



Conference Session:
HOT TOPICS IN IMMIGRATION
FOR 2015
with
Wendy Hess

Thursday, April 16, 2015
10:30 to 11:30 AM

4/16: Hot Topics in Immigration for 2015

HOT TOPICS IN IMMIGRATION FOR 2015 with Wendy Hess

Date: Thursday, April 16, 2015

Time: 10:30 AM to 11:30 AM

SESSION DESCRIPTION:

This session will provide a very brief overview of the U.S. Immigration system, with an emphasis on:

- Nonimmigrant and Immigrant Employment-based visas for businesses and entrepreneurs, particularly H-1B, TN, NIW (National Interest Waiver) and EB5 (Investor) visas
- Family- based Immigrant visas (such as spousal visas)
- In the News: DACA (Deferred Action for Childhood Arrivals) and DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents) and their impact on individuals and their employers

ABOUT THE SPEAKER:



Wendy Castor Hess, a founding partner in the Immigration law firm of Goldblum & Hess, located in both Philadelphia and in Jenkintown, Pennsylvania, has been practicing immigration law for over 33 years. Ms. Hess currently serves as Chair of the Philadelphia Bar Association's Immigration Committee, and as Co-Chair of the Pennsylvania Bar Association's Immigration Committee. Ms. Hess also served as Chair of the Philadelphia Chapter of the American Immigration Lawyers Association (AILA) and as a member of the AILA U.S. Department of Labor Liaison Committee. Her practice focuses on representing entrepreneurs, employers and their employees, particularly in the medical, pharmaceutical, IT and university communities. Ms. Hess, who is fluent in Spanish, also represents individuals in family-based cases. She serves as counsel to the Mexican Consulate in Philadelphia and is listed in Best (Immigration) Lawyers in America (Best Lawyer of the Year 2014), Super Lawyers (Pennsylvania) and in The International Who's Who of Corporate Immigration Lawyers.

HOT TOPICS IN U.S. IMMIGRATION LAW FOR 2015

April 16, 2015

Group Legal Services Association's
Annual Educational Conference
Philadelphia, PA



Photo Credit: Claude Taylor

Wendy Castor Hess, Esq.

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Understanding Who Is Permitted To “Enter” The U.S.

- **Nonimmigrants**
- **Immigrants**
- **Refugees**
- **Asylees**



Understanding The Types of Cases:

Immigrants vs. Nonimmigrants

- **Within the “immigrant” category, there are essentially 4 categories:**
 1. Family based (includes VAWA)
 2. Employment-based
 3. Asylees/Refugees
 4. Diversity Lottery (DV)
- **Within the “nonimmigrant” category, there are numerous visa options, depending on the Foreign National’s intended purpose of travel**

Preliminary Analysis

1. How did the Foreign National enter the U.S.?
 - Visa vs. I-94 (or I-94W)
 - “EWI” – Entry Without Inspection
 - Refugee
 - Asylee
2. Is there a category – immigrant or nonimmigrant – in which a Foreign National may “fit”?
3. Is there any reason to preclude obtaining such visa/status?

U.S. Visa Stamp



Classification

Validity Dates

- Governs ability to enter the United States

The "Old" I-94 Card

Departure Number
742832036 01

U.S. IMMIGRATION
250 WAS

Immigration and
Naturalization Service

1-94
Departure Record

ADMITTED B-2
UNTIL _____ (CLASS)

Feb. 17, 2013

Aug. 16, 2013

14 Family Name
DOE

15 First (Given) Name
JOHN

16 Birth Date (Day Mo Yr)
16.04.62

17 Country of Citizenship
U.K.

Date of Arrival

Manner of Entry
(Visa Class)

Date Authorized
Stay Expires

- Governs ability to stay in the U.S.

Electronic I-94 Record

- April 2013, CBP started electronic rollout of Form I-94 automation for Foreign Nationals arriving by air or sea
- Paper Form I-94 still issued at land border ports of entry
- Electronic I-94 available at www.cbp.gov/I94

Electronic I-94 Record



U.S. Customs and Border Protection
Securing America's Borders

Get I-94 Number

I-94 FAQ

Admission (I-94) Number Retrieval

Admission (I-94) Record Number: 69000888062

Admit Until Date (MM/DD/YYYY): 10/10/2012

Details provided on Admission(I-94) form:

Family Name:	LI
First (Given) Name:	LYDIA
Birth Date (MM/DD/YYYY):	01/01/1990
Passport Number:	P123123213
Passport Country of Issuance:	Mexico
Date of Entry (MM/DD/YYYY):	04/11/2012
Class of Admission:	B1

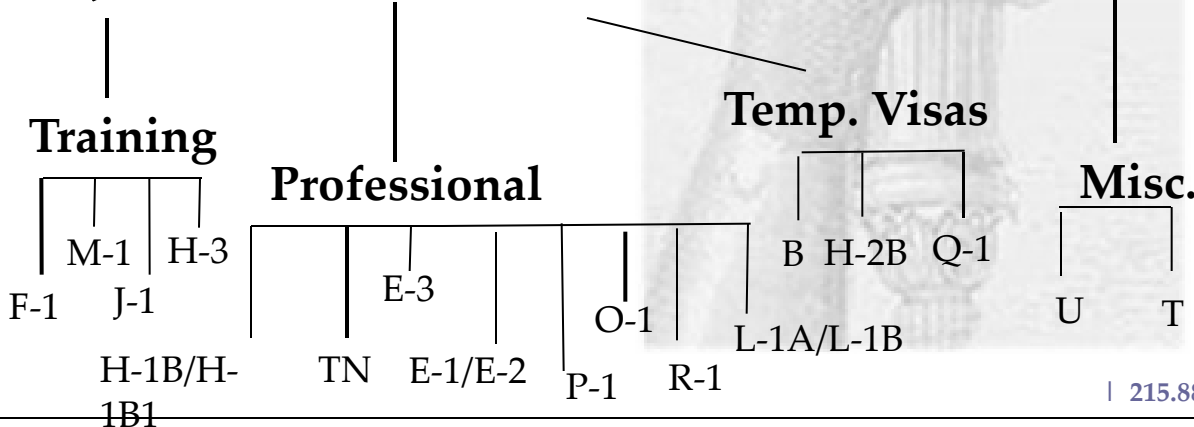
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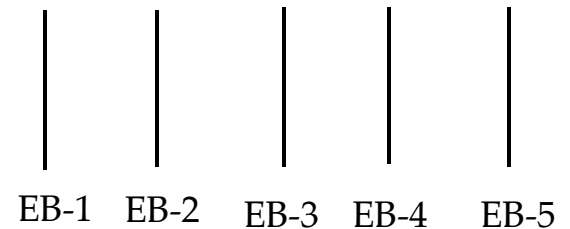
Two Arms of Employment-Based Immigration Law:



Nonimmigrant



Immigrant



Nonimmigrant Visa Overview

- **Visa Waiver Program (VWP)**
- **B-1:** Business Visitors
- **E-1:** Treaty Traders – Managers, Executives, Specialized Knowledge
- **E-2:** Treaty Investors – Managers, Executives, Specialized Knowledge
- **E-3:** Australians in Professional Specialty Occupations
- **F-1 / M-1:** Students
- **H-1B:** Professionals in Specialty Occupations
- **H-1B1:** Professionals from Singapore/Chile in Specialty Occupations (Free Trade Agreement)
- **H-2B:** Non-professional seasonal, peakload, and project related employees
- **H-3:** Trainees
- **J-1:** Exchange Visitors & Trainees
- **L-1A** (Managers / Executives)/ **L-1B** (Specialized Knowledge): Intracompany Transferees
- **O-1:** Scientists & Other Aliens of Extraordinary Ability
- **P:** Internationally recognized performers and athletes
- **Q-1:** Cultural Exchange Visitors
- **R-1:** Religious Workers
- **S-1:** Suppliers of Critical Information Relating to Criminal Organizations or Terrorism
- **T-1:** Victims of Trafficking in Persons
- **TN:** Canadian and Mexican Professionals in Specialty Occupations
- **U-1:** Victims of Crime

The Visa Waiver Program (“VWP”)

- The VWP was established in 1986 to promote better relations with United States allies by eliminating unnecessary barriers to travel. The VWP enables nationals of these certain countries (countries with a lower incidence of illegal immigration to the United States) to travel to the United States for business for stays of 90 days or less. Please note, however, that this stay **cannot** be extended. The Visa Waiver Program participating countries are:

Andorra	Hungary	New Zealand
Australia	Iceland	Norway
Austria	Ireland	Portugal
Belgium	Italy	San Marino
Brunei	Japan	Singapore
Czech Republic	Latvia	Slovakia
Denmark	Liechtenstein	Slovenia
Estonia	Lithuania	South Korea
Finland	Luxembourg	Spain
France	Malta	Sweden
Germany	Monaco	Switzerland
Greece	the Netherlands	United Kingdom

Since December 1, 2008, all VWP applicants must complete an On-line registration (ESTA).

Visas For Business Visitor: B-1

9 FAM 41.31

Versatile visa for Business Meetings & Transactions

- Maximum stay: 6 months
- Requires 100% nonimmigrant intent
- Apply directly at the consulate abroad
- Additional permissible activities include (but are not limited to):
 - Sales initiatives
 - Installation / service related to contractual agreement
 - Prospective investment activities
 - Short stay professional work on behalf of foreign entity (B-1 in lieu of H-1B)
 - Short stay training for foreign workers (B-1 in lieu of H-3)

Visas For Treaty Countries

8 CFR § 214.2(e)

E-1: “Treaty Trader”

- The applicant must be a national of a treaty country (underlying treaty of trade or commerce with the U.S.) and hold a supervisory / executive or essential skills position
- The trading firm must have the nationality of the treaty country
- The international trade must be “substantial”
- The trade must be principally between the U.S. and the treaty country

E-2: “Treaty Investor”

- The applicant must be a national of a treaty country and if not the investor, must hold a supervisory / executive or essential skills position
- The U.S. entity must have the nationality of the treaty country (at least 50% owned by treaty national)
- The investment must be “substantial”, “real”, and “not marginal”

- **Can apply directly at Consulate / Embassy**
- **100% nonimmigrant intent**
- **Available for up to 5 years and renewable indefinitely**
- **Spouses can obtain employment authorization**

Treaty Traders and Investors

(E-1 & E-2 Countries)

Albania (just E-2), Argentina, Armenia (just E-2), Australia, Austria, Azerbaijan (just E-2), Bahrain (just E-2), Bangladesh (just E-2), Belgium, Bolivia, Bosnia and Herzegovina, Brunei (just E-1), Bulgaria (just E-2), Cameroon (just E-2), Canada, Chile, Colombia, Congo (Brazzaville & Kinshasa – just E-2), Costa Rica, Croatia, Czech Republic (just E-2), Denmark, Ecuador (just E-2), Egypt (just E-2), Estonia, Ethiopia, Finland, France, Georgia (just E-2), Germany, Greece (just E-1), Grenada (just E-2), Honduras, **Iran**, Ireland, **Israel (just E-1)**, Italy, Jamaica (just E-2), Japan, Jordan, Kazakhstan (just E-2), Korea (South), Kosovo, Kyrgyzstan (just E-2), Latvia, Liberia, Lithuania (just E-2), Luxembourg, Macedonia, Mexico, Moldova (just E-2), Mongolia (just E-2), Montenegro, Morocco (just E-2), Netherlands, Norway, Oman, **Pakistan**, Panama (just E-2), Paraguay, Philippines, Poland, Romania (just E-2), Senegal (just E-2), Serbia, Singapore, Slovak Republic (just E-2), Slovenia, Spain, Sri Lanka (just E-2), Suriname, Sweden, Switzerland, Taiwan, Thailand, Togo, Trinidad & Tobago (just E-2), Tunisia (just E-2), Turkey, Ukraine (just E-2), United Kingdom, and Yugoslavia

Free Trade Visa for Professional Specialty

Occupations: E-3

9 FAM 41.51

- **E-3 Visa:** For Nationals of **Australia** only
 - 10,500 annually
 - Must have a university degree or its equivalent in a “specialty occupation” and be sponsored by a business in the United States
 - Initial application is filed with local **U.S. Embassy or Consulate General**
 - Spouses of E-3 visa holders are able to work
 - E-3 holders are permitted an initial stay of two years, and indefinite extensions of two years



Visas for Students (F-1)

Working In F-1 Student Status: CPT or OPT

8 CFR § 214.2(f)

Curricular Practical Training (CPT):

- What evidences employment authorization?
Form I-20 issued by Designated School Official (DSO)
- Who is eligible?
F-1 student in required internship or practicum with school sponsored corporate partner
- Duration: Up to 364 days (Full-Time). If more than 364 days on CPT, may lose OPT eligibility after graduation.

