

# U.S. IMMIGRATION – EMPLOYMENT VISAS & PERMANENT RESIDENCE OPTIONS

Harvard University  
November 17, 2021

## Presenters:

Prasant D. Desai, Esq.

Mary E. Walsh, Esq.

Madeline Choi Cronin, Esq.

Alison Howard-Yilmaz, Esq.

Iandoli Desai & Cronin, P.C.

38 Third Ave., Suite 100

Boston, MA 02129

(617) 482-1010

[www.iandoli.com](http://www.iandoli.com)

# DISCLAIMER

The information provided in this presentation is for informational purposes only. The opinions expressed in this presentation are solely those of the writer. No attorney-client relationship is created or intended to be created by virtue of this presentation.

Immigration law is complex and nuanced. This presentation provides information in general terms. Therefore, please seek individualized guidance from a competent professional before taking any action.

# AGENDA

- ▶ **Temporary Employment Visas**
- ▶ **Options for U.S. Permanent Residence (“Green Card”)**  
(Employer, Self-sponsored, & Family Categories)
- ▶ Pitfalls, timing, visa retrogression, and the importance of **early planning!**

# OVERVIEW: IMMIGRATION CATEGORIES

## ▶ U.S. CITIZENS

- By Birth (law of the soil and law of blood)
- By Naturalization

## ▶ NON-CITIZENS

- Immigrants: Lawful Permanent Residents (“green card holders”)
- Nonimmigrants: Persons Permitted in U.S. for Temporary Stay
- Others: Refugees, Asylees, Temporary Protected Status (TPS), Deferred Action for Childhood Arrivals (DACA)
- Persons present without lawful status

# NONIMMIGRANT BASICS

- ▶ U.S. Department of State (DOS) issues visas;
- ▶ U.S. Department of Homeland Security (DHS) controls actual **admission & stay** in U.S.;
- ▶ U.S. Immigration & Customs Enforcement (ICE) controls students via Students & Exchange Visitors Program (SEVP) as well as detention and removal/deportation.
- ▶ May only be admitted to the U.S. in one category at a time
- ▶ **Form I-94:** created by Customs & Border Protection (CBP) at admission noting admission date, category, and length of authorized stay - **TIP: after each entry, confirm spelling of your name, proper immigration category, and expiration date**
  - Approval of change or extension request (below) is noted with creation of an updated I-94
- ▶ **Change of Status:** may change categories within U.S. via U.S. Citizenship & Immigration Services (USCIS) if in valid status at time of application—limitations apply
- ▶ **Extension of Status:** may extend authorized stay within U.S. via USCIS if in valid status at time of application—limitations apply
- ▶ **NOTE: international travel after approval of change or extension may require new DOS-issued visa in order to re-enter the U.S.**

# COMMON NONIMMIGRANT WORK CATEGORIES

Visa	Type of work	Limitations
F-1	Higher degree & new OPT	All nationalities. No quota. E-verify NOT required Self-employment permitted
F-1	STEM OPT extensions	All nationalities. No quota. E-verify employers ONLY Self-employment <b>not</b> permitted
J-1	Exchange visitor	All nationalities. No quota.
H-1B	Specialty Occupation	All nationalities. Cap-subject and cap-exempt. Cap subject quota: 65,000 for bachelor's, add. 20,000 for U.S. master's
H-1B1	Specialty Occupation	Chile (1,400) & Singapore (5,400)
TN	TN Professional Occupations	Canadians & Mexicans. No quota.
E-3	Specialty occupation	Australians. 10,500
O-1	Extraordinary ability	All nationalities. No quota.
E-1/E-2	Traders/Investors	Countries w/specific U.S. treaties. No quota.
L-1	Intracompany transferee	All nationalities. No quota.

# F-1 OPTIONAL PRACTICAL TRAINING (OPT)

- ▶ Approved for up to 12 months
- ▶ Part-time or full-time
- ▶ Employment must be directly related to degree/major permitted on OPT
- ▶ Apply as early as you can b/c applications taking up to 5-6 months last year and no way to expedite
- ▶ Cannot accrue more than 90 days of unemployment
- ▶ Self-employment allowed
  - Must be able to show business has been legally created to avoid accruing unemployment

# SCIENCE, TECHNOLOGY, ENGINEERING & MATH (STEM) OPT

- ▶ If current or previous OPT was granted on the basis of a STEM degree then may qualify for 24 month extension.
- ▶ List of STEM degree fields:
  - <https://www.ice.gov/sites/default/files/documents/Document/2016/stem-list.pdf>.
- ▶ Part-time or full-time
- ▶ Employer must be registered with E-Verify
- ▶ Employer required to develop training/mentoring plan and agree to greater reporting responsibilities
- ▶ Must adhere to reporting requirements or can violate F-1 status and SEVIS record terminated



# SPECIAL ISSUES UNIQUE TO J-1 EXCHANGE VISITORS

- ▶ 2-year Home Residency Requirement (2YHRR)
  - Must return for 2 years to place of last residence before being permitted to gain permanent residence, H-1B, L-1, or K-1 status
- ▶ 2YHRR applies to:
  - **J-1 physicians** receiving medical training (clinical residency or fellowship)
  - J-1 scholars whose work is **financed** by the U.S. or foreign government
  - J-1's home country in need of J-1's skill/subject via Department of State's "**skills list**"
  - **J-2 spouses** of the three above-named J-1's

# J-1 2YHRR OPTIONS

- ▶ Determine if you really are subject and why
  - Review visa(s) in passport(s)
  - Review DS-2019(s)
  - Obtain a free DOS Advisory Opinion
- ▶ If you are subject:
  - Satisfy the 2YHRR by returning to country of last residence as listed on DS-2019
  - 2 years can be fulfilled consecutively or cumulatively, in the aggregate over years; **OR**
  - Obtain a waiver of the 2YHRR

# J-1 WAIVER PROCESS

## Four (4) Grounds for a Waiver

1. Request by Interested Government Agency
2. Hardship to U.S. Citizen Spouse or Child
3. Persecution
4. No Objection Letter from home country
  - **NOTE: #4 is not available to J-1 medical trainees**

## Obtaining a J-1 waiver:

- ▶ File Form DS-3035, J-1 Visa Waiver Recommendation Application with U.S. DOS
- ▶ Procedure and documentation requirements vary according to basis of waiver
- ▶ Processing times vary depending upon waiver category
- ▶ USCIS has final authority to grant waiver
- ▶ Once waiver granted, scholar can be subject again if he or she enters new program

# OVERVIEW: H-1B NONIMMIGRANTS

- ▶ Basic Criteria
- ▶ Benefits & Limitation
- ▶ Annual Quota & Timing
- ▶ Cap-Exempt Employers to Avoid the Annual Lottery
- ▶ Alternatives to the H-1B

# BASIC H-1B CRITERIA

- ▶ Sponsorship by U.S. Employer – Employer is the “Petitioner” filing an H-1B petition on your behalf as “Beneficiary”
- ▶ “Specialty Occupation”
  - Requires at least a Bachelor’s degree in a specific field related to job duties
- ▶ Required Wage
  - Employer must provide public notice of intent to hire H-1B worker and rate of pay
- ▶ Ability to Pay
  - Employer must show ability to pay the prevailing wage
  - Wages vary dramatically based on occupation and worksite location
  - Candidate must possess required degree or equivalent *at time of filing*
- ▶ Licensed occupations require the license, usually in hand for filing

# H-1B VISA BENEFITS

- ▶ Preferred way to transition to a green card due to “Dual Intent”
- ▶ Permits up to 6 years of work status
- ▶ Full-time or part-time H-1B is allowed
  - NOT allowed for permanent residence sponsorship as it must be full-time
- ▶ Concurrent employment permitted with separate H-1B petition by each Employer/Petitioner
- ▶ Part-time study allowed
- ▶ Non-competitive: Do not have to be the best or only candidate.
  - Labor Certification /PERM (market test) NOT required
- ▶ Dependents eligible for H-4 status
- ▶ Up to a 60-day grace period after loss of job in some cases

