EMPLOYMENT-BASED IMMIGRATION LAW OVERVIEW & UPDATE

SHRM-GT Employment Law Update

Breakout Session

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Overview

- F-1 Student & J-1 Visas
- H-1B Specialty Workers
- L-1 Intracompany Transferees
- B-1 Visas
- Green Card/Permanent Residency Processing
  - Extraordinary Ability
  - Outstanding Researcher
  - Multinational Managers
  - National Interest Waiver
  - PERM/Labor Certification
- Requests for Evidence
- General Processing Issues and Moving Forward

F-1 Visas

Curricular Practical Training

- Training relates directly to the student's major area of study.
- Training is an integral part of the school's established curriculum.
- Designated school official (DSO) authorized CPT in SEVIS, and the authorization prints on the student's Form I-20.
- Occurs before the student's program end date on the Form I-20.
- Authorization is for one specific employer and for a specific period of time.

Curricular Practical Training

- Student must secure the training opportunity before CPT can be authorized.
- CPT must be authorized before the student can begin work.
- Student can have more than one CPT authorization at the same time.
- One year of full-time CPT eliminates a student's eligibility for OPT.

Optional Practical Training

- Training relates directly to the student's major area of study.
- DSO recommends OPT in SEVIS.
- Student does not have to secure training before the DSO can recommend OPT.
- Authorized by the U.S. Citizenship and Immigration Service (USCIS), and the student is issued an Employment Authorization Document (EAD).
- Allows the student to work for any employer, as long as the training relates to the student's major course of study
- Can occur before or after the student's program end date.
- Periods of OPT cannot overlap.
- Students are eligible for an additional 12 months of OPT authorization, when they change to a higher educational level.

Optional Practical Training

- For students engaged in post-secondary schools or at conservatories. Twelve months of Regular OPT is available for each higher level of study. (For example a student may have 12 months for a bachelor's degree and another 12 months for a master's degree).
- 4 Different Variations of OPT:
  - Pre-Completion OPT: Any portion of OPT used before the student's Program End Date. It may be part-time or full-time.
  - Post-Completion OPT: Any portion of OPT used after the student's Program End Date. It must be full-time.

Optional Practical Training

- 24-month (STEM) OPT Extension: For students who majored in designated Science, Technology, Engineering, and Math (STEM) degrees approved by DHS. This type of OPT is a 24-month extension of OPT.
- Cap-Gap OPT Extension: For students whose prospective employers filed a qualifying H-1B-cap subject petition.

J-1 Visas

J-1 Visas

- Students are eligible to apply for J-1 status only if they meet one of the following criteria:
  - They are financed by either the U.S. government, or home country government or an international organization
  - The program is carried out under a written agreement between the U.S. government, foreign government, foreign educational institution or state/local government
  - Exchange visitor is supported substantially by funding from sources other than personal or family funds

Home Residency Requirement

- Certain J-1 exchange visitors are required to spend two years in their home country at the end of their J-1 program.
- J-1 exchange visitors subject to this requirement cannot apply for H, L, or immigrant status unless they either return to their country of nationality for two years or obtain a waiver of the requirement.

2-Year Requirement Waivers

- Statement of "No Objection" from your home country.
- Interested U.S. government agency.
- Persecution.
- Exceptional hardship to a U.S. citizen or permanent resident spouse or child.
- Request by a designated state department of health. *Available only to medical doctors*.

H-1B Visas

The Basics

- Regulatory Authority: 8 CFR §214.2(h)
- Jobs which professional workers in a "specialty occupation" is required.
  - University (bachelors) degree or equivalent
- Beneficiary must have a 4-year college/university degree or equivalent experience in the field.
  - "3 for 1" rule
  - Credential Evaluations
- H-4 Dependents

The Basics

- Six-year limit per person
- Can get extensions beyond six-years if:
  - Candidate has accumulated 365 days in employer-based green card process (1 year extensions), or
  - I-140 Petition (petition for alien worker) has been approved but immigrant quota is oversubscribed (3-year extensions).
- Six-year limit is aggregate of all positions on H-1B (with multiple employers).
  - Remember: Portability

H-1B Quota (Visa Cap)

- Fiscal year cap of 65,000
  - Applies to all new H-1B petitions, with exceptions for institutions of higher education, not-for-profit organizations affiliated with institutions of higher education, and government research organizations.
- 20,000 additional visas for graduates of U.S. Master's (or higher) degree programs
- Separate quota allocation for nationals of Chile (1,400) and Singapore (5,400)- H-1B1 (see next slide)
- H-1B Lottery: March of each year
- If selected and approved, cap-subject H-1B's are valid from Oct.1
- Some Petitioners are Cap Exempt

