

Permanent Residence: First Preference Priority Worker Category Provides an Opportunity to Jump to the Head of the "Green Card" Line

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What do a nationally-ranked cyclist from South Africa, a research scientist from Tunisia who discovered a new gene, and an international business executive from Brazil have in common? You might say that they are all high achievers with a high level of skill in their respective fields; and that would certainly be true. But in the immigration context, you could also say that they may qualify for permanent residence in the United States in an elite group reserved for only those individuals who are considered to have extraordinary ability in their field, are teachers or researchers who are internationally recognized as outstanding, or are being transferred to the U.S. as an executive or manager of a multinational company.

For many foreign nationals, becoming a Permanent Resident of the United States and receiving a "Green Card", is the fulfillment of a long held dream. Due to heavy backlogs and long waits for permanent residence visa numbers, foreign nationals, in particular those from countries such as India and China, may not see their dream of permanent residence become reality for many years. The First Preference Employment-Based Priority Workers (EB-1) category, however, provides a fast track to U.S. permanent residence. Proceeding under the First Preference category offers several benefits, including skipping the labor certification/labor market test route and having a permanent residence visa number immediately available. If the U.S. Citizenship and Immigration Services (USCIS) agrees that the foreign national qualifies for the First Preference category, the individual will become a permanent resident many years earlier than would have been possible if required to proceed under one of the other employment-based categories.

Individuals who do not qualify for permanent residence in the First Preference category and wish to become permanent residents based on employment, must obtain permanent residence in one of the other employment-based categories, including the Second (professionals holding advanced degrees or with exceptional ability) or Third (Professionals holding bachelor's degrees, Skilled Workers for jobs requiring at least two years training/work experience or Other Workers) categories. These categories involve an often lengthy and expensive Labor Certification process (which includes conducting recruitment, showing that there are no U.S. workers (U.S. citizens or permanent residents) able, qualified and available to fill the job (20 C.F.R. § 656.1(a)(1)), submitting an application to the U.S. Department of Labor (USDOL) for processing, responding to an audit notice if selected for audit, and hopefully, in the end, obtaining certification/approval of the application). In addition to having to work through the Labor Certification maze, individuals in the Second and Third Preference categories also are often subjected to long backlogs for permanent residence visa numbers which are tied to the date that the labor

certification application is originally submitted to the USDOL and the country in which they were born. In some cases, the wait may be many years — especially if the foreign national was born in India, China, Mexico or the Philippines.

Individuals in the First Preference category, however, are able to immediately and concurrently file the I-140 Immigrant Petition and the I-485 Application to Adjust Status to Permanent Residence and possibly have their Green Cards within months rather than years. Qualifying for permanent residence in the First Preference category means demonstrating that the foreign national meets the requirements for one of the three classifications in the category.

Extraordinary Ability

To qualify for the First Preference category as a person with extraordinary ability, the foreign national must be able to show that he has sustained national or international acclaim in a particular field (such as the sciences, business, the arts, or athletics) and can provide extensive documentation that his achievements have been recognized by experts in the relevant field. The extraordinary ability classification is reserved for those individuals who can demonstrate that they are at the "very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2).

Evidence of sustained international acclaim may be in the form of a one-time international award of major significance (such as an Olympic Gold Medal, a Nobel Prize, or an Oscar). In lieu of a one-time award, evidence of at least three of the following categories could provide support for approval: (1) a lesser national or international prize or award for excellence (e.g., the Randolph Caldecott Medal for the year's best illustrated children's book published in the United States); (2) membership in an association requiring outstanding achievement in order to become a member (such as membership in the Academy of Motion Picture Arts and Sciences where membership is limited to those who have achieved distinction in the field); (3) published material about the foreign national in professional or major trade publications or other major media (for example, featured articles in Velonews and Bicycling magazines); (4) participation as a judge of others in the same field (e.g., a Judge for the CLIO Award in creative advertising); (5) original scientific, scholarly, artistic, or business-related contributions of major significance (such as the invention of a medical device); (6) authorship of scholarly articles in major professional or trade publications or other major media (e.g., an article published in high impact journals such as the Journal of the American Chemical Society or The New England Journal of Medicine); (7) display of the foreign national's work at artistic exhibitions or showcases (such as a musical performance at the Grammy's); (8) performance in a critical or leading role for an organization with a distinguished reputation (e.g., the President of a prestigious university); (9) command of a high salary in relation to others in the field; and/or (10) commercial success in the performing arts (as demonstrated, for example, by box office receipts or compact disk sales). 8 C.F.R. § 204.5(h)(3)(i)-(x).

Naturally, not all of the above-listed categories will apply to all fields of endeavor but comparable evidence is acceptable. All evidence provided must be supported by documentation that explains why the award or contribution is significant (such as

letters from respected individuals in the field describing the worth and impact of the relevant honor) and also explaining in detail the criteria for award and/or selection.

No offer of employment is required for the extraordinary ability classification, however, the petition must include evidence that the foreign national is going to continue to work in the area of expertise once admitted to the United States. A letter from a prospective employer, a contract, or the foreign national's statement explaining in detail how he plans to continue to work the field once approved will be sufficient to fulfill this requirement. 8 C.F.R. § 204.5(h)(5).

When considering the possibility of proceeding under the extraordinary ability classification, you will want to make sure that the evidence and documentation that you submit in support of the petition is sufficient to show extraordinary ability in accordance with the relevant group. For example, to qualify as "major media", a newspaper should have significant national or international distribution, such as the New York Times. Articles published in small community newspapers would not qualify as major media. In addition, the "judging the work of others" requirement may be satisfied by showing that the person evaluated the work of accomplished professionals as a member of a national panel of independent experts. Generally the display of work at artistic exhibitions or showcases is intended to apply to the visual arts (such as sculptors or painters) rather than to business executives. Also, "essential capacity" means that the person was responsible for the organization's success or standing to a degree consistent with sustained national or international acclaim.

Outstanding Professors and Researchers

In order to qualify for First Preference classification as an outstanding professor or researcher, the foreign national must show that he: (a) has international recognition in a specific academic area; (b) has at least three years of experience in teaching or research in the same academic area; and (c) will be filling a tenure or tenure track teaching position or a comparable research position at an institution of higher education. A permanent offer of employment from a private employer employing at least three full-time research employees and evidence of accomplishments in the academic field also will meet the requirements for the third point.

In order to satisfy the "international recognition as outstanding in an academic area" prong, the foreign national must submit evidence in at least two of the following categories: (1) receipt of a major prize or award for outstanding achievement; (2) membership in an association requiring outstanding achievement in order to become a member; (3) published material in professional publications about the foreign national's work; (4) participation as a judge of others; (5) original scientific or scholarly research contributions; and/or (6) authorship of scholarly books or articles published in journals with international circulation. 8 C.F.R. § 204.5(i)(3)(i)(A)-(F).

The petition for an outstanding professor or researcher must include letters from current or former employers to show that he meets the three years of experience in teaching or research requirement. The letters submitted must include a description of the job duties performed and the name, address, and title of the individual writing

the letter. 8 C.F.R. § 204.5(i)(3)(ii). In addition, the petition must include a written offer of employment from a U.S. university or institution of higher learning (for a tenure or tenure-track teaching or permanent research position) or from a private employer (for a permanent research position) in the academic field. 8 C.F.R. § 204.5(i)(3)(iii).

It is important to review and evaluate the items and documentation presented by the foreign national to determine whether they rise to the necessary level of outstanding achievement in the academic field. For example, a grant is not indicative of international recognition if it is based on submission of a proposal rather than awarded in recognition of past outstanding achievements. Merely showing that an association has a preeminent reputation will not, without more, establish that membership requirements are exclusive or restricted or require outstanding achievements of its members. The USCIS considers peer review of submitted papers as routine in academia and in order to satisfy the "judging" requirement, the foreign national would have to show that he served in an editorial position for a distinguished international journal or received independent requests from a substantial number of international conferences or journals. Letters demonstrating original contributions in the academic field should be provided by independent members (not within the immediate circle of the foreign national's colleagues) of the field influenced by the foreign national's work. The foreign national's publication record should set him apart from others in the field — not merely the publication of a Ph.D. dissertation. Good support of the publication prong would be evidence where independent members of the field have cited the foreign national's work, letters from independent members of the field who have been influenced by the foreign national, or course reading lists from courses in the U.S. and abroad listing the foreign national's work as required or recommended reading.

Multinational Executives and Managers

The third classification in the First Preference Priority Worker category is the one reserved for multinational executives and managers. In order to qualify for this classification, the foreign national must show that he: (a) worked for a foreign affiliated company of a U.S. company that has been in business for at least one year; (b) worked as an executive or manager for the foreign affiliated company for at least one continuous year within the three years immediately preceding either the filing of the petition (if the foreign national is outside the U.S.), or immediately preceding the foreign national's entry into the U.S. in nonimmigrant status (e.g., L-1A status); and (c) is transferring to the U.S. affiliated company to fill a position that is executive or managerial in nature. 8 C.F.R. § 204.5(i)(3)(i)

Generally, showing that the foreign or the U.S. entity is a wholly-owned subsidiary of the other or that both the U.S. and the foreign entities are owned and controlled by the same parent, will satisfy the "affiliation" requirement. In order to qualify as an "executive" assignment, the job must involve direct management of the company or a major component or function of the company, allow for wide discretionary decision-making, and require only limited supervision from the board of directors, stockholders, or higher-level executives. 8 C.F.R. § 204.5(j)(3)(i) A "manager" is an individual who manages the organization or a department, has the authority to direct

the day-to-day operations of the organization or department, supervises and controls supervisory, professional, or managerial employees (or an essential function), and has the discretion to hire and fire employees or to recommend other personnel actions with regard to the employees he supervises. 8 C.F.R. § 204.5(j)(3)(i). First-line supervisors generally do not meet the "manager" requirement unless they are supervising professional employees (such as those who hold at least bachelor's degrees and work in positions requiring the attainment of a bachelor's degree in the relevant field).

The petitioning U.S. employer must submit a letter of support with the petition stating that a position is available for the foreign national as either an executive or manager and must fully describe the duties that relate to the offered position.

It is important to make sure, when proceeding under the multinational manager or executive classification, that the type of business and organizational structure support the employment of a manager or executive. The description of the job duties for the U.S. and the foreign positions should be specific and describe in detail the types of business decisions the individual will make and the level of discretion that the foreign national will have while holding the position. In evaluating a petition in this classification, the USCIS will take into consideration the needs of the organization and the stage of development of the organization. If the foreign national will primarily be performing duties necessary to produce the product or service offered by the company, the position will not be considered to be managerial or executive.

Being able to file a permanent residence case in the First Preference Priority Worker category is an option reserved only for those few who can demonstrate high levels of achievement in a particular field or are transferring into the U.S. to work as a manager or executive for an U.S. affiliate of the employer abroad. Obtaining permanent residence in the First Preference category requires considerable groundwork and planning, detailed and extensive documentation, and preparation of a petition package that will impress upon the USCIS that the foreign national meets the necessary requirements for inclusion in this category. Even if a foreign national is not a candidate for the First Preference category at the time, it is possible for him to develop a resume and evidence, using the above list of requirements as a guide, to make applying in this category a reality at some point in the future. Certainly, it is worthwhile to explore with the foreign national in the initial discussions about sponsorship for permanent residence, the possibility of proceeding in the First Preference category. Generally, the foreign national would come forward already knowing or having a good idea that he is a candidate for one of the classifications in this category but there may be an occasion when you discover a diamond in the rough that just requires a little polishing before being able to qualify for treatment in the First Preference Priority Worker category.

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