

January 1990

## Business Immigration

Elsbeth W. Gordon

Follow this and additional works at: <https://scholarship.law.ufl.edu/fjil>

---

### Recommended Citation

Gordon, Elsbeth W. (1990) "Business Immigration," *Florida Journal of International Law*: Vol. 5: Iss. 2, Article 9.

Available at: <https://scholarship.law.ufl.edu/fjil/vol5/iss2/9>

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Journal of International Law by an authorized editor of UF Law Scholarship Repository. For more information, please contact [kaleita@law.ufl.edu](mailto:kaleita@law.ufl.edu).

## BUSINESS IMMIGRATION\* \*\*

|      |   |     |
|------|---|-----|
| I.   | INTRODUCTION . . . . .  | 283 |
| II.  | BACKGROUND . . . . .  | 283 |
| III. | TEMPORARY EMPLOYMENT VS. PERMANENT<br>EMPLOYMENT . . . . .                                      | 284 |
|      | A. <i>Procedures and Benefits for Obtaining Temporary<br/>Work Visas</i> . . . . .              | 284 |
|      | 1. L-1: Temporary Visa for Intracompany Transferee . . . . .                                    | 285 |
|      | 2. H-1: Temporary Work Visa for Foreign Persons of<br>Distinguished Merit and Ability . . . . . | 286 |
|      | 3. H-2: Visa for a Temporary Worker . . . . .   | 287 |
|      | B. <i>Procedures and Benefits for Obtaining a Permanent<br/>Work Visa</i> . . . . .             | 288 |
|      | 1. Labor Certification . . . . .  | 289 |
|      | 2. Preference Petition . . . . .  | 289 |
|      | 3. Permanent Residence . . . . .  | 290 |
| IV.  | FORESEEN CHANGES . . . . .  | 291 |
| V.   | CONCLUSION . . . . .  | 292 |

## I. INTRODUCTION

Complex and restrictive immigration laws inhibit United States businesses from hiring foreign persons. However, the rapid growth and expansion of international trade compels United States businesses to hire skilled foreign persons in order to compete in the international market.<sup>1</sup> Therefore, United States businesses should have a basic knowledge of the legal procedures and the benefits of seeking temporary employment visas versus permanent employment visas for prospective foreign employees under the Immigration and Nationality Act (INA).

## II. BACKGROUND

The United States has been “the land of unlimited possibilities” to immigrants since the turn of the century.<sup>2</sup> A fluctuating economy and

---

\*Editor’s Note: In December 1990, Congress updated the Immigration Statutes. Therefore, these changes should be taken into consideration when reading this article.

\*\*Won Best Comment Award for Fall 1990.

1. Foster & Karna, *Employment of Foreign Nationals: Immigration Law Issues*, 7 A.C.C.A. Dkt. 15 (1989).

2. L. GOLDBERGER, *LAND OF UNLIMITED POSSIBILITIES: OBSERVATIONS ON ECONOMIC LIFE IN THE UNITED STATES OF AMERICA* (1903).

a constant flow of immigrants forced Congress in 1952 to establish limitations on the number of foreign persons allowed to work in the United States.<sup>3</sup> Congress attempted to protect unemployed Americans and to ensure that the majority of job opportunities would first be available to American citizens.<sup>4</sup> The most recent legislation is the Immigration and Nationality Act (INA) which encompasses all past and current reforms within immigration law.<sup>5</sup> With respect to business immigration, INA imposes strict requirements on skills demonstrated by foreign persons seeking to work in the United States,<sup>6</sup> determines the length of time foreign persons may work in the United States,<sup>7</sup> and restricts the number of foreign persons allowed to work in the United States.<sup>8</sup> The length of time of employment, however, is the crucial issue, and is the question that should be examined first by United States businesses considering employment of foreign persons.

### III. TEMPORARY EMPLOYMENT VS. PERMANENT EMPLOYMENT

When employing foreign persons, United States businesses should first determine whether the employment should be temporary or permanent. INA labels foreign persons in temporary employment as nonimmigrants, and foreign persons in permanent positions as immigrants.<sup>9</sup> Therefore, before employing foreign persons, United States businesses should weigh the procedures and benefits of obtaining a temporary work visa versus the procedures and benefits of a permanent work visa.

