



**OFFICE OF BUSINESS LIAISON**

<p><b>Employer Information Bulletin 14</b></p> <p style="text-align: center;"><b>Employment-based Permanent Residence</b></p> <p style="text-align: center;"><b>December 8, 2004</b></p>	<p><b>EBISS: (800) 357-2099</b>  <b>NCSC: (800) 375-5283</b>  <b>TDD: (800) 767-1833</b>  <b>Fax: (202) 272-1864</b>  <b>Order Forms: (800) 870-3676</b>  <b>Website: <a href="http://www.uscis.gov">www.uscis.gov</a></b></p>
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The following is not intended to be legal advice pertaining to your situation and should not be construed as such. The information provided is intended merely as a general overview with regard to the subject matter.

**EMPLOYMENT-BASED PERMANENT RESIDENCE<sup>1</sup>**

In 1990, Congress created a priority system for granting permanent residence to aliens based on employment skills. Annually, 140,000<sup>2</sup> immigration visas are available for principal aliens who qualify under the following five employment-based (“EB”) preference categories:

<b>FIRST</b>	<b>“EB-1”</b>	<b>Priority Workers</b>	<b>40,000 visas per year</b>
		<ul style="list-style-type: none"> <li>• Aliens of <i>extraordinary</i> ability in the sciences, arts, education, business, or athletics</li> <li>• Outstanding professors or researchers</li> <li>• Certain managers and executives transferred to the United States to work for their foreign employer or a U.S. affiliate or subsidiary firm.</li> </ul>	
<b>SECOND</b>	<b>“EB-2”</b>	<b>Advanced degree Professionals and Aliens of Exceptional Ability</b>	<b>40,000 visas per year</b>
		<ul style="list-style-type: none"> <li>• Aliens of <i>exceptional</i> ability in the sciences, arts, or business.</li> <li>• Members of the professions, if they hold an advanced degree (or the equivalent).</li> </ul>	
<b>THIRD</b>	<b>“EB-3”</b>	<b>Skilled Workers, Professionals and other Workers</b>	<b>40,000 visas per year</b>
		<ul style="list-style-type: none"> <li>• Professionals with bachelor’s degrees (not qualifying for a higher preference category)</li> <li>• Skilled workers (minimum two years training and experience)</li> <li>• Unskilled workers (maximum 10,000 visas available per year, of which 5,000 have been dedicated to adjustees under the Nicaraguan Adjustment and Central American Relief Act (NACARA).</li> </ul>	
<b>FOURTH</b>	<b>“EB-4”</b>	<b>Special Immigrants – Religious Workers</b>	<b>10,000 visas per year</b>
		<p>This classification is comprised of all special immigrants as defined in INA § 101(a)(27), other than returning residents (§ 101(a)(27)(A)) and former U.S. citizens who are eligible to become citizens again under INA § 324(a) or 327 (§101(a)(27)(B)). This Employer Information Bulletin 14, however, discusses only one subcategory: religious workers.</p> <p><b>Religious workers includes:</b></p> <ul style="list-style-type: none"> <li>• Ministers (those authorized to conduct worship services and perform other duties assigned to the clergy of the religion)</li> <li>• Religious workers in professional fields</li> <li>• Other religious workers.</li> </ul> <p><b>Limit on admissions:</b> Until September 30, 2008, up to 5,000 EB-4 immigrant visas may be made available each fiscal year to religious workers who are not ministers. Ministers are not subject to this limit.</p> <p><b>SUNSET OF PROVISION FOR RELIGIOUS WORKERS: AFTER SEPTEMBER 30, 2008, religious workers other than ministers will no longer qualify as EB-4 immigrants.</b></p> <p>Ministers will still qualify after September 30, 2008.</p>	

<sup>1</sup> This bulletin will not cover immigration based on family relationship, diversity lottery, asylum, or refugee status.  
<sup>2</sup> Annual limitations in numbers of the employment-based (EB) immigrant refer to principal aliens. Dependents are not subject to numerical limitations.

<b>FIFTH</b>	<b>“EB-5”</b>	<b>Immigrant Investors</b>	<b>10,000 visas per year</b>
<ul style="list-style-type: none"> <li>• Alien entrepreneurs whose <b>new</b> commercial enterprises will <i>directly</i> create 10 or more new jobs in the U.S.; 3,000 visas reserved for investors in targeted employment areas and 300 for Immigrant Investor Pilot Program.</li> </ul> <p><b>This bulletin does not discuss the requirements for EB-5 Immigrant investors.</b></p>			

**PROCEDURE**

**Step 1. Visa petition process.** An eligible petitioner must file with the appropriate USCIS office an I-140 for the alien seeking to immigrate. In most cases, the eligible petitioner is the U.S. employer seeking to employ the alien. Under some situations, the alien himself or herself may file the petition. See the discussions below relating to each separate classification to determine who may file the petition.

**For 2<sup>nd</sup> and 3<sup>rd</sup> employment-based classifications:** An alien may not immigrate in the 2<sup>nd</sup> or 3<sup>rd</sup> employment-based classifications unless the Secretary of Labor has determined that there are not enough domestic workers available in the United States to perform the intended employment in the part of the United States where the alien will be employed and that the alien’s immigration will not adversely affect wages and working conditions in the United States. The intending employer may not file a Form I-140 with USCIS unless the intending employer has obtained this labor certification, and includes the labor certification with the Form I-140. The intending employer obtains this labor certification as provided in regulations published by the U.S. Department of Labor, not USCIS. See 20 C.F.R. part 656 or the Department of Labor website ([www.doleta.gov/business](http://www.doleta.gov/business)) for further information. See the discussions of the EB-2 and EB-3 classifications for specific provisions for each classification.

**Step 2. Acquisition of permanent residence.**

**A. If the alien is present in the U.S. in a lawful nonimmigrant status,** the alien may apply for adjustment of status under INA § 245 by filing Form I-485 with the appropriate USCIS office. If the alien wants to engage in employment while the adjustment application is pending; the alien should also file Form I-765 with the Form I-485. **NOTE: If the alien’s priority date is current; the alien may file these Forms at the same time as the employer’s filing of the Form I-140.**

**B. If the alien is abroad, or is not eligible for adjustment of status,** the alien may apply for an immigrant visa at a U.S. consulate abroad once the alien’s priority date is current. If the alien obtains the immigrant visa, the alien becomes a permanent resident when the alien travels to the U.S. with the immigrant visa and is admitted by an immigration inspector.

**Determining the priority date:** Under INA § 203(f), immigrant visas are available in the order in which the underlying visa petition was filed. The “priority date” determines an alien’s “place in line.” For EB-1immigrants, the priority date is the date the employer files the Form I-140 with USCIS. For EB-2 and EB-3 immigrants, the priority date is the date the employer applies for the labor certification, if an individual labor certification is required. If an individual labor certification is not required, the priority date is the date the employer files the Form I-140 with USCIS. **If the alien is the beneficiary of more than one Form I-140, the priority date for EACH Form I-140 is the priority date for the earliest Form I-140.** For EB-4 Immigrants, Form I-360 is used instead of Form I-140. The priority date is the date of filing the Form I-360.

The Visa Office, U.S. Department of State, publishes for each month a *Visa Bulletin*, which specifies the priority date for each immigrant visa classification. If an individual’s priority date is earlier than the priority date shown in the *Visa Bulletin* for the particular immigrant visa classification, then an immigrant visa is available for the individual’s use. If the *Visa Bulletin* shows the priority date as “C,” then an immigrant visa is available for all approved visa petition beneficiaries in that classification. The current *Visa Bulletin* is available at <http://travel.state.gov>, as are past editions of the *Visa Bulletin*.

## **FIRST PREFERENCE: Priority Workers**

### **Aliens with extraordinary ability**

#### **WHO MAY FILE:**

The alien may file the Form I-140 on the alien's own behalf. So may any other person acting on the alien's behalf.

#### **DEFINITION OF "EXTRAORDINARY ABILITY"**

**Extraordinary ability** means a level of expertise found only in that small percentage of persons who have risen to the very top of their respective fields.

#### **REQUIREMENTS:**

- Alien's **extraordinary** achievements in the sciences, arts, education, business, or athletics have resulted in sustained national or international status in the alien's field
- Alien intends to enter the U.S. to work in the field in which he or she has earned extraordinary status
- USCIS finds that alien's admission, as a permanent resident will substantially benefit the U.S.

#### **DOCUMENTATION**

Alien must demonstrate a major achievement such as an internationally recognized award (for example Nobel Prize) **or** evidence establishing at least **three** of the following:

1. Lesser national or international award for excellence in the field of alien's intended U.S. employment
2. Membership in association(s) in alien's field that require members to have demonstrated outstanding achievements as judged by acknowledged experts
3. Published material about the alien in major professional/trade publications or other major media
4. Selection of alien to judge others in the same or allied field
5. Original contributions of importance in the alien's field
6. Authorship of scholarly articles in professional/trade publications or other major media
7. Display of alien's work in artistic exhibitions
8. Performance of leading or critical role for distinguished organizations or institutions
9. High salary or other remuneration in relation to others in alien's field
10. Commercial success in the performing arts (box office receipts, recordings, videos, etc.)

