP visits, FDNS also conducts site visits to support occasional Benefit Fraud and Compliance Assessments and on cases in which immigration fraud is suspected.

j. Termination of H-1B Employees/Return Airfare. An employer who terminates an H-1B employee is obligated to provide the alien return airfare to his or her home country. In addition, an employer is required to notify the USCIS of the termination and to withdraw the H-1B petition filed on the alien's behalf. As soon as the employment relationship is terminated, the alien is immediately out of status and must leave the country. There is no grace period for H-1B employees following termination.

k. Duration of Stay. Generally, H-1B status is available for an initial period of up to three years, with a possible extension for up to three more years. However, under AC21, extensions beyond the typical six years are available in certain circumstances for employees with permanent residency applications pending.

l. H-1B Portability. Under AC21, an H-1B employee meeting certain eligibility criteria may change employers as soon as a new employer files, and the USCIS receives, a non-frivolous H-1B petition on behalf of the alien. The employee does not need to wait for approval of the new petition before changing jobs. However, it is advisable to wait for a receipt notice before changing jobs, to ensure that the H-1B Petition has been accepted for filing.

m. H-1B Cap. There are a limited number of new H-1B petitions accepted each federal fiscal year (October 1 through September 30). Currently, the number of new H-1B petitions accepted is capped at 65,000 per year, subject to certain limited exceptions. The first 20,000 H-1B petitions filed on behalf of aliens with U.S.-earned Master's or higher degrees are exempt from the H-1B numerical limitation of 65,000. Accordingly, USCIS administers a separate "20,000 cap" for such exempt petitions. 8 U.S.C. § 1184(g). Petitions for new employment in H-1B status are accepted starting April 1st (and must be for employment starting no earlier than October 1st of the same year) and continue to be accepted by USCIS until the H-1B cap is reached for the fiscal year. The H-1B quota often is exhausted within the first few days that H-1B petition filings are permitted (starting April 1).

n. Employers Prohibited from Filing Multiple H-1B Petitions on Behalf of a Single Employee. USCIS issued an interim final rule on March 19, 2008, that prohibits employers from filing more than one petition for an H-1B visa for a single employee in a fiscal year. USCIS will now either deny or revoke multiple petitions filed by an employer for the same H-1B worker. USCIS will not refund filing fees for duplicative or multiple H-1B petitions. The rule does not prevent related employers (such as a parent company and its subsidiary) from filing petitions on behalf of the same alien for different positions, based on legitimate business needs.

Under the interim final rule, USCIS will use a random selection process for all the master's degree or higher cap-exempt cases received on the first five business days available for filing H-1B petitions for a given fiscal year, if necessary. If the U.S. master's exemption limit is reached on the first five business days, USCIS will first conduct the random selection process for such petitions before it begins random selection for petitions to be counted toward the 65,000 cap. Petitions eligible for the U.S. master's degree or higher exemption that are not selected to receive an H-1B visa number from the 20,000 cap will be considered with the other H-1B petitions in the random selection for the 65,000 cap filed on the first five business days.

Petitions filed on behalf of current H-1B workers do not count towards the congressionally mandated H-1B cap. Accordingly, this rule does not affect USCIS processing of petitions filed to:

- Extend the amount of time a current H-1B worker may remain in the U.S.;
- Change the terms of employment for current H-1B workers;
- Allow current H-1B workers to change from one cap-subject position to a different cap-subject position with a different employer; or
- Allow current H-1B workers to work concurrently in a second H-1B position.

o. UCIS Changes Policy on When an Amended H-1B Petition must be Filed when Employee is Assigned to a New Worksite. In *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO Apr. 9, 2015), USCIS stated that an H-1B employer is required to file an amended petition prior to assigning an H-1B employee to a worksite not listed in the original approved petition, if employment at the new geographic location would require the employer to obtain a new certified LCA. In this decision, UCIS based its revocation of an H-1B petition on the finding that Simeio relocated its alien worker from the worksite designated in the approved H-1B visa petition to new worksites subject to higher prevailing wage rates without first notifying CIS by filing a petition to amend the original terms and conditions. UCIS subsequently issued guidance specifying the requirements for filing amended H1B petitions based on changes in worksite location. The guidance states that if an H1B worker relocated on or before April 9, 2015, which is the date the *Simeio Solutions* case was decided, the employer may choose to file an H-1B amendment, but generally is not required to do so based solely on the location change. However, if an adverse action was initiated before the date the guidance was published (July 21, 2015), the UCIS may continue to pursue the matter even if it involves a relocation that occurred before April 10, 2015. For workers relocated between April 9 and August 18, 2015, to a new worksite not covered by the LCA that was filed with the existing H-1B petition, an H-1B amendment must be filed by January 15, 2016. For workers relocated on or after August 19, 2015 to a worksite not covered by the original LCA, the petitioner must file an amended or new petition before the employee begins working at the new location. H-1B workers generally may begin working at the new location when the amended H-1B petition is filed; they are not required to wait until the petition is adjudicated.

3. Temporary Workers Performing Temporary Services in Short Supply (H-2B). This category applies to aliens coming to the U.S. temporarily to perform temporary services or labor when U.S. workers are unavailable for such work. H-2A status is granted to agricultural workers; H-2B status is granted to nonagricultural workers. The following addresses nonagricultural workers only.

Basic Requirements.

a. The employer must obtain labor certification from the state employment service office certifying that no U.S. workers both willing and capable of performing these services can be located, and that the proposed employment will not adversely affect wages and working conditions of U.S. workers similarly employed. 8 C.F.R. § 214.2(h)(6)(i).

b. The employer must demonstrate that the alien is coming temporarily to perform services that are temporary in nature. Both the job itself and the petitioning employer's need for the specific alien must be temporary.

Duration of Stay. Initial admission is for the period needed by the employer, not to exceed one year unless extraordinary circumstances are present. Extensions are available in one-year increments for up to two more years.

4. Temporary Trainees (H-3). The H-3 trainee is an alien coming temporarily to the U.S. to receive training at the invitation of an individual, organization, firm, or other trainer in any field of endeavor, including agriculture, commerce, communication, finance, government, transportation, and the professions.

Basic Requirements.

a. The proposed training is not available in the alien's own country;

b. The alien will not be placed in the normal operation of the business in which citizen and resident workers are regularly employed;

c. The alien will not engage in productive employment unless such employment is incidental and necessary to the training; and

d. The training will benefit the alien in pursuing a career outside the U.S.

Restrictions on the Training Program. A training program that has any of the following attributes will not be approved:

e. Deals in generalities with no fixed schedule, objectives, or means of evaluation;

f. Is incompatible with the nature of the petitioning business or enterprise;

g. Is on behalf of an alien who already possesses substantial training and expertise in the proposed field of training;

h. Is in a field in which it is unlikely that the knowledge or skill will be used outside of the U.S.;

i. Will result in productive employment beyond that which is incidental and necessary to the training;

j. Is designed to recruit and train aliens for the ultimate staffing of domestic operation in the U.S.;

k. Does not establish that the petitioner has a physical plant and sufficiently trained manpower to provide the training specified; or

l. Is designed to extend the total allowable period of practical training previously authorized a nonimmigrant student.

***Duration of Stay*.** Length of training program up to two years.

Visa Waiver. Trainees who qualify for H-3 status and who are nationals of countries designated under the Visa Waiver program may also be eligible to enter the U.S. under visa waiver status.

F. Exchange Visitors (J-1).

General. An alien may obtain J-1 status if he or she is entering the U.S. to participate in a cultural exchange program approved by the Department of State. The exchange program must be in one of the following categories:

1. Professors and research scholars;

2. Short-term scholars coming to the U.S. for not more than four months to lecture, observe, consult, and to participate in seminars, workshops, conferences, study tours, professional meetings, or similar types of educational and professional activities;

3. Trainees/Interns;

4. College and university students;

5. Teachers at primary and secondary accredited educational institutions;

6. Secondary school students;

7. Specialists in a field of knowledge or skill coming to the U.S. to observe, consult, or demonstrate special skills;

8. Alien physicians seeking to pursue graduate medical education or training;

9. International visitors (for the exclusive use of the Department of State);

10. Government visitors (for the exclusive use of federal, state, or local government agencies);

11. Camp counselors;

12. Au pairs; or

13. Summer students in a travel/work program.

Trainees/Interns. An alien may be admitted in J-1 status to receive practical training in skills related to a specialty or nonspecialty occupation through an approved exchange program. The program must involve structured instruction in American techniques, methodologies, or expertise within the field of endeavor. An alien may enter the U.S. as a J-1 trainee for a maximum of 18 months or as an intern for up to 12 months. During that time, he or she is authorized for employment only in accordance with the approved training program.

Home Residency Requirement. A J-1 exchange visitor may be required to reside in his or her home country for two years following expiration of J-1 status. The alien may not apply for permanent residency, H status, or L status until the home residency requirement is satisfied or waived. In general, the home residency requirement applies if:

1. The alien's participation in the program "was financed in whole or in part, directly or indirectly, by an agency of the government of the U.S. or by the government of his nationality or last residence";

2. At the time of entry into the U.S., the alien was engaged in a field of endeavor requiring specialized knowledge or skills designated by the Department of State as being required by his or her country of nationality or last residence; or

3. The alien entered the U.S. to receive graduate medical training.

8 U.S.C. § 1182(e). Waiver of the J-1 home residency requirement is available in limited circumstances, and must be sought through the Department of State.

Spouse and Children of J-1 Exchange Visitor. The spouse and children of a J-1 exchange visitor may accompany him or her and may receive employment authorization as long as the income is not used to support the J-1 alien. 8 C.F.R. § 214.2(j)(1)(v)(A).

Rule Amending the Exchange Visitor Program. On October 6, 2014, the State Department published a rule making certain changes to the Exchange Visitor Program. The rule imposes new background check and experience requirements on entities seeking to become dedicated sponsors and for sponsors seeking to renew their designations. It also requires private sector sponsors to submit management reviews in a format and on a schedule determined by the Department. Additionally, it enhances provisions governing the Student and Exchange Visitor Information System (SEVIS) database that sponsors use to track the whereabouts of exchange visitors and updates requirements regarding health and accident insurance. The rule is available at: https://www.federalregister.gov/articles/2014/10/06/2014-23510/exchange-visitor-program-general-provisions. The comment period for the rule closed December 5, 2014, and it took effect January 5, 2015.

G. Intracompany Transferees (L-1).

Basic Requirements:

1. The alien has been continuously employed abroad for at least one of the past three years by a parent, affiliate, or subsidiary of the U.S. company; and

2. The alien has been employed as an executive, manager, or in a position involving "specialized knowledge" abroad, and is coming to the U.S. to assume such a position. INA § 101(a)(15)(L); 8 U.S.C. § 1101(a)(15)(L).

To Qualify as an Executive, the Alien Must:

1. Direct the management of the organization or a major component or function;

2. Establish goals and policies;
3. Exercise wide latitude in discretionary decision making; and
4. Receive only general supervision or direction from higher-level executives, board of directors, or stockholders.

To Qualify as a Manager, the Alien Must:

1. Manage an organization, department, or function;
2. Supervise and control the work of other supervisory, professional, or managerial employees or manage an essential function within the organization or department;
3. Have authority to hire and fire or recommend personnel actions or otherwise function at a senior level; and
4. Exercise discretion over day-to-day operations of the activity or function.