#### A. *Procedures and Benefits for Obtaining Temporary Work Visas*

When a United States business needs a foreign employee to fill an immediate position, the business should apply for a temporary work visa. INA allows countless numbers of temporary work visas in every year.<sup>10</sup> Under the best circumstances the process to obtain a temporary work visa takes between six to eight weeks,<sup>11</sup> a much shorter time

---

3. P. ZULKIE, IMMIGRATION COMPLIANCE IN EMPLOYMENT AND BUSINESS 5 (1987).

4. *Id.*

5. Immigration and Nationality Act of 1952, 66 Stat. 163 (1952) (amended 1989), 8 U.S.C. § 1101-1525 (1989).

6. INA § 101; 8 U.S.C. § 1101 (1989).

7. INA § 221(a); 8 U.S.C. § 1201(a) (1989).

8. INA § 201-210A; 8 U.S.C. § 1151-1161 (1989).

9. INA § 101(a)(15); 8 U.S.C. § 1101(a)(15) (1989).

10. INA § 214; 8 U.S.C. § 1184 (1989).

11. Foster & Karna, *supra* note 1, at 2.

than it takes to obtain a permanent work visa.<sup>12</sup> Temporary work visas, however, expire at the end of five to six years regardless of whether the United States business still needs the foreign employee.<sup>13</sup> If the United States business foresees that a position requires a long-term employee, the business should consider obtaining a permanent work visa.

The main qualification required for obtaining a temporary work visa is proof of having a permanent residence in a foreign country with no intention of abandoning that residence.<sup>14</sup> The residence qualification assures INA that the foreign person intends to return<sup>15</sup> to their country of origin at the expiration of their temporary work visa.<sup>16</sup>

Although INA provides many different types of temporary work visas,<sup>17</sup> there are three types most suitable for United States businesses.<sup>18</sup> These three visas may be obtained at the United States Consulate where the foreign person resides.<sup>19</sup> The United States business should work directly with the foreign person<sup>20</sup> to ensure that the foreign person has all the correct paper work before approaching the United States Consulate for the visa.<sup>21</sup> The three types of temporary work visas are:

1. L-1: Temporary Visa for Intracompany Transferee.<sup>22</sup>

United States businesses with foreign affiliates or subsidiaries

12. The process for a permanent work visa could take more than four years to obtain. See D. GRUNBLATT, *Obtaining Permanent Residence Through Employment-Related Categories: Basic Procedures*, in LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES, BASIC IMMIGRATION LAW No. 373, 8 (1989).

13. R. STORETTE, *U.S. Immigration and Nationality Law: Nonimmigrant Employment and U.S. Permanent Residence*, in LITIGATION AND ADMINISTRATION PRACTICE COURSE HANDBOOK SERIES, BASIC IMMIGRATION LAW No. 373, 1-2 (1989).

14. Immigration officials are legally prohibited from issuing any type of temporary visa if the immigration official believes that the foreign person intends to remain permanently in the United States. 22 C.F.R. § 41.55 (1986).

15. INA § 101(a)(15)(H)(i); 8 U.S.C. § 1101(a)(15)(H)(i) (1989).

16. E. RUBIN, *OVERVIEW OF BUSINESS IMMIGRATION LAW* 244 (1990).

17. COMM. ON THE JUDICIARY ON IMMIGRATION, 101ST CONG., 1ST SESS., IMMIGRATION AND NATIONALITY ACT (as amended through Jan. 1, 1989) with notes and related laws 386-90 (Comm. Print Apr. 1989) [hereinafter COMM. ON THE JUDICIARY].

18. Foster & Karna, *supra* note 1, at 3-5.

19. In the following text is a complete list of all Consular Offices issuing visas, see COMM. ON THE JUDICIARY, *supra* note 17, at 394-97.

20. Foreign persons will not be able to obtain a work visa without the sponsorship of a United States business. See GRUNBLATT, *supra* note 12, at 2.