H-1B Cap-exempt Employers

- **Institutions of higher education**: Universities and colleges are examples of cap-exempt employers.
- **Nonprofit entities affiliated with institutions of higher education**: These include nonprofits that are related to or affiliated with universities.
- **Nonprofit research organizations**: These include nonprofits that conduct research.
- **Government research organizations**: These include government-funded research organizations.
- **For-profit companies (concurrent employment)**: If the employee will work at an approved nonprofit or qualifying institution.
- Existing H-1B visa holders who wish to change employers (AC 21)
- Cap-exempt petitions can be submitted throughout the year

H-1B1 for Chileans

- Do not need to file for petition with USCIS.
- Application made directly to the U.S. Consulate
- Include:
  - Certified ETA 9035/9035E signed by representative of AURA
  - Letter from employer confirming the support of the petition, job description and terms of the employment
  - Credentials for the employee
  - Information about the employer
  - Copy of employee passport

The Labor Condition Application

- The U.S. employer must guarantee to the Department of Labor in a Labor Condition Application (LCA) that:
  - The foreign-born professional will be paid at or above the rate paid for a similar position at the employer's own offices or at those of their local competitors (i.e. prevailing wage or actual wage, whichever is higher);
  - The foreign worker will not "adversely affect" the working conditions of his or her U.S. colleagues;
  - U.S. colleagues will be given notice of the foreign worker's presence among them (10 Day Posted Notice in 2 Conspicuous Locations); and
  - There is no strike or lockout at the worksite.

Step #1:
Prevailing Wage

- Before proceeding the Labor Condition Application, you must first get the Prevailing Wage.
- Go to O*Net:
  - Search for job description/job title
- Use FLAG Portal:

https://flag.dol.gov/

LCA Violations

- Employers must follow through on these attestations (wage rate, notice, etc.) or they will be in violation of the law and could be subject to civil penalties and pay back wages or be debarred from the H-1B program altogether!
- The DOL will begin an investigation of employer practices through both a formal complaint and its own investigation/audit mechanisms.

Step #2: I-129 Petition

- Application is filed to U.S. Citizenship & Immigration Service (U.S. CIS)
- Filing Fee for I-129 (varies depending on company size, non-profit status, etc)
- Asylum Fee (either nothing, $300 or $600)
- $500 Fraud Fee- There is no exemptions to this fee. It is used to "combat fraud" in the H-1B and L-1 categories. 1/3 of the account will be given to the DOS, 1/3 to the DHS and 1/3 to the DOL.
- $750 or $1,500 Training Fee- There are exemptions to this fee (e.g. non-profits, institutions of higher education, 2nd extensions), but the training fee for most employers is $1,500. For any employer that has 25 or fewer full-time employees, the fee is $750.
- $2,805 Premium Processing Fee (optional)
- Form I-907 for Premium Processing (optional)
- Form I-129H Classification Supplement
- Form I-129H-1B Data Collection and Filing Fee Exemption Supplement
- G-28 (if attorney representation)
- Diploma/Resume/Transcript of Beneficiary and degree evaluation if necessary
- Letter from Employer (supporting the application)
- Evidence of Maintenance of Status (if beneficiary is present in the U.S.)
- Any other Documentation from Employer (brochures, catalogs, website info)

Premium Processing

- The Premium Processing Fee is $2,805.00
- Use Form I-907
- The application will get action taken on his/her case within business 15 days of receipt by the USCIS.
  - Therefore, within business 15 days the USCIS will either approve, deny or request more information from the applicant.

Additional Considerations

- USCIS must approve the I-129 before Visa can be issued (at consulate).
  - Security delays, standard wait times at consul
  - DS-160 must be submitted online by the applicant
- All new H-1Bs (e.g. new graduates, hired from abroad or changing status from one visa to H-1B) are subject to the annual quota.
- Change of employer – H-1B petition is filed with paystubs from previous employer.