To meet the "specialized knowledge" test, the alien must have a special knowledge of the company product and its application in international markets or have an advanced level of knowledge of the processes and procedures of the company. INA § 214(c)(2)(B).

The INA (§ 214(c)(2)) was amended in 2004 to prevent an L-1 visa holder from being primarily stationed at the worksite of another employer in cases where:

1. The L-1 visa holder will be controlled and supervised by an unaffiliated employer; or
2. The placement of the L-1 visa holder at the third-party site is part of an arrangement to provide labor for the third-party rather than placement at the third-party site in connection with the provision of a product or service involving specialized knowledge specific to the petitioning employer.

8 U.S.C. § 1184(c)(2)(F). This modification applies to initial, extended, or amended petitions filed on or after the effective date (December 8, 2004).

Family of Intracompany Transferee. The spouse and unmarried children under the age of 21 are entitled to enter in L-2 status. The spouse may apply for employment authorization.

Duration of Stay. Granted initially for up to three years, with extensions up to five years total for specialized knowledge employees, and up to seven years total for managers and executives.

H. Aliens of Extraordinary Ability in the Sciences, Arts, Education, Business, or Athletics (O-1, O-2). O-1 status is available to aliens of extraordinary ability in the sciences, arts, education, business, or athletics. The O-2 category is for certain aliens accompanying O-1 aliens in the arts or athletics. The O-3 category is for dependents of aliens in the O-1 or O-2 categories.

Duration of Stay. The initial period of stay is for the anticipated duration of the event. Extensions are available for up to three years. The alien has 10 days after the expiration of O status to depart.

1. **Extraordinary Ability Aliens (O-1).**

Basic Requirements.

a. Extraordinary ability. INA § 101(a)(15)(O)(i); 8 U.S.C. § 1101(a)(15)(O)(i).

(1) Aliens other than those in the television and motion picture industry must have extraordinary ability in the sciences, arts, education, business, or athletics, which has been demonstrated by sustained national or international acclaim.

(2) Aliens in the television and motion picture industries must show a demonstrated record of extraordinary achievement.

b. The alien's achievements have been recognized in the field through extensive documentation. INA § 101(a)(15)(O)(i); 8 U.S.C. § 1101(a)(15)(O)(i).

c. The alien seeks to enter the U.S. to continue work in the area of extraordinary ability. INA § 101(a)(15)(O)(i); 8 U.S.C. § 1101(a)(15)(O)(i).

2. Aliens Accompanying O-1 Aliens in the Arts or Athletics (O-2). An O-2 accompanying alien provides essential support to an O-1 artist or athlete. This status is not available to aliens seeking to accompany an O-1 alien in the fields of science, business, or education, and entitles the applicant to work only for the O-1 artist or athlete.

Basic Requirements. An alien accompanying an O-1 artist or athlete of extraordinary ability must:

a. Be coming to the U.S. to assist in the performance of the O-1 alien;

b. Be an integral part of the actual performance; and

c. Have critical skills and experience with the O-1 alien that are not of a general nature and that are not possessed by a U.S. worker. 8 C.F.R. § 214.2(o)(4)(ii)(A).

An alien accompanying an O-1 alien of extraordinary achievement in the television and motion picture industries must have skills and experience with the O-1 alien that are not of a general nature and that are critically based on a pre-existing, longstanding working relationship. An O-1 petition must include a written advisory opinion from an appropriate union if one exists for the field of endeavor.

I. Performing Entertainers and Athletes (P-1, P-2, P-3).

General. P-1 status is available to aliens who are internationally known athletes, either individually or as part of a group or team, and entertainment groups (but not individuals). P-2 aliens are performing artists under a reciprocal exchange program. P-3 aliens are culturally unique entertainers.

1. Spouse and Children of a P Category Alien: are eligible to accompany the alien in P-4 status. This status does not authorize employment.

Admission in all P categories is limited to a specific performance, competition, event, or performance. An athletic competition or entertainment event could include an entire season of performances. 8 C.F.R. § 214.2(p)(3).

2. Athletes and Group Entertainers (P-1).

Basic Requirements. INA § 214(c)(4); 8 U.S.C. § 1184(c)(4).

An alien athlete (P-1A) must:

a. Perform at an internationally recognized level of performance; and

b. Seek to enter the U.S. temporarily and solely for the purpose of competing in a specific athletic competition.

An alien entertainer (P-1B) must:

a. Perform with or be an integral or essential part of an entertainment group that has been recognized internationally as being outstanding in the discipline for a sustained and substantial period of time; and

b. Have a sustained and substantial relationship with the group over a period of at least one year.

Duration of Stay. Individual athletes may be issued a period of stay of up to five years, with extensions to a total of 10 years; team athletes and entertainment groups are issued periods of stay for the anticipated duration of the performance or competition up to one year.

3. Performing Artists Under a Reciprocal Exchange Program (P-2).

Basic Requirements.

a. Performs as an artist or entertainer, either individually or as part of a group, or is an integral part of the performance;

b. Seeks to enter temporarily and solely for the purpose of performing; and

c. Is under a reciprocal exchange program that is between an organization or organizations in the U.S. and one or more foreign states and that provides for the temporary exchange of artists, entertainers, or groups.

Duration of Stay: for the duration of the performance or event, up to one year.

4. Culturally Unique Entertainers (P-3).

Basic Requirements.

a. Performs as an artist or entertainer, either individually or as part of a group, or is an integral part of the performance; and

b. Seeks to enter temporarily and solely to perform, teach, or coach in a commercial or non-commercial program that is culturally unique.

"Culturally unique" means a style of artistic expression, methodology, or medium that is unique to a particular country, nation, society, class, ethnicity, religion, tribe, or other group of persons. 8 C.F.R. § 214.2(p)(3).

Duration of Stay: for the duration of the performance or event, up to one year.

J. Religious Workers (R).

Basic Requirements.

1. The alien has been a member of a religious denomination having a bona fide nonprofit religious organization in the U.S. for the two years immediately preceding the time of application.

2. The alien seeks to enter the U.S. to:

a. Perform services as a minister of that religious denomination; or

b. Work in a professional capacity in a religious vocation or occupation; or

c. Work in a religious vocation or occupation for a bona fide organization affiliated with a recognized religious denomination; and

3. The alien does not seek to stay in the U.S. for more than five years.

Duration of Stay. Duration of employment, up to five years.

The spouse and children of a R category alien are eligible to accompany the alien in R-2 status. R-2 aliens are ineligible for employment authorization.

K. Canadian and Mexican Professionals (TN). The TN professional work permit was created under the immigration provisions of the North American Free Trade Agreement (NAFTA). The TN category permits Canadian and Mexican citizens who are members of specific professions listed in the agreement to accept employment in the U.S. for a period of up to three years and is renewable indefinitely. *See* 8 C.F.R. § 214.6(h)(1)(iii)-(iv). The duration of the TN status that is ultimately granted is a discretionary decision made by either a USCIS officer or CBP officer. An individual may be granted up to, but no more than, three years of TN status at a time. However, when an individual has spent numerous years in the U.S. under TN status, he/she may face inquiries by consular and CBP officers regarding his/her "intent" in the U.S. (i.e. is the foreign national's intent truly temporary as required by TN classification where the foreign national has spent numerous years in the U.S. working). Therefore, at some point, it may become advisable for the foreign national to change status to another nonimmigrant classification, such as H-1B, which permits dual intent.

Spouses and unmarried minor children may apply for TD status to accompany the alien. 8 C.F.R. § 214.6(j). Spouses and children may attend school in TD status but are not permitted to work in this status.

For Canadian nationals, the TN category represents a significant advantage over the H-1B category because it provides for streamlined same-day application procedures at the port of entry. However, unlike the H-1B category, the TN status does not permit "dual intent," meaning that if a green card may later be sought, H-1B status may still be preferable.

As of January 1, 2004, Mexican nationals may apply directly to a U.S. Consular post having jurisdiction over current residence for visa issuance without prior approval from the USCIS.

L. Spouses and Children of Permanent Residents (V). Green card holders in the U.S. may sponsor their spouses and unmarried children under the age of 21 for permanent residency. Due to current visa backlogs, however, it may take several years for these petitions to be approved and for a visa to become available. As a result, the spouse and/or child may have a long wait before he or she may enter the U.S. as a permanent resident. If the green card holder filed a Form I-130 for the spouse and/or minor child on or before December 21, 2000, the spouse and/or child may be eligible for the V visa classification if more than three years have passed since the I-130 was filed. V visa holders are authorized for employment in the U.S.

M. Nonimmigrant Classification Summary.

Visa	Description	Length of initial authorized stay (and extensions) (Form I-94)
A-1, A2, A-3	Diplomat and entourage	Duration of service.
B-1	Temporary business visitor	Usually less than six months, with maximum of one year (extensions in increments of six months).
B-2	Temporary visitor for pleasure	Usually six months, with maximum of one year (extensions in increments of up to six months).
C-2, C-3	UN and foreign government transits in flight	Eight hours or next available connecting flight.
D	Crewman (vessel/aircraft)	Maximum 29 days.
E-1	Treaty trader, spouse, and children	One year (extensions in two-year increments).
E-2	Treaty investor, spouse, and children	One year (extensions in two-year increments).
E-3	Australian nationals in specialty occupations and their spouses and children	Initial period of stay is for the validity of the LCA, or no more than two years. Extensions may be granted indefinitely for up to two years at a time (also not to exceed LCA).
F-1	Student (academic)	Duration of studies. Potential additional year for participation in Optional Practical Training program.
F-2	Spouse and children of F-1	Same as F-1.
G-1, G-2, G-3, G-4, G-5	Representative of foreign government or internal organization	Duration of service.

Visa	Description	Length of initial authorized stay (and extensions) (Form I-94)
H-1B	Temporary worker – specialty occupations	Up to three years initially. Extension for a total of six years (or longer in certain circumstances).
H-2A	Temporary or seasonal agricultural workers	Duration of sponsoring employer's established need, with extensions up to three years.
H-2B	Temporary worker performing temporary services in short supply in U.S.	One year (extension in one-year increments up to maximum three-year stay).
H-3	Alien trainee	Up to two years.
H-4	Spouse and children of H-1B, H-2 or H-3	Same as H-1B, H-2, or H-3.
I	Foreign media specialists, spouse and children	Duration of employment. Extensions for one year without limit.
J-1	Exchange visitor	Duration of status.
J-2	Spouse and children of J-1	Same as J-1.
K-1	Alien fiancé of U.S. citizen and accompanying children of fiancé	90 days to marry and then apply for change to permanent resident.
K-3, K-4	Spouse and children of U.S. citizen when petition for green card has already been filed	Duration of application process.
L-1	Intracompany transfer employee	Up to three years (extensions up to five years total for specialized knowledge employees, seven years total for managers and executives).
L-2	Spouse and children of L-1	Same as L-1.
M-1	Vocational school student	Duration of studies.
M-2	Spouse and children of M-1	Same as M-1.
O-1	Aliens of extraordinary ability in sciences, arts, education, business, or athletics, or demonstrated record achievement in the motion picture or television industry	Duration of event (extensions up to three years plus 10 days).
O-2	Accompany aliens of O-1	Same as O-1.
O-3	Spouse and children of O-1 and O-2	Same as O-1.
P-1	Internationally recognized athlete or member of an internationally recognized entertainment group and essential support personnel	Individual athletes - up to five years (extensions up to 10 years; team athletes and entertainment groups – duration of performance, compensation, or event up to one year).
P-2	Artists and entertainers performing under a reciprocal exchange program and essential support personnel	Duration of performance or event, up to one year.