21. Consulates will refuse to process an application without a complete set of documents. *Id.* at 12.

22. INA § 101(a)(15)(L); 8 U.S.C. § 1101(a)(15)(L) (1989).

should utilize this type of temporary visa.<sup>23</sup> The L-1 contains two requirements: 1) the business must prove that the foreign person has been employed by the business in its foreign affiliate or subsidiary for the year immediately preceding the transfer to the same business within the United States,<sup>24</sup> and 2) the business must prove that the foreign person will be employed in a managerial or executive position<sup>25</sup> that involves specialized knowledge.<sup>26</sup> The L-1 permits a foreign person to work in the United States for three years with the possibility of an extension for two to three additional years.<sup>27</sup> If a business foresees a need for a particular foreign person in its United States office, the business might consider hiring the foreign person first for one year in one of its foreign affiliates or subsidiary and then applying for the L-1 intracompany transfer.

## 2. H-1: Temporary Work Visa for Foreign Persons of Distinguished Merit and Ability.<sup>28</sup>

The H-1 work visa provides United States businesses with a relatively quick<sup>29</sup> method of bringing in professional<sup>30</sup> foreign persons. However, United States businesses must prove that the foreign person is a "professional"<sup>31</sup> with at least the equivalent of a United States four-year university degree<sup>32</sup> and assure immigration officials that the foreign person's profession is essential to the position in the United States business.<sup>33</sup> United States courts rarely substitute experience

23. United States businesses without foreign ties could utilize the L-1 visa by incorporating in a foreign country and employing a foreign person within that country for a year on salary. This could be costly, yet it could be beneficial to a small United States business that wants to develop ties in a foreign country.

24. INA § 101(a)(15)(L); 8 U.S.C. § 1101(a)(15)(L) (1989).

25. Words defined in 8 C.F.R. § 214(2)(L)(1)(ii) (1986).

26. INA § 101(a)(15)(L); 8 U.S.C. § 1101(a)(15)(L) (1989).

27. R. STORETTE, *supra* note 13, at 1.

28. INA § 101(a)(15)(H)(i); 8 U.S.C. § 1101(a)(15)(H)(i) (1989).

29. Quick means a minimum of six to eight weeks. *See Foster & Karna, supra* note 1, at 2.

30. Distinguished merit and ability has been interpreted to mean a professional with a degree. *See id.* at 4.

31. "The term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, or seminaries." INA § 101(a)(32); 8 U.S.C. § 1101(a)(32) (1989).

32. *Matter of Bedi*, 11 I&N Dec. 802 (engineer declared not a professional without a degree); *Matter of Delis*, 11 I&N Dec. 860 (teacher declared not a professional without a degree).

33. *Foster & Karna, supra* note 1, at 4.

for formal education.<sup>34</sup> Diplomas provide the best documentation for proving professionalism.<sup>35</sup> The H-1 work visa permits the foreign person to work in the U.S. for three years with the possibility of an extension of two additional years.<sup>36</sup>

### 3. H-2: Visa for a Temporary Worker.<sup>37</sup>

A United States business that immediately needs skilled<sup>38</sup> or unskilled workers may apply for the H-2 visa.<sup>39</sup> A "labor certification" must be obtained from the Department of Labor (DOL) before applying for the H-2 visa.<sup>40</sup> The DOL requires that the United States business first attempt to obtain unemployed Americans for the temporary positions before filling the positions with foreign persons.<sup>41</sup> Prior to the Immigration Reform and Control Act of 1986 (IRCA), unskilled foreign persons had worked for less than minimum wage and thereby took jobs away from Americans who were working within the legitimate system of minimum wages.<sup>42</sup> Accordingly, IRCA imposes heavy sanctions on any United States business that violates the H-2 visa requirements.<sup>43</sup> The H-2 visa permits a foreign person to work in the United

34. Two categories of exceptions are: "[T]hose rare instances where individuals without the normal academic qualifications required, manage through extraordinary personal ability, to occupy clearly professional positions, usually after completion of virtually all normal coursework required, but lacking a corresponding degree, and directed experience and specialized non-institutional instruction leading to professional qualification." Matter of Portugues Do Atlantico Information Bureau, I.D. #2982 (noted in GRUNBLATT, *supra* note 12, at 5).