Optional/Practical Training (OPT):

- What evidences employment authorization?
Employment Authorization Document (EAD)
- Who is eligible?
All F-1 students after completion of degree
Must be directly related to major
Cannot begin until date indicated on EAD (and card in hand)

OPT REGULATIONS

OPT Filing Deadlines:

- Up to 90 days before program end date and up to 60 days after program end date (but must be within 30 days of the date entered in SEVIS by DSO)

H-1B Cap Gap: Automatic Extension of Status & Work Authorization if:

- Student on post-completion OPT & maintaining status
- H-1B Cap reached & H-1B Petition has been filed
- If H-1B Petition selected & approved = automatic extension
- If H-1B Petition NOT selected = no automatic extension

EXTENSIONS FOR “STEM” DEGREES

(STEM = Science, Technology, Engineering, and Math)

17-month Post-Completion OPT Extension:

- Must have received a STEM degree
- Employer must be enrolled in E-Verify
- Extension must be timely filed (at least 90 days before current post-completion OPT expires)
- Reporting obligation to DSO every 6 months

Unemployment While on OPT:

- CANNOT be unemployed for more than 90 days (or 120 days for STEM students who receive 17-month extension)

“EAD” or “OPT”



- Authorizes Employment
OPT = 1 year (in most instances, unless STEM)

Visas For Professional Specialty Occupations: H-1B

8 CFR § 214.2(h)

Four Part Test:

1. Foreign National has a U.S. baccalaureate degree or a foreign degree that is equivalent to a U.S. baccalaureate degree in field of study related to intended position;
2. Position requires a degree in a specific field of study;
3. Position pays the “prevailing wage” for the occupation in the metropolitan area as determined by the Department of Labor (“DOL”); AND
4. There is an “H-1B number” available (65,000 for those with a 4-year degree or its equivalent and 20,000 for those with a U.S. master’s degree available annually). Certain sponsors are exempt from this cap

- 6 year maximum period of stay (can be extended when Foreign National has commenced Green Card process - AC 21)
- Carries dual intent
- Spouses are NOT permitted to work
- H-1B status is hard to obtain for those with associate’s degree unless the Foreign National has at least 6 years of progressive experience in the same field
- **CAUTION: Export Control Licenses needed for some occupations**

The H-1B Problem

Lack of availability for “cap subject” positions

- 1) **IMPORTANT:** Can (and should) file for an October 1st cap subject H-1B six months before fiscal year commences (April 1st) in order to secure a cap subject number
- 2) **POTENTIAL PROBLEM:** For FY 2015 the H-1B visas for baccalaureate degrees and for U.S. master’s degrees visas ran out by April 7, 2014 – 172,500 H-1B Petitions were received by USCIS.

H-1B “Retrogression Relief”

(Or reason to swiftly start the “Green Card” process)

If H-1B employee has:

- Completed first two steps of the “green card” process (PERM and I-140 petition) and
- Has reached the permitted “maximum” 6 years in H-1B status and
- Cannot apply for permanent residence due to retrogression (typically Indian and Chinese nationals are most impacted)

Then:

Such H-1B employee is eligible for a 3 year extension of his/her H-1B – or at least 9 years in H-1B status under the American Competitiveness in the Twenty-First Century Act of 2000 (“AC 21”) (Pub. L. 106-313)

Alternatively, if H-1B employee has a “PERM” Application pending with the U.S. Department of Labor for over 365 days, he/she is eligible for a 1 year extension of his/her H-1B status under AC 21

H-4 Employment Authorization Document

New Development!

On February 24, 2015, USCIS announced that Applications for Employment Authorization (Form I-765) for certain H-4 dependent spouse will be accepted **beginning May 26, 2015**, if the following requirements are met:

- 1)The H-1B nonimmigrant spouse must be the principal beneficiary of an approved I-140 Immigrant Petition; or
- 2)The H-1B nonimmigrant spouse must have been granted H-1B status beyond the six year limit based on the American Competitiveness in the Twenty-first Century Act of 2000.

Visas For Professional Specialty Occupations:

H-1B1 FTA

9 FAM 41.53



- Special visa based on bilateral free trade agreements between the U.S. and **Chile** and the U.S. and **Singapore**
- Available in 18 month increments
- Theoretically renewable indefinitely
- Carries 100% nonimmigrant intent
- Spouses are not permitted to work
- Apply directly at the Consulate / Embassy

Visas For Intracompany Transferees

8 CFR § 214.2(l)

- **L-1A: Intracompany Managers / Executives**
 - Maximum Stay: 7 years
- **L-1B: Intracompany Specialized Knowledge Employees**
 - Maximum Stay: 5 years

Requirements:

- **Qualifying Corporate Relationship:** United States entity and foreign entity must share qualifying relationship (must have at least 50% common ownership)
- **Qualifying 1 year of Employment:** must have been employed by overseas entity for at least one year during past three years
- **Qualifying Type of Employment:** Managers, Executives (L-1A) or those with “specialized knowledge” (L-1B)

Major Advantages:

- Spouses of L visa holders are permitted to obtain employment authorization
- L-1A Foreign Nationals have “fast track” to green card

Extraordinary Ability Foreign Nationals: O-1

8 C.F.R. § 214.2(o)

- Obtained by those with extraordinary credentials, who have **“sustained national or international acclaim,”** and will be employed in a capacity requiring same
- Less stringent standard for those working in the arts as opposed to the sciences
- Often held by those subject to J visa’s two year home residency requirement
- Can renew indefinitely
- O visa is normally granted for the length of either a specific project or, in terms of a salaried employee, for an initial three-year period
- Extensions granted in 1 year increments
- Often a vehicle for subsequent pursuit of permanent residence via I-140 EB-1 Petition for Alien of Extraordinary Ability

Treaty Nationals (TN)- Canada/Mexico

8 CFR § 214.6

Position must be **listed** in the NAFTA schedule.

Includes: University Teacher, Scientific Technician/Technologist, Engineer, Computer Systems Analyst, Nutritionist, Biochemist, Biologist, Chemist, Geochemist & Pharmacologist.

ADVANTAGE:

- Fast: Canadians apply at border, Mexicans apply at U.S. Embassy/Consulate General.
- Inexpensive.
- Unlike H-1Bs – not cap subject.
- Available in 3 year increments.



DISADVANTAGE:

- 100% non-immigrant intent.
- Spouses not permitted to work.

Other Nonimmigrant Working Visas

- **H-2B**
 - Available for seasonal, peak load, and “project” positions.
 - Requires nonimmigrant intent- cannot be a vehicle for the “green card”
- **H-3**
 - Available for trainees (except for graduate medical education or training)
- **J-1**
 - Available to exchange visitors, including exchange students, au pairs, trainees/interns, graduate medical trainees, students, professors and short-term scholars
- **P-1/2/3**
 - For athletes and performers
- **Q-1**
 - Cultural Exchange Visa (“Disney World,” etc.)