Visa	Description	Length of initial authorized stay (and extensions) (Form I-94)
P-3	Artists and entertainers in a culturally unique program and essential support personnel	Duration of performance or event, up to one year.
P-4	Spouse and children of P-1, P-2, P-3	Same as P-1, P-2, P-3.
Q-1	International cultural exchange program visitors	Up to 15 months, plus 30 days.
Q-2	Cultural exchange visitors specifically from Northern Ireland and certain countries within the Republic of Ireland who are between 18 and 35 years old	Up to 36 months.
R-1	Religious workers	Duration of employment, up to five years.
R-2	Spouse and children of R-1	Same as R-1.
S	Government informant whose presence is necessary for investigation or prosecution	Up to three years.
TN	Canadian and Mexican professionals	Up to three years (extension in maximum of three-year increments for indefinite period).
TD	Spouse and children of TN	Same as TN.
WB	Visa waiver visitors for business	Maximum of 90 days.
WT	Visa waiver visitors for pleasure	Maximum of 90 days.
V-1, V-2, V-3	Spouses and minor children of legal permanent residents whose green card petitions were filed prior to December 21, 2000, and whose petitions have been pending for three years	Duration of application process.

IV. EMPLOYMENT-BASED IMMIGRATION

A. Preference System Overview. With the exception of those aliens who are the spouses, unmarried minor children, or parents of U.S. citizens, all prospective immigrants are subject to an annual quota that limits the number of persons who can immigrate to the U.S. Visas are divided among family-based, employment-based, and diversity categories.

There are a limited number of employment-based visas available each year. These visas are divided among the five preference groups. Because the demand for permanent visas frequently exceeds the available supply, some preference groups may become over-subscribed. In that instance, the prospective immigrant is placed on a waiting list based on his or her "priority date," the time that he or she first applied for labor certification or filed the immigrant visa petition.

The five employment-based preference groups are:

1. First preference (EB-1) – priority workers, including persons of extraordinary ability, outstanding professors and researchers, and multinational executives and managers;

2. Second preference (EB-2) – members of the professions holding advanced degrees or persons of exceptional ability;

3. Third preference (EB-3) – skilled workers, professionals, and other workers;
4. Fourth preference – special immigrants (religious workers); and
5. Fifth preference – investors.

B. Labor Certification. Two of the five employment-based immigration preference groups (the second and third) require labor certification for aliens as a prerequisite to obtaining a visa based upon employment. This means the DOL must verify that there are not sufficient able, willing, qualified, and available U.S. workers for a particular job, and that the employment of an alien for the job in question will not adversely affect the wages and working conditions of workers in the U.S. similarly employed. *See* 20 C.F.R. Part 656.

The process for obtaining a labor certification was revised as of March 28, 2005. The regulations (called the PERM regulations) were enacted to streamline the process for obtaining a labor certification.

1. **Qualifying Criteria.**

   a. Full-time Status. The employer must be seeking a foreign worker as a full-time employee.

   b. Pre-filing Recruitment Process. Before filing for the labor certification, an employer must complete certain recruitment steps. This recruitment must occur between 30 and 180 days prior to the filing of the labor certification application.

   (1) Publish the Job Opening. The employer must advertise the position in two different Sunday editions of the newspaper. If the job requires experience and an advanced degree, the employer may advertise in a professional journal in lieu of one of the Sunday advertisements. Additionally, the employer must post the job opening where it normally posts employee notices, in any internal media, and in the job bank maintained by the State Workforce Agency (SWA).

   (2) Additional Requirement for Professional Occupations. If the job is for a professional position (those requiring at least a bachelor's degree), the employer must take additional recruitment steps. The regulations list 10 additional forms of recruitment of which the employer must choose three.

   (3) Documentation. The employer must prepare a recruitment report describing the recruitment steps taken, the results achieved, the number of hires, and the number of U.S. workers rejected and reasons for the rejections (if applicable).

   (4) Exceptions to Recruitment. Applications involving college or university teachers selected pursuant to a competitive selection process, Schedule A employers (see Labor Certification exceptions below), and sheepherders are not required to conduct pre-application recruitment.

   c. Notice. The employer is required to provide notice of the filing of an ETA 9089 to a bargaining representative (if any), or by posting notice in conspicuous places at the employer's place of employment. This notice must be posted for at least 10 consecutive business days. This notice requirement is in addition to the recruitment mandate of publishing in any in-house publications. 20 C.F.R. § 656.10(d).

   d. Prevailing Wage Determination (PWD). Starting January 1, 2010 the employer now must request a PWD from the National Prevailing Wage and Helpdesk Center (previously submitted to the relevant SWA) prior to the filing of the application. The offered wage must be equal to or greater than the prevailing wage.

2. **Labor Certification Application.** Under the Permanent Labor Certification Program (PERM) regulations, a complete application consists of a single form (ETA Form 9089), which may be filed directly with the DOL through an automated, on-line system. 20 C.F.R. Part 656.

a. Documentation. Supporting documentation need not be filed with the application, but the employer must provide the required documentation if the employer's application is selected for audit or if the Certifying Officer otherwise requests it. The supporting documentation shall be kept for five years from the date of filing the application.

b. Job Requirements. The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O*NET Job Zones. The regulations also provide standards for evaluating the job's minimum requirements and state that in evaluating whether an alien beneficiary satisfies these requirements, the DOL will not consider any education or training the alien obtained at the employer's expense, unless the employer offers similar training to domestic workers. Additionally, if the alien beneficiary is already employed by the employer, the DOL will not consider any work experience the alien gained while working for the employer unless it was in a position not substantially comparable to the one for which certification is sought.

c. Layoffs. If there has been a layoff by the employer within six months of the application for labor certification, involving the occupation for which certification is sought or a related occupation, the employer must document that it has notified and considered all potentially qualified laid off U.S. workers of the job opportunity involved in the application and the results of the notification and consideration.

d. Signature. Applications filed electronically must, upon receipt of the certification, be signed by the employer immediately in order to be valid. Applications filed by mail must contain the original signature.

e. Final Rule Regarding Substitutions and Other Labor Certification Issues. Effective July 17, 2007, the DOL ceased its informal practice of allowing employers to substitute an alien named on a pending or approved labor certification with another qualified, prospective alien employee. *See* 20 CFR Part 656. The DOL had permitted this practice as an accommodation to employers due to the length of time it took to obtain a permanent labor certification or receive approval of the Form I-140 petition. The revised rule eliminated this practice by prohibiting the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. The prohibition applies to all pending permanent labor certification applications and to approved permanent labor certifications, whether the application was filed under PERM or under prior regulations implementing the permanent labor certification program. The rule also clarifies the DOL's "no modifications" policy for applications filed under the PERM procedure.

Additionally, the Final Rule:

- provides a 180-day validity period for approved labor certifications; employers must file an approved permanent labor certification in support of a Form I-140 within 180 calendar days;
- prohibits the sale, barter or purchase of permanent labor certifications and applications;
- generally requires employers to pay the costs of preparing, filing and obtaining certification – the rule strictly prohibits the alien beneficiary from paying any costs incurred in the labor certification process;
- reinforces existing law pertaining to the submission of fraudulent or false information;
- clarifies current DOL procedures for responding to incidents of possible fraud; and
- establishes procedures for debarment from PERM.

3. Exceptions to the Labor Certification Process. Certain occupations have already been determined as not having sufficient able, willing, qualified, and available U.S. workers, and that the

employment of an alien for those occupations will not adversely affect similarly situated workers in the U.S. 20 C.F.R. § 656.5. These pre-determined occupations are termed "Schedule A" occupations and are divided into two groups: Group 1 includes certain qualified physical therapists and registered nurses; Group 2 includes aliens of exceptional ability in science or arts, as well as those with exceptional ability in performing arts whose work in the past 12 months has required and will continue to require exceptional ability**.**

Although an alien falling into one of these two groups must still file a PERM application, including the PWD, they do not need to complete the pre-filing recruitment procedures. In turn, the application allows Schedule A employers to bypass the recruitment questions.

Also, unlike normal PERM provisions, Schedule A employers are required to submit documentation verifying a Schedule A designation. *See* 20 C.F.R. § 656.15. The application and supporting documentation are filed directly with the appropriate DHS office, instead of the normal Employment and Training Administration (ETA) application processing center.

There are also special regulations for sheepherders (20 C.F.R. § 656.16) and college or university teachers selected pursuant to a competitive selection process (20 C.F.R. § 656.18).

4. Proposed Guidance on Job Changes by Employment-Based Adjustment Applicants. USCIS has issued proposed guidance on job portability for employment-based adjustment applicants. The proposed guidance discusses in detail the factors an adjudicator should consider when determining whether a new position is in the same or similar occupational classification for purposes of I-140 portability. The proposed guidance recognizes that an adjustment applicant should be able to accept promotions and new career opportunities without the need to be sponsored for a new labor certification and I-140 petition, as long as the new and former jobs share essential qualities. The guidance will not be finalized until the comment period is closed and USCIS has reviewed the comments.

C. VisaScreen for Certain Health Care Workers. As of July 26, 2005, aliens working in certain designated health care positions involving the provision of direct care, other than physicians, are required to submit a VisaScreen certificate to be eligible for nonimmigrant employment or permanent residence sponsorship. The positions are: registered nurses, occupational therapists, physical therapists, speech language pathologists and audiologists, medical technologists, physician assistants, and medical technicians. The nonimmigrant classifications subject to this requirement include TN professionals, H-1B Specialty Workers, H-1C Nurses, J-1 Exchange Visitors, and O-1 Outstanding Aliens.

A VisaScreen is a comprehensive credentials, licensing, and educational evaluation issued by designated independent certifying organizations. To obtain a VisaScreen, affected foreign health care workers must: (1) demonstrate competence in oral and written English with a passing score on all examination components from an approved testing service; (2) have a passing score on a test (recognized by the majority of states licensing the occupation) that predicts the likelihood of success when the person later takes the occupation's state licensing or certification examination, OR a passing score on the occupation's actual state licensing or certification examination; and (3) have their credentials, including their education, training, license, and experience, reviewed to confirm that they are comparable to those of U.S. workers, are authentic and unencumbered, and meet all applicable state and federal requirements for admission into the U.S. in the profession.

In addition, to receive an immigrant visa or be approved for an adjustment of status, registered nurses generally must pass the National Council Licensure Examination (NCLEX) exam or be able to provide a Commissioner on Graduates of Foreign Nursing Schools (CGFNS) certificate. To actually practice nursing, they must have a registered nurse license for the state in which they will practice. There are different requirements for other healthcare workers in addition to VisaScreen.

Health care workers who graduated from a college, university or a professional training school located in Australia, Canada (except Quebec), Ireland, New Zealand, the U.K. or the U.S. are exempt from the English Language requirement.

Some healthcare workers may be exempt from the education comparability review and English language proficiency testing components for VisaScreen if he or she graduated from an entry-level program accredited for that profession.

D. First Preference: Priority Workers (EB-1). Priority workers fall within three categories: (1) aliens with extraordinary abilities; (2) outstanding professors and researchers; and (3) certain multinational executives and managers. INA § 203(b)(1); 8 U.S.C. § 1153(b)(1). There is no allocation of the available priority worker visas among these subcategories. In addition, **no labor certification is required.** 8 C.F.R. §§ 204.5(h)(5); 204.5(i)(3)(iii). An offer of employment generally is required in the form of a letter. However, Aliens with Extraordinary Abilities may petition for themselves and therefore do not need an offer of employment.

1. Aliens with Extraordinary Abilities. In this classification, the alien must show that he or she has "extraordinary ability in the sciences, arts, education, business or athletics which has been demonstrated by sustained national or international acclaim" and that his or her "achievements have been recognized in the field through extensive documentation." INA § 203(b)(1)(A)(i); 8 U.S.C. § 1153(b)(1)(A)(i).

No labor certification or job offer is required, but the petitioner must submit evidence that he or she will continue to work in the U.S. in the area of expertise. The petitioner must also show that his or her entry will benefit the U.S. prospectively.

2. Outstanding Professors and Researchers. To satisfy this requirement, an alien must be internationally recognized as outstanding in a specific academic area, have a minimum of three years of experience teaching or researching in that area, and be entering the U.S. in a tenure or tenure-track position or to engage in research with a private employer having a research department consisting of at least three full-time research employees. INA § 203(b)(1)(B); 8 U.S.C. § 1153(b)(1)(B).

3. Multinational Executives and Managers. The alien must have been employed for at least one of the past three years in an executive or managerial capacity by a "firm or corporation or other legal entity or an affiliate or subsidiary thereof" located abroad. The alien must be coming to the U.S. to continue to render services to the same employer or subsidiary or affiliate in a managerial or executive capacity. INA § 203(b)(1)(C); 8 U.S.C. § 1153(b)(1)(C).

"Managerial capacity" means an assignment with the organization in which the employee personally:

a. Manages the organization or department;

b. Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function;

c. Has authority to hire and fire or recommend personnel actions; and

d. Exercises discretion over day-to-day operations.

"Executive capacity" means an assignment in the organization in which the employee primarily:

a. Directs the management of the organization;

b. Establishes goals and policies;

c. Exercises wide latitude in discretionary decision making; and

d. Receives only general supervision or direction from higher-level executives, board of directors, or stockholders.

E. Second Preference: Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability (EB-2). The second preference covers workers in two categories: (1) members of the professions holding advanced degrees or their equivalents; and (2) aliens who because of their exceptional ability in the sciences, arts, or business will substantially benefit the national

economy, cultural, or educational interests or welfare of the U.S. INA § 203(b)(2); 8 U.S.C. § 1153(b)(2). A job offer and labor certification are generally required to obtain a second preference visa.

1. Members of the Professions Holding Advanced Degrees. These professions include the occupations listed in INA § 101(a)(32); 8 U.S.C. § 1101(a)(32), as well as any occupation for which a baccalaureate degree or foreign equivalent is the minimum requirement for entry.

An "advanced degree" is any graduate or professional degree above a baccalaureate. A baccalaureate degree plus five years of progressive experience will be deemed the equivalent of a master's degree. 8 C.F.R. § 204.5(k)(2).

2. Aliens of Exceptional Ability in the Sciences, Arts, or Business. Exceptional ability is a degree of expertise significantly above the ordinary. It may be shown by any three of the following:

a. Degree relating to area of exceptional ability;

b. Letters from current or former employers showing at least 10 years' experience;

c. License to practice profession;

d. Evidence that the person has commanded a salary or remuneration demonstrating exceptional ability;

e. Membership in professional association; or

f. Recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

Alternatively, comparable evidence may be submitted to show exceptional ability if the above categories are inapplicable.

National Interest Waiver. The USCIS may waive the job offer and labor certification requirements for Second Preference aliens if it is in the national interest to do so. INA § 203(b)(2)(B); 8 U.S.C. § 1153(b)(2)(B). To obtain a national interest waiver, the employer must prove that:

1. the area of employment is one of "substantial intrinsic merit";

2. the proposed benefit of the alien's work is "national in scope"; and

3. the national interest served by waiving the labor certification requirement outweighs the national interest served by the labor certification requirement.

See Matter of New York State Department of Transportation, Int., Dec. 3363 (Comm'r 1998).

F. Third Preference: Skilled Workers, Professionals, and Other Workers (EB-3). The third preference category covers workers in three categories: (1) skilled workers; (2) professionals; and (3) other workers. A job offer and labor certification are required in order to obtain a third preference visa. INA § 203(b)(3); 8 U.S.C. § 1153(b)(3).

The distinction between professionals/skilled workers and other workers is an important one because "other workers" are limited to 10,000 visas of the 40,040 visas available to the third preference category. INA § 203(b)(3)(B); 8 U.S.C. § 1153(b)(3)(B). There is a substantial backlog of "other worker" visa applications.

1. Skilled Workers. Skilled workers are those in positions that require a minimum of two years of training or experience. Relevant postsecondary education may be considered as training. 8 C.F.R. § 204.5(l)(2).

2. Professionals. Professionals must possess a baccalaureate degree or foreign equivalent, and the petitioner must demonstrate that such a degree is the normal requirement for entry into the profession.

3. Other Workers. Other workers are those workers who cannot be classified as skilled workers or professionals. Visas for this category are backlogged for years.

G. Fourth Preference: Special Immigrants. The Special Immigrant category encompasses several divergent subcategories of aliens seeking permanent U.S. residency. These categories include persons seeking reacquisition of citizenship; returning residents; religious workers; U.S. employees abroad and employees of the American Institute in Taiwan; Panama Canal Treaty employees; persons who served honorably for 12 years in the U.S. military under a treaty with his or her country of nationality; and North Atlantic Treaty Organization (NATO) civilian employees. INA § 101(a)(27); 8 U.S.C. § 1101(a)(27).

To qualify as a religious worker, the alien must have been a member of a religious denomination that has a bona fide nonprofit religious organization in the U.S. (as defined by the Internal Revenue Code of 1986) and must have carried on religious work continuously for at least the two years immediately preceding the filing of the petition. 8 C.F.R. § 204.5(m). The religious worker must be coming to the U.S. solely for the purpose of: (1) carrying on the vocation of a minister of that religious denomination; (2) working for the organization in a professional capacity in a religious vocation or occupation for the organization; or (3) working in a religious vocation or occupation for a religious organization or an affiliated organization. 8 C.F.R. § 204.5(m); 22 C.F.R. § 42.32(d)(1)(ii). In *Shia Ass'n of Bay Area v. United States*, 849 F. Supp. 2d 916, 922 (N.D. Cal. 2012), the court held that the 2008 amendments to 8 C.F.R § 204.5(m)(11), which imposed a requirement that "qualifying experience during the two years immediately preceding the petition[,] … if acquired in the United States, must have been authorized under United States immigration law" is unconstitutional because it prohibits a person who has worked even one day in unauthorized employment from being eligible for an adjustment of status. The court held that this provision conflicts with 8 U.S.C. § 1255(k), which provides that an alien may be eligible for an adjustment of status, even if the alien has engaged in unauthorized employment, so long as the alien has not engaged in unauthorized employment for more than an aggregate period exceeding 180 days. Because the requirements for a special immigrant worker visa petition and adjustment of status are connected, by making an individual ineligible for a special immigrant worker visa petition if the person has worked one day in unauthorized status, the regulation also makes the individual ineligible for adjustment of status. Thus the court found the regulation to be ultra vires to the INA and not applicable to the plaintiffs.

The nonminister special immigrant religious worker program has been extended through September 30, 2015. However, this program does not govern the admissibility of the ministers of a religious denomination. Therefore, ministers are not subject to the sunset date or the cap on the number of visas available through the program.

H. Fifth Preference: Employment Creation (Investors) (EB-5). This category covers aliens with a specified amount of money to invest in a commercial enterprise employing at least 10 full-time U.S. workers or authorized immigrant workers. 8 C.F.R. § 204.6(e). In general, the threshold investment amount is $1 million, but this may vary according to where the enterprise will operate. INA § 203(b)(5); 8 U.S.C. § 1153(b)(5). The minimum investment required may be less in rural areas or areas that have experienced high unemployment or more in areas with high employment rates. INA § 203(b)(5)(C); 8 U.S.C. § 1153(b)(5)(C).

Employment creation visas are issued conditionally for a two-year period, after which the applicant's compliance is re-evaluated. INA § 216A(a); 8 U.S.C. § 1186b(a).

I. Other Employment-Based Immigration Information.

1. Diversity Visa Lottery. Every fiscal year, a certain number of immigrant visas are made available to individuals from specific countries whose rates of immigration to the U.S. have been low. Aliens wishing to enter the Diversity Lottery must submit an application to the USCIS during a one-month application period each year. "Winners" are chosen at random, and they must ensure that they consular process for their immigrant visa prior to the expiration of the fiscal year.

2. Recapture of Unused Visas. Under AC21, employment-based permanent residency visas that are not utilized in a previous year will be made available during subsequent years until used

up. This should reduce some of the lengthy waiting periods endured by some green card applicants.

3. Job Portability. In some circumstances, beneficiaries of a First-preference Multinational Manager/Executive, First-preference Outstanding Researcher/Professor, Second-preference, or Third-preference petition may change employers without first requiring the new employer to file its own petition or labor certification application. INA § 204(j); 8 U.S.C. § 1154(j). This flexibility is dependent upon a number of factors that must be assessed on a case-by-case basis.

V. ALIEN EMPLOYMENT AUTHORIZATION AND EMPLOYER SANCTIONS

A. Scope. The IRCA, codified at 8 U.S.C. § 1324a, applies to all employers, regardless of size, including public employers.

Under IRCA, a person or entity MAY NOT:

1. Hire, recruit, or refer for a fee an alien knowing that the alien is unauthorized with respect to employment in the U.S. 8 U.S.C. § 1324a(a)(1)(A).

2. Continue to employ an alien in the U.S. knowing that the alien is or has become unauthorized with respect to employment. 8 U.S.C. § 1324a(a)(2).

3. Use a contract, subcontract, or exchange to obtain the labor of an alien in the U.S. knowing that the alien is unauthorized with respect to employment. 8 U.S.C. § 1324a(a)(4).

4. Hire a person for employment in the U.S. without complying with the requirements of an employment verification system as described below. 8 U.S.C. § 1324a(a)(1)(B).

In April 2009, DHS issued updated worksite enforcement guidance that outlined the new administration's strategy and described ICE's major enforcement priorities – "specifically focusing on dangerous criminal aliens and employers who cultivate illegal workplaces by breaking the country's laws and knowingly hiring illegal workers." The guidance identified I-9 audits as the most important administrative tool in building criminal cases and bringing employers into compliance with the law.

On the heels of the updated worksite enforcement guidance, ICE launched a wave of I-9 audits, serving 652 employers across the country with Notices of Inspection (NOIs) – more NOIs issued in one day than the total number of NOIs issued for the entire prior fiscal year (503). The NOIs meant ICE would audit the employers' hiring records, specifically their Form I-9s, to determine compliance with the employment eligibility verification laws.

Although the number of mandated NOIs for FY 2015 was reduced to 1500, approximately 50 percent fewer than in past years, the reason for the reduction is that ICE is conducting more criminal investigations. ICE has indicated it is increasing the number of criminal inspections because employers seem to be viewing I-9 fines as part of doing business. Even with the reduced number of NOIs for FY 2015, the agency appears to be on track to meet the amount of fines imposed in 2014 (over $16 million).