# H-1B LIMITATIONS

- ▶ H-1B period of stay generally may not exceed 6 years
  - Some extensions beyond 6 years possible
  - Worker can recapture all time spent outside U.S.
  - 6-year clock rewinds if 1 year outside U.S. but must go through lottery again
- ▶ Worksite changes post-approval require planning and possible amended H-1B petition filing
- ▶ H-4 spouses may apply for Employment Authorization (EAD) only if:
  - H-1B spouse is a beneficiary of an approved I-140 **or**
  - H-1B spouse has been granted an AC21 Extension
- ▶ No self-employment or contract work
- ▶ Employer must demonstrate *bona fide professional* job
  - Issues with small & new employers

# ANNUAL H-1B QUOTA & TIMING

- ▶ Applies to Cap-Subject employers (i.e., private industry)
- ▶ Annual, national quota (“cap”) of 65,000 new H-1B positions
- ▶ Additional 20,000 H-1Bs for holders of a U.S. master’s degree or higher
- ▶ Visas become available October 1<sup>st</sup> each year
- ▶ ‘Cap gap’ protection for F-1 students on OPT



# H-1B LOTTERY PROCESS

## ▶ **Advanced Online Registration**

- Employers transmit certain details of sponsored worker to USCIS via on-line system in March
- USCIS will then run random computer-generated lotteries and notify employers by the end of March
- If registration is selected, Employer allowed to submit I-129 petition to USCIS within a 90-day window, between April 1<sup>st</sup> to June 30<sup>th</sup>

## ▶ **Change to order of lotteries**

- USCIS used to run the general 65,000 Bachelor's lottery first and then then U.S. Master's degree lottery second
- Reversing order gives U.S. Master's degree graduates greater likelihood of selection

# H-1B CAP EXEMPTIONS

## Not Subject to Annual Quota

- ▶ Employment by college or university
- ▶ Employment by non-profit organization affiliated with college or university
- ▶ Employment by non-profit research organization or a governmental research organization
- ▶ Part-time or full-time employment by university/college with subsequent concurrent employment by for-profit enterprise
- ▶ Employment by for-profit enterprise “at” university/college

# ENTREPRENEURIAL ISSUES

- ▶ Early planning critical to ensure lawful employment
- ▶ Start-ups/self-employment and supporting activities permitted during 12-month, F-1 Optional Practical Training
- ▶ STEM OPT—no self-employment permitted
- ▶ Passive investments permitted
- ▶ Start-ups permitted to file H-1B petition on behalf of non-citizen even if they own part of the company but must show bona-fide employer/employee relationship (i.e., ability to be fired)
- ▶ Possible Alternative: International Entrepreneurial Parole – high requirement of investment and ownership

# FREE TRADE AGREEMENT PROFESSIONALS

- ▶ **TN: Mexico & Canada—Formerly NAFTA, now USMCA**
  - Basics:
    - No quota
    - Valid for 3 years at a time
    - Requires employment by U.S. employer.
    - Offered job must be one that is identified by the treaty, approximately [63 occupations identified](#)
  - Application Process:
    - Canadians may apply at the border
    - Mexicans must obtain a visa at U.S. Consulate

# OTHER FREE TRADE AGREEMENT PROFESSIONALS

- ▶ **H-1B1: Singapore and Chile**
  - Similar to H-1B
  - High quota, low usage
- ▶ **E-3: Australia**
  - Similar to H-1B
  - Employer required to make wage attestations
  - High quota, low usage
  - Spouse eligible for employment authorization
- ▶ Application Process for H-1B1 and E-3:
  - No USCIS pre-approval required
  - Worker may apply for visa directly at US Consulate

# E-1 TRADERS & E-2 INVESTORS

- ▶ Available to a citizen of a country that has a treaty of commerce and navigation (trade) with the U.S.
- ▶ U.S. employer must then also be owned  $\geq 50\%$  by nationals of the same treaty country
  - Over 80 countries have either E-1 or E-2 or both types of treaties with U.S.: <https://travel.state.gov/content/visas/en/fees/treaty.html>
- ▶ **E-1 Treaty Trader:** Engaged in substantial trade with treaty country and U.S.
- ▶ **E-2 Treaty Investor:** Substantial investment in the U.S.
- ▶ Typically, process is completed at a U.S. Embassy or Consulate but can also elect change of status without leaving the U.S.

# L-1 INTRA-COMPANY TRANSFEREES

- ▶ Requires sponsorship by U.S. employer
- ▶ Employee must have worked abroad for one complete year in the last three years
- ▶ Qualifying employment must be with the Parent, Branch, Subsidiary or Affiliate of the U.S. employer
- ▶ L-1A:
  - 7 years max
  - Executive or Manager of Professionals or Essential Function
- ▶ L-1B:
  - 5 years max
  - Person with “specialized knowledge”

# O-1: EXTRAORDINARY ABILITY

- ▶ **Persons of extraordinary ability**
  - Sciences, Education, Business, Athletics
  - Arts (fine arts, visual arts, culinary, performing arts)
- ▶ Must be sponsored by a U.S. employer for an “event”
  - An “event” includes, but is not limited to, scientific projects, academic years, lecture series, conferences, business projects, or tours
- ▶ Available for initial period of 3 years
  - Renewals in 1-year increments
- ▶ May be option to **postpone** (not satisfy) the J-1 two-year home residency requirement.
  - **Note: NOT available for change of status.** Must apply for visa at U.S. Embassy or Consulate abroad.



# O-1A (Sciences, Education, Business or Athletics)

Requires: Sustained national or international acclaim, person is one of the small percentage who have risen to the very top of their field of endeavor.

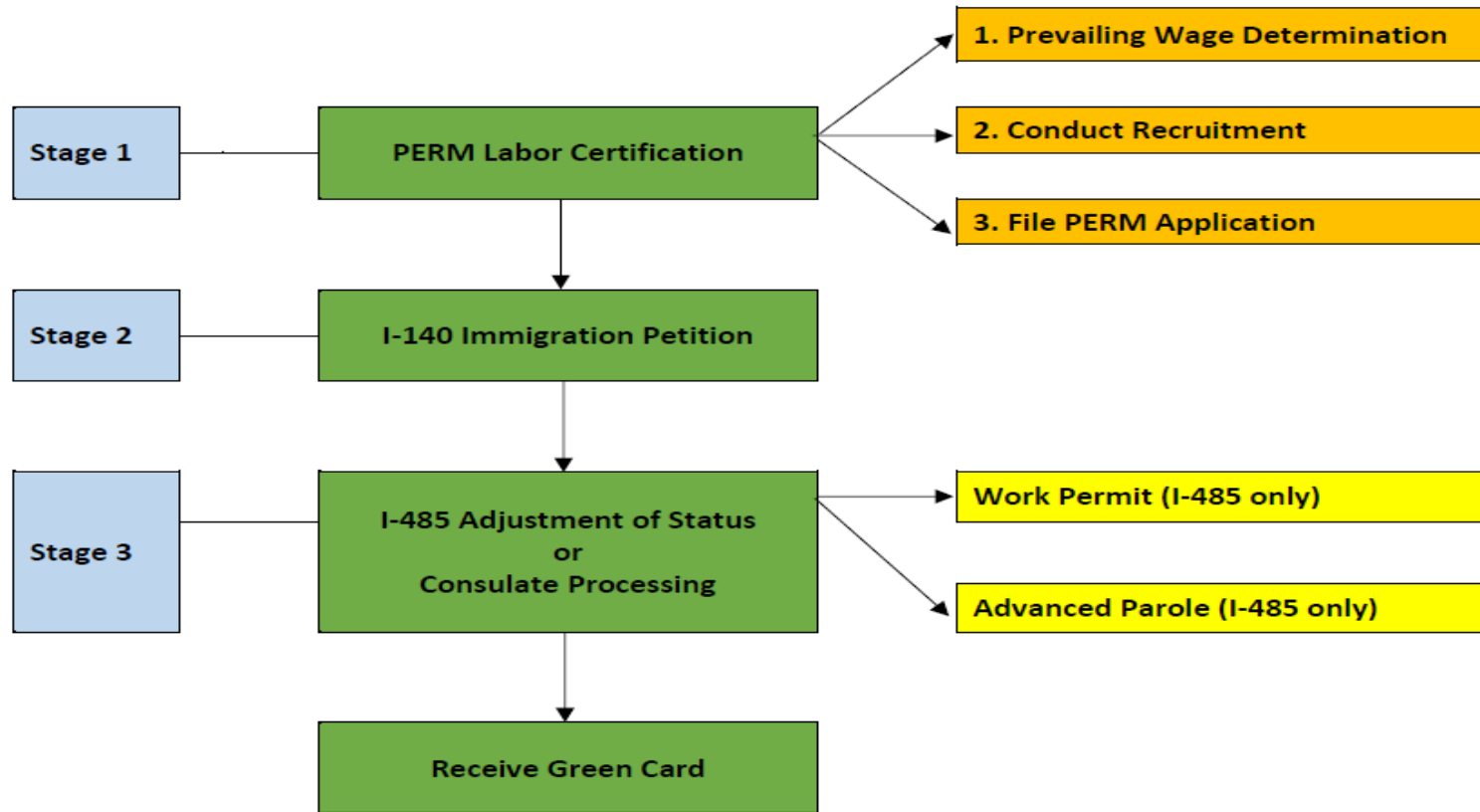
Requires: Receipt of major, internationally recognized award, such as the Nobel Prize; OR at least 3 of the following:

1. **Receipt of nationally or internationally recognized prizes or awards** for excellence in the field of endeavor;
2. **Membership in** associations that demand outstanding achievement of members
3. **Published material** about the scholar in professional publications
4. **Judged the work of others**, either individually or on a panel
5. Original scientific, scholarly, artistic, athletic, or business-related **contributions of major significance** to the field
6. **Authorship of scholarly articles** in professional or major trade publications or other major media
7. Performance of a **leading or critical role** in distinguished organizations.
8. Evidence that the alien has either commanded a **high salary** or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.
9. Miscellaneous: If listed criteria do not readily apply, **comparable evidence** of eligibility may be submitted (i.e., patents or grant funding).

# PATHWAYS TO LAWFUL PERMANENT RESIDENCE

- ▶ Employment Based
- ▶ Family Based
- ▶ Diversity Lottery
- ▶ Investment
- ▶ Asylum/Refugee
- ▶ Others: Violence Against Women Act (VAWA) etc.

# Employment-Based Green Card Flowchart



# EMPLOYMENT-BASED GREEN CARD CATEGORIES

- ▶ **EB-1:**
  - EB-1A Persons of Extraordinary Ability
  - EB-1B Outstanding Professors & Researchers
  - EB-1C Multinational Managers & Executives
- ▶ **EB-2: Masters Degree or equivalent**
  - National Interest Waiver (NIW)
  - PERM (Labor Certification)
- ▶ **EB-3: Bachelors Degree/Skilled Workers**
  - PERM (Labor Certification)
- ▶ Employer must sponsor foreign worker
  - **Exception:** EB-1A Extraordinary Ability and EB-2 NIW cases, you may self-sponsor.
- ▶ Employer must show via a Labor Certification (PERM) market test that no qualified U.S. worker was available for job
  - **Exception:** All EB-1 cases and EB-2 NIW
- ▶ ALL CATEGORIES SUBJECT TO STRICT ANNUAL QUOTA
  - See *Visa Bulletin* for backlogs