35. See *supra* note 32 and accompanying text.

36. R. STORETTE, *supra* note 13, at 2.

37. INA § 101(a)(15)(H)(ii); 8 U.S.C. § 1101(a)(15)(H)(ii) (1989).

38. *Id.*

39. Skilled, meaning that the foreign person does not qualify as a professional as required under the H-1 category.

40. Foster & Karna, *supra* note 1, at 4.

41. A foreign person is

ineligible to receive a visa unless the Secretary of Labor has certified to the Secretary of State and the Attorney General that 1) there are insufficient United States workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform work, and 2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

INA § 212(a)(14); 8 U.S.C. § 1182 (1989).

42. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603.

43. Employers and the foreign employee who violate IRCA will receive monetary sanctions and possibly imprisonment. See N. MONTWIELER, *THE IMMIGRATION REFORM LAW OF 1986* 31-45 (1987).

States for one year with the possibility of a extension for two additional years.<sup>44</sup> Businesses should depend on the H-2 visa as a last resort.<sup>45</sup> High unemployment of unskilled Americans severely limits the number of labor certifications the DOL grants.<sup>46</sup>

Although INA describes other visa forms available for temporary work visas,<sup>47</sup> the L-1, H-1, and H-2 are the three visas most often utilized by United States businesses who need to employ foreign persons.<sup>48</sup> However, many United States businesses need employees who will remain with the business for more than six years.<sup>49</sup> Therefore, the business will have to take the more difficult route of obtaining a permanent work visa for the foreign person.<sup>50</sup>

### B. *Procedures and Benefits for Obtaining a Permanent Work Visa*

Permanent visas allow a business to employ a foreign person for an unlimited period of time.<sup>51</sup> However, the process is lengthy and complicated.<sup>52</sup> INA sets a quota of 270,000 permanent visas issued a year,<sup>53</sup> and the majority of those visas go to relatives of American citizens.<sup>54</sup> The United States business should help the foreign person apply for a permanent visa only if the business positively needs a foreign person for specific, long-term employment.<sup>55</sup> Otherwise a temporary visa would be more practical and more realistic.<sup>56</sup> The process of obtaining a permanent visa consists of three applications: 1) an application for labor certification, 2) a preference petition based on an offer of permanent, full-time employment, and 3) an application for permanent residence.<sup>57</sup>

---

44. R. STORETTE, *supra* note 13, at 2.

45. Foster & Karna, *supra* note 1, at 4.

46. V. BRIGGS, JR., *The Imperative of Immigration Reform*, in *ESSAYS ON LEGAL AND ILLEGAL IMMIGRATION* 64 (1986).

47. COMM. ON THE JUDICIARY, *supra* note 17, at 386-90.

48. Foster & Karna, *supra* note 1, at 3-5.

49. D. GRUNBLATT, *supra* note 12, at 8-9.

50. *Id.*

51. R. STORETTE, *supra* note 13, at 7.

52. D. GRUNBLATT, *supra* note 12.

53. INA § 201(a); 8 U.S.C. § 1151 (1989).

54. INA § 201(b); 8 U.S.C. § 1151(b) (1989).

55. Foster & Karna, *supra* note 1, at 2-3.

56. Realistic in the sense that there is not a limitation placed on the amount of temporary visas issued, whereas only a certain amount of permanent visas are allocated each year. *Id.*

57. R. STORETTE, *supra* note 13, at 6-7.

## 1. Labor Certification

The DOL controls the labor certification process for permanent work visas.<sup>58</sup> The United States business must assure DOL that there is not an unemployed American who can fulfill the position.<sup>59</sup> DOL requires businesses to advertise<sup>60</sup> in the United States for an American employee before attempting to acquire a permanent foreign employee.<sup>61</sup> Once the business has established that the position cannot be filled by an American and that the need exists for a foreign person,<sup>62</sup> the business then must file a preference petition.<sup>63</sup>

## 2. Preference Petition

The preference petition must include an offer of employment from the business and a description of the position.<sup>64</sup> The preference categories<sup>65</sup> described under INA designate the foreign person's pref-

58. 20 C.F.R. § 656 (1986).

