

OVERVIEW OF EMPLOYMENT-BASED LAWFUL PERMANENT RESIDENCE

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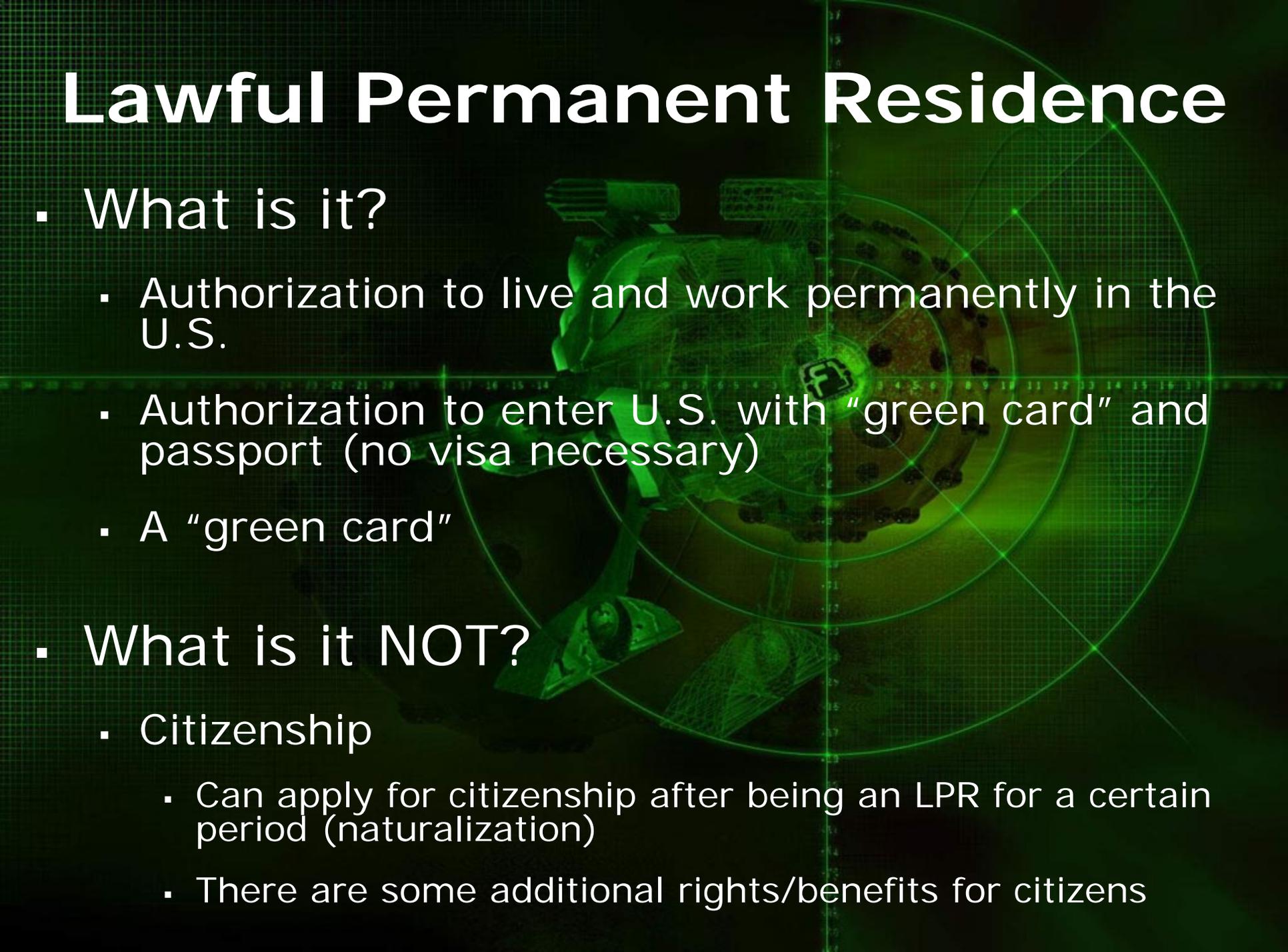
University of Idaho

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Presentation Outline

- Overview of permanent residence
- Overview of employment-based permanent residence
- Outstanding professors and researchers
- Labor certification
 - Labor certification for teaching faculty
 - Labor certification for other professional occupations
- Self-petitioning (post-docs., etc)
- Adjustment of status

Lawful Permanent Residence



- What is it?
 - Authorization to live and work permanently in the U.S.
 - Authorization to enter U.S. with “green card” and passport (no visa necessary)
 - A “green card”
- What is it NOT?
 - Citizenship
 - Can apply for citizenship after being an LPR for a certain period (naturalization)
 - There are some additional rights/benefits for citizens

- Who can become a permanent resident?
 - Not just anyone
 - The law provides certain grounds for LPR
 - Family-based: relationship to U.S. person
 - Employment-based: benefit to a U.S. employer
 - Public policy-based: ("asylum"/"lottery") to "avoid chaos" and to balance the sources of immigration to the U.S.
 - Total number of LPR "visas" is limited
 - Queues may develop, so depending on home country and category, it could be a long process
 - Petition approval places people in queue for the visa until their category/country allotment is available again
 - Certain people are ineligible: people who committed serious crimes or immigration violations, people who entered U.S. illegally, etc.

- How is it obtained
 - Pursuant to complicated laws, regulations, policies, procedures of three agencies (depending on route)
 - U.S. Citizenship & Immigration Services (USCIS)
 - U.S. Department of State (DOS)
 - U.S. Department of Labor (DOL)
 - Usually, through filing of a petition
 - Filed with U.S. Citizenship & Immigration Services
 - By the one who wants LPR, or
 - On behalf of the one who wants LPR
 - Petition approval assigns ***FUTURE*** right to a "green card"
 - Immigrant visa/status or "green card" is obtained by
 - Applying for adjustment of status to LPR in the U.S., or
 - Applying for the visa at U.S. consulate in home country
 - "Visa" queues/backlogs, depending on country and category
 - Approved petition alone provides no right to remain in the U.S. work, etc.
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▪ Main Routes to LPR

▪ Asylum

▪ Self-petition

- Must prove likelihood of persecution if you return home

▪ Diversity Visa Lottery

▪ No petition -- apply on Dept. of State web site

- Must be from country with low immigration to U.S
- DOS chooses 50,000 per year (notifies 100,000)

▪ Family relationship to U.S. Citizen/L.P.R.

▪ U.S. citizen/LPR relative files petition

- Preferences and queues

▪ Employment

▪ Usually employer offering full-time permanent job files petition, but ***some exceptions allow self-petition***

- Preferences and queues

Employment-Based LPR

Some Key Concepts

- With a few exceptions:
 - Employer must apply/petition for employee
 - Usually three steps:
 - Employer files labor certification application with DOL
 - Employer files immigrant petition (I-140) with USCIS
 - Employee and dependents (spouse and minor children) file adjustment of status applications (I-485)
 - Full-time, permanent job required
 - Some routes like "outstanding professor/researcher," "extraordinary ability," and NIW skip labor certification

▪ EB LPR Categories

- Each year 140,000 places allocated among five categories, called “preferences”

- First Preference (EB-1)

- Aliens with extraordinary ability
- Outstanding professors and researchers
- Certain multinational executives and managers

- Second Preference (EB-2)

- Members of the professions holding advanced degrees
- Aliens of exceptional ability

- Third Preference (EB-3)

- Professionals and skilled workers
- Other workers

- Fourth Preference (EB-4): Certain special immigrants

- Fifth Preference (EB-5): Investors in commercial enterprises

Outstanding Professor or Researcher

- EB-1 "Outstanding Professor or Researcher"
 - Available for
 - Professors in a tenure-track or tenured position
 - Researchers with a "permanent" position
 - Requirements
 - At least three years of experience in the field
 - Recognized internationally as outstanding in a specific academic area, as established by evidence in at least two of the following categories
 - original scientific or scholarly contributions to the field (letters)
 - authorship of scholarly books or articles
 - published material about applicant's work
 - participation, individually or on a panel, judging the work of others
 - receipt of major prizes or awards for outstanding achievement
 - membership in an organization that requires outstanding achievement
 - other comparable evidence
- Careful and specific definition of the field of endeavor is crucial
- Expert letters powerful evidence (must be carefully constructed)
- Main advantages
 - Labor certification is not required
 - EB-1 least likely to retrogress or backlog

Labor Certification (EB-2 and EB-3)

- What is it?
 - Determination by USDOL that there is no qualified available U. S. worker willing to fill the position offered and that employment of the foreign national employer intends to hire will not adversely affect job opportunities, wages and working conditions of U.S. workers
 - The first step in the “green card” process for most EB petitioners
- How is it obtained?
 - Generally, employer must demonstrate proper recruitment efforts and that no qualified U.S. worker applied (*different for “college and university teachers”*)
- Problems
 - Complicated and arcane requirements, not “real world”
 - Unforgiving computer system (PERM) now “reads” applications
 - Qualified U. S. worker need only meet the ***minimum qualifications*** for the position
 - So you’re not proving that you found the most qualified applicant (that would be easy)
 - Different and much preferable standard for “college and university teachers”
- Overview of Process
 - Obtain prevailing wage determination
 - Conduct proper recruitment and prepare “recruitment report”
 - Post notice for 10 business days and publish in usual in-house media
 - Wait 30 days (but not more than 180 days) and file ETA-9089 online
 - DOL may approve, audit, or deny
 - If approval, employer may file I-140 for employee

PROCESS: Professional Occupations

- Employer must conduct proper recruitment (30 to 180 days before filing), including:

MANDATORY RECRUITMENT

Job Order:

- Place ad with State Workforce Agency (SWA) to go into job bank and remain active for 30 days

Advertisements in newspaper or professional journal

- Two Sundays in most appropriate newspaper of general circulation in area of employment
- If job requires experience and advanced degree, and professional journal ad would be normal, employer may place advertise in professional journal in lieu of one Sunday newspaper ad

ADDITIONAL RECRUITMENT, *three* of the following

- recruitment at job fairs
- recruitment through the employer's web site
- recruitment through a job search web site (other than the employer's site)
- on-campus recruiting
- recruitment through trade or professional organizations
- use of private employment firms or placement agencies
- use of an employee referral program
- use of a campus placