

Overview Of Immigration Law for Non Practitioners

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Why Do You Need to Know about Immigration?

- ▶ Foreign nationals are subject to a complex patchwork of statutes, regulations, jurisprudence, memoranda, and cables which pose a formidable barrier to casual research by the uninitiated attorney.
- ▶ Approximately 12% of our population is foreign born.
- ▶ Immigration and nationality law is considered second in complexity only to tax law.
- ▶ It is impossible to competently “dabble” in this area.
- ▶ Immigration status and issues frequently impinge on other areas of law.
- ▶ A little basic knowledge can prevent grievous errors with regard to non-citizens in other areas of law.

Sources of Law

- ▶ Immigration and Nationality Act of 1952 (McCarran-Walter Act), organic law; amended many, many times. Never cited ref. USC! (8 USC § 1101)
- ▶ 8CFR, 20 CFR, 22CFR -regulations of the DHS, DOL, and DOS affecting foreign nationals.
- ▶ I and N Decisions—precedent decisions of DHS and EOIR.
- ▶ BALCA Decisions—precedent decisions of the DOL.
- ▶ Federal cases—district, circuit, and Supreme Court.
- ▶ Foreign Affairs Manual—regulatory interpretations of DOS.
- ▶ Operations Instructions, Adjudicator's Field Manual—regulatory interpretations of DHS.
- ▶ [Uscis.gov](http://uscis.gov); travel.state.gov; ice.gov; doleta.gov; cpb.gov—websites provide memoranda, cables, latest news, other guidance.

Nonimmigrant vs. Immigrant

- ▶ If a person arrives legally in the US, most often they first come as a *nonimmigrant*.
- ▶ A *nonimmigrant* is permitted to come to the US for a limited period of time, for a specific purpose or purposes. As implied by the name, usually such persons should not intend to *immigrate* permanently to the US.

Nonimmigrant vs. Immigrant

- Legal *immigrants*, on the other hand, are permitted to remain in the US indefinitely, and work for any US employer, unless they are convicted of certain crimes or abandon their residence in the US.
- The law contains a presumption that every person seeking to enter the US is an immigrant, unless they affirmatively demonstrate that they are coming for a specific, temporary purpose. Sec. 214(b) of the INA.
- We will discuss the ways to legally immigrate to the US further along.

Nonimmigrants

- ▶ A *nonimmigrant* usually needs a valid *visa* to enter the US. A *visa* is a passport decal given by a US consulate abroad which permits the holder to present him/herself at a US port of entry for inspection and possible admission to the US. Everyone except Canadians, Bermudians, and Visa Waiver Program entrants [citizens of 39 industrialized countries] is generally required to have a valid visa for entry.
- ▶ Upon admission, the nonimmigrant is given a white or green paper card, called an I-94, which shows what the person is allowed to do in the US, and how long he/she is permitted to stay.
- ▶ Every nonimmigrant is admitted in a particular category, which indicates what that person is allowed to do here. Categories are indicated on the I-94 card by letter and number which correspond to the Immigration and Nationality Act. For example, tourists are "B-2".

I-94

Departure Number

742831632 01

U.S. IMMIGRATION
250 WAS 177

Immigration and
Naturalization Service

SEP 13 1991

I-94
Departure Record

ADMITTED B-2
LEAVE MARCH 12, 1992

1. Family Name

POE

12. First (Given) Name

DAVID

17. Country of Citizenship

IRELAND

10. Birth Date (Day/Mo/Yr)

01/01/1966

See Other Side

STAPLE HERE



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

Get I-94 Number

I947AD

Admission (I-94) Number Retrieval

Admission (I-94) Record Number: 60000888062

Admit Until Date (MMDDYYYY): 10/10/2012

Details provided on Admission(I-94) form:

Family Name:	LI
First (Given) Name:	LYDA
Birth Date (MMDDYYYY):	01/01/1966
Passport Number:	P123123213
Passport Country of Issuance:	Mexico
Date of Entry (MMDDYYYY):	04/11/2012
Class of Admission:	B1

Nonimmigrant Status

- *Nonimmigrant status* is acquired upon admission in a particular nonimmigrant category.
- A nonimmigrant can *violate status* by engaging in an activity which does not comport with the purpose of admission, eg, unauthorized employment.
- A nonimmigrant can *overstay* by remaining longer than permitted by USCIS.
- In either case, the nonimmigrant and any dependants thus become *removable* from the US, and if encountered by DHS, may be placed in *removal proceedings*.