B. Independent Contractors. Federal law does not require an employer to verify the employment authorization of independent contractors or their employees. However, ICE will closely scrutinize all such relationships to ensure that employers are not simply labeling employees "independent contractors" to avoid their obligations under IRCA. Factors to be considered in determining independent contractor status may include whether the individual or entity supplies his/its tools or materials, makes its services available to the general public, works for a number of clients at the same time, directs the order or sequence in which the work is to be done and determines the hours during which the work is to be done. 8 C.F.R. §274a.1(j). Additional factors include: (1) the relationship with the employer, including the amount of supervision and the manner in which the work relationship is terminated; (2) the determination of whether rate of pay is by hour or by the number and quality

of jobs; (3) whether the job requires low level or high level skills (jobs requiring low level skills are rarely considered independent); (4) employer/employee intent and local and industry practice; and (5) provision of certain benefits (e.g., annual leave, retirement, Social Security). *See U.S. v. Bakovic*, 3 OCAHO no. 482 (Jan. 15, 1993).

Note however, that some state laws expand federal requirements and require employers seeking state contracts to verify the employment eligibility of their employees and prohibit them from using independent contractors and subcontractors who do not verify their employees through one of the government-approved electronic employment verification systems (for example, DHS E-Verify, formerly known as "Basic Pilot"). Whether an employer seeking public contracts in a specific state will be required to do more than required under federal law requires an analysis of the laws of the state in which the employer seeks state contracts.

C. Definition of "Unauthorized Alien." Under IRCA, an unauthorized alien is one who, at the time of employment, is not either: (1) admitted for permanent residence; or (2) authorized to be so employed by IRCA or the Attorney General.

D. Actual Knowledge or Constructive Knowledge. "Knowing" an alien is unauthorized means either:

1. Actual knowledge: for example, the employee volunteers the fact that he or she is not authorized; or

2. Constructive knowledge: certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know that an employee is not authorized to work in the U.S. 8 C.F.R. § 274a.1(l)(1). Whether particular facts or circumstances will equate to constructive knowledge must be analyzed on a case-by-case basis. Mere rumors that an employee is not authorized will not suffice. Once an employer has constructive knowledge, it is obligated to investigate further and to take appropriate action. *See New El Rey Sausage Co. v. INS*, 925 F.2d 1153 (9th Cir. 1991). *See also Aramark Facility Services v. SEIU, Local 1877,* 530 F.3d 817 (9th Cir. 2008) (Social Security Administration (SSA) no-match letters received by the employer were not intended by the SSA to contain "positive information" of immigration status and could be triggered by numerous reasons other than fraudulent documents; accordingly, the letters did not by themselves provide constructive notice of immigration violations).

E. Regulations Addressing SSA "No Match" Letters. In October 2009, DHS formally withdrew its Social Security "no-match" regulation, promulgated in August 2007 under the Bush administration. The no-match regulation had set forth a "safe harbor" for employers who receive letters from the SSA stating that an employee's Social Security Number (SSN) does not match the agency's records. The safe harbor rule required employers to take certain steps to resolve the discrepancy within a certain period of time or face liability. Shortly after being issued in 2007, the no-match regulation was challenged in court, subject to an injunction and ultimately never implemented. As of October 7, 2009, the rule was formally rescinded. In the summary of the final rule withdrawing the regulation, DHS stated that it will "focus its enforcement efforts relating to the employment of aliens not authorized to work in the United States on increased compliance through improved verification, including participation in E-Verify, ICE Mutual Agreement Between Government and Employers (IMAGE), and other programs."

The final rule notes that the receipt of a no-match letter "when considered with other probative evidence, is a factor that may be considered in the totality of the circumstances and may in certain situations support a finding that the employer had 'constructive knowledge'" of an employee's lack of employment authorization. Thus, it is essential that employers continue to address any discrepancies and continue to respond to Social Security No Match Letters in a reasonable and nondiscriminatory manner. The U.S. Department of Justice has provided guidance for employers who receive no-match letters. The guidance is available on the agency's web site at: http://www.justice.gov/crt/about/osc/pdf/publications/SSA/Employees.pdf.

F. Defenses to Allegations of Employing Unauthorized Aliens.

1. Compliance with Employment Verification System. A person or entity that complies in good faith with the requirements of an Employment Verification System has established an affirmative defense to certain minor mistakes made with regard to completion of the Form I-9. 8 U.S.C. § 1324a(a)(3). The regulations state that this affirmative defense is rebuttable. 8 C.F.R. § 274a.4.

2. Other Defenses.

a. Individual hired was not an "alien";

b. Individual was authorized to work; or

c. Hiring was not "knowing."

G. Employment Verification System. As noted above, an employer must verify the work authorization of all employees. An employer satisfies this verification requirement by completing a Form I-9 for each employee at the beginning of employment and by re-verifying an employee's work authorization if the document presented by the employee evidences that work authorization is limited.

Employers in multiemployer associations with collective bargaining agreements are relieved from verifying work authorization for applicants who worked for another member of the association within three years and whose status was verified by the other employer. Likewise, an employer who has acquired another company need not execute a new Form I-9 for employees of the acquired company whom it chooses to continue to employ. However, if an employer does not conduct its own I-9 verification, and the individual is later found to be unauthorized, a rebuttable presumption is created that the employer knew or should have known of the illegality.

On March 8, 2013, USCIS issued a revised Form I-9 (Rev. 03/08/2013) and provided employers a 60-day implementation period. Beginning May 7, 2013, employers must use only the current version of the Form I-9 (Rev. 03/08/2013) to verify the identity and employment eligibility of new hires and re-verify existing employees where necessary. Employers can download a copy of the current Form I-9 from the USCIS web site: http://www.uscis.gov/files/form/i-9.pdf.

In March 2013 USCIS also issued an updated *Handbook for Employers – Guidance for Completing Form I-9* that reflects the requirements of the current Form I-9. The *Handbook for Employers* is available from the USCIS web site: http://www.uscis.gov/files/form/m-274.pdf.

1. Required Documentation. Under IRCA, three categories of documents are acceptable to verify work authorization. List A documents are those establishing both identity and authorization to work, while List B documents establish only identity and List C documents establish employment authorization. Form I-9 verification is satisfied by either a document from List A or one document each from List B and List C.

2. Current Lists of Acceptable Documents.

List A – Documents Establishing Both Employment Authorization and Identity (8 C.F.R. § 274a.2(b)(1)(v)(A)).

a. A U.S. Passport or U.S. Passport Card;

b. Permanent Resident Card or Alien Registration Receipt Card (Form I-551);

c. An unexpired foreign passport containing an unexpired temporary I-551 (permanent residency) stamp or temporary I-551 printed notation on a machine-readable immigrant visa;

d. An unexpired employment authorization document that contains a photograph (Form I-766);

e. In the case of a nonimmigrant alien authorized to work for a specific employer incident to status, an unexpired foreign passport with an unexpired Arrival-Departure Record, Form I-94

or Form I-94A, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, as long as the period of endorsement has not yet expired and the proposed status is not in conflict with any restrictions or limitations identified on the form; or

f. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the U.S. and the FSM or RMI.

List B – Documents Establishing Identity Only (8 C.F.R § 274a.2(b)(1)(v)(B)).

a. Driver's license or identification card issued by a state or outlying possession of the U.S., containing a photograph. If either document does not contain a photograph, other identifying information should be included on the license or ID, such as name, birth date, gender, height, eye color, and address.

b. Identification card issued by federal, state, or local government agencies or entities provided it contains photograph or personal identifying information such as name, birth date, gender, height, eye color, and address.

c. School identification card with photograph.

d. Voter's registration card.

e. U.S. military card or draft record.

f. Military dependent's identification card.

g. U.S. Coast Guard Merchant Mariner Card.

h. Native American tribal document.

i. Canadian driver's license.

If the applicant is under 18 years of age and is unable to produce documents listed in (a)-(i), the following are acceptable evidence of identity:

a. School record or report card;

b. Clinic, doctor, or hospital record; or

c. Day care or nursery school record.

If the applicant is under 18 years of age and is unable to produce any of the documents listed above, he or she may be exempt if certain procedures are followed. 8 C.F.R. § 274a.2(b)(1)(v)(B)(3).

List C – Documents Establishing Employment Authorization (8 C.F.R. § 274a.2(b)(1)(v)(C)).

a. An original Social Security number card other than one that has printed on its face "not valid for employment purposes" or "Valid for Work with DHS Authorization Only" (copies or commercially produced cards are not acceptable);

b. A Certification of Birth Abroad issued by the U.S. Department of State, Form FS-545;

c. A Certification of Report of Birth issued by the U.S. Department of State, DS-1350;

d. An original or certified copy of a birth certificate issued by a state, county, municipal authority, or territory of the U.S. bearing an official seal;

e. Native American tribal document;

f. U.S. Citizen Identification Card (Form I-197);

g. Identification card for use of resident citizens in the U.S. (Form I-179); or

h. An unexpired employment authorization document issued by the USCIS (other than those listed under List A).

H. Verification and Completion of the I-9.

Step 1. On or before the first day of work, the newly hired employee must complete § 1 of Form I-9, in which he or she attests, by a hand-written or electronic signature, under penalty of perjury, that he or she is:

1. A citizen of the U.S.;
2. A noncitizen national of the U.S. (persons born in American Samoa, certain former citizens of the former Trust Territory of the Pacific Islands, and certain children of noncitizen nationals born abroad);
3. A lawful permanent resident; or
4. An alien authorized to work in the U.S.

Every element of § 1, except the Social Security field, must be completed by the employee and the employee must sign and date § 1. Note however that the Social Security field in § 1 must be completed by the employee if the employer participates in DHS's E-Verify online employment verification program. The employer is responsible if the employee fails to complete § 1 and can be assessed fines for any such failure. INA § 274A(b)(2), 8 U.S.C. § 1324a(b)(2).

Step 2. Within three business days of the start of employment, or on the first day if employment will last for less than three days, the employee must present documentation verifying work authorization and identity. 8 C.F.R. § 274a.2(b)(1)(i)(A). The employer or its agent must examine the documents to determine that they appear to be genuine on their face and that they relate to the individual who has presented the documents. 8 C.F.R. § 274a.1(g); 8 C.F.R. § 274a.2(b)(1)(ii). Documents that appear to be forged, fraudulent, or tampered with cannot be accepted.

Receipts presented for I-9 purposes. In general, a receipt indicating that an employee has applied for a document listed in List A, B, or C cannot be accepted by the employer in lieu of the actual document. However, there are a handful of exceptions to this general rule. 8 C.F.R. § 274a.2(b)(1)(vi).

1. If an employee presents a receipt indicating he or she has applied for a replacement document after the original was lost, stolen, or damaged, the employer must accept it. However, the employee must present the replacement document to the employer within 90 days after the date of hire.
2. If an employee presents a Form I-94 arrival/departure record with a "Temporary I-551" stamp and photograph on it (which is considered a "receipt" for a Form I-551 green card), the employer must accept it. However, the employee must present an actual Form I-551 green card before the expiration date listed on the Form I-94 or, if the I-94 has no expiration date, within one year of the I-94's issuance.
3. An employee also may present a Form I-94 indicating admission to the U.S. as a refugee, which is considered a receipt for an Employment Authorization Document or an unrestricted Social Security Card. However, the employee must present within 90 days after the date of hire an actual Employment Authorization Document or an unrestricted Social Security Card along with a List B document.