Additional Considerations: $100,00 H-1B Fee

- $100,000 Fee: Applications for H-1B visas filed on or after Sept. 21, 2025 for workers outside the U.S. and who are not current H-1B visa holders are subject to the $100,000 charge.
- The fee also applies if a petition filed on or after Sept. 21 "requests consular notification, port of entry notification or pre-flight inspection for an alien in the United States."
- The $100,000 payment must be paid prior to applying for an H-1B visa, according to USCIS.
- Importantly for employers, the fee does not apply when a visa applicant files to move from one type of visa to another, such as from an F-1 visa for non-U.S. students to H-1B status.

L-1 Visas

L-1 Intracompany Transferee Visas Who Qualifies?

- The L-1 Visa is available to:
  - Executive;
  - Manager; or
  - Employee having "specialized knowledge" of a company's business activities
- "coming to the U.S. to provide services in a similar capacity to the same company, a branch office, a subsidiary or an affiliate."

The Basics

- L-1 Regulatory Authority: 8 CFR §214.2(l)
- L-1A: Multinational Executive or Manager
- L-1B: Specialized Knowledge
- Candidate must have been employed abroad for at least one year within the previous three years by foreign parent, subsidiary, affiliate or branch office.

Managerial Capacity

- The term "managerial capacity" means an assignment within an organization in which the employee primarily:
- Manages the organization, or a department, subdivision, function, or component of the organization;
- Supervises and controls **the work of other** supervisory, professional, or managerial **employees**, or manages an **essential function** within the organization, or a department or subdivision of the organization;
- Has the authority to hire and fire, or recommend those as well as other personnel actions (such as promotion and leave authorization), if another employee or other employees are directly supervised; or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- Exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional.

Executive Capacity

- Directs the management of the organization or a major component or function of the organization;
- Establishes the goals and policies of the organization, component, or function;
- Exercises wide latitude in discretionary decision-making; and
- Receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

Specialized Knowledge

- Special knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

Benefits of L-1 Visa

- No annual quota like H-1B
- Payroll may be based in U.S. or abroad
- L-2 dependent spouses may work
- Multinational Managers/Executives (L-1A) qualify as EB-1 for purposes of permanent residence applications (expedited process- although the I-140 cannot be premium processed)

Time Limits

- 7-year limit for L-1A
- 5-year limit for L-1B
  - Unless candidate changes status to H-1B and has accumulated 365 days in employer-based permanent residence process, or when I-140 petition has been approved but immigrant quota is oversubscribed.
- Time spent in H or L status with another employer counts toward 5 or 7 year limit
- Recapture Time
- No quota = unlimited availability
- Premium Processing (I-907) is available

Filing Process

- Filing Fees at USCIS.gov
- I-129 Form
- I-129L Supplement
- I-907 Premium Processing (optional)
- Evidence of Parent/Subsidiary Relationship- One entity must own more than 50% of the shares of the other, and must also be able to control it. This is demonstrated through Articles of Incorporation or Association.
- Evidence of Affiliation- Also demonstrated by Incorporation paperwork and other legal documents.
- Evidence of Employee working in an executive, managerial or specialized knowledge capacity for the foreign entity at least one year in the past three years.
  - Specialized knowledge is a higher level of knowledge than can be commonly found within the same type of position in the same industry/company, i.e. proprietary knowledge specifically applicable to the employer's unique products which also distinguishes the L-1 employee from other employees.

Green Card Processing

Employment-Based Immigration

- Obtaining an immigrant visa (green card) by securing an offer of permanent employment.
  - An immigrant visa gives a foreigner the right to permanently live and work in the United States.
  - Employer sponsorship (labor certification)
  - Self petition (highly skilled/talented individuals)

- For many, the employment-based (EB) method can be a lengthy process. Often for H-1B holders and skilled workers, labor certification from the U.S. Department of Labor is required before proceeding onto the I-140 petition.

- The U.S. Government uses quotas and a preference system to allocate these immigrant visas.

- Regulatory Authority: 8 CFR §204.5

Quota System: Visa Bulletin

- Worldwide Level- INA §201(d)
- Numerical Limitations per country- INA §202
- Backlogs: Oversubscription by country/category
- Check out the Visa Bulletin published by the U.S. Department of State on a monthly basis

EB-1: Priority Workers

- Labor certification is not required for EB-1's. Priority workers include:
  - Individuals of extraordinary ability in the arts, sciences, business, education and athletics.
  - Managers and executives of international companies being transferred permanently to the U.S.
  - Outstanding professors and researchers.

Extraordinary Ability

- Regulatory Authority: 8 CFR §204.5(h)
- In order to qualify for this sub-category, an individual must show extraordinary ability in the sciences, arts, education, business or athletics. The petitioner must show a sustained national or international acclaim with recognized achievements. In order to win an EB-1 case the foreigner must submit extensive documentation to back up his/her claim as an individual with extraordinary ability.
- The individual needs to show receipt of major internationally recognized award (Nobel Prize) OR
- Exhibit at least 3 of 10 criteria listed.
- O-1 visa holders might qualify

Extraordinary Ability Criteria

1. Receipt of lesser nationally or internationally recognized prizes or awards for excellence;
2. Membership in associations in the field that demand outstanding achievement of their members;
3. Published material about the foreigner;
4. Evidence that the foreigner is a judge of the work of others in the field;
5. Evidence of the foreigners original contributions of major significance to the field;
6. Authorship of scholarly articles;
7. Display of the alien's work at artistic exhibitions or showcases;
8. Evidence the alien has performed in a leading or critical role for organizations that have a distinguished reputation;
9. Evidence that the alien commands high remuneration in relation to others in the field; or
10. Evidence of commercial success in the performing arts.

- If the above criteria do not apply, the petitioner may submit "other comparable evidence".

Outstanding Professors/Researchers

- Regulatory Authority: 8 CFR §204.5(i)
- In order to qualify for this sub-category, a foreigner must show international recognition as being outstanding in a specific academic field.
- The petitioner must also have a minimum of three years of experience in teaching and/or research in that academic field.
- There must be a job offer from a college, university, research institute, or private company.
- College or university teachers must be tenured or on a tenure-track.

Outstanding Professors/Researchers: Criteria

- The individual must meet at least two of the following criteria:

1. Receipt of major prizes or awards;
2. Membership in associations that require outstanding achievements;
3. Published material in professional journals written by others about the alien's work;
4. Participation as a judge of the work of others in the same of an allied field;
5. Original scientific or scholarly research contributions to the field; or
6. Authorship of scholarly books or articles in scholarly journals with international circulation in the field.

Multinational Managers/Executives

- Regulatory Authority: 8 CFR §204.5(j)
  - L-1A visa holders might qualify
- In order to be eligible for priority worker status, a multinational manager or executive must:

  - Been employed outside the U.S. in a managerial or executive capacity for at least one of the three years immediately preceding the filing of the petition.
  - The past employment must have been with the same employer, an affiliate, or a subsidiary of the employer.
  - The foreign worker must be coming to work in an executive or managerial capacity.

EB-2: Advanced Degree Holders & Aliens of Exceptional Ability

- Regulatory Authority: 8 CFR §204.5(k)
- Advanced degree: Master's degree or higher
  - Certified position must require a Master's or higher degree or foreign equivalent degree
  - Master's equivalence = B.A. plus 5 years progressively responsible experience in the field
  - H-1B holders might qualify

Exceptional Ability

- Show that the alien is an alien of exceptional ability in the sciences, arts, or business, petition must prove at least 3 of the following:
  - An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.

Exceptional Ability Criteria (continued)

1. Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least 10 years for full-time experience in the occupation for which he or she is being sought;
2. A license to practice the profession or certification for a particular profession or occupation;
3. Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
4. Evidence of membership in professional associations; or
5. Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

- If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

National Interest Waivers

- The CIS may exempt the requirement of a job offer, and thus of a labor certification, for aliens of exceptional ability in the sciences, arts or business if exemption would be in the national interest.
- To apply for the exemption, the petitioner must submit Form ETA-9089, in duplicate, as well as evidence to support the claim that such exemption would be in the national interest.
- *Matter of Dhanasar* provides that after eligibility for EB-2 classification has been established, USCIS may grant a NIW if the petitioner demonstrates, by a preponderance of the evidence, that:
  - The foreign national's proposed endeavor has both substantial merit and national importance.
  - The foreign national is well positioned to advance the proposed endeavor.
  - On balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

PERM (Labor Certification)

- Typically, labor certification is a prerequisite for obtaining an employment-based permanent residency. Beneficiaries that fall into the EB-1 category are exempt from this stage of the process.
- PERM is the labor certification system that will allow employers to file labor certification petitions online (http://www.plc.doleta.gov).
- Employers will not need to submit supporting documentation with the cases and will instead retain all documentation for inspection in the case of an audit.
- A percentage of all cases will be flagged for a more extensive supervised recruitment process.

Prevailing Wage Determination

- Must get PWD and must be at least 100% of the prevailing wage rate.
- File prevailing wage request through the Department of Labor portal - icert. Include job description, minimum requirements, location, other pertinent information, and provide the SOC job code for the proposed position.
- The DOL will either agree with your suggested job code or re-categorize the position. DOL will also use a four tier scale for determining prevailing wages based on education, experience, job requirements, etc.

Recruitment under PERM

- Within six months prior to filing an application, employers are required to place a job order with the State Workforce Agency and run two newspaper advertisement in Sunday papers.
- Employers of professionals are also required to conduct three additional types of recruitment from a supplemental list of recruiting methods. Documentation of recruitment is not to be submitted with the application, but must be maintained in a file that will be available to the DOL in the case of a request by a Certifying Officer or an audit.
- Recruitment materials must contain dates of posting and other specific contact details.

Additional Forms of Recruitment

Employers of professionals are required to conduct three additional types of recruitment based on a list of recruiting methods contained in the rule. The acceptable additional recruiting methods for professionals include:

- job fairs
- employer's web site
- job search website other than the employers
- on-campus recruiting
- trade or professional organizations
- private employment firms
- employee referral program with incentives
- campus placement offices
- local ethnic newspapers
- radio and television advertising

Notice of Filing

- In addition to recruitment, the employer must prepare and post a notice of filing.
- The notice of filing directs any inquiries regarding the labor market test to the Department of Labor.
- The notice of filing must contain much more specific information than is required in the advertisement, including detailed contact information, work hours, location, etc. Most of the information in the prevailing wage request can also be used in the notice of filing.
- The notice of filing must be posted for 10 business days and the dates of filing must be written on the notice along with the signature of the contact person.

Recruitment Report

- Employers are required to document recruiting results in a recruiting report.
- Employers under PERM will need to prepare a recruiting report that describes:
  - recruitment steps undertaken including the dates of each advertisement/posting
  - Results of recruitment including # of resumes received, interview results = lawful job related reason to disqualify candidates.

Submission of PERM Application

- Employer must register with the Department of Labor and create a sub-account for attorneys to file the PERM application electronically.
- After the application is filed, the DOL will verify that job offer with a survey via email. If there is no response via email, the DOL will call the employer to verify sponsorship.

PERM Audits

- The DOL's computers will review applications based on various selection criteria that will allow problematic applications to be identified for audit. Also some applications will be randomly selected for auditing.
- If an application is selected for auditing, the employer will be notified and required to submit specific documentation to verify the information submitted in the ETA 9089.
- Common audits include recruitment documentation or business necessity – where the employer will need to document why minimum requirements are higher than the DOL's categorical assessment.
- The documentation will be reviewed by an ETA official and either certified or, if the application is incomplete of the documentation does not support the ETA 9089,the application will be denied and the employer will be notified of the reasons.
- The Certifying Officer also has the option in audited cases of ordering the employer to conduct supervised recruiting.

I-140 Petition (Stage #2)

- Once the employer gets an approved Labor Certification, either through the regular process, RIR or PERM, they must file an I-140 petition with the USCIS before expiration.
- IMPORTANT: An approved labor certification will expire after 180 days from the date of approval!
- Currently the filing fee to the USCIS for this petition is $715.00

I-140 Documentation

- Typical supporting documentation that are filed with this petition include:

- The approved labor certification (EB-1's and NIW's are exempt from this).
- Letter from employer in support of the petition. The letter explains what the company does, description of the job position, why the prospective employee qualifies for the position (summarizing his/her skills).
- Beneficiary's education credentials (copies of degrees, transcript, awards, honors)
- Degree evaluation from a credentialing evaluation service when the degree is from a foreign university.
- Affidavits/Letters from former employers demonstrating the individual's experience/training in the position.
- When the petition depends on an offer of employment, it must include evidence of the employer's ability to pay the stated wage/salary. Thus it is important to submit annual reports, federal tax returns, financial statements. If the employee is already employed by the sponsoring employer, W-2 forms, pay stubs and personal tax returns can also be submitted confirming that he/she already received the offered wage.

I-485 or Consular Processing (Stage #3)

- Once the petitioner/beneficiary receive an approved I-140 and they have a current priority date, they can than apply for the "green card".
- To see if their priority date on the I-797 Notice of Approval is current, you should check the Dept. of State website for the visa bulletin. The "green card" application is completed on Form I-485.
- Consular processing pertains to an individual who is overseas when the I-140 is approved.

Moving Forward…

Thank You!