Nonimmigrants

- ▶ A few commonly encountered nonimmigrant categories:
 - ▶ B-1 (visitor for business) and B-2 (tourist)
 - ▶ F-1 academic student
 - ▶ H-1B temporary worker

Nonimmigrants

- ▶ Business visitors and tourists generally cannot work. Business visitors may come to the US for meetings, short training courses, professional development seminars and the like. They may also make sales calls relating to products or services not produced in the US. The business visitor visa can be used in very limited circumstances for employment, but should never generally be considered a “work visa”.

Nonimmigrants

- ▶ F-1 students come to the US to study English, as well as academic programs. They can get permission to work off campus in various ways during their studies, and usually enjoy a one year to 36 month period of work authorization, known as *optional practical training* (OPT), at the end of each degree program.
- ▶ Employers often make offers to these individuals near the end of their degree program, and start them once they receive Optional Practical Training.
- ▶ F-2 dependents cannot work.

Nonimmigrants

- ▶ H-1B temporary workers perform services for the sponsoring employer in professional level occupations (those requiring at least a four year degree). H-1B's are one of many types of work visa.
- ▶ Common examples of H-1B positions would be engineers, accountants, some IT positions, physicians, researchers and academics.
- ▶ H-1B's may not work for any other employer than that which sponsored the employee via a petition to the USCIS. They are also location-specific.

Nonimmigrants

- H-1B's are allowed a total of six years with all employers in the US. If they begin the permanent residence process before the end of the fifth year, they may continue extending their stay beyond the normal six years.
- H-1B's are subject to very strict quotas—no more than 85,000 may come to the US each year. These numbers run out very quickly each year. To make the quota this year, employers must electronically register by March 20, 2020. Prior to this year, employers had to submit a paper application in the first 5 business days of April.

NONIMMIGRANTS

- Other types of work visas:
 - H-1B1: citizen of Chile or Singapore
 - E-3: citizen of Australia
 - H-3/ J-1 trainees
 - O-1: person of extraordinary ability
 - TN: Treaty NAFTA worker
 - R-1: Religious worker
 - L-1: Executive, managerial, or “specialized knowledge” transferee of multinational entity
 - E-1/E-2: Treaty trader or investor
 - H-2B/H-2A: nonagricultural or agricultural workers
 - Q-1: Cultural exchange aliens

Other Types of Work Authorization

- Beyond the standard nonimmigrant work categories, foreign nationals in a myriad of different situations can obtain work authorization, eg:
 - Persons applying for or granted political asylum.
 - Persons applying for permanent status via a relative or an employer.
 - Spouses of investors (E-2), intracompany transferees (L-2), and exchange visitors (J-2).
 - In almost all these cases, these persons will have a USCIS work card, aka an EAD (employment authorization document).

The Undocumented

- ▶ Aside from nonimmigrants, large numbers of persons enter and remain in the US without documents, or violate status, or stay longer than permitted by USCIS.
- ▶ Because of 1996 amendments to the INA, it is often very difficult to help such persons regularize their situation.
- ▶ Hopefully legislation will address this issue in 2010. Congress has attempted “comprehensive immigration reform” twice and failed. CIR ASAP recently introduced in the house.

Mythology of the Undocumented

- ▶ Many myths exist in popular culture:
 - ▶ “Having a baby gives them the right to stay”: not until the baby is 21 years old.
 - ▶ “They come and get on welfare”: Nope. Only eligible for emergency medical care, public health benefits (diseases, pregnant moms), FEMA food, water, evacuation assistance.
 - ▶ “It’s easier for them than legal immigrants”: Not!
Can’t get a DL, can’t get legal, exploited by employers, can’t get an SSN.

Permanent Residence

- Many persons who come to the US as nonimmigrants, or undocumented, desire to obtain permanent status in the US. This is known as *lawful permanent residence*, *LPR*, *permanent residence*, and so on.
- Permanent residence gives an individual the right to remain and work in the US permanently for any employer, absent serious criminal conduct, or abandonment of the US residence.
- A period of permanent residence is almost always a prerequisite to becoming a US citizen, though a permanent resident need not become a citizen in order to remain in the US.

Permanent Residence—How?

- Employment-based
- Investment
- Family-based
 - U.S. citizen or permanent resident spouse or parent
 - US citizen child over 21, or sibling
 - Aunts, cousins, American friends—no! Adoption over 16, no!
- Asylum
- Diversity Visa Lottery
- Periodic Special Programs
- Relief in Removal Proceedings

Permanent Residence via Employment

- ▶ Generally foreign national must be offered a permanent, full time job.
- ▶ Need not be in job to be sponsored.
- ▶ Employer usually must show that no US citizens or residents available to fill job.
- ▶ Must agree to pay “competitive” wage.
- ▶ Must also generally show enough of a profit throughout process in order to pay such wage.

Permanent Residence Through Employment

- Process has three steps:
 - **Labor certification:** highly structured test of labor market; no qualified workers; employer must pay both atty's fee and costs; filed electronically with DOL.
 - **Employer petition:** ability to pay, foreign national's qualifications; filed with USCIS.
 - **Adjustment of status:** filed by foreign national and dependants with USCIS. Must show clean immigration, criminal, health records. If outside US or doesn't meet certain strict conditions, foreign national applies for *immigrant visa* for self and dependants.

Employer Sponsorship

- ▶ The process can be started or stopped according to the company's needs, and cannot be dictated or carried forward in the absence of the company's support.
- ▶ Problem cases: those who have been in US illegally over six months; those who cannot obtain work visa to cover processing times (nurses, nannies); workers with common skills in poor economy.

How long does it all take?

- ▶ Process to permanent residence can be lengthy (years), not because the processing with the government is lengthy but because the demand for immigrant visas exceeds the supply.
- ▶ Applies to both family and employment based permanent residency.
- ▶ The higher in preference, the shorter the line.

Removal Proceedings

- ▶ Foreign nationals can be refused admission and removed from the US.
- ▶ Likewise, foreign nationals who are found in the interior who have no right to remain in the US may be removed.
- ▶ Those caught in the interior have substantive and procedural due process rights, including, generally, the right to a hearing before an immigration judge, and the right to appeal.
- ▶ Trend is increased enforcement across the board

Crosstalk with Other Areas of Law

- ▶ Criminal Law: Foreign nationals can be deported or refused admission to the US for “conviction” of very minor offenses. Examples: domestic violence, simple possession of drugs, petty burglary.
 - ▶ “Conviction” includes any instance where plea is entered and “punishment” imposed, even if plea later withdrawn.
 - ▶ All expunged, many pardoned offenses still count for immigration purposes, and MUST be admitted in ALL immigration contexts.

Crosstalk

- Domestic law:
 - Adoption generally conveys no immigration benefit if finalized after age 16 (18 if younger sibling adopted at same time).
 - Undocumented, nonimmigrants can divorce in state in which domiciled, even if spouse abroad (waiver of service and citation).
 - Undocumented can marry in any parish; attempts to prevent or discourage marriage are likely unconstitutional.
 - There may be difficult custody issues for undocumented immigrants—instability of their situation.

Crosstalk

- ▶ Labor and employment law:
 - ▶ Anti discrimination provisions of INA Sec. 274B: citizenship status discrimination.
 - ▶ State cannot constitutionally prevent permanent residents from entering most professions. Thus, state law requiring citizenship for liquor license likely unconstitutional.
 - ▶ Undocumented have right to unionize, have rights under wage and hour laws, workmen's comp, etc. But fear of retaliation often discourages asserting rights.

Crosstalk

- ▶ Constitutional Law:
 - ▶ Foreign nationals have same rights under Fifth and Eighth Amendments in criminal proceedings, but with very different consequences (often removal)!
 - ▶ Until very recently, most federal courts had held consistently that almost all state attempts to legislate in the area of immigration were preempted by the Constitution and comprehensive federal legislation, but this bedrock principle has fallen by the wayside since 9/11.

QUESTIONS?

¿Preguntas?

Perguntas?

Domande?

Fragen?

Questiós?

Vragen?