# Visa Bulletin, December 2021

EMPLOYMENT BASED IMMIGRANT CATEGORIES	ALL OTHER COUNTRIES	CHINA	INDIA	PHILIPPINES	MEXICO
<b><u>EB-1</u></b> <i>Filing Date</i>	Current	Current	Current	Current	Current
<i>Final Action</i>	Current	Current	Current	Current	Current
<b><u>EB-2</u></b> <i>Filing Date</i>	Current	01 Apr 2019	08 Jul 2013	Current	Current
<i>Final Action</i>	Current	01 Jan 19	01 May 12	Current	Current
<b><u>EB-3</u></b> <i>Filing Date</i>	Current	01 April 2018	22 Jan 2012	Current	Current
<i>Final Action</i>	Current	22 Mar 18	15 Jan 12	Current	Current

# CATEGORY & COUNTRY QUOTA BACKLOGS

- ▶ Annual Quota is divided by Category (EB-1, EB-2, EB-3) and Nationality (country of birth not citizenship)
- ▶ Backlogs can occur in both **category** and **country** queues
- ▶ Significant backlogs in some categories and for some countries
- ▶ Planning the entire process early while maintaining legal nonimmigrant status is critical
- ▶ Must be “current” at time of filing and at time of ultimate green card approval
  - Dual Charts – Dates for Filing and Final Action

# 3-STEP LABOR CERTIFICATION (PERM)-BASED GREEN CARD

- Requires employer sponsorship

## Step 1: Labor Certification (PERM)

- DOL certification to DHS that employer's sponsorship of foreign national will **not take** away job opportunity from qualified US worker
- If job market test shows no qualified, willing, and able U.S. worker was available, Employer files a labor certification application with DOL
  - Some occupations are pre-certified: nurses, physical therapists
  - "Special Handling" process for college/university professors

## Step 2: Immigrant Petition (Form I-140)

- Once labor certification application is approved, the Employer may then file an immigrant visa petition for non-citizen with DHS.

## Step 3: Adjustment of Status (Form I-485)

- If no backlog in visa queue, non-citizen and dependents may apply for adjustment of status (green card) simultaneously with immigrant visa petition or when "current."

# EMPLOYMENT BASED APPLICATIONS WITHOUT LABOR CERTIFICATION

If Labor Certification is not required, Employment Based Green Card Applications consist of two basic steps/components:

- ▶ **Step 1: I-140, Immigrant Petition for Alien Worker**
  - Petitioner's request to USCIS that a named non-citizen physician or researcher meets the requirements of the EB-1(A), EB-1(B) or EB-2 category
  - Petitioner may file multiple I-140's
    - Must meet requirement of each category applied for as of time of filing
  
- ▶ **Step 2: I-485, Application to Apply to Adjust Status to Permanent Resident**
  - Individual application by foreign national and spouse and each minor unmarried child under 21 years of age which demonstrates that applicant is admissible to U.S. and should be granted residency
  - Approval of I-485 results in “green card” status for applicant
  - I-485 may only be filed if an immigrant visa number is immediately available



# EB-1(A): PERSONS OF EXTRAORDINARY ABILITY

- ▶ Persons of extraordinary ability in the sciences, arts, education, business or athletics.
  - **May self-sponsor. Labor Certification (PERM) NOT required**
- ▶ Must present evidence of either:
  - Receipt of a "major, internationally recognized award, such as the Nobel Prize"; **OR**
  - Documentation of at least **3** of the following (next slide):

# EB-1(A): PERSONS OF EXTRAORDINARY ABILITY

- Lesser nationally or internationally recognized prizes
- Membership in associations which demand outstanding achievement of their members
- Published material about the alien in major media
- Judging the work of others
- Original scientific, scholarly, artistic, athletic, or business-related contributions of major significance
- Authorship of scholarly articles in professional or major trade publications or other major media
- Work has been displayed at artistic exhibitions or showcases
- Performance of a leading or critical role in distinguished organizations
- Having commanded a high salary or other remuneration in comparison to others in the field
- Evidence of commercial success in the performing arts
- Miscellaneous: If listed criteria do not readily apply, comparable evidence of eligibility may be submitted (i.e., patent or grant funding).

# EB-1(B): OUTSTANDING PROFESSORS & RESEARCHERS

- ▶ Outstanding professors & researchers.
  - May **NOT** self-sponsor. Labor Certification (PERM) **NOT** required.
- ▶ Must present evidence of the following:
  1. An **offer of employment** by either:
    - U.S. university or college offering a tenure or tenure-track position or permanent research position; **OR**
    - Organization which employs at least 3 full-time researchers offering a permanent research position
  2. At least **3 years of teaching and/or research** in academic field as post-doc; **AND**
  3. Evidence that scholar/researcher is recognized internationally as **outstanding in academic field**. This evidence must consist of at least two of the following eligibility criteria (next slide):

# EB-1(B) ELIGIBILITY CRITERIA

- ▶ Evidence that scholar/researcher is recognized internationally as **outstanding in academic field**. This evidence must consist of at least **two** of the following eligibility criteria:
  - ▶ Receipt of major prizes or awards for outstanding achievement
  - ▶ Membership in associations which demand outstanding achievement of their members
  - ▶ Published material about the alien in major media
  - ▶ Judging the work of others
  - ▶ Original scientific, scholarly contributions to the field
  - ▶ Authorship of scholarly articles in professional or major trade publications or other major media

# EB-2: NATIONAL INTEREST WAIVER

- ▶ **May self-sponsor. Labor Certification (PERM) **NOT** required.**
- ▶ Must have a Masters degree (or equivalent) or higher
- ▶ USCIS may grant a national interest waiver if the Petitioner demonstrates:
  - I. That the foreign national's proposed endeavor has both substantial merit and national importance
  - II. That he or she is well positioned to advance the proposed endeavor; and
  - III. That on balance, it would be beneficial to waive the job offer and labor certification requirements.
- ▶ Examples of work deemed to be in the “National Interest” of the U.S. are pursuits that:
  - Promote economic development
  - Improve wages and working conditions
  - Improve education and training programs for children and under-qualified workers
  - Improve health care, or
  - Provide more affordable housing for the young and/or old and poor

# RECAP OF EMPLOYMENT-BASED IMMIGRANT CATEGORIES

- ▶ EB-1's do NOT need Labor Certification
- ▶ EB-2's **DO** need Labor Certification **except** those with a National Interest Waiver
- ▶ EB-3's **ALL** need Labor Certification

# FAMILY-BASED IMMIGRANT CATEGORIES

## ▶ **Sponsored by U.S. Citizen:**

- Parent\*
- Spouse\*
- Unmarried minor child\*\*
- Son or Daughter – married or unmarried
- Sister or Brother

## ▶ **Sponsored by Lawful Permanent Resident**

- Spouse
- Unmarried son or daughter

## ▶ **\*Immediate Relatives:** not subject to a quota & often can adjust status to permanent residence inside the U.S.

- ‘Spouse’ includes same-sex married persons & trans persons of both the same and opposite sex
- ‘Child’ includes children adopted before 16 years of age and step-children where the step-relationship was created before 18 years of age.

## ▶ **Other Family-Based Categories:** subject to category & country quotas backlogs — See *Visa Bulletin*

# STAY INFORMED ON LATEST DEVELOPMENTS...

- ▶ Sign up for Iandoli Desai & Cronin's monthly newsletter at <http://iandoli.com/newsandupdates>.

Receive Our Newsletter \*

First Name

Last Name

Email Address \*

Phone

(###)

###

####

SUBMIT



# QUESTIONS?



## CONTACT INFO

IANDOLI DESAI & CRONIN P.C.

38 Third Avenue

Suite 100

Boston, MA 02129

(617) 482 1010

[info@iandoli.com](mailto:info@iandoli.com)

[www.iandoli.com](http://www.iandoli.com)