Other Nonimmigrant Working Visas

- **R-1**
 - Obtainable for up to 5 years
 - Intended for ministers, pastors, and “religious” workers whose work utilizes knowledge of/teaching of religion [high denial rate]
 - Must be offered a position for a bona fide, tax-exempt, non-profit Religious Institution
 - Applicant must be a member of that religious denomination for at least 2 years prior to filing of petition
- **S-1**
 - For suppliers of critical information relating to criminal organizations or terrorism
- **T-1**
 - For victims of trafficking in persons
- **U-1**
 - For victims of a crime who assist the U.S. government in the investigation or prosecution of same

Immigrant Visas: the “Green Card”

(or “Lawful Permanent Resident Status”)

- For Foreign Nationals who intend to reside permanently in the United States
- Obtained through employment or family
- Most categories are subject to quotas and the Visa Bulletin (http://travel.state.gov/visa/bulletin/bulletin_1360.html)



General Process for Obtaining a “Green Card” – LPR Status Through Employment

Foreign National obtains Nonimmigrant Working Visa



Employer files PERM Application with the U.S. Department of Labor



Employer files I-140 Immigrant Petition
with U.S. Citizenship & Immigration Services (“USCIS”)



If the Foreign National is within the U.S., the Foreign National files I-485 Application
to Adjust Status with USCIS

(If outside the U.S., the Foreign National must Consular Process)

*Requires current “Priority Date” and may take years -- many years ---
after approval of I-140 Petition!*



Foreign National secures “Green Card” - Lawful Permanent Resident status (“LPR”)

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Employment-Based Choices

Options **NOT** requiring PERM or any recruitment

EB1: File I-140 Petition for:

Extraordinary Ability Foreign Nationals (8 C.F.R. §204.5(h))

Outstanding Researchers / Professors (8 C.F.R. §204.5(i))

EB2: File I-140 Petition for:

National Interest Waiver (8 C.F.R. §204.5(k)(4)(ii))

- See also: *In re New York State Department of Transportation*, 22 I.&N. Dec. 215 (1998)

Schedule A Group II:

Scientists of Exceptional Ability (20 C.F.R. §656.5(b))

Options requiring PERM or any recruitment

EB2: Foreign National with Advanced Degree & Offered Position requiring same (8 C.F.R. §204.5(k))

EB3: Foreign National with Bachelor's Degree, Associate's Degree, or two years of experience & Offered Position requiring same (8 C.F.R. §204.5(l))

What is a “Priority Date”?

- The “Priority Date” is the cutoff date which determines a given individual’s eligibility to seek permanent resident status, based upon the numerical quota for that particular category
- For family-based cases, the Priority Date is the filing date of the Immigrant Visa Petition (Form I-130)
- For employment-based cases, the Priority Date is the filing date of either the PERM application (with the U.S. DOL) or the I-140 Immigrant Petition (with USCIS), depending upon the classification sought
- If the Priority Date is before the date listed in current U.S. Department of State Visa Bulletin, the Foreign National is eligible to “Adjust Status” (if in U.S.) or process an immigrant visa abroad (“Consular Processing”)

Excerpts from Visa Bulletin – Employment

Employment-Based	All Chargeability Areas Except Those Listed	CHINA	INDIA	MEXICO
1 st EB-1	Current	Current	Current	Current
2 nd EB-2	Current	22 NOV 05	22 JAN 05	Current
3 rd EB-3	01 JUN 02	22 FEB 02	15 APR 01	01 MAY 02

October
2009

Employment-Based	All Chargeability Areas Except Those Listed	CHINA	INDIA	MEXICO
1 st EB-1	Current	Current	Current	Current
2 nd EB-2	Current	15 APR 07	15 APR 07	Current
3 rd EB-3	22 NOV 05	15 JUL 04	08 JUL 02	22 NOV 05

September
2011

Employment-Based	All Chargeability Areas Except Those Listed	CHINA	INDIA	MEXICO
1 st EB-1	Current	Current	Current	Current
2 nd EB-2	Current	01 APR 11	01 SEP 07	Current
3 rd EB-3	01 OCT 14	01 JAN 11	08 JAN 04	01 OCT 14

April
2015

The “Green Card” Three-Step Dance

Depending on the Employment Based route that is pursued and if the Foreign National is impacted by retrogression, this is either a 1, 2 or 3 step process:

Step 1: The Employer files the “**PERM**” application with the United States Department of Labor (“DOL”) (if PERM is required)

If no retrogression, can file steps 2 & 3 at the same time

Step 2: The Employer files the **I-140** Immigrant Petition with the United States Citizenship and Immigration Service (“USCIS”)

Step 3: The Foreign National files his/her and his/her family’s **I-485** Applications for Permanent Residence, **I-765** Application for Employment Authorization, and **I-131** Application for Advance Parole directly with the U.S.C.I.S.

EB-1 Foreign Nationals of Extraordinary Ability

8 C.F.R. §204.5(h)

Comments:

- If no visa retrogression – 1 step process
- PERM Application Step NOT required
- **Foreign National can self-petition**
- Beware of Kazarian v. USCIS, 596 F.3d 1115, C.A. 9 (Cal.) March 4, 2010 (No. 07-56774)

Threshold requirements:

- Foreign National who seeks to enter the United States in the sciences, education, business or athletics fields – which has been demonstrated by sustained national or international acclaim & whose achievements have been recognized in the field through extensive documentation;
- Foreign National seeks to enter the United States to continue work in the area of extraordinary ability; and
- Foreign National entry to the United States will substantially benefit prospectively the United States

Note: Can be used for “rising stars” although intended for one of the small percentage who have risen to the very top of their field of endeavor.

EB-1 Foreign Nationals of Extraordinary Ability

8 C.F.R. §204.5(h)(3) Proving National and/or International Acclaim

Regulatory requirements: Foreign National must provide evidence of a one-time achievement (that is, a major, internationally recognized award such as an Oscar/Nobel Prize) or at least **three of the following ten:**

- (i) Receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
- (ii) Membership in associations in the field, which require outstanding achievements of their members, as judged by recognized experts;
- (iii) Published material about the FN in professional or major trade publications;
- (iv) Participation, either individually or on a panel as a judge of the work of others in the same or allied field;
- (v) Original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field (*use testimonial letters*);
- (vi) Authorship of scholarly articles in the field, in professional or major trade publications or other major media;
- (vii) Work in the field at artistic exhibitions or showcases;
- (viii) Performance in a leading or critical role for organizations or establishments that have a distinguished reputation;
- (ix) Command of a high salary or other significantly high remuneration for services, in relation to others in the field; or
- (x) Commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales

PLUS, pursuant to *Kazarian*, the Foreign National must also survive a final “merits determination”

EB-1 Outstanding Researcher/Professor

8 CFR §204.5(i)

Comments:

- If no visa retrogression - 1 step process
- PERM Application Step NOT required
- HOWEVER: Cannot Self-Petition
- Employment must either be for university/medical school (tenure track) teacher or **permanent** researcher with such institutions OR in a department/ division of private employer where there are at least 3 full time researchers
- Cannot be used for post-docs
- Beware of *Kazarian v. USCIS, 596 F.3d 1115, C.A. 9 (Cal.) March 4, 2010 (No. 07-56774)*

Requirements: Researcher/Professor, recognized **internationally as outstanding** in field.

Evidence consists of **at least 2** of following:

- 1) Receipt of major prizes or awards for outstanding achievement in the academic field;
- 2) Membership in associations which require outstanding achievements;
- 3) Published material about the FN's work in professional or major trade publications;
- 4) Participation as editor/judge of work of others;
- 5) Original scientific contributions of major significance in the field; and/or
- 6) Authorship of scholarly books/ articles in field (in scholarly journals with international circulation; **and**

-At least three years of experience in teaching and/or research in academic field

PLUS, pursuant to *Kazarian*, the Foreign National must also survive a final "merits determination

EB-2 National Interest Waiver

8 C.F.R. §204.5(k)(4)(ii)

In re New York State Department of Transportation, 22 I.&N. Dec. 215 (1998)

Comments:

- PERM not required
- Foreign National can self-petition
- Difficult and very discretionary

Requirements:

Research position:

- 1) Work is in an area of substantial intrinsic merit;
- 2) The benefits of the work is national in scope; and
- 3) The Foreign National's employment serves the national interest substantially more than would an available U.S. worker.

Physician in HPSA or MUA area:

- 1) Need full-time employment contract (or evidence of private practice);
- 2) Need letter from Federal agency or State's Dept. of Public Health attesting that work is or will be in the public interest; and
- 3) Must work in qualifying position for at least 5 years from approval date of Form I-140

EB-2 & EB-3 PERM

8 C.F.R. §§204.5(k)(1)

Comments:

- Most widely used categories for obtaining permanent residency
- Indian and Chinese clients will push for EB-2 instead of EB-3 filing (because of severe retrogression)
- Remember: it is the standard requirements for the job with the petitioning employer that controls, assuming the Foreign National possesses the required qualifications

Requirements:

- **EB-2: Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability**
 - A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree
- **EB-3: Skilled workers, professionals**
 - Professional means a qualified Foreign National who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the profession
 - Skilled worker means a Foreign National who is capable, of performing skilled labor (requiring at least two years training or experience)

(EB-2) PERM Via Special Recruitment – Faculty

20 CFR §656.18

Comments:

- Perfect process where recruitment was appropriately conducted
- Hard to get denial unless deadlines are missed
- Less expensive advertising than PERM

Requirements:

- 1)Only “some” classroom teaching is required;
- 2)Need to prove university pursued (normal) competitive recruitment & selection process;
- 3)Application must be filed within 18 months of Foreign National’s selection; and
- 4)Recruitment must (only) include one journal ad plus “normal recruitment”

Schedule A, Group II

20 CFR §656.5(b)

Comments:

- PERM Application (Labor Certification) not required to be submitted to the DOL (submit ETA 9089 directly to USCIS)
- **NO LONGER A SEPARATE CATEGORY**
- Employer must be Petitioner
- Don't Forget Posting Notice

Requirements (for scientists):

- 1) During past year, work must have been in area of exceptional ability;
- 2) Must intend to practice the “same science”; and
- 3) Must establish “widespread acclaim and international recognition” **per two** of the six qualifiers listed under outstanding researcher

Note: Similar processing requirements for Schedule A Group I occupations (i.e. Registered Nurses, PTs)

Other Employment Based Immigrant Visas

Other workers: Unskilled labor.

8 C.F.R. §204.5(l)

- Requires PERM labor certification - for jobs that require less than two years experience/training

Fourth Preference: Special Immigrants/Religious Workers.

8 C.F.R. §204.5(m)

- Limited to 10,000 immigrant visas per year and is rarely subject to retrogression. To qualify, a foreign religious worker/special immigrant must have been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States for at least two years

Fifth Preference: Employment Creation-Investors.

8 C.F.R. §204.6

- This category is available to the self-employed who are willing to create a business in which they have invested at least \$1 million (**or \$500,000 if in “targeted” areas**) which business will employ at least 10 United States citizen and/or Lawful Permanent Resident workers unrelated to the owner

“EB-5” Immigrant Investor Option: Job Creation Through Investing in the U.S.

Purpose: To obtain a green card either via “regular” investment or via a “Regional Center”

Visa category: EB-5

Key Points:

- 10,000 Investor Visas are available each year:
 - In FY 2014 4,925 I-526 Petitions were approved
- 5,000 visas are set aside for **Regular Investors**
- Up to 5,000 visas are set aside for certified "**Regional Center**" **Investors**
- Increasingly being used as an immigration vehicle
 - There are approximately 640 certified Regional Centers in the U.S. and new ones are being created every day
 - **BEWARE:** Investigate Regional Centers carefully! Due diligence is key

Pursuing the "EB-5" Visa as a "Regular" Investor

6 Requirements:

- 1) The investor must invest:
 - \$500,000 if in a targeted employment area ("TEA")
 - \$1,000,000 if not in a TEA
- 2) The investor must invest in a "new" commercial enterprise:
 - Establish a new business;
 - Restructure/reorganize an existing business; OR
 - Expand an existing business or invest in a "troubled" business and retain all existing jobs
- 3) The investor's capital must be placed "at risk"
- 4) The investor's capital must be obtained through lawful means
- 5) The investor's new commercial enterprise must create at least 10 full-time positions for U.S. workers and thereby benefit the U.S. economy
- 6) The investor must manage the enterprise OR be involved in policy decisions

Diversity Lottery



- The Immigration and Nationality Act provides a maximum of up to 55,000 immigrant visas each fiscal year to permit immigration opportunities for persons from countries other than the principal sources of current immigration to the United States
- Entries for the DV-2017 Diversity Visa lottery will begin on October 1, 2015
- Applicants may access the electronic Diversity Visa entry form at: www.dvlottery.state.gov during the registration period
- Must have the equivalent of a U.S. high school degree or 2 years specialized work related training
- **If subject to Immigration “bars” individual is NOT eligible**
(There is no waiver for DV cases)

Family-Based Immigration: The Basic Process

First:

Determine if the individual fits within one of the family-based categories.

if yes



Second:

File the appropriate family-based or fiancé(e) petition with USCIS or Consular Office.

Third:

When Priority Date is current, pursue Adjustment of Status or Consular Processing.

Watch out for Grounds of Excludability!

Family-Based Preference Categories Explained

- **Immediate Relative:** Spouse, Parents, and Unmarried Children (under 21) of U.S. Citizens: Always Current and Available
- **First Preference:** Unmarried Adult (over 21) Sons and Daughters of U.S. Citizens: 23,400 plus any numbers not required for fourth preference
- **Second Preference:** Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, and any unused first preference numbers
 - **2A.** Spouses and Children: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit
 - **2B.** Unmarried Sons and Daughters (21 years of age or older): 23% of the overall second preference limitation
- **Third Preference:** Married Sons and Daughters of Citizens: 23,400, plus any numbers not required by first and second preferences
- **Fourth Preference:** Brothers and Sisters of Adult Citizens: 65,000, plus any numbers not required by first three preferences

Excerpts from Visa Bulletin – Family

April 2015

	All Charge-ability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	01 AUG 07	01 AUG 07	01 AUG 07	01 NOV 94	01 FEB 05
2A	01 AUG 13	01 AUG 13	01 AUG 13	08 JUL 13	01 AUG 13
2B	22 AUG 08	22 AUG 08	22 AUG 08	041 FEB 95	01 APR 04
3rd	08 FEB 04	08 FEB 04	08 FEB 04	01 APR 94	08 AUG 93
4th	15 JUN 02	15 JUN 02	15 JUN 02	08 JUL 97	22 SEP 91

Adjustment of Status vs. Consular Processing

Adjustment of Status:

- Adjustment of status is the process by which individuals who are already in the United States obtain Permanent Resident Status (obtain a “Green Card”) after completing certain steps in the immigration process

Consular Processing:

- Immigrant Visa (IV) processing abroad (Consular Processing) is a process by which an individual with an approved Immigrant Petition and Priority Date may apply at an Embassy or Consulate abroad for issuance of an Immigrant Visa

Temporary Protected Status & Deferred Enforced Departure

- Temporary Protected Status (“TPS”) is given to eligible Foreign Nationals who are temporarily unable to safely return to their home country because of ongoing armed conflict, a natural/environmental disaster, or other extraordinary and temporary circumstances
- Deferred Enforced Departure: Nationals of designated countries are not subject to removal from the United States, usually for a specified period of time

Deferred Action for Childhood Arrivals (“DACA”)

As of June 15, 2012

- May be requested by a Foreign National if ALL of the following requirements are met:
 - The Foreign National was under the age of 31 as of June 15, 2012;
 - The Foreign National came to the U.S. before reaching his/her 16th birthday;
 - The Foreign National has continuously resided in the U.S. since June 15, 2007, up to the present time;
 - The Foreign National was physically present in the U.S. on June 15, 2012 and at the time such deferred action request is submitted to USCIS;
 - The Foreign National entered without inspection before June 15, 2012, or the Foreign National’s lawful immigrant status expired as of June 15, 2012;
 - The Foreign National is currently in school, has graduated or obtained a certificate of completion from high school, has obtained a general education development (GED) certificate, or is an honorably discharged veteran of the U.S. Coast Guard or Armed Forces; AND
 - The Foreign National has NOT been convicted if a felony, “significant misdemeanor” offense, three or more other misdemeanors, and does not otherwise pose a threat to national security or public safety

Deferred Action for Childhood Arrivals (“DACA”)

Update Pursuant to November 20, 2014 Executive Action

- On November 20, 2014, the President announced a series of executive actions to crack down on illegal immigration at the border, prioritize deporting felons not families, and require certain undocumented immigrants to pass a criminal background check and pay taxes in order to temporarily stay in the U.S. without fear of deportation.
- DACA was expanded, and such expansion also extended the deferred action period and employment authorization to **three years** from the current two.

Deferred Action for Childhood Arrivals (“DACA”)

New Requirements Pursuant to Expanded DACA

- **Expansion of DACA (Deferred Action for Childhood Arrivals) – Eligibility:**
 - All individuals who are at least 15 years old (*prior requirement eliminated those born prior to June 15, 1981*);
 - Came to the U.S. before reaching 16th birthday;
 - Have continuously resided in the U.S. since January 1, 2010 up to present (*prior requirement was June 15, 2007*);
 - Were physically present in the U.S. on June 15, 2012;
 - Had no lawful immigration status on June 15, 2012;
 - Are currently in school, have graduated or obtained a certificate of completion from high school, have obtained GED, or are honorably discharged veteran of the Coast Guard or Armed Forces of the U.S.; and
 - Have not been convicted of a felony, significant misdemeanor, or three or more misdemeanors, and do not otherwise pose a threat to national security or public safety.

Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”)

- Covers undocumented individuals living in the U.S who, as of November 20, 2014, are the parent of a U.S. citizen or LPR and meet certain guidelines:
 - Have continuous residence in the U.S. since January 1, 2010;
 - Are the parent of a U.S. citizen or LPR born on or before November 20, 2014; and
 - Are not an enforcement priority for removal.

Recent Developments/Updates

Moving Target

- **December 3, 2014:** 17 states filed a complaint in U.S. District Court seeking declaratory and injunctive relief from the President's November 20, 2014 Executive Actions, specifically the executive actions which expanded DACA and instituted DAPA;
- **February 16, 2015:** District Court grants preliminary injunction;
- **February 23, 2015:** Federal Government filed emergency expedited motion to stay the preliminary injunction that was granted regarding expanded DACA/DAPA;
- **March 9, 2015:** U.S. District Court judge set a hearing date of March 19, 2015 and stated: "Due to the seriousness of the matters discussed therein, the Court will not rule on any other pending motions until it is clear that these matters, if true, do not impact the pending matters or any rulings previously made by this Court."
- **March 12, 2015:** Federal Government filed an emergency motion for a stay pending appeal with the Fifth Circuit Court of Appeals.

Potential/Most Common Grounds for Inadmissibility

Health:

- Communicable diseases (INA 212(a)(1)(A)(i))
- Vaccines (INA 212(a)(1)(A)(ii))
- Physical or Mental Disorder (INA 212(a)(1)(A)(iii))

Criminal:

- Crime Involving Moral Turpitude (INA 212(a)(2)(A)(i)(I))
- Drug Offenses (INA 212(a)(2)(A)(i)(II))
- Multiple Convictions (even if not CIMT)
 - Were the aggregate sentences to confinement over 5 years?

Immigration Violations:

- Entered Without Inspection (EWI) (INA 212(a)(6)(A))
- The 3 and 10-year bars (INA 212(a)(9)(B))
- Misrepresentation/Fraud

Grounds for Inadmissibility: Security/Other

- Additional issues which can potentially render a Foreign National inadmissible to the United States:
 - Terrorist associations
 - Participation in genocide, torture, extrajudicial killing, ethnic cleansing, or Nazi Persecution
 - Membership in a totalitarian party
 - Smuggling
 - Human Trafficking
 - Student Visa Abuses

Avoiding the Need for a Waiver of Inadmissibility

245(i) Eligibility (The Saving Grace)

A Foreign National who is in the U.S. in “illegal status” may still be able to adjust his/her status to LPR if the following conditions are satisfied:

1. The Foreign National was the beneficiary of an immigrant petition or labor certification filed on or before April 30, 2001;
2. The Foreign National was continuously physically present, legally or illegally, in the United States on December 20, 2000; and
3. There is no other basis of inadmissibility

Overcoming Inadmissibility Issues: The Waiver Process (Form I-601)

- Identify the basis for the waiver, if one exists
 - Does the Foreign National have any qualifying relatives in U.S.?
 - Will the Foreign National's inadmissibility cause "extreme hardship" to a USC/LPR spouse, son, daughter, or parent?
 - Foreign National's criminal history?
- File Application For Waiver of Ground of Inadmissibility (Form I-601) at appropriate USCIS location or Consulate (if Foreign National is abroad)
 - USCIS/Consular Section may request additional information, or an interview
- PROBLEMS:
 - Foreign National will not know if the waiver will be granted until he/she departs the United States and appears at the U.S. Embassy for the interview;
 - Can take many, many months to process and the Foreign National may not return to his/her family in the United States unless the waiver is granted.

The Waiver Process (Form I-601A)

- Under current law, immediate relatives of U.S. citizens who are not eligible to adjust status in the United States must travel abroad and obtain an immigrant visa. Individuals who have accrued more than 180 days of unlawful presence while in the United States must obtain a waiver of inadmissibility to overcome the unlawful presence bars under section 212(a)(9)(B) of the Immigration and Nationality Act (“3 and 10 year bars”) before they can return to the United States.
- Beginning March 4, 2013, certain immigrant visa applicants who were the spouses and children, and parents of U.S. citizens (immediate relatives) were allowed to apply for **provisional unlawful presence waivers** before they left the United States if their sole ground of inadmissibility was this “3 and 10 year bar”.

I-601A Eligibility Requirements

To be eligible for a provisional unlawful presence waiver ALL of the following conditions must be fulfilled:

- 17 years of age or older.
- An immediate relative of a U.S. citizen (not a preference category immigrant who has a visa available). An immediate relative is an individual who is the spouse, child (unmarried and under 21), or parent of a U.S. citizen.
- Have an approved [Form I-130, Petition for Alien Relative](#), or [Form I-360, Petition for Amerasian, Widow\(er\), or Special Immigrant](#).
- Have a pending immigrant visa case with DOS for the approved immediate relative petition and have paid the DOS immigrant visa processing fee (IV Fee).
- Able to demonstrate that refusal of your admission to the United States will cause extreme hardship to your U.S. citizen spouse or parent.
- Physically present in the United States to file your application for a provisional unlawful presence waiver and provide biometrics.
- Not have been scheduled for an immigrant visa interview by DOS before January 3, 2013.
- Meet all other requirements for the provisional unlawful presence waiver, as detailed in 8 CFR 212.7(e) and the [Form I-601A and its instructions](#).

I-601A Eligibility Requirements (Continued)

Ineligible IF:

- Subject to one or more grounds of inadmissibility **other than unlawful presence**.
- DOS initially acted before **January 3, 2013**, to schedule Immigrant Visa (IV) interview for the approved immediate relative petition upon which provisional unlawful presence waiver application is based, even if immigrant visa interview has been cancelled, individual failed to appear for the interview, or interview was rescheduled **on or after** Jan. 3, 2013.

Note: The date and time that an individual is scheduled to appear for an immigrant visa interview at the designated U.S. Embassy or Consulate is not the date USCIS will use to determine if eligibility to file a Form I-601A. If DOS initially acted before January 3, 2013, to schedule immigrant visa interview, individual is not eligible to file a Form I-601A, even if s/he failed to appear for interview or if s/he or DOS cancelled or rescheduled interview for a date on or after January 3, 2013. Instead, individual may file a [Form I-601, Application for Waiver of Grounds of Inadmissibility](#), from outside the United States after being interviewed for immigrant visa, and the consular officer has found that the individual is inadmissible for a ground that may be waived.

- In removal proceedings that have not been administratively closed.
- At the time of filing, individual is in removal proceedings that have been administratively closed **but** have been placed back on the EOIR calendar to continue removal proceedings.
- Individual does not meet one or more of the requirements, as outlined in the [Form I-601A and its instructions](#).

I-601A Expansion

Anticipated Changes to I-601A pursuant to President Obama's Executive Action announced on November 20, 2014:

- Allowing spouses and children of Lawful Permanent Residents as well as the adult children of U.S. Citizens and Lawful Permanent Residents to apply;
- Broadening the definition of “extreme hardship”

Other Options: Asylum

- **Asylum---must be able to prove** persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion
 - Asylum Application must be filed **within 365 days** of arrival in the United States—unless “changed circumstances”
 - EAD (Employment Authorization) Application can be filed **150 days after** the Asylum Application was filed
 - If Application is granted: Can apply for lawful permanent resident status 1 year thereafter!

Other Relief: Cancellation of Removal

• Requirements:

- Continuous residence in the U.S. for at least ten years
- Good moral character during this time
- Not otherwise subjected to criminal bars to admissibility
- Removal would result in “exceptional and extremely unusual hardship” to a qualifying U.S. citizen or permanent resident relative (spouse, parent, or child)
- Limited number of visas per year (4,000 per fiscal year)

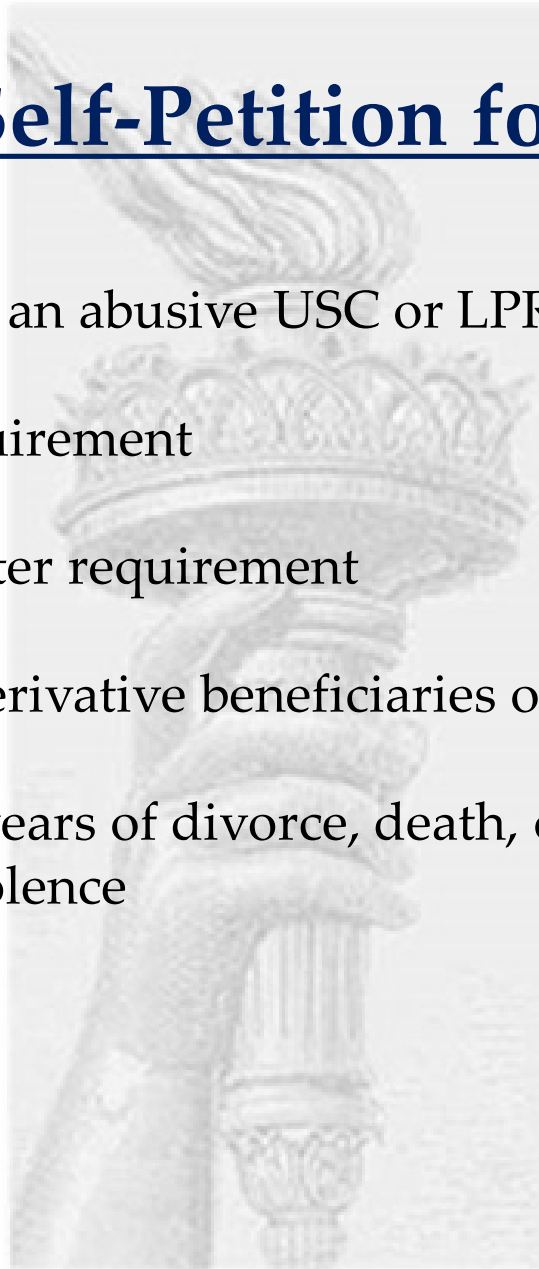
Violence Against Women Act (VAWA)

8 USC §§1154(a)(1)(A) and (B); INA § 204(a)(1)(A) and (B)

- VAWA was created in 1994 in order to provide protection and assistance to victims of domestic violence regardless of their immigration status;
- VAWA allows immigrant victims to obtain immigration relief without their abuser's cooperation or knowledge;
- The self-petition is available for immigrant victims of domestic violence who are/were married to a USC or LPR;
- Children who are under 21 and unmarried are automatically included as derivatives;
- Gender neutral;
- "Self-petitioner" is both Beneficiary and his/her own Petitioner;
- Approval of the self-petition entitles the self-petitioner to apply for adjustment of status to permanent resident.

VAWA Self-Petition for Spouses

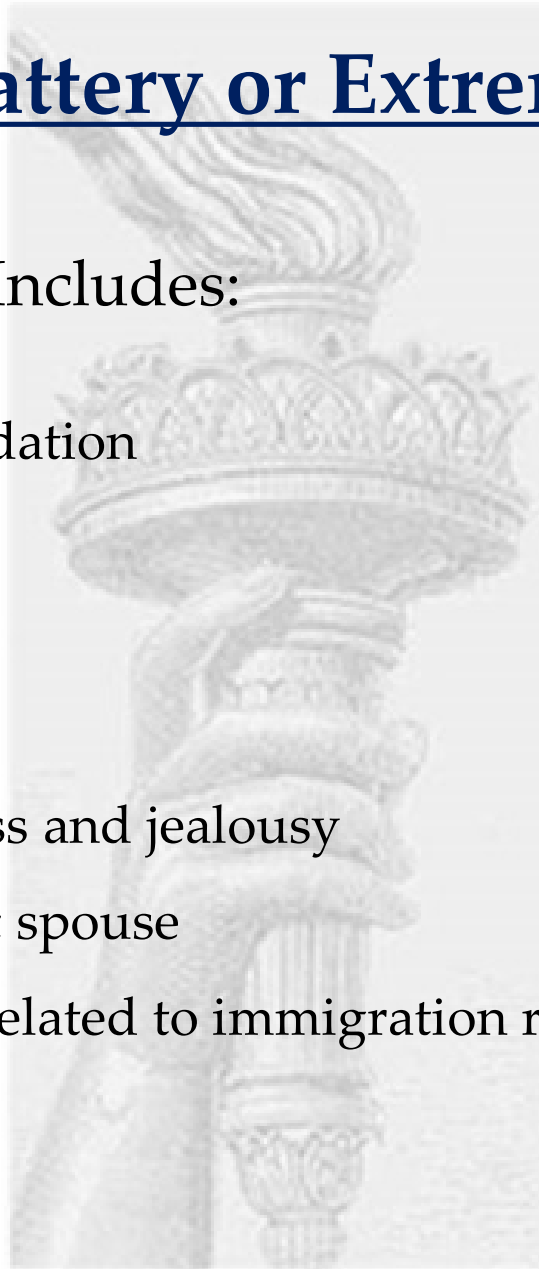
- Must be married to an abusive USC or LPR in good faith
- Joint residence requirement
- Good moral character requirement
- Children may be derivative beneficiaries of their parents
- Must file within 2 years of divorce, death, or abuser's loss of status due to domestic violence



VAWA Battery or Extreme Cruelty

“Extreme Cruelty” Includes:

- Verbal abuse or degradation
- Isolation
- Intimidation
- Economic abuse
- Extreme possessiveness and jealousy
- Using children against spouse
- Coercion and threats related to immigration removal



The “U” Visa: A Remedy for Immigrant Victims

- A nonimmigrant status for certain crime victims including victims of “domestic violence” who cooperate with law enforcement;
- Employment authorization eligible;
- Certain public benefits – varies by state;
- Deportation process is terminated;
- Leads to permanent residence after three years in valid U Visa status;
- Derivative eligibility for certain family members; and
- Need I-918B Law Enforcement Certification.

The “U” Visa: Legal Authority

- Created by the Victims of Trafficking and Violence Protection Act of 2000 (Public Law No: 106-386, 114 Stat. 1464);
- INA §§ 101(a)(15)(U), 214(p), 212(d)(14), 245(m);
- 8 C.F.R. § 103, 212, 214, 248, 274a, 299, 245.23 and 245.24;
- Federal Register: September 17, 2007 (Volume 72, Number 179) [Pages 53013 – 53042] & 73 Fed. Reg. 75540 – 75564 (December 12, 2008);
- USCIS Memoranda: See www.uscis.gov or www.asistahelp.org

The “U” Visa: Requirements

- Victims apply using form I-918, which must be accompanied by evidence to satisfy 5 statutory elements:
 - 1) Victim of “qualifying criminal activity”;
 - 2) Possesses information regarding the crime;
 - 3) Has been, is being or likely to be helpful to investigation or prosecution of the crime;
 - 4) Criminal activity occurred in or violated laws of U.S.;
 - 5) Suffered “substantial physical or mental abuse” as a result of the crime.

The “U” Visa:

Definition of “Qualifying Criminal Activity”

- Principal applicant must be victim of at least one from a specific list of crime categories in INA 101(a)(15)(U):
 - Domestic Violence;
 - Stalking;
 - Serious Assaults and Homicides: Felonious Assault, Manslaughter, Murder, Female Genital Mutilation, Torture;
 - Sexual Assault and Abuse: Abusive Sexual Contact, Incest, Rape, Sexual Assault;
 - Kidnapping and related: Abduction, False Imprisonment, Hostage, Kidnapping, Unlawful Criminal Restraint;
 - Trafficking and Labor Exploitation: Involuntary Servitude, Peonage, Prostitution, Sexual Exploitation, Slave Trade, Trafficking, Fraud in Foreign Labor Contracting;
 - Other Exploitation and Interference with Justice: Blackmail, Extortion, Obstruction of Justice, Perjury, Witness Tampering;
 - Other Related Crimes.

HOT TOPICS IN IMMIGRATION FOR 2015 with Wendy Hess

Link to video about DACA (Deferred Action for Childhood Arrivals)

We are DACA

<https://www.youtube.com/watch?v=zhXiTN4CJTQ>