

Pursuing Lawful Permanent Residence Through the First Three Employment-Based Preference Categories: An Overview

Every year, by operation of statute, 120,000 immigrant visa numbers are allotted to the first three **employment-based** preference categories. These three categories, discussed in greater detail below, are:

- EB-1 (Employment-Based First Preference) Priority Workers
- EB-2 (Employment-Based Second Preference) Professionals with Advanced Degrees or Persons with Exceptional Ability
- EB-3 (Employment-Based Third Preference) Skilled or Professional Workers

I. EB-1 Priority Workers

The first preference category is reserved for:

- Foreign nationals of extraordinary ability in the sciences, arts, education, business, or athletics
- Outstanding professors or researchers
- Managers and executives transferred to the United States from qualifying related business entities abroad

One of the benefits of qualifying in the first preference category is that a labor certification is not required, and in the case of foreign nationals of extraordinary ability, neither is an offer of employment from a U.S. employer. In lieu of a job offer, a foreign national with extraordinary ability must demonstrate that he or she will continue to work in the area of extraordinary ability in the United States.

II. EB-2 Professionals with Advanced Degrees or Persons with Exceptional Ability

The second preference category includes:

- Foreign nationals of exceptional ability in the sciences, arts, or business, including those whose work is deemed to be in the “national interest.” Foreign nationals who can demonstrate that their work is in the national interest of the United States do not need to undergo a labor market test.
- Members of the professions holding advanced degrees, including a four-year bachelor’s degree plus five years of progressive experience. Please note the job offered must require an advanced degree.

III. EB-3 Skilled or Professional Workers

The third preference category includes:

- Professionals with a U.S. baccalaureate degree or foreign equivalent (a combination of education and experience is not allowed)
- Skilled workers (the position offered must require a minimum of two years of training or experience)

Once the appropriate preference category has been determined, the path to permanent residency generally requires the following three steps.

STEP I – Labor Certification

Unless the foreign national qualifies under the first preference category or for a National Interest Waiver, a labor certification (PERM) must be filed with the Department of Labor (DOL). This filing serves to confirm that the sponsoring employer tested the U.S. labor market and found no qualified U.S. workers available for the position at the time of application. In addition, the employer attests that the employment of the foreign national will not adversely affect the wages and working conditions of similarly employed U.S. workers.

STEP II – Form I-140, Petition for Alien Worker

Once the labor certification has been approved by the DOL, Form I-140, Petition for Alien Worker, is filed by the employer on behalf of the foreign national with USCIS. (If a foreign national of extraordinary ability is filing without an employment offer, he or she files Form I-140 as a “self petitioner.”) This step allows USCIS to verify the qualifications of the foreign national and the ability of the U.S. employer to pay the foreign national. It is at this point that the foreign national is officially classified in one of the above-mentioned preference categories.

STEP III – Form I-485, Application to Register Permanent Residence or Adjust Status

Upon approval of the Form I-140, if a visa number is not immediately available, the foreign national must wait to file for permanent residence until a number becomes available. If a visa number is available, Form I-140 may be filed concurrently with Form I-485, Application to Register Permanent Residence or Adjust Status. Alternatively, a foreign national may choose to complete the green card process at a consulate abroad. Whether accomplished through an adjustment of status or through consular processing, this final stage of the green card process addresses whether the foreign national and his or her immediate family are “admissible” as immigrants. During this stage, issues including maintenance of status in the United States, unfulfilled immigration obligations (such as a two-year foreign home residency requirement), and medical or criminal grounds of inadmissibility are reviewed.

Visa Numbers and Priority Dates

In order to be eligible to file for Adjustment of Status or Consular Processing, a foreign national's priority date must be “current” as indicated by the Department of State's monthly visa bulletin. If the demand for immigrant visa numbers in certain categories exceeds the limited supply of available slots, then a backlog develops, creating a waiting list based on priority date. For foreign nationals in either the EB-2 or EB-3 category, a priority date is received on the date the labor certification is accepted for processing. For foreign nationals who do not require a labor certification, the priority date is the date the Form I-140 is received by USCIS. This priority date determines when the foreign national is eligible to be assigned an immigrant visa number and complete the green card process through either adjustment of status or consular processing.

For more information, contact:

Eleanor Pelta
Partner
202.739.5050
epelta@morganlewis.com

Eric Bord
Partner-Elect
202.739.6040
bord@morganlewis.com

Lance Nagel
Partner
415.442.1345
lnagel@morganlewis.com

James Vazquez-Azpiri
Partner
415.442.1343
ajvazquez@morganlewis.com