**Note: If the above criteria do not readily apply to the alien's occupation, the alien may submit comparable evidence.**

#### **EMPLOYMENT IN THE US**

Strictly speaking, the alien of extraordinary ability need not be seeking "employment" in the United States. The alien must, however, be coming to the U.S. to continue to work in the area of the alien's extraordinary ability. Thus, the alien must present employment offers, prearranged commitments, arrangements to engage in self-employment, or other evidence showing that the alien will continue to work in the area of the alien's extraordinary ability.

## **Outstanding Professors and Researchers**

### **WHO MAY FILE:**

The intending U.S. employer must file the Form I-140.

### **REQUIREMENTS:**

- Evidence of international recognition in area of academic specialty demonstrated by submitting evidence of *two* of the following:
  1. receipt of major prizes/awards for outstanding achievement in the field
  2. Membership in an association requiring outstanding achievement in the field
  3. Published material in professional publications written by others about applicant's work in the field
  4. Participation as a judge of the work of others in the field
  5. Original scientific or scholarly research
  6. Authorship of scholarly articles/books in the specialty area
- 3 years experience in teaching or research (includes graduate or post doctoral work, if qualifying)
- An offer for a tenure track teaching or comparable research position (of unlimited duration) at an institution of higher education or private institution of demonstrated research accomplishments in the field that employs at least 3 full-time researchers.

## **Certain Multinational Executives and Managers**

### **WHO MAY FILE:**

The intending U.S. employer must file the Form I-140, The intending U.S. employer must be the same firm, or a subsidiary or affiliate of the firm, who employed the alien abroad.

### **REQUIREMENTS:**

- During the three years immediately preceding the filing the petition, the alien must have been employed abroad by the U.S. employer (or a subsidiary or affiliate of the U.S. employer) for at least one year as a manager<sup>3</sup> or executive.<sup>4</sup>
- The alien must be coming to the U.S. to continue employment as a manager or executive with the foreign employer or U.S. subsidiary or affiliate.

### **SECOND PREFERENCE:**

**Professionals with advanced degrees (or the equivalent), or aliens of *exceptional* ability in arts, sciences, or business.**

### **REQUIREMENTS FOR ALL SECOND PREFERENCE CASES:**

Unless the alien obtains a national interest waiver (see below), no alien qualifies as an EB-2 immigrant unless an employer in the U.S. is seeking the alien's service in the qualifying field of employment.

The intending U.S. employer must obtain a labor certification, unless USCIS waives the job offer requirement. Unless the field of employment is listed as a "Schedule A" occupation in 20 CFR 616.10, an individual labor certification is required. See 22 C.F.R. Part 656, subpart C for the governing regulations.

<sup>3</sup> The precise definition of "managerial capacity" is found at 8 CFR 204.5(j)(2). As a general principle, a *manager* directs the operational affairs of the organization as a whole, an operating division, or a major function. Management includes responsibility for personnel decisions affecting supervisory and professional personnel unless a function is managed. A functional manager must operate at a senior level.

<sup>4</sup> The precise definition of "executive capacity" is found at 8 CFR 204.5(j)(2). As a general principle, an *executive* directs the management of the organization, a division, or a major function, including establishing goals and policies and exercising discretionary decision-making. An executive must not receive more than general supervision from higher-level executives, a board of directors, or stockholders.

## **WHO MAY FILE:**

Unless the alien seeks a waiver of the job offer requirement, the intending U.S. employer must file the Form I-140. If the alien does seek a waiver of the job offer requirement, then the alien, or someone acting on the alien's behalf, may file the Form I-140.

## **REQUIREMENTS FOR MEMBERS OF THE PROFESSIONS HOLDING ADVANCED DEGREES (or the equivalent)**

An alien qualifies for the Second Preference Employment-Based classification as a member of the professions holding an advanced degree (or the equivalent) only if:

- The position to be filled by the beneficiary must require a member of the professions with an advanced degree or the equivalent.
- The beneficiary has the credentials specifically required for the position.

**Member of the professions** include architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries, as well as those working in any other occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

*Advanced degree* means an academic or professional degree beyond the baccalaureate.

**Or the equivalent** means the possession of a bachelor's degree in the field, followed by at least five years of progressive experience in the specialty.

For a critically important discussion of "the equivalent of an advanced degree," see the Memorandum dated 03/20/00 from the Offices of Programs and Field Operations clarifying EB-2 requirements. The Memorandum was published in the *Federal Register* on July 3, 2000, as an appendix to the notice published at 65 *Fed. Reg.* 41,093. In summary, it provides that an alien qualifying for EB-2 must have a master's degree, the foreign equivalent, or a bachelor's degree plus five years of progressively responsible experience in the specialty. Correspondingly, the position on which an EB-2 petition is based must require an advanced degree or the equivalent. Specifically, blocks 14 and 15 of the ETA-750 supporting an I-140 for EB-2 classification must specify that the position require either a master's degree or bachelor's degree (U.S. or foreign equivalent) followed by at least five years experience in the specialty. If "progressive" experience is not specified, it should be clear from the description of job requirements that a person would qualify for the position only if the post-baccalaureate experience was progressive. A request for evidence or a notice of intent to deny may be required to obtain evidence clarifying this issue. Note also that, although DOL accepts a bachelor's degree plus 3 years' experience as equivalent to a master's degree, this does not satisfy the EB-2 requirement.

## **Aliens of exceptional ability**

**Exceptional ability** requires a degree of expertise significantly above that ordinarily encountered.

"*The arts*" includes athletics and entertainment.

## **REQUIREMENTS:**

- Exceptional ability in the arts, sciences, or business, demonstrated by a minimum of **three** of the following types of documentation relating to the field of exceptional ability:
  1. Official academic record demonstrating that alien has earned degree(s)
  2. Statement(s) from employer(s) demonstrating at least ten years of full-time experience in the field
  3. License or certification for professional practice
  4. Salary or other remuneration for services commensurate with that of a professional
  5. Membership in professional association(s)
  6. Recognition by peers or government/professional entities for achievements and contributions

## **National Interest Waiver**

In order to obtain a ***national interest waiver***, a petitioner must submit Form ETA-750 part B (Statement of Qualifications of Alien) together with evidence to support the claim that such an exemption would be in the national interest. The term **national interest** is not defined by statute or regulation and each case is judged on its own merit.

Under the decision in *Matter of New York State Department of Transportation*, 22 I & N Dec. 215 (AAO 1998), USCIS considers the following factors when evaluating a request for a **national interest waiver**:

- (1) The proposed employment is in an area that has substantial inherent value,
- (2) The proposed benefit to be provided by the applicant is national in scope,
- (3) The national benefit to be provided by the applicant outweighs the national interest in the labor certification process (i.e. testing the U.S. labor market to ensure that no U.S. worker is available to fill the position for which the applicant is to be hired).

## **National Interest Waiver for Physicians**

Special rules were established by statute and regulations for certain physicians who are willing to work full-time for five (5) years in medically underserved areas or at VA facilities. The Secretary of Health and Human Services (HHS) currently limits physicians in designated shortage areas to the practice of family or general medicine, pediatrics, general internal medicine, obstetrics/gynecology and psychiatry.

### **REQUIREMENTS:**

- The petition must meet all documentary requirements of the EB-2 category such as petition with national interest waiver request, evidence of advanced degree or exceptional ability. In addition, the following must be submitted:
  - Full-time employment contract, employment commitment letter from a VA facility, or if self-employed, sworn statement committing to full-time practices of clinical medicine and steps taken to establish such practice.
  - Evidence that the service will be provided in a medically underserved area designated by the HHS or a VA facility.
  - Attestation from a Federal agency or state health department issued within six (6) months of the filing of the petition that the physician's work is or will be in the national interest.
  - Evidence that the physician meets the admissibility requirements of INA sec. 212(a)(5)(B) that requires graduates of an unaccredited medical school to have passed parts I and II of the National Board of Medical Examiners Examination (or an equivalent examination) and is competent in oral and written English.
  - Evidence of USCIS-issued waiver if the physician has been a J-1 receiving medical training in the U.S

<b>THIRD PREFERENCE: Skilled workers, professionals, and other workers.</b>
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### **WHO MAY FILE:**

The intending U.S. employer must file the Form I-140.

### **LABOR CERTIFICATION:**

The intending U.S. employer must obtain a labor certification. Unless the field of employment is listed as a "Schedule A" occupation in 20 C.F.R. 616.10, an individual labor certification is required. See 22 C.F.R. parts 656, subpart C for the governing regulations.

### **DEFINITIONS:**

- ***Skilled worker*** means one capable of performing labor that requires at least two years of training or experience. Member of the professions include architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries, as well as those working in any other occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.
- ***Other workers*** include all beneficiaries with lower credentials than skilled workers who perform unskilled labor.

## **REQUIREMENTS:**

The common requirement for each subcategory is that the offered job must require a person with the stated qualifications (skilled work, membership in a profession, unskilled work) and the alien must have the required qualifications. For example, a member of one of the professions who holds a bachelor's degree would not qualify for EB-3 status if the proffered employment did not require a person with that qualification.

## **FOURTH PREFERENCE: "Special Immigrant" religious workers.**

**Religious workers are divided into three subcategories: *ministers*<sup>5</sup>, *professionals and workers in a religious occupation or vocation*.** *Note:* Only ministers will qualify as Fourth Employment-Based Special Immigrants after September 30, 2008.

### **REQUIREMENTS FOR RELIGIOUS WORKERS**

- Each petition for a religious worker must be filed on Form I-360. It must also be accompanied by
- Evidence that the organization qualifies as a nonprofit *religious organization*<sup>6</sup> in the form of an Internal Revenue Service tax-exempt documentation.
- Letter from an authorized official of the religious organization in the United States establishing membership for at least two (2) years in the *religious denomination*<sup>7</sup> and two years experience as a minister, professional or worker in a religious occupation or vocation immediately preceding the filing of the petition.
- The letter must also certify the individual is authorized to perform the duties of a minister, or is qualified in the religious occupation or vocation.

Applicants who seek to enter the U.S. as a *professional*<sup>8</sup> or *worker in a religious vocation or occupation*<sup>9</sup> are eligible for EB 4<sup>th</sup> preference classification only through September 30, 2008 and must meet the following requirements:

- Membership in the religious denomination that has had a bona fide nonprofit religious organization in the U.S. for at least two (2) years immediately preceding the date of filing the petition.
- Must also have worked in the religious vocation during the same two-year period.
- Seeking entry into the U.S. solely for the purpose of carrying on a religious vocation or occupation.

## **FORM I-485**

### **Application to Adjust Status from Nonimmigrant to Employment-Based Permanent Resident**

### **WHO MAY FILE:**

Any applicant who has an approved I-140 or I-360 or I-526 and for whom an immigrant visa is currently available may file a Form I-485 to apply for permanent residence in the U.S. A new rule adopted in July 2002 by the USCIS states that if a visa is currently available for a preference category, a Form I-485 may be filed concurrently with the Form I-140.

<sup>5</sup> A *minister* must be authorized (e.g. ordained) by a recognized religious denomination to conduct religious worship and to perform duties usually performed by authorized clergymen/women. Lay preachers do not qualify.

<sup>6</sup> A *religious organization* must be approved or eligible for approval under Internal Revenue Code §501(c)(3).

<sup>7</sup> A *religious denomination* is a religious group or community of believers having an ecclesiastical government, creed, statement of faith, form of worship, discipline, services, ceremonies, and/or the like.

<sup>8</sup> *Professional capacity* means an activity in a religious vocation/occupation for which a bachelor's degree or foreign equivalent is the minimum entry-level requirement.

<sup>9</sup> A *religious occupation or vocation* covers traditional religious functions (liturgical work, religious instruction, counseling, etc). Lay members of religious organizations, engaged in lay work such as the business enterprise of a church, do not qualify.

**APPLICATION PACKET** (Follow instructions on form and include all required dates and signatures)

- G-325A
- Copy of I-797 approval notice for I-140 or I-360 or I-526 (not required for I-140 if otherwise eligible for concurrent filing)
- Current employment letter on company letterhead (for principal)
- Form I-864, Affidavit of Support, if the alien will be employed by a relative who is a citizen or resident alien or by a firm in which the relative has a substantial interest (5% ownership)
- Even if a Form I-864 is not required, a Form I-134 affidavit of support may be required for all dependents (must be filled out completely front and back)
- Proof of the applicant's initial lawful admission into the United States and the applicant's continued maintenance of status. This may include the following:
  - Photocopy of applicant's entire passport including all previously issued passports
  - Photocopy of Form I-797 Approval Notices for all extension and change of status
  - Photocopy of Form I-20 or Form DS-2019 (**formerly IAP-66**) school records (front and back, including all school annotations)
  - Photocopy (front and back) of applicant's Form I-94 Arrival/Departure Record
- Copy of birth certificate with English translation
- Copy of marriage certificate with English translation for current marriage
- Copy of divorce decree or death certificate of former spouse with English translation for any prior marriages
- Two photographs
- IRS Form 9003
- I-693 (Medical Exam)