

VI. PRIORITY WORKERS AND OTHER EMPLOYEES:
PERMANENT RESIDENCE

§ 12:27 Permanent residence for priority workers

Research References

West's Key Number Digest, Aliens " 44, 51.5

Construction and application of sec. 203(a)(3) of Immigration and Nationality Act of 1952 (8 U.S.C.A. sec. 1153(a)(3)) as amended giving preference visas to professionals or persons having ability in arts and sciences, 18 A.L.R. Fed. 287

Federal Procedural Forms § 40:446

The INA features five employment-based categories of immigrant visas.¹ Four of those classifications are pertinent to foreign business personnel and are discussed in this chapter: the first preference relates to priority workers; the second preference to professionals with advanced degrees or those with exceptional ability in the sciences, arts, and business; the third preference to skilled workers, professionals, and other workers; and the fifth preference to investors.² This section briefly discusses the first preference for priority workers and its relevance to foreign companies.

First preference priority workers, including multinational executives and managers,³ are allocated 28.6% of the 140,000 employment-based immigrant visas available (approximately 40,000) as well as any unused immigrant visas from the fourth and

¹9 FAM § 41.31, n. 7.4-2.

¹9 FAM § 41.31, n. 8. The future availability of B-1 visas for otherwise qualified H-1B beneficiaries is in doubt because of the requirement that a labor condition application be certified prior to securing H-1B status. As of this writing, however, the "B-1 in lieu of H-1B" visa is still available.

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¹8 U.S.C.A. § 1153(b).

²The fourth preference relates to special immigrants, such as religious workers, certain former employees of the United States Government, or certain former employees of international organizations and is not relevant to this discussion. 8 U.S.C.A. §§ 1153(b)(4), 1101(a)(27).

³See § 12:19.

fifth preference categories (for special immigrants and investors).⁴ Because the supply of visas for first preference priority workers is normally greater than the demand, backlogs are unlikely. Priority workers include foreign nationals possessing “extraordinary ability” in business.⁵ The standards for this category are so high, however, that few can qualify. In order to be classified as a foreign national with extraordinary ability in business, one must have achieved “sustained national or international acclaim” with achievements that “have been recognized in the field through extensive documentation.”⁶ Furthermore, the foreign national must be seeking to enter the United States to continue work in the area of extraordinary ability, and his or her work must “substantially benefit prospectively the United States.”⁷

The pertinent regulations make clear that foreign nationals with extraordinary ability include only the “small percentage who have risen to the very top of their field of endeavor.”⁸ One can show “sustained national or international acclaim” and achievements that have been “recognized in the field” by receiving a “major,

⁴8 U.S.C.A. § 1153(b)(1).

⁵Priority workers also include foreign nationals of extraordinary ability in the sciences, arts, education, and athletics as well as outstanding professors and researchers, all of which are beyond the scope of this chapter.

⁶8 U.S.C.A. § 1153(b)(1)(A).

⁷8 U.S.C.A. § 1153(b)(1)(A).

⁸8 C.F.R. § 204.5(h)(2). This regulatory definition is consistent with the Immigration Act of 1990s legislative history in which a House Committee Report stated:

Recognition can be through a one-time achievement such as receipt of a Nobel Prize. An alien can also qualify on the basis of a career of acclaimed work in the field [I]n short, admission under this category is to be reserved for that small percentage of individuals who have risen to the very top of their field of endeavor. HR Rep No 95723, 101st Cong, 2d Sess pt 1, at 59 (1990).

Interpreting this regulation, the INS Acting Assistant Commissioner for Adjudications has not only stressed that meeting three of these criteria is sufficient to establish an “extraordinary ability” alien, but also emphasized that the examiner must “evaluate the evidence presented.”

Generally, we maintain that a book by the alien published by a “vanity” press, a footnoted reference to the alien’s work without evaluation, an unevaluated listing in a subject matter index, or a negative or neutral review of the alien’s work would be of little or no value. On the other hand, peer-reviewed presentations at academic symposia or peer-reviewed articles in scholarly journals, testimony from other scholars on how the alien has contributed to the academic field, entries (particularly a goodly number) in a citation index which cite the alien’s work as authoritative in the field, or participation by the alien as a reviewer for a peer-reviewed scholarly journal would more than likely be solid pieces of evidence. We are also inclined to believe that thesis direction (particularly a Ph.D. thesis) would demonstrate an alien’s outstanding ability as a judge of the work of others. Letter from Lawrence J. Weinig to INS Northern Service Center Director James J. Bailey, dated July 30, 1992 and reproduced in 69 Interpreter Releases 1052 (Aug 24, 1992).

internationally recognized award” or by demonstrating at least three of the following:

- (1) receipt of lesser-recognized prizes or awards for excellence in the field of endeavor;
- (2) memberships in associations in the field for which classification is sought which require outstanding achievements of their members;
- (3) published materials about the foreign national in professional or major trade publications or major media relating to the foreign national’s work in the field;
- (4) participation as judges of the work of others in the field;
- (5) original scientific, scholarly, or business-related contributions of major significance in the field;
- (6) authorship of scholarly articles in the field in professional, or other major trade publications, or other major media;
- (7) having work displayed in exhibitions;
- (8) performances in leading or critical roles for organizations with distinguished reputations;
- (9) a high salary in relation to others in the field; or
- (10) commercial successes in the performing arts.⁹

While many of these evidentiary criteria do not readily apply to the field of business, the regulations do point out that one can submit “comparable evidence to establish the beneficiary’s eligibility.”¹⁰ Moreover, while the regulations do not specify how foreign nationals must show that their entry will “substantially benefit prospectively the United States,” meeting the above criteria will likely satisfy this statutory requirement.

First preference foreign nationals with extraordinary ability in business need not secure a DOL labor certification prior to petitioning for an immigrant visa. Moreover, it is not necessary for them to be the recipients of a specific job offer. Foreign nationals without such an offer, however, must demonstrate that they are “coming to the United States to continue work in the area of expertise”¹¹ and provide “prearranged commitments,” such as contracts or “detailed plans” of how the they intend to continue their work in the United States.¹²

⁹8 C.F.R. § 204.5(h)(3).

¹⁰8 C.F.R. § 204.5(h)(4).

¹¹8 C.F.R. § 204.5(h)(5).

¹²8 C.F.R. § 204.5(h)(5).

§ 12:28 Permanent residence for professionals with advanced degrees and foreign nationals of exceptional ability

Research References

Federal Procedural Forms § 40:446

West's Key Number Digest, Aliens ¶44, 51.5

Construction and application of sec. 203(a)(3) of Immigration and Nationality Act of 1952 (8 U.S.C.A. sec. 1153(a)(3)) as amended giving preference visas to professionals or persons having ability in arts and sciences, 18 A.L.R. Fed. 287

Second preference priority workers are allocated 28.6% of the 140,000 employment-based immigrant visas available (approximately 40,000) plus any unused first preference visas.¹ Because the supply of these visas is normally greater than the demand, backlogs are unlikely. Second preference foreign nationals must generally secure a DOL labor certification or qualify for the DOL's Schedule A.²

Professionals with Advanced Degrees

The second employment-based preference is applicable to members of the professions holding advanced degrees or their equivalent who will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States and whose services in the professions are sought by an employer in the United States.³ The foreign national with an advanced degree must also be employed in a profession for which a U.S. baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.⁴

An advanced degree is a U.S. academic or professional degree or a foreign equivalent degree "above that of baccalaureate."⁵ Although the statute speaks of advanced degrees "or their equivalent," DHS regulations mandate the attainment of at least a baccalaureate degree, and schooling, experience, and training—no matter how extensive—cannot substitute for a baccalaureate degree. The regulations do, however, allow a U.S. baccalaureate degree or a foreign equivalent degree that is followed by at least five years of experience to serve as the equivalent of a master's degree, though

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¹8 U.S.C.A. § 1153(b)(2)(A).

²8 C.F.R. § 204.5(k)(4).

³8 U.S.C.A. § 1153(b)(2)(A).

⁴8 C.F.R. § 204.5(k)(2); see § 12:15.

⁵8 C.F.R. § 204.5(k)(2).

foreign nationals whose professions require a doctoral degree must possess a U.S. doctorate or a foreign equivalent degree.⁶

With regard to the requirement that the foreign national's employment "substantially benefit prospectively the national economy," the regulations do not require additional evidence; presumably, the employment of advanced degree professionals is, in itself, sufficient to meet the substantial benefit standard.

Aliens of Exceptional Ability in the Sciences, Arts, or Business

Exceptional ability means a "degree of expertise significantly above that ordinarily encountered" in the relevant field.⁷ The INA makes it clear that the possession of a degree, a similar award from a college, or a license or certification for a particular profession or occupation is not, by itself, considered sufficient evidence of exceptional ability.⁸ The DHS regulations require evidence of at least three of the following in order to establish exceptional ability:

- (1) an official academic record reflecting a degree, diploma, certificate, or similar award from a college or other institution of learning relating to the area of exceptional ability;
- (2) letters from current or former employers showing at least 10 years of full-time experience in the occupation;
- (3) a license to practice the profession or certification for a particular occupation;
- (4) a salary or other remuneration demonstrating exceptional ability;
- (5) membership in professional associations; or
- (6) recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.⁹

When the above categories of proof do not apply to a foreign national's occupation, one may submit "comparable evidence" to establish eligibility.¹⁰

The "National Interest" Waiver

Generally, an employer will petition for the services of a second preference foreign national. The DHS, however, can waive the need

⁶8 C.F.R. § 204.5(k)(2). This definition closely parallels the H-1B definition of specialty occupation worker.

⁷8 C.F.R. § 204.5(k)(2).

⁸8 U.S.C.A. § 1153(b)(2)(C).

⁹8 C.F.R. § 204.5(k)(3)(ii).

¹⁰8 C.F.R. § 204.5(k)(2); § 204.5(k)(3)(iii). As with advanced degree professionals, the regulations do not suggest the need to provide evidence that employment of the exceptional aliens will "substantially benefit prospectively the national economy."

for a job offer and the requirement for a DOL labor certification if it is “in the national interest.”¹¹ Because no DOL certification need be secured, the national interest waiver can be a valuable tool. The appropriate standards, however, are quite high. Foreign nationals must satisfy a rigorous three-part test, providing comprehensive documentary proof of the following: (1) that the individual is seeking work in an area of “substantial intrinsic merit”; (2) that he or she will provide a benefit that is national in scope; and (3) that he or she possesses a record of past accomplishments from which it can be concluded that he or she will serve the national interest to a greater extent than other persons with the same level of education, training, and/or experience.¹²

§ 12:29 Permanent residence for skilled workers, professionals, and other workers

Research References

West’s Key Number Digest, Aliens ⇨44, 51.5

Construction and application of sec. 203(a)(3) of Immigration and Nationality Act of 1952 (8 U.S.C.A. sec. 1153(a)(3)) as amended giving preference visas to professionals or persons having ability in arts and sciences, 18 A.L.R. Fed. 287

Federal Procedural Forms § 40:446

Third preference priority workers are allocated 28.6% of the 140,000 employment-based immigrant visas available (approximately 40,000) plus any unused first and second preference visas.¹ Skilled workers and professionals are eligible for all of these immigrant visas, which are awarded on the basis of filing order. Other “unskilled” workers, however, are permitted no more than 10,000 of the visas available to this preference category each fiscal year.²

As of this writing, the supply of these visas is greater than the demand for skilled workers and professionals, and there is no backlog.³ Employers who sponsor foreign national beneficiaries for the third preference classification must secure individual DOL labor

¹¹8 U.S.C.A. § 1153(b)(2)(A) & (B).

¹²On August 7, 1998, the INS’s Administrative Appeals Office (AAO) designated the decision *In re Matter of New York State Department of Transportation (NYSDOT)*, Int. Dec. 3363 (Comm’r 1998) as a precedent decision. This decision established a novel, three-part test for assessing the approvability of national interest waiver (NIW) petitions under the employment-based second preference.

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¹8 U.S.C.A. § 1153(b)(3)(A).

²8 U.S.C.A. § 1153(b)(3)(B).

³With respect to China and the Philippines, per country caps in the past have been reached for professional and skilled worker beneficiaries from these countries, creating backlogs. As of March 2002, no backlogs exist, but in the future,

certifications or must employ foreign nationals who qualify for the DOL's Schedule A program.

Skilled Workers

“Skilled workers” are defined as foreign nationals who can perform skilled permanent jobs—requiring at least two years of training or experience—as of the time the employer's application is filed.⁴ Relevant postsecondary education may be considered as training for purposes of the two-year qualification.⁵ Foreign nationals must document their training and experience with letters from prior trainers and employers.⁶

Professionals

Foreign nationals seeking to qualify as “professionals” must hold at least a U.S. baccalaureate degree or a foreign equivalent degree in a field in which such a degree is the normal entry-level requirement. DHS regulations reject the substitution of work experience or training for the degree.⁷ Foreign nationals with experience and training equivalent to a degree, however, can qualify as “skilled workers” and thereby secure the same third preference visas.

Other Workers

“Other Workers” are defined as foreign nationals capable of performing unskilled permanent jobs that require less than two years of training or experience at the time the employer's application is filed.⁸

§ 12:30 The labor certification process

Research References

West's Key Number Digest, Aliens ¶44, 51.5

Alien's entitlement to sixth-preference classification under sec. 203(a)(6) of Immigration and Nationality Act of 1952 (8 U.S.C.A. sec. 1153(a)(6)), where labor certification has been granted, 80 A.L.R. Fed. 676
Am. Jur. Pleading and Practice Forms, Aliens and Citizens §§ 6, 7, 18

The INA prohibits foreign nationals from seeking employment-

they may reappear. There are also currently no backlogs for “other workers” though there consistently have been in the past.

⁴8 U.S.C.A. § 1153(b)(3)(A)(i).

⁵8 C.F.R. § 204.5(1)(ii)(2). Skilled jobs must comport with the DOL's Dictionary of Occupational Titles (DOT), which identifies jobs for which two years of experience may be appropriately required. The DOL is moving away from using the DOT and now often turns instead to the “Standard Occupational Classification” (SOC) system.

⁶8 C.F.R. § 204.5(1)(3)(ii)(A).

⁷8 C.F.R. § 204.5(1)(3)(ii)(C).

⁸8 U.S.C.A. § 1153(b)(3)(A)(iii); 8 C.F.R. § 204.5(1)(ii)(2).

based second and third preference visas unless the Department of Labor (DOL) certifies that:

- (1) there are not sufficient workers who are able, willing, qualified, or equally qualified in the case of members of the teaching professions or foreign nationals with exceptional ability in the sciences or the arts and available at the time of application for a visa and admission to the United States and at the place where the foreign national is to perform such skilled or unskilled labor; and
- (2) the employment of such a foreign national will not adversely affect the wages and working conditions of workers in the United States whom are similarly employed.¹

The process consists of filing an application for labor certification. As of March 28, 2005, the DOL instituted a new electronic filing system to process these applications, called “Program Electronic Review Management” (PERM). All applications for labor certification filed prior to March 28, 2005, were transferred to one of two “Backlog Elimination Centers” for processing under DOL’s previous regulations.

All applications after March 28, 2005, were subject to the new PERM rules. Preparation of the PERM application typically involves the following steps: (1) drafting a description of the job—including minimum job requirements—that are the subject of the application; (2) determining a “prevailing wage” for the job; (3) advertising the offered position; (4) evaluating the applications of U.S. citizens or U.S. permanent residents who are interested in the job; (5) preparing a recruitment report; and (6) filing the application, either electronically or by mail.

Drafting a Job Description

The employer must first draft a job description with job requirements that comply with a myriad of DOL regulations.² There are a number of restrictions placed on what a given job can require. What an employer is permitted to require of its job applicants in the context of a labor certification depends on the job duties and how the job is classified by the DOL. The job requirements must be those normally required for the occupation, unless the employer adequately documents the “business necessity” for heightened requirements.³ Because of these restrictions, employers often find themselves limited in terms of how much education or experience they can require for a position that is the subject of a labor certifi-

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¹8 U.S.C.A. §§ 1182(a)(5)(A)(i), (ii).

²See 20 C.F.R. § 656.17(i).

³20 C.F.R. § 656.17(h)(1).

cation application. In addition, there are certain restrictions on requiring foreign language proficiency, experience gained with the employer, and “special” skills or experience.⁴

Prevailing Wage

Next, a request is made to the State Workforce Agency (SWA) to determine the prevailing wage for the position. The prevailing wage is the wage that is typically paid for the particular position in the geographic area where the work will be performed. The SWA determines the prevailing wage using DOL data based on four different wage levels, taking into account education and experience requirements.

The salary articulated in the labor certification application must be 100% of the prevailing wage determined by the SWA. The employer may use private wage surveys as an alternative source to determine prevailing wage amounts, although doing so may cause delay in the adjudication of the labor certification application. Employers are not required to pay the prevailing wage to the foreign national until he or she is granted U.S. permanent residence.

Advertising the Offered Position

The next step in PERM is to test the labor market by advertising the offered position and opening up the job application process to U.S. workers. During this process, the employer must place a job order with the SWA and place two advertisements in a newspaper of general circulation.⁵ The employer must also post a notice at the work site and in any other in-house media stating that a PERM application is being filed for the offered position.⁶ For professional positions, or those which normally require a bachelor’s degree or higher, employers must take three additional recruitment steps such as advertising at job fairs, on the employer’s website, on a general job search website, in local or ethnic newspapers, or on radio or television.⁷ The employer may also advertise the position through on-campus recruitment, trade or professional organizations, private employment firms, employee referral programs with incentives, or campus placement offices.⁸ There are specific deadlines in which these recruitment steps must take place.

Evaluation of the Applicants

The employer is required to carefully screen any applications submitted in response to the recruitment steps take in connection

⁴20 C.F.R. § 656.17(h)(2) to (4).

⁵20 C.F.R. § 656.17(e)(1).

⁶20 C.F.R. § 656.10(d)(3).

⁷20 C.F.R. § 656.17(e)(1)(ii).

⁸20 C.F.R. § 656.17(e)(1)(ii).

with the labor market test. A U.S. citizen or permanent resident's job application may be rejected if the candidate lacks the minimum requirements for the position. A candidate may not, however, be rejected if he or she lacks a skill that DOL believes can be acquired during "a reasonable period of on-the-job training."⁹ Consequently, any U.S. citizen or permanent resident applicant who appears "almost qualified" cannot be rejected, absent a good explanation by the employer in its recruitment report (discussed below) that outlines why the skill at issue cannot be acquired during a reasonable period of on-the-job training.

Recruitment Report

The employer must prepare a recruitment report describing the recruitment steps and the results achieved.¹⁰ It must include the number of U.S. citizen or permanent resident applicants rejected and the lawful job-related reasons for rejection, as well as the number of candidates hired, if any, as a result of the labor market test.¹¹ The employer must justify in the recruitment report any special skills or experience required for the position. The employer must sign the recruitment report and maintain it—along with all evidence of recruitment undertaken in connection with the labor market test—for a period of five years from the date of filing the application for labor certification.¹²

If there is a lay-off by the employer in the geographic area where the foreign national is expected to work that involves the occupation for which labor certification is being sought, the employer must be able to document in the recruitment report that it has notified and contacted the laid-off U.S. workers or green card holders and made them aware of the job opportunity.¹³

Filing the Application for Labor Certification

The application for labor certification (Form ETA 9089) is filed alone, without the recruitment report or any other evidence of the labor market test.¹⁴ The application may be filed either electronically or by mail, although those filed electronically will be processed more quickly than those submitted by mail.

⁹20 C.F.R. § 656.17(g)(2).

¹⁰20 C.F.R. § 656.17(g)(1).

¹¹20 C.F.R. § 656.17(g)(1).

¹²20 C.F.R. § 656.10(f), § 656.17(e)(1).

¹³20 C.F.R. § 656.17(k)(1).

¹⁴20 C.F.R. § 656.17(a)(3).

DOL may select “problem” applications as well as applications chosen randomly for an audit.¹⁵ If a case is audited, the employer will be notified and required to submit any requested documentation within 30 days. After review of the documentation, DOL may approve or deny the case or request further information. In audited cases, DOL may order the employer to conduct “supervised recruitment” for an individual case or for any future filings for up to two years.

Although DOL audit authority ends when a labor certification application is granted, DOL maintains indefinite authority to revoke a labor certification for any ground that would have resulted in a denial of the labor certification application had it been known. Further, a labor certification application may be invalidated by the Department of Homeland Security or the Department of State upon a finding of fraud or willful misrepresentation in the labor certification application.

If the prospective employer identifies U.S. applicants who meet the minimum qualifications for the position or if the DOL determines that the employment of the foreign national would adversely affect the wages or working conditions of U.S. workers whom are similarly employed, the DOL will deny the application for labor certification.¹⁶

Schedule A

DOL regulations “pre-certify” certain occupations that have insufficient qualified U.S. workers whose wages and working conditions will not be adversely affected by the hiring of foreign nationals.¹⁷ Employers sponsoring foreign nationals in these occupations may petition the DHS directly for immigrant visa approvals without first filing an application for labor certification. The applicable occupations are presently organized into two groups and listed in Schedule A of the DOL regulations.¹⁸ Group I consists of physical therapists and professional nurses, while Group II covers foreign nationals with exceptional ability in the sciences or arts.

To qualify under Group II, foreign nationals must present evi-

¹⁵20 C.F.R. § 656.17(b)(3).

¹⁶20 C.F.R. § 656.24(b). Under the INA, two types of foreign nationals are subject to a special rule that can make it easier to secure approval of an Application for Labor Certification: members of the teaching profession and aliens with exceptional ability in the sciences or the arts. 8 U.S.C.A. § 1182(a)(5)(A)(ii). These foreign nationals are subject to “Special Handling” under DOL regulations and can obtain a DOL labor certification by showing that they are “more qualified” than any available U.S. applicants instead of documenting that there are no “minimally qualified” U.S. workers. 20 C.F.R. § 656.21a(a)(iii), (iv).

¹⁷20 C.F.R. § 656.10.

¹⁸20 C.F.R. § 656.10

dence of “widespread acclaim and international recognition” accorded them by “recognized experts in their field,” documentation of their work in the field during the past year, and a showing that their intended work in the United States will require exceptional ability.¹⁹ In addition, these foreign nationals must present at least two of the following seven types of documentation:

- (1) internationally recognized prizes or awards for excellence in the field;
- (2) membership in international associations requiring outstanding achievements;
- (3) published materials in professional publications relating to the foreign national’s work in the field;
- (4) participation as a judge of the work of others in the field;
- (5) original scientific or scholarly research contributions of major significance in the field;
- (6) authorship of published scientific or scholarly articles in the field; or
- (7) display of the foreign national’s work at artistic exhibitions in more than one country.²⁰

An employer petitioning for a Schedule A worker must apply for a labor certification by filing an application with the DHS but need not apply with the DOL.²¹ In this application, the employer must include a Form ETA 9089 along with a prevailing wage determination and evidence that notice of filing the labor certification was provided to the bargaining representative or to the employer’s employees directly.²² However, such employers are not required to otherwise test the labor market.

§ 12:31 Additional considerations regarding employment-based petitions for permanent residence

Research References

West’s Key Number Digest, Aliens ⇨44, 51.5

Alien’s entitlement to sixth-preference classification under sec. 203(a)(6) of

Immigration and Nationality Act of 1952 (8 U.S.C.A. sec. 1153(a)(6)), where labor certification has been granted, 80 A.L.R. Fed. 676

Am. Jur. Pleading and Practice Forms, Aliens and Citizens §§ 6, 7, 18

Concurrent Filing

Since July 2002, the DHS has permitted the concurrent filing of a Form I-140 employment-based immigrant visa petition and a Form

¹⁹20 C.F.R. § 656.22(d).

²⁰20 C.F.R. § 656.22(d).

²¹20 C.F.R. § 656.15(a).

²²20 C.F.R. § 656.15(b).

I-485 application to adjust status to that of permanent resident so long as an immigrant visa is immediately available.¹ The concurrent filing rule only applies, however, to those foreign nationals who are attempting to immigrate under the first three employment-based preference categories; fourth-preference religious workers and fifth-preference investors are excluded from using the concurrent filing rule.² This procedure represents an attempt by the DHS to improve efficiency and customer service, and it features the added advantage of allowing applicants to obtain work authorization for themselves and their immediate family members much more quickly than under the traditional system.

Permanent Residence Portability

A foreign national whose unadjudicated Form I-485 application to adjust status to that of permanent resident has been pending for 180 days or more may change jobs and/or employers without affecting the validity of the underlying Form I-140 employment-based immigrant visa petition or the underlying DOL labor certification so long as the new job is in the “same or a similar occupational classification” as the job for which the I-140 petition and application for labor certification was filed.³

Affidavit of Support

In certain employment-based cases, an affidavit of support form must be submitted by the foreign national at the time he or she files a Form I-485 application to adjust status to that of permanent resident. This affidavit—submitted to show that the sponsored person (beneficiary) is not likely to become a “public charge” in the United States—is only required where the beneficiary is related to an owner of the sponsoring employer and where the latter owns at least 5% of the for-profit entity. In these circumstances, the sponsoring relative must file a Form I-864.⁴ This form demonstrates that he or she is a U.S. citizen or lawful permanent resident domiciled in the United States who can maintain an income of at least 125% of the federal poverty guidelines issued by the U.S. Department of

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¹67 Fed. Reg. 49561 (July 31, 2002); 79 Interpreter Releases 1158 (Aug. 5, 2002). The rule also allows one to file a Form I-485 application to adjust status to that of permanent resident if a Form I-140 employment-based immigrant visa petition was pending as of July 31, 2002.

²67 Fed. Reg. 49561 (July 31, 2002); 79 Interpreter Releases 1158 (Aug. 5, 2002). The rule also allows one to file a Form I-485 application to adjust status to that of permanent resident if a Form I-140 employment-based immigrant visa petition was pending as of July 31, 2002.

³8 U.S.C.A. § 1154(j); 8 U.S.C.A. § 1182(a)(5)(A)(iv).

⁴The Form I-864 is accessible at <http://uscis.gov/graphics/formsfee/forms/index.htm>.

Health and Human Services. The affidavit makes the sponsoring relative liable to reimburse the government for any public benefits paid to the foreign national beneficiary during the period of the obligation. For the obligation to terminate, the beneficiary must die, become a U.S. citizen, or be credited for 40 quarters of work over 10 years, whichever occurs first.⁵

⁵8 U.S.C.A. § 1183A.