

Visas: An Overview

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A visa grants a foreign national permission to enter the United States. A "nonimmigrant visa" permits a foreign national to remain in the United States temporarily, usually to work, to visit relatives, or to attend school. Most nonimmigrant visas are not subject to numerical caps.

An "immigrant visa" (also known as a "green" card or permanent resident status) permits a foreign national to remain in the United States permanently (for more information see <http://www.millermayer.com/Immigration/ImmigrantVisas/tabid/204/Default.aspx>). A permanent resident has the right to become a naturalized U.S. citizen after three to five years (for more information see <http://www.millermayer.com/NewsandArticles/NaturalizationProcedure/tabid/321/Default.aspx>). Immigrant visas are numerically limited by country and by class, e.g. family relationship or job skills.

To enter or to stay in the United States as a nonimmigrant or immigrant usually requires several steps. First, a foreign national or his or her employer or relative often files an application with the U.S. Citizenship and Immigration Services (USCIS) to be classified in one of the nonimmigrant or immigrant visa categories. If the USCIS approves the application, the foreign national may need to go to a U.S. embassy or consulate overseas to have a visa stamped in his or her passport. This stamp indicates the visa class and the date of issuance and expiration. At the border, an immigration inspector will review the visa stamp and issue an admission card (Form I-94 for nonimmigrants). The inspector can authorize admission for any length of time, up to the expiration date on the visa stamp. The USCIS also issues permanent resident alien cards to immigrants in the United States.

The following is a list of common nonimmigrant and immigrant visa categories.

Nonimmigrant Visa Categories

There are approximately 24 types of nonimmigrant visas, each authorizing a temporary stay in the United States. It is often possible to extend your stay and/or change from one nonimmigrant visa category to another.

A: Government Officials

This class includes ambassadors, public ministers, diplomats, consular officers and other officials assigned to represent their country to the United States. Spouses, children, servants, attendants and their families are also included in this class.

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B-1: Visitors for Business

This class includes foreign nationals who intend to conduct business for a foreign employer. A B-1 visitor may not displace an American worker, or receive compensation from an American source.

B-2: Visitors for Pleasure

These are tourists and relatives visiting family members in the United States. B-2 nonimmigrants are not permitted to work in the United States. Persons coming primarily for the purpose of studying are not properly classifiable as B-2 nonimmigrants.

Visitors- Visa Waiver Pilot Program

Nationals from a growing list of countries, designated based upon a historically low rate of non-immigrant visa refusals, are permitted to enter the United States as visitors for business or pleasure without first obtaining visas. Individuals entering under this program are permitted to remain in the United States for a maximum of 90 days, and are generally barred from extending their stay or changing status while in the United States.

C-1: Transit Aliens

A transit alien is someone passing through the United States on the way to a third country. A maximum period of 29 days is permitted.

D: Crewmen

This class includes vessel or aircraft workers required for normal operation of the ship or plane. Crewmen are admitted to the United States for up to 29 days.

E-1: Treaty Traders

A treaty trader is someone who enters the United States primarily to carry on trade between the United States and a foreign country that has signed a treaty of commerce and navigation (or its equivalent) with the United States. The treaty trader must carry a passport from the country he or she is representing. The initial period of admission is one year. Extensions of stay are possible.

E-2: Treaty Investors

A treaty investor is also a national of a foreign country with which the United States has signed a treaty of commerce and navigation, or its equivalent. However, a treaty investor is someone directing and developing a business in which he or she has invested a substantial amount of capital. Top managers and executives of firms that have made substantial investments in qualifying enterprises may also qualify, as may "essential" employees. A one-year initial period of admission is permitted, with extensions available in appropriate circumstances.

F: Academic Students

An F-1 student is admitted to pursue a full course of study at a school or institution approved by the USCIS to accept foreign students. An F-1 student must maintain a home in a foreign country to which he or she will return upon completion of studies. This category also includes the student's spouse and unmarried children under 21 years old (known as "F-2"s).

With permission, F-1 students may work on-campus, and off-campus after the first academic year part-time during the semester and full-time during vacations, and after graduation, for a period of up to one year for "practical training." F-1 students are admitted for "duration of status," which is defined as the length of time necessary to complete a particular degree program,

plus a period of authorized practical training. For more information see <http://www.millermayer.com/Immigration/Individuals/F1StudentVisas/tabid/254/Default.aspx>.

G: Representatives to International Organization

This class includes persons accredited by their governments to represent it to an international organization such as the United Nations, World Bank, or Red Cross.

H-1B: Temporary Professional Workers

H-1B's are persons coming to the United States to engage in "specialty occupations." This includes all professionals holding bachelor's degrees and some persons who can show professionalism based on a combination of schooling and appropriate work experience. This class requires a prearranged job, which may be temporary or permanent in nature, in a professional field. The employer must also file an "attestation" with the U.S. Department of Labor that it will pay the foreign national the higher of the prevailing or actual wage for the job, and provide adequate working conditions, among other things (for more information on the "attestation," see

<http://www.millermayer.com/Immigration/Individuals/H1B/H1BLaborConditionApplicationChecklist/tabid/149/Default.aspx>. The initial period of admission is three years, with a second three-year period available. After remaining in the United States for six years on an H-1B visa, a foreign national is required to live abroad for one year before re-entering the United States in H or L visa status. The H-1B class is subject to an annual cap of 65,000. For more information on the H-1B class, see

<http://www.millermayer.com/Immigration/Individuals/H1B/SpecialtyOccupationWorkers/tabid/132/Default.aspx>.

H-2A: Temporary Agricultural Workers

H-2B: Temporary Non-Professional Workers

These classes include skilled and unskilled workers who lack bachelor's degrees who are coming to the United States temporarily to perform jobs that are temporary or seasonal in nature. This class requires prearranged employment and a certification from the U.S. Labor Department that U.S. workers are unavailable for the job. The initial period of admission is authorized by the Labor Department and USCIS, and is not to exceed one year. Extensions are available in limited circumstances for a maximum period of three years.

H-3: Trainees

An H-3 trainee is a foreign national coming temporarily to the United States to engage in training not available in his or her home country, who intends to use this training outside of the United States. A trainee may not engage in productive employment if a U.S. resident would be displaced.

H-4: Spouses and Children

Spouses and children of H-1, H-2 or H-3 nonimmigrants are generally admitted for the duration of the status of the primary visa holder. H-4's are not permitted to work in the United States.

I: Journalists

This category allows foreign nationals to be admitted to the United States, upon a basis of reciprocity, as a bona fide representative of a foreign press, radio, film or other foreign information media, for a period of one year. Spouses and unmarried children under 21 are included in this class.

J: Exchange Visitors

This category includes foreign nationals who will participate in a program approved by the U.S. Information Agency. Participants include students, scholars, trainees, teachers, professors, research assistants, specialists, or leaders in a field of specialized knowledge. Certain exchange visitors are required by law to return to their home country for a period of two years to impart the knowledge they gained in the United States before they may re-apply to enter the United States. Spouses of J-1 nonimmigrants are issued J-2 visas and are sometimes permitted to work in the United States. For more information on the J visa category, see <http://www.millermayer.com/Immigration/Individuals/J1ExchangeVisitors/tabid/174/Default.aspx>.

K: Fiancés or Fiancées of U.S. Citizens

This class covers those engaged to be married to U.S. citizens who are coming to the United States solely to conclude a valid marriage with the petitioner within 90 days after entry, and the minor children of such persons. The period of admission is 90 days, and is not subject to extension.

L: Intra-company Transferees

The L-1 category is for persons coming to the United States to work temporarily for the U.S. branch, subsidiary or affiliate of their foreign employer. To qualify for this category, a person must have worked for the foreign affiliate for at least one year immediately prior to transfer to the United States. This class includes only executives, managers and employers with "specialized knowledge" who will fill a position in one of these categories in the United States. The initial period of admission is three years. Extensions are possible up to a total of five years for specialized knowledge personnel and seven years for managers or executives. The spouse and children of L-1's may obtain derivative status as L-2's for the duration of the principal L-1's status. For more information see <http://www.millermayer.com/Immigration/Individuals/L1IntracompanyTransfereeVisas/tabid/169/Default.aspx>.

M: Vocational Students

The M-1 category includes persons coming to the United States to study at a vocational or other non-academic school, other than a language training program, that has been authorized by USCIS to allow foreign students to attend. M-1 students are generally not permitted to work, but may obtain a limited period of "practical training." Spouses and minor children are classified in the M-2 category.

N: Relatives of United Nations Employees

This class includes certain parents and children of foreign nationals who have worked for international organizations in the United States.

O: Noncitizens of Extraordinary Ability

The O-1 visa category is for foreign nationals of "extraordinary ability" in the sciences, arts, education, business and athletics, as demonstrated by "sustained national or international acclaim." This class requires prior consultation with unions, management groups and other outside sources. Assistants to the principal nonimmigrant are admissible as O-2's. Spouses and minor children of O-1 and O-2 nonimmigrants are admissible in the O-3 class. For more information see

<http://www.millermayer.com/Immigration/Individuals/O1ExtraordinaryAbility/tabid/155/Default.aspx>.

P: Performing Athletes and Entertainers

This visa category includes three subcategories of persons coming to perform in athletic or entertainment events. The P-1 class includes athletes performing as individuals, or groups and entertainers performing as a group recognized at an international level. The P-2 class includes athletes and entertainers entering to perform under reciprocal exchange programs. The P-3 class includes those entering to perform in a culturally unique program. The P-1 and P-3 classes require consultation with U.S. unions to determine eligibility. Spouses and minor children of P-1, P-2 and P-3's are admissible as P-4's.

Q: Cultural Exchange Visitors

This class includes persons participating in designated international cultural exchange programs. Sponsors of such programs must employ at least five persons, including the foreign national. The maximum admission period permitted is fifteen months. For more information see <http://www.millermayer.com/Immigration/NonimmigrantVisas/Q2VisasANewWorkVisaCategory/tabid/262/Default.aspx>.

R: Religious Workers

This class includes ministers, professional religious workers and other religious workers entering the United States to work at an affiliated U.S. entity, and who have worked for the religious organization abroad for at least two years before application. The initial period of admission is three years.

S: Noncitizens who assist with Law-Enforcement and Anti-Terrorism Efforts

This class allows certain noncitizens to be admitted to the United States to testify in criminal cases. This category also authorizes the admission of a limited number of noncitizen informants. The period of admission is limited to three years.

T: Victims of a Severe Form of Trafficking in Persons

This class allows for temporary immigration to victims of severe trafficking in persons and their immediate family. There are four subcategories: T-1 provides a nonimmigrant classification for the victim, T-2 for the victim's spouse, T-3 for the victim's children, and T-4 for the victim's parents if the victim is under the age of 21.

TN/TD: North American Free Trade Agreement (NAFTA): Trade Visas for Canadians and Mexicans

TN visas are temporary professional worker visas for Canadians and Mexicans. These visas do not have a cap, but they are for people who work in specific occupations, such as architects, accountants, scientists, and management consultants. TD visas are for their spouses and minor children. For more information see <http://www.millermayer.com/Immigration/Individuals/TNNAFTAProfessionalWorker/tabid/182/Default.aspx>.

U: Victims of Certain Crimes

This classification provides temporary immigration to victims and witnesses willing to help law enforcement of certain crimes such as murder, rape, prostitution, and other specific crimes that have occurred in the U.S. or its territories. There are four subcategories: U-1 status for the

victim of the crime, U-2 for the victim's spouse, U-3 for the victim's children, and U-4 for the victim's parents if the victim is under the age of 21.

V: Certain Second Preference Beneficiaries

The V-1 category provides a nonimmigrant status to the spouse of a lawful permanent resident who is the principal beneficiary of a family based I-130 petition filed before December 21, 2000. The V-2 category provides a nonimmigrant status to the child of a lawful permanent resident who is the principal beneficiary of a family based I-130 petition filed before December 21, 2000. And the V-3 category provides a nonimmigrant status to the derivative child of a V-1 or a V-2.

Immigrant Visa Categories

An immigrant or lawful permanent resident ("LPR") is someone admitted to the United States permanently. To obtain immigrant status, an applicant must meet both the substantive and numerical requirements of the law (for more information see <http://www.millermayer.com/NewsandArticles/BecomeResident/tabid/363/Default.aspx>). Substantively, one must qualify as a specified close relative of a U.S. citizen or another LPR, as an employee of a sponsoring employer or prospective employer, or as a "diversity immigrant" under a visa "lottery" program. Further, the potential immigrant must not fall within any of the general categories of inadmissible noncitizens specified in the law, such as criminality, mental defect, Communist party affiliation, drug trafficking, or terrorism.

In addition to substantive requirements, there are also country-specific and worldwide statutory quota limits imposed on most categories of family and employment-based immigrant visas. These quota limitations often can result in extended waiting periods before immigrant status may be obtained.

Currently, about 670,000 immigrant visas are available each year.

A. EMPLOYMENT-BASED IMMIGRANTS

There are five employment-based immigrant visa categories. Three of these categories have additional subcategories. The employment-based immigrant visa categories are as follows:

Employment-Based Category 1 (EB-1) PRIORITY WORKERS

The first employment-based category covers "priority workers." No labor certification is required in this category. Roughly 40,000 visas have been allocated annually to this group. This category has three subcategories.

Category 1 - Subcategory A

Noncitizens with "extraordinary ability" in arts, sciences, education, business or athletics - To qualify in this subcategory, the applicant must show sustained national or international acclaim and achievements recognized through extensive public documentation, and must be able to demonstrate that his or her contribution would "substantially benefit" the United States prospectively. For more information see <http://www.millermayer.com/Immigration/ImmigrantVisas/EB1ExtraordinaryAbility/tabid/215/Default.aspx>.

Category 1 - Subcategory B

Outstanding professors and researchers - To qualify in this subcategory, the applicant must establish international recognition or acclaim, must have at least three years' experience in teaching and research in the field, and must have an offer of employment for a tenured or tenured-track teaching position at a U.S. university or college, or a comparable research position in private industry. For more information see <http://www.millermayer.com/Immigration/ImmigrantVisas/EB12OutstandingProfessorsandResearchers/tabid/218/Default.aspx>.

Category 1 - Subcategory C

Certain multinational executives and managers - This subcategory provides an immigrant visa for individuals who were employed as executives or managers overseas during at least one year within the three-year period immediately prior to transfer into the United States, and who are transferred to the United States to perform executive or managerial duties. The overseas and U.S. employers must be the same or affiliated entities. The definitions of executive capacity and managerial capacity are fairly broad, and include managing a function, not just employees. For more information see <http://www.millermayer.com/Immigration/ImmigrantVisas/EB13MultinationalManagersExecutives/tabid/220/Default.aspx>.

Employment-Based Category 2 (EB-2)

PROFESSIONALS AND NONCITIZENS OF EXCEPTIONAL ABILITY

The second employment-based category annually allows for 40,000 visas, plus any spilldown of unused visas from Category EB-1. This category has two subcategories. The first is open to members of the professions holding advanced degrees (e.g. above that of baccalaureate) or their equivalent. The second subcategory is available to those who, because of their exceptional ability in the sciences, arts or business, will substantially benefit the national economy, cultural or educational interests, or welfare of the United States.

Under the second subcategory, the applicant's exceptional ability must be demonstrated by more than just a degree or license, and must be substantially above that normally encountered in the sciences, arts or business.

An applicant in this category generally must obtain a labor certification for his or her position (for more information see

<http://www.millermayer.com/Immigration/LaborCertifications/tabid/202/Default.aspx>).

However, a specific job offer and labor certification may not be necessary if an applicant can demonstrate that such an exemption would be in the national interest. For more information see <http://www.millermayer.com/Immigration/ImmigrantVisas/NationalInterestWaiver/tabid/222/Default.aspx>.

Employment-Based Category 3 (EB-3)

SKILLED WORKERS, PROFESSIONALS AND OTHER WORKERS

This category also allows for 40,000 visas annually, plus any spilldown of unused visas from Categories EB-1 and EB-2. There are three subcategories in this category. An applicant in each of these subcategories usually must obtain a labor certification for his or her position. For more information see

<http://www.millermayer.com/Immigration/LaborCertifications/tabid/202/Default.aspx>.

Category 3 - Subcategory A

Skilled workers - A noncitizen qualifies as a skilled worker if, at the time of petitioning for

classification, he or she is capable of performing skilled labor requiring at least two years training or experience, and is being sponsored for a permanent position for which qualified workers are not available in the United States.

Category 3 - Subcategory B

Professionals - This subcategory encompasses noncitizens holding baccalaureate degrees or their equivalent who are members of the professions.

Category 3 - Subcategory C

Other workers - This subcategory is reserved for noncitizens capable of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. A cap of 10,000 visas within the overall 40,000 annual limit for Category EB-3 is set for applicants seeking to qualify in this subcategory.

Employment-Based Category 4 (EB-4)

SPECIAL IMMIGRANTS

This category has 10,000 green cards available per year, and encompasses religious workers, certain former United States government employees, and certain foreign nationals working for international organizations.

Employment-Based Category 5 (EB-5)

EMPLOYMENT-CREATION IMMIGRANTS

This "immigrant investor" category provides up to 10,000 green cards annually to applicants who invest a minimum of \$1 million in a new enterprise in the United States that will create jobs for at least ten United States citizens or permanent residents, other than immediate family members of the investor. In certain targeted employment areas, the investment may be reduced to \$500,000. For more information see <http://www.millermayer.com/Immigration/EB5Investors/tabid/126/Default.aspx>.

B. FAMILY-BASED IMMIGRANTS

There are two basic types of familial relationships that serve as a basis to apply for permanent resident status: immediate relatives and family-sponsored preference immigrants. There is a worldwide cap on family-sponsored immigrants of 480,000 per year.

Immediate Relatives

Spouses and minor (i.e., under 21) unmarried children of United States citizens, parents of United States citizens (provided the citizen is over 21 years old), and certain spouses of deceased United States citizens can qualify for an immigrant visa as immediate relatives. There are no numerical limitations on this category of immigrant visas.

Family Sponsored Immigrants

Each family preference category has its own annual allocation of green cards under the worldwide limit on family-based immigrant visas. The current family-based preference categories and annual numerical limits are:

Family First Preference (23,400 visas)

Unmarried sons and daughters of United States citizens

Family Second Preference (114,200 visas)

- (a) Spouses and unmarried children of permanent resident noncitizens
- (b) Unmarried adult sons and daughters of permanent resident noncitizens

Family Third Preference (23,400 visas)

Married sons and daughters of United States citizens

Family Fourth Preference (65,000 visas)

Brothers and sisters of United States citizens, if such citizen is at least 21 years of age.

In addition, the spouse or child of the principal noncitizen is entitled to the same status and order of consideration, if accompanying or following to join the spouse or noncitizen.

C. DIVERSITY IMMIGRANTS

"Diversity immigration" refers to a concept of allowing people a chance to immigrate to the United States even if they lack close relatives or a job offer.

The permanent diversity program began October 1, 1994. Under that program, 50,000 immigrant visas are available each year to people from countries that traditionally have not had much immigration to the United States in the past. To qualify for this program, applicants must have at least a high school education or its equivalent, or have worked two years in an occupation that requires two years of training or experience.

The permanent diversity program is aimed at helping potential immigrants from such regions as Africa and Europe. Millions of people apply for the permanent diversity visa program every year.

Tax Notes

Residence for tax purposes

U.S. law creates a statutory definition of the term "resident alien" for tax purposes. There are two tests, one based upon visa status and the other based upon "substantial presence" in the United States.

First, a noncitizen who has been granted lawful permanent resident status is a resident for U.S. tax purposes, without exception. Absence from the United States for the entire year does not prevent the need to file a U.S. tax return, unless the noncitizen's permanent resident status has been terminated under the immigration laws. Permanent resident status can be relinquished in appropriate cases.

Second, even many nonimmigrants can be deemed to be U.S. residents for tax purposes if they have been physically present in the United States for 183 or more days within the calendar year. This is known as the "substantial presence" test. Alternatively, one is deemed "substantially present" in the United States if he or she has been "cumulatively present" in the United States over the last three years for a sufficient number of days. Cumulative presence is calculated by a complex formula. An exception to the cumulative presence rules is provided for an individual noncitizen who is able to show that his or her "tax home" and family connections remain in a foreign country.

Generally, non-residents holding A, F, G, J or M visas are not considered residents for tax purposes. However, non-residents who are engaged in trade or business in the United States or

who have U.S.-source income may have to file form 1040-NR and pay applicable taxes on that income.

Estate taxes and immigration status

Ordinarily under U.S. law, if a person dies, he or she can leave a certain amount to his or her spouse tax-free. This is known as the "marital deduction." That deduction normally is not available where the surviving spouse is not a U.S. citizen unless there is a disposition by means of a qualified domestic trust. Accordingly, it may be important for spouses to consider careful tax planning or applying for naturalization as U.S. citizens to avoid excessive estate taxes.

Further, the federal income tax definition of resident does not apply for federal estate or gift tax purposes. Rather, one is a resident for estate or gift tax purposes if his or her "domicile" is the United States. If one dies a resident of the United States, i.e., is a "domiciliary," the estate is subject to U.S. estate tax on everything he or she owns, regardless of its location. If one dies a nonresident, the estate is subject to U.S. estate tax only on property situated in the United States.