59. This is the same requirement used in obtaining a H-2 temporary work visa. *See supra* note 41 and accompanying text.

60. To satisfy the DOL's requirement for advertising, a United States business must, "test the market by means of a recruitment campaign which consists of a three-day advertisement in a newspaper of local circulation, an internal job posting on the premises of the business and a local job order opened with the local state employment service." R. STORETTE, *supra* note 13, at 6.

61. The United States business must make a good faith showing of the unavailability of an American worker for the vacant position. The business cannot advertise the position with unduly restrictive job requirements that are not completely necessary for the job.

62. A labor certification was denied to a United States business that advertised for a Medical Chemistry Engineer fluent in Farsi because the United States business could not prove the necessity of having an employee that spoke Farsi. Matter of Moyammad Massaud Anvari, 87 I&N Dec. 695.

63. R. STORETTE, *supra* note 13, at 6.

64. *Id.* at 7.

65. The preference categories along with the percentage of visas allotted are:

- a) First preference: Unmarried sons and daughters of U.S. citizens: Not more than 20 percent of the overall annual limitation in any fiscal year.
- b) Second preference: Spouses and unmarried sons and daughters of aliens lawfully admitted for permanent residence: 26 percent of the overall limitation, plus any not required for first preference.
- c) Third preference: Members of the professions and scientists and artists of exceptional ability: 10 percent of the overall limitation.
- d) Fourth preference: Married sons and daughters of U.S. citizens: 10 percent of the overall limitation, plus any not required for the first three preferences.
- e) Fifth preference: Brothers and sisters of U.S. citizens 21 years of age or over: 24 percent of the overall limitation, plus any not required for the first four preferences.



erence number.<sup>66</sup> Unfortunately for United States businesses, permanent work visas are given third and sixth preference.<sup>67</sup> The majority (eighty percent) of the 270,000 total permanent visas allotted annually are granted to the relatives of American citizens.<sup>68</sup> Only twenty percent of the annual 270,000 visas are granted in order to bring foreign persons to work in the United States.<sup>69</sup> Therefore, the first question the United States business should ask of foreign persons who want to work in the business is whether they have relatives living permanently in the United States.<sup>70</sup>

### 3. Permanent Residence

The final step after successfully completing<sup>71</sup> the labor certification and the preference petition is applying for permanent residence.<sup>72</sup> Under permanent residence, a foreign person will be granted a green card allowing the foreign person to work and live in the United States.<sup>73</sup> Although the process seems easy, it may take over five years.<sup>74</sup>

Permanent residence will ensure that a United States business acquires a long-term employee.<sup>75</sup> However, it will probably be a long time until the foreign person may start the job.<sup>76</sup> One solution a busi-

f) Sixth preference: Skilled and unskilled workers in occupations for which labor is in short supply in the United States: 10 percent of overall limitation. INA § 201-203; 8 U.S.C. § 1151-1153 (1989).

66. R. STORETTE, *supra* note 13, at 7.

67. INA § 201-203; 8 U.S.C. § 1151-1153 (1989).

68. Ironically enough, these relatives that are granted 80% of the visas will probably obtain jobs in the United States, which defeats the purpose of limiting permanent work visas, which purpose is purportedly to limit the number of foreign persons taking jobs away from American citizens. Protecting unemployed American citizens is also the purpose behind labor certification. 20 C.F.R. § 656 (1986).

69. Twenty percent of the maximum permanent visas (270,000) equals 54,000.

70. If the foreign person is related to an American citizen or a person with permanent residence, the United States business would be better advised to have the relative of the prospective employee file a preference petition, rather than have the foreign person's future employer file the petition. The time for processing the petition would be shorter. *See* D. GRUNBLATT, *supra* note 12, at 6.

71. Meaning the foreign person has been allotted a visa number. *See* COMM. ON THE JUDICIARY, *supra* note 17, at 371-73.

72. This entire procedure may be taken care of in the foreign person's country at the U.S. Consulate. *See id.*, at 394-97.