Document Abuse. The choice of documents supplied is the employee's alone, so long as the employee meets the minimum requirements of IRCA. The employer may not require the employee to present additional or different documents than the ones chosen by the employee. 8 U.S.C. § 1324b(a)(6).

Under IRCA prior to the 1996 amendment, it was unlawful "document abuse" for an employer to fail to accept a document that is facially genuine or to ask for additional or different documents. Under the 1996 law, it is "document abuse" only if the employer acts with the purpose or intent of discriminating against the individual because of national origin or citizenship status. 8 U.S.C. § 1324b(a)(6). *See also Robison Fruit Ranch, Inc. v. U.S.*, 147 F.3d 798, 802 (9th Cir. 1998).

Step 3. Complete § 2 of Form I-9, if the documents are from the lists of acceptable documents, appear to be genuine on their face, and relate to the individual presenting them, within three days of employment.

The employer must attest, under penalty of perjury, that it has reviewed the documents and that, to the best of the employer's knowledge, the employee is eligible to work in the U.S.

The employer must complete all information required by § 2, and either via a handwritten or electronic signature, sign and date that section.

Step 4. Re-verify employment eligibility, if necessary.

Some documents evidence only temporary work authorization. In those instances, the employee should have noted an expiration date in § 1 of Form I-9. It is the employer's responsibility to re-verify the employee's work authorization on or before the expiration date by having the employee present a valid, unexpired document from List A or List C. Once the employer has inspected the new document, it should complete § 3 of the Form I-9. It should be noted that an employer is not required to re-verify the employment eligibility of permanent residents.

To assure compliance with this requirement, it is advisable to set up a tickler system to provide reminders of an upcoming expiration date. To avoid a violation of the law or an interruption in service from employees who face expiration, set up the tickler with two dates: the first, two weeks before expiration; the second, one day before expiration.

I. Retention of I-9 and Underlying Documentation.

1. Retention of Form I-9.

Duration. Employer must keep Form I-9s for all current employees throughout their employment. The employer must continue to keep the Form I-9 for each terminated employee for a period of three years from the original date of hire, or one year after employment is terminated, whichever is longer.

Location of Retained Forms. Employers should consider keeping the verification documents in a location separate from the employee's personnel file so that (a) the ICE, in the course of an investigation, will be limited in their access to additional information contained in such files; and (b) the forms and copies of identity/authorization documents (if any are copied and retained) cannot be used as evidence of an intent to discriminate based on a protected characteristic (race, national origin, etc.) should an unlawful discrimination charge arise.

Format of Retained Forms. As of April 28, 2005, employers are permitted to retain Forms I-9 in electronic format and use electronic signatures. Pub. L. No. 108-380 (amending INA § 274A(b)). The guidelines surrounding the rule note that employers may either complete and retain the forms electronically, or may complete the forms on paper and store them electronically.

It should be noted that electronic storage is an additional option. Employers may still choose to retain their Forms I-9 on paper, microfilm, or microfiche format. An employer who elects to keep I-9 records on microfilm or microfiche must comply with strict standards. "Microfilm, when displayed on a microfilm reader (viewer) or reproduced on paper must exhibit a high degree of legibility and readability." Further, the employer must maintain a detailed index of all microfilmed data that will enable the immediate location of any particular record. 8 C.F.R. § 274a.2(b)(2)(i)-(iii).

If a Form I-9 is completed electronically, the system used to capture the electronic signatures of the employer and employee must meet the following strict standards. 8 C.F.R. § 274a.2(h)-(i).

a. The electronic system must logically attach the electronic signature to an electronically completed Form I-9;

b. The system must affix the electronic signature at the time of the transaction;

c. The system must create and preserve a record verifying the identity of the person producing the signature; and

d. The system must provide the employee who signs a printed confirmation of the transaction, at the time of the transaction.

The system must include an acknowledgement that the attestation to be signed has been read by the signatory.

On July 22, 2010, the DHS issued its final rule on electronic signatures and storage of Form I-9. The final rule made some relatively minor changes in the previously issued interim rule and provided clarification of certain ambiguities. The primary changes implemented by this rule are as follows:

- employers must complete a Form I-9 by the third business (not calendar) day after an employee started work for pay;
- employers may use paper, electronic systems, or a combination of paper and electronic systems;
- employers may change electronic storage systems as long as the systems meet the performance requirements of the regulations;
- employers need not retain audit trails of each time a Form I-9 is electronically viewed, but only when the Form I-9 is created, completed, updated, modified, altered, or corrected; and
- employers may provide or transmit a confirmation of a Form I-9 transaction, but are not required to do so unless the employee requests a copy.

2. Retention of Underlying Documentation. Under federal law, employers are permitted (though not required) to make and keep photocopies of the documentation supplied by the applicant. Such a practice provides evidence of the documents the employer relied upon in verifying work authorization. (Of course, copies of documents that do not reasonably appear to be genuine can serve as evidence against the employer.) If copies are kept, the employer must make sure to do so for all employees, not simply for employees of particular national origins or immigration statuses.

J. Reliance on Facially Genuine Documents. As a part of its effort to avoid discrimination on the basis of national origin, IRCA specifies that an employer is under no obligation to go beyond facial examination of a reasonably genuine document or documents. Thus: "A person or entity has complied with the requirement of this paragraph with respect to examination of a document if the document reasonably appears on its face to be genuine." 8 U.S.C. § 1324a(b)(1)(A). An employer is not required to become an expert at identifying forged or fraudulent documents. *Collins Foods v. INS*, 948 F.2d 549 (9th Cir. 1991) (reversing fine against employer who failed to detect forged social security card).

K. Government Searches and Inspections. No search warrant is required for I-9 inspections. However, the regulations require the ICE to provide the employer with three days' notice prior to an inspection of the forms and accompanying underlying documentation (if any). The forms must be produced at the location where the request for production is made, or, if the employer so elects, at the ICE office nearest to that location. *See generally* 8 C.F.R. § 274a.2(b)(2)(ii). Failure to make records available is subject to the same penalties as failure to complete the verification procedures for all new employees.

L. Reliance on State Employment Agency Documentation. Employers are not required to examine work authorization documents for employees who are referred by a state employment agency that certifies to the employer that it has complied with IRCA's verification requirements.

Procedure. If the state employment agency verifies work authorization of any applicants, it must do so for all individuals referred. The agency issues a certification on official agency letterhead, signed

by an appropriate official and addressed to the employer to which the individual is being referred. The certification must state that the agency has verified the individual's identity and must identify the documents provided to evidence identity and work authorization, as required by IRCA. It must also be dated, specify the position or type of employment, and identify the individual being referred. It must stipulate any restrictions, conditions, or other limitations that relate to the individual's employment eligibility in the U.S. and state that the employer is not required to re-verify the individual's identity or eligibility, but must retain the certification letter in lieu of the Form I-9. The form must also contain a signature line, to be signed by the applicant in the presence of the employer.

Storage. The certification must be retained by the employer in its original form in a manner identical to storage of the Form I-9. The employer is responsible for updating the certificate if it indicates only temporary work authorization.

Timing. An employer has 21 days to obtain the certificate from the state, either by mail or delivered personally by an agency representative. The applicant cannot bring the certification to the employer. Before sending the certification, the state agency will either: (1) forward a written job order to the employer; or (2) confirm the hiring by telephone. The employer must retain the job order or a written record of the telephone call to show compliance with the law during the 21-day period after hire, where it keeps its Form I-9s. The record must include the referred person's name, date of referral, job order number, name and title of agency official, and telephone and address of the state employment agency.

M. Continuing Employment After Breaks in Active Service. It is unnecessary to re-verify an employee's employment eligibility if the employee is continuing in his or her employment or at all times has a reasonable expectation of employment. Under the regulations, "continuing employment" includes the following situations:

1. The employee takes paid or unpaid leave on account of study, illness, or disability of a family member, illness or pregnancy, maternity or paternity leave, vacation, union business, or other temporary leave accrued by the employer;

2. The employee is promoted, demoted, or gets a pay raise;

3. The employee is on a temporary layoff due to lack of work;

4. The employee is not working because a strike or labor dispute is in progress;

5. The employee is reinstated after disciplinary suspension for a wrongful termination is found unjustified by any court, arbitrator, or administrative body or otherwise resolved through reinstatement or settlement;

6. The employee transfers from one distinct unit of an employer to another distinct unit of the same employer (the employer may transfer the employee's Form I-9 to the receiving unit);

7. The employee continues his or her employment with a related, successor, or reorganized employer (as defined by the regulations), provided that the employer obtains and maintains from the previous employer the Form I-9s when applicable; or

8. The employee is engaged in seasonal employment.

Rehires. If the employer rehires an individual it previously employed within three years from the date the original I-9 was completed and for whom it complied with IRCA requirements within three years previously, it will not be required to complete a new I-9. The employer must examine the old I-9 to ensure that the work authorization noted on the I-9 has not expired. If the employee is still eligible to work, the employer may simply note the new date of hire on the old I-9. If according to the I-9 the employee's work authorization has expired, the employer must re-verify the employee's eligibility by completing § 3 of the form. 8 C.F.R. § 274a.2(c).

"Grandfathered" Employees. Employers were not required to verify the employment eligibility of any employee hired on or before November 6, 1986, the date IRCA became effective. 8 C.F.R. §

274a.2(a). However, an employee loses grandfathered status if he or she quits, is terminated, deported, or leaves the country under an order of voluntary departure.

N. Enforcement and Penalties for Noncompliance with IRCA.

1. Complaints and Investigations. IRCA directed the Attorney General to establish procedures for complaints and investigations. These procedures permit:

a. Individuals and Private Entities to File Complaints Regarding Alleged Violations. Any person having knowledge of a potential violation may submit a signed, written complaint in person or by mail to the ICE office having jurisdiction over the business or residence of the potential violator. The complaint must identify the complainant and the potential violator and provide their addresses. Anonymous complaints are not acceptable. The complaint should also contain detailed allegations including the date, time, and place of the alleged violation and the specific conduct alleged to have violated the statute. 8 C.F.R. § 274a.9(a).

b. Investigations Conducted by the ICE. The ICE may conduct investigations for violations on its own initiative without having received a written complaint. Complaints from third parties are investigated if they appear to have a reasonable probability of validity. 8 C.F.R. § 274a.9(b).

2. Random Inspections. The ICE's enforcement strategy includes random inspections of employers, in conjunction with independent investigations of suspected violators.

3. Special Provisions for Federal Contractors. Pursuant to a Memorandum of Understanding between the DOL and the INS, investigators from the Office of Federal Contract Compliance Programs (OFCCP) now include inspection of I-9s as a routine part of any Affirmative Action Program (AAP) on-site audit. The OFCCP will refer employers who violate IRCA requirements to the ICE. In addition, a 1996 Executive Order (EO) bars employers who knowingly hire illegal aliens from receiving government contracts for one year.

4. Subpoena Power. IRCA provides that immigration officers "shall have reasonable access to examine evidence of any person or entity being investigated." The administrative law judges (ALJs) are specifically granted subpoena power for the production of evidence "at any designated place or hearing." Subpoenas issued by ALJs are enforceable upon application of the Attorney General in a U.S. District Court. *See U.S. v. Florida Azalea Specialists*, 19 F.3d 620 (11th Cir. 1994) (holding that the Special Counsel has authority to issue a subpoena to compel the production of evidence during the course of an investigation, and not only after a complaint has been filed before an ALJ). In addition, immigration officers themselves are empowered to issue subpoenas to compel the production of Forms I-9. *See* 8 C.F.R. § 274a.2(b)(2)(ii).

5. Orders, Notices, and Opportunity for Hearing. Upon completing its investigation, ICE may issue a Warning Notice or a Notice of Intent to Fine to employers it believes have violated IRCA's requirements. If an employer receives a Notice of Intent to Fine, it may request a hearing before an ALJ within 30 days after it receives the notice. Failure to request a hearing will result in the issuance of a final order 45 days after the notice is served. 8 C.F.R. § 274a.9(c),(d),(e). If a hearing is requested, the ALJ will issue findings and an order after its conclusion.

6. Cease and Desist. The ICE or ALJ may issue an order requiring the employer to cease and desist from the violations.

7. Penalties. 8 C.F.R. § 274a.10. Violators of IRCA can incur substantial penalties. DHS and the U.S. Attorney General have issued a rule that adjusts for inflation the civil monetary penalties assessed or enforced by these two departments under the INA. The increase, which was effective March 27, 2008, was the first increase in the civil monetary penalties since 1999 and resulted in an approximately 25 percent increase over current penalties.

The increased penalty amounts are effective March 27, 2008 and apply only to violations that occur after that date.

- **Hiring, Recruiting and Referral Sanctions:** Under the current provisions, the penalty for knowingly hiring, recruiting or referring undocumented workers ranges from $375 to $3,200 per individual for a first offense, increasing to a maximum of $16,000 for multiple prior violations.
- **Employment of Undocumented Workers:** Under the current provisions, the penalty for the knowing employment of undocumented workers ranges from $375 to $3,200 for a first offense, up to a maximum of $16,000 for multiple prior violations.
- **Form I-9 "Paperwork Violations":** The penalties for Form I-9 "paperwork violations," including failure to properly complete the Form I-9 or failure to retain the Form I-9 for the required period of time, remain at the current rate of $110 to $1,100 per violation.
- **Unfair Immigration-Related Employment Practices:** Under the current provisions, penalties for unfair immigration-related employment practices, such as discrimination against job applicants or employees based on nationality or citizenship status, range from $375 to $3,200 for a first offense, up to a maximum of $16,000 for multiple prior violations. However, the penalties for "document abuse," refusal to accept permissible documents presented by an employee in compliance with the Form I–9 requirements, remain at the current range of $110 to $1,100 per violation.

The INS has imposed a "second offense" penalty on employers when violations occur at two different locations. For example, in *Furr's*/*Bishop's Cafeterias, L.P. v. INS*, 976 F.2d 1366 (10th Cir. 1992), the court found that all 155 cafeterias owned by the employer were subject to several common levels of management and were not independent for purposes of hiring. The court agreed with the INS that entities are considered separate only when they are "completely independent of common control."

8. "Pattern and Practice" Violations. Any employer engaging in a "pattern or practice" of hiring unauthorized aliens can be subjected to criminal penalties, including possible imprisonment of up to six months, and a fine of up to $3,000 for each unauthorized alien. *See also* 8 C.F.R. § 274a.10. For example, in September 2014, five of seven franchise store operators agreed to plead guilty to criminal harboring and wire fraud counts brought against them in connection with an alleged multi-state conspiracy to conceal systemic employment of illegal immigrants, exploit immigrant employees, and steal identities. According to indictments filed in 2013, the defendants, who owned, managed and controlled 14 7-Eleven franchise stores during the course of the conspiracies, allegedly hired dozens of illegal immigrants, equipped them with more than 20 identities stolen from U.S. citizens, housed them at residences owned by the defendants, and stole substantial portions of their wages. *See Fourteen 7-Eleven Stores Seized, Nine Charged in Illegal Immigration Scheme in N.Y. and Va.,* http://oig.ssa.gov/audits-and-investigations/investigations/june17-ny. According to the release published by the Office of the Inspector General (OIG) of the SSA, indictments, arrests and seizures are the result of one of the largest criminal immigrant employment investigations ever conducted by the Department of Justice and DHS. *Id.* The defendants agreed to forfeit their homes and franchise ownership rights to the government. They also face additional criminal fines and up to 20 years imprisonment at sentencing.

The anti-harboring statute, 8 U.S.C. § 1324(a)(1), makes it a crime to conceal, harbor or shield an alien from detection in any place, including any building or any means of transportation, knowing, or in reckless disregard of the fact, that the alien entered or remains in the United States in violation of law, or to engage in any conspiracy to do so, or to aid and abet such violations. Employers should be aware that forms I-9 and payroll records are among the categories of documents and things typically listed in criminal search and seizure warrants in harboring cases. An employer's failure to prepare and retain I-9s in accordance with the law and regulations is cited by prosecutors as circumstantial evidence of reckless disregard of the employment of undocumented workers. Likewise, evidence of complicity in document fraud has been held to constitute "concealment" under the harboring statute. Undocumented alien workers at the location named

in the warrant constitute "contraband" and typically are arrested, detained, and interrogated by government agents regarding the employer's knowledge of their immigration status as well as the employer's compliance with wage and hour and health and safety laws. Wage theft, passport seizure, and threats of deportation for reporting the employer serve as aggravating factors under the harboring statute and may also be used to build a case for the separate crime of human trafficking. Employee victims can qualify for work permits by cooperating in the investigation and successful prosecution of offending employers. Where the line between independent contractors and employees is blurred vis-à-vis a franchisor and its franchisees, as alleged by the operators in the 7-Eleven case, a franchisor may find itself exposed to liability for the franchisee operator's failure to comply with the I-9 requirements or otherwise to ensure that the documents used in the employment verification process were not obtained fraudulently with the assistance of the operator. Likewise, the franchisor may find itself named as a defendant in lawsuits filed by employees of the franchisee for wage and hour and other labor protective statute violations.

9. "Paperwork Violations." This term designates failure to follow the required IRCA verification procedures. The civil fines for paperwork violations range from $110 to $1,100 "for each individual with respect to whom such violation occurred." IRCA directs that in determining the amount of such a penalty, "due consideration" shall be given to:

a. The size of the business;

b. The employer's good faith;

c. The seriousness of the violation;

d. Whether the individual hired was an unauthorized alien; and

e. The history of previous violations. 8 U.S.C. § 1324a(e)(5).

10. Limitation of Liability for Violations of Paperwork Requirements Under IIRIRA. Under IIRIRA, penalties will no longer be imposed against employers who commit "technical" violations in checking work authorization, 8 U.S.C. § 1324a(a)(3), and maintaining paperwork, 8 U.S.C. § 1324a(b)(6), as long as the employer has made a "good faith attempt" to comply with the verification requirements. These provisions have been narrowly construed. For example, technical violations have been found where the employee failed to list maiden name, birth date or address in § 1 or failed to list an "A number" in § 1 when it is included in § 2, or the employer failed to date the I-9. However, failure to provide a name, to sign an I-9, or to indicate an individual's alien or citizenship status will not be covered by the good faith defense.

The defense does not apply if an employer fails to correct the violation within 10 days after being given notice of the violation by the ICE or another enforcement agency, or if the employer has engaged in a pattern or practice of violations.

In addition, the good faith defense is limited to violations occurring on or after the date the law was enacted – September 30, 1996.

a. Perjury or Misuse of Documents. The "attestation" form is required to be executed "under penalty of perjury." Among the penalties for fraud, forgery, and other misuse of documents contained under § 103 of IRCA, the Act provides, in addition to fines, for imprisonment for up to two years for "a false attestation" or for "using" an identification document known to be false.

b. Fines Imposed. Fines proposed by USCIS have been sizeable, including a $1.2 million fine against a California roofing company for allegedly failing to complete I-9s on any of its workers and presenting fabricated I-9s to the USCIS during an audit.

c. Criminal Sanctions. As part of an aggressive and stepped-up worksite enforcement plan, ICE has started imposing a variety of criminal sanctions on employers in addition to financial penalties. There has been a shift away from pursuing administrative fines alone under the employer sanctions statute to bringing criminal charges against employers who hire undocu-

mented workers and seizing their illegally derived assets. Harboring undocumented workers, money laundering and/or knowingly hiring undocumented workers are among the charges ICE commonly pursues during criminal investigations. In an era of increased worksite enforcement activity, there are a plethora of examples in which employers have been the subject of criminal sanctions. A couple of examples are described below.

- ICE announced that a grand jury has returned a six-count felony indictment against five current managers of a manufacturing company, charging the defendants with engaging in a conspiracy to harbor illegal aliens, to encourage and induce illegal aliens, and to transport illegal aliens. Seven managers from the same company pleaded guilty in 2007 to felony and misdemeanor charges related to the unlawful employment of illegal aliens and await sentencing on those charges. All charges carry a 10-year maximum term of imprisonment, with the exception of the aiding and abetting charge, which has a five-year maximum term of imprisonment. All counts carry a maximum potential fine of $250,000.
- In July 2007, the owner of an Ohio retail business that sells and repairs sewing machines was sentenced for crimes involving the employment of undocumented workers. The owner was sentenced to six months in prison, required to forfeit his $770,000 residence, plus $2.693 million in currency by investigating agents, and required to complete 100 hours of community service. In April 2007, the owners pleaded guilty to charges of encouraging and inducing illegal aliens to come to the U.S., harboring illegal aliens, fraud and misuse of government documents, and engaging in a pattern of employing illegal aliens.
- In December 2008, a New York pallet manufacturer entered into record settlement agreement of over $20 million to resolve corporate criminal charges for conduct associated with the hiring and employment of illegal alien workers prior to April 19, 2006. The settlement did not resolve criminal charges against individual company employees.

11. Online Employment and SSN Verification Programs. Under Federal law, employers may voluntarily choose to verify the employment eligibility of their employees through a variety of online verification programs. An employer's use of these programs must be in addition to, not in lieu of, completing its federal I-9 obligations.

a. E-Verify. E-verify (formerly known as the Basic Pilot/Employment Eligibility Verification Program) is an Internet based system operated by DHS in partnership with the SSA that allows participating employers to electronically verify the employment eligibility of their newly hired employees. On a federal level, E-Verify is now required for qualifying federal contractors and subcontractors. *Please see* the section on Federal Contractor E-Verify requirements below. Some states have passed legislation mandating that certain employers use E-Verify. Generally, state E-Verify requirements can be divided into three categories: (1) states that require public employers to use E-Verify; (2) states that require qualifying state contractors and subcontractors to use E-Verify as a condition of a state contract; and (3) states that require all employers to use E-Verify. Because state law developments are quickly evolving, please consult legal counsel to understand what, if any, obligations you may have under your specific state's laws.

In order to register for E-Verify, an employer must sign a Memorandum of Understanding (MOU) that sets forth the obligations of the employer, DHS, and the SSA under the E-Verify program. An employer participating in E-Verify is obligated to verify the employment eligibility of every new employee hired after the date the MOU is signed. An employer may not use E-Verify to pre-screen applicants or in a discriminatory manner. An employer may choose to withdraw from the program upon a 30 day written notice to DHS. A copy of the MOU applicable to employers (but excluding federal contractors) can be accessed on the USCIS E-Verify web site, http://www.dhs.gov/e-verify. Click on the E-Verify MOU link on the right side of the page.

b. E-Verify for Federal Contractors. Effective September 8, 2009, qualifying federal contractors and subcontractors are required to use E-Verify as a condition of the qualifying federal contract. An employer may only enroll in E-Verify as a "federal contractor" only after (1) it is awarded a contract that contains the specific Federal Acquisition Regulation (FAR) E-Verify clause in it; or (2) an existing indefinite delivery/indefinite quantity contract (IDIQ) is bilaterally modified by the government contracting officer and the employer to include the FAR E-Verify clause. The federal government is required to place the FAR E-Verify clause in its initial solicitation of bids and also in the contract that is ultimately awarded to a contractor. Therefore, an employer will know whether it must use E-Verify as a condition of the contract as early as the bid stage.

Under the Federal Contractor E-Verify law, a covered prime contract is one that: (1) is awarded after September 8, 2009, or bilaterally modified after September 8, 2009, if it is an existing IDIQ contract; (2) has a value of greater than $100,000; (3) has a period of performance of greater than 120 days; (4) all work is performed in U.S.; and (5) contains the FAR E-Verify clause. A covered subcontract under the rule is one that (1) has a value of greater than $3,000; (2) for services or construction; and (3) contains the FAR E-Verify clause. Prime contractors are responsible for "flowing-down" the E-Verify requirement to any covered subcontracts by placing the FAR E-Verify clause in them and ensuring that the subcontractor uses E-Verify. There is a significant exemption under the rule for contracts for commercially-available-off-the-shelf-items (COTS). These are items that are available in the commercial marketplace and provided to the government without substantial modification.

The rule provides significant phase-in periods for a contractor to enroll in E-Verify and to initiate E-Verification of employees once it is actually awarded or has a covered contract modified after September 8, 2009. Once enrolled as a "federal contractor," an employer has the option to E-Verify (1) all new hires and any current employees placed directly on the covered contract; or (2) the entire existing workforce. In addition, certain employees are exempt from being E-Verified: (1) those hired prior to November 7, 1986; (2) those with certain security clearances (e.g. HSPD-12, confidential, top-secret); (3) those who have been run through E-Verify previously; and (4) and those who perform indirect, overhead/clerical type functions on the contract.

c. Social Security Number Verification System (SSNVS). The SSNVS is one of the services offered by SSA's Business Services Online (BSO). It allows registered users (employers and certain third-party submitters) to verify the names and SSNs of employees against SSA records. It is available at: http://www.ssa.gov/bso/bsowelcome.htm. With SSNVS, an employer may:

- Verify up to 10 names and SSNs online and receive immediate results. There is no limit to the number of times the SSN Verification web page may be used within a session.
- Upload electronic files of up to 250,000 names and SSNs and usually receive results the next government business day.

In addition to SSNVS, the BSO suite consists of Registration Services and Employer Services. Registration Services offer a User Identification Number (User ID) assignment, password selection and various registration maintenance functions. Employer Services include W-2 file upload, W-2 and W-2c online key-in functions (no special software or forms required) and the ability to track files and view processing results and notices. The SSNVS Handbook governing proper use of the program may be reviewed at the following website: http://www.ssa.gov/employer/ssnvs_handbk.htm.

VI. UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES (INA § 274B, 8 U.S.C. § 1324B).

A. Unfair Practices. Discrimination and "document abuse" are unfair practices under the IRCA. IRCA prohibits discrimination against any individual (other than an alien unauthorized to work) because of national origin or "citizenship status."

IRCA prohibits only intentional discrimination by employers. Unlike other employment discrimination statutes, IRCA does not also prohibit forms of unintentional discrimination that may have a "disparate impact" on parties in the protected group. *See, e.g., Zarazinski v. Anglo Fabrics Co.*, 4 OCAHO 638 n. 14 (1994).

1. Scope of the National Origin Prohibition. The prohibition applies only to employers of more than three employees, and does not apply to employers covered by Title VII of the Civil Rights Act of 1964 (Title VII). Thus, IRCA national origin discrimination provisions extend only to employers of between four and 14 employees.

2. Scope of the Citizenship Status Provision. The citizenship discrimination provision applies to all employers covered by IRCA. It prohibits discrimination against "protected individuals," including:

- Citizens or nationals of the U.S.; or
- An alien who is:
  - **(1)** lawfully admitted for permanent residence;
  - **(2)** granted lawful "amnesty" status;
  - **(3)** admitted as a "refugee"; or
  - **(4)** granted "asylum."

Generally, individuals who are in the U.S. as students or under temporary work visas are not protected by the citizenship status discrimination provision. In addition, protected lawful permanent residents who fail to apply for naturalization within six months of becoming eligible to do so will lose their protection against citizenship status discrimination.

3. Limited Hiring Policies. The INS has indicated that employers may lawfully have a policy of refusing to hire individuals who are not "protected individuals" under IRCA (permanent residents, legalized aliens, or applicants for legalization, refugees or asylees). Such a policy must be monitored and consistently enforced to make sure the employer does not discriminate on the basis of national origin.

IRCA permits employers to discriminate on the basis of citizenship only if such discrimination is "otherwise required" by law, regulation, executive order, or government contract.

IRCA also permits public employers to exercise wide latitude with respect to IRCA's anti-discrimination provision. *See Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1274 (9th Cir. 1993).

4. Document Abuse. Until the IIRIRA was passed in 1996, employers who asked for additional or different documents from an alien, or who refused to honor documents that reasonably appeared to be genuine, automatically committed the unfair practice of "document abuse." This placed employers in an extremely difficult situation. IIRIRA addressed this problem by limiting an employer's liability for document abuse to situations where it refuses the presented documents or requires different documents for the purpose or with the intent to discriminate against the individual on the basis of citizenship or national origin. *See Robison Fruit Ranch, Inc. v. U.S.*, 147 F.3d 798 (9th Cir. 1998) (discussing document abuse violations pre- and post-1996); and *U.S. v. Diversified Technology & Services of Virginia, Inc.*, 9 OCAHO 1095 (April 15, 2003) (holding that a company who requested INS documents from non-citizen workers did not discriminate against employees where there was no evidence of intentional discrimination).

An employer may still risk Title VII liability if its policy of demanding particular documents has a disparate impact on individuals of a particular national origin.

5. Right of Preference. An employer does not violate IRCA by giving preference to citizens over aliens "if the two individuals are equally qualified."

6. Language Requirements. The IRCA Conference Committee Report stated: "Nothing in this bill [IRCA] shall prevent the use of language as a Bona Fide Occupational Qualification."

B. Enforcement Provisions. The Office of Special Counsel for Immigration-Related Discrimination (OSC) within the Civil Rights Division of the U.S. Department of Justice (DOJ) has made it a priority to pursue employers who allegedly misuse or abuse access to the E-Verify program and unlawfully discriminate against applicants and employees in hiring and termination on the basis of citizenship status discrimination and document abuse. Employers suspected of engaging in a pattern or practice of discriminatory employment verification procedures could face months of costly investigation and be forced to pay civil money penalties, back wages and punitive damages. Additionally, they could be ejected from participating in the E-Verify program, lose the right to do business in states that mandate private employer participation, and face debarment from federal contracting rights.

1. How OSC Learns of Potential I-9 and E-Verify Pattern and Practice Citizenship Status and Document Abuse Discrimination. Reports of alleged employment discrimination growing out of inappropriate I-9 and E-Verify employment verification procedures can reach OSC through multiple channels. An individual who feels that he was subjected to discriminatory treatment in the verification process based on national origin or citizenship status can file a charge of discrimination with OSC, EEOC or a state or local fair employment practices agency, which could trigger a broad investigation of the respondent employer's I-9 and E-Verify practices. OSC could also open an investigation based on an anonymous tip reported on the agency's hot line. For the past several years, OSC has also pursued enforcement leads received from the CIS Verification Division's Office of Monitoring and Compliance and from the DHS Office of Homeland Security Investigation (HSI), a division of ICE responsible for enforcement of the I-9 verification and paperwork rules.

2. Investigation of Charges. OSC has broad investigatory authority under IRCA to identify and deter intentional discrimination in hiring and termination by covered employers based on national origin (employers employing more than three and fewer than 15 employees) and citizenship status (all employers employing more than three employees). Backed by the subpoena power vested in the DOJ Executive Office for Immigration Review Office of the Chief Administrative Hearing Officer (OCAHO), OSC has successfully required respondent employers to produce all I-9 and E-Verify records, application forms, and verification policies and training materials covering extended time periods. The agency is looking for direct and indirect anecdotal and statistical evidence that the employer subjected foreign workers to disparate treatment through practices such as insisting that such workers produce a DHS work authorization document for I-9 and E-Verify purposes and by terminating foreign workers upon receipt of a tentative non-confirmation notice without first giving them timely notice and an opportunity to resolve the original no-match situation.

3. Orders and Penalties. If OSC concludes an investigation with a finding of "reasonable cause" of discrimination, the agency may file an administrative complaint against the employer with OCAHO seeking civil money penalties, back pay, compensatory and punitive damages, reinstatement, and other affirmative relief on behalf of identified, aggrieved individuals or one or more classes of aggrieved individuals of unknown identity. Months of pleadings, motions, discovery, hearings and briefing would follow. At the end of these proceedings, if the ALJ finds the employer guilty of violating § 274B, the judge could issue an order directing the employer to pay civil money penalties ranging from $250 to $1,100 per violation (in a first offense case) and such other damages as OSC has proved at trial. In addition, the court could order the employer to hire or reinstate individuals who were denied employment or lost their jobs as a result of the

employer's unlawful conduct. Conviction also could lead to termination of the employer's right to participate in the E-Verify program – a result that could lead to debarment as a federal contractor and the imposition of state fines and penalties for failure to meet state E-Verify mandates.

Specifically, ALJ, upon finding an unfair immigration-related employment practice, "shall" issue a cease and desist order, and "may":

- Require future compliance for a three-year period;
- Require retention of all applicant names and records for three years;
- Require the hiring, and payment of back pay, to persons "directly and adversely" affected;
- Assess a civil penalty (up to $2,200 per individual for a first offense, up to $11,000 for later offenses); and
- Require payment of attorneys' fees to the prevailing party (other than the U.S.) if "the "the losing party's argument is without reasonable foundation in law or fact."

To avoid costly and protracted litigation with OSC and the complications flowing from a liability finding, many employers agree to resolve OSC discrimination charges and complaints through conciliation agreements. Although such agreements typically provide that the employer denies liability for the alleged violations, the employer nevertheless must agree to pay civil money penalties to the federal government and full back wages to injured workers, submit to random OSC inspections over the term of the agreement, provide anti-discrimination training to all managers and officials with responsibility for making I-9 and E-Verify employment eligibility determination decisions, and consent to enforcement of the settlement agreement by the United States district court with jurisdiction over the employer.

4. How to Protect Your Business. The government encourages E-Verify employers to conduct internal compliance assessments to ensure compliance with the privacy, anti-discrimination, usage, and paperwork retention requirements of the E-Verify MOU. To guide employers in measuring the rate of compliance, DHS has developed a detailed 77-point E-Verify compliance check list and encourages employers to track the effectiveness of corrective action measures over time.

Any documents related to such self-assessment audits would be subject to future discovery in the event of litigation with the OSC or other parties, unless protected under the attorney client and work product privileges. As such, it is highly recommended that employers refrain from engaging in conducting E-Verify self-assessments except where performed at the direction of counsel for the purpose of rendering legal advice, with appropriate precautions taken to ensure the confidentiality of all working papers and advice memoranda.