73. G. KAISER, *BEHIND THE GREEN CARD, HOW TO LEGALLY ENTER AND STAY IN THE U.S.A.* (1978).

74. R. STORETTE, *supra* note 13, at 7.

75. *Id.*

76. This is considering that it could take over four years to obtain a permanent work visa. *Id.*

ness might consider is to first bring the foreign person into the United States under a temporary work visa, making sure subsequently that the foreign person is the necessary employee ultimately needed by the United States business. Then, while the foreign employee is already working in the United States, the business could start the procedures for obtaining permanent residence.<sup>77</sup>

#### IV. FORESEEN CHANGES

Currently, the 101st Congress is considering changing the Immigration and Nationality Act.<sup>78</sup> The new proposals concentrate on allotting more visas to foreign employees who are needed by United States businesses.<sup>79</sup> Instead of allocating only twenty percent of the 270,000 permanent visas to foreign employees, the new proposals would increase the number of permanent work visas by fifty percent.<sup>80</sup> This step is long overdue.<sup>81</sup> With the enhancements to the European Community in 1992, the reversion of Hong Kong to China in 1997, and the rapid growth and competition of the Japanese and Korean industries, the United States can no longer ignore the necessity of acquiring intelligent, skilled, foreign persons in United States businesses.<sup>82</sup> Furthermore, the current process to obtain foreign employees takes too long and needs to be revamped.<sup>83</sup> The process under INA now takes a minimum of at least six to eight weeks to obtain a visa for a tempo-

---

77. Foreign persons may change a temporary visa to a permanent visa once they are in the United States. However, Immigration declares that it is illegal to use a temporary visa to get into the U.S. in order to apply for a permanent visa. Therefore, a foreign person and a United States business should stress that the job was temporary in the beginning, and that the foreign employee subsequently became indispensable compelling the United States business to make the foreign person a permanent offer of employment. There is a doctrine of dual intent, which is suppose to allow a foreign person to apply for a temporary visa with the intent to make the visa permanent once the foreign person is in the United States. The doctrine is a legal fiction. United States businesses should not be advised to apply for dual intent because the foreign person will most likely be turned down. See D. GRUNBLATT, *supra* note 12, at 22.

78. On October 25, 1990, House and Senate negotiators approved a complete revision of the immigration laws. The bill still needs to be approved by the full House and Senate. The intent of the bill is to, "grant entry to more skilled workers like scientists and engineers, who are expected to be in short supply in the next decade." See N.Y. Times, Oct. 26, 1990, at A1, col. 3.

79. F. BEAN, G. VERNEZ & C. KEELY, *OPENING AND CLOSING THE DOORS: EVALUATING IMMIGRATION REFORM AND CONTROL* 102-03 (1989).

80. The bill states that 140,000 visas would be issued to the Third and Sixth preference categories. *Id.* at 104.

81. Many revisions in the new immigration bill will eliminate sections that date back to the 1950s. See N.Y. Times, *supra* note 78.

82. F. BEAN, *supra* note 79, at 109-13.

83. N.Y. Times, *supra* note 78.

rary position and over five years for a permanent work visa.<sup>84</sup> INA, as currently written, ignores the demands that the United States businesses must face to stay competitive and is forcing United States businesses out of the international market.<sup>85</sup> Currently, INA concentrates on controlling illegal immigration. Primary consideration, however, should be given to foreign persons who are necessary to United States businesses.<sup>86</sup> Immigration law should concentrate on strengthening the position of United States businesses in world competition by allowing these businesses to expand their employee recruitment to the international arena and to permit free movement of needed employees regardless of nationality.

## V. CONCLUSION

The Immigration and Nationality Act (INA) splits employment of foreign persons into two categories, temporary and permanent. Where business immigration is crucial to the success of a United States business in competitive international trade, the United States business should be advised to first explore the INA regulations and the benefits of employing foreign persons who might qualify for a nonimmigrant temporary work visa. The process to obtain a permanent work visa is subject to strict quotas and a lengthy process that may take five or more years, and thus may not be in the best interest of a United States business who seeks skilled employees in order to stay in the current international market.

*Elsbeth W. Gordon*

---

84. Foster & Karna, *supra* note 1, at 2.

85. United States businesses engaged in trade could forfeit international contracts if the businesses are not able to immediately employ certain foreign persons that are a necessity to fulfilling contracts.

86. Visas could be designated to allow foreign persons to work in United States businesses for any period of time, and when the job need terminates, the visa becomes invalid and the foreign person would not be allowed to remain in the country and obtain another position which could be filled by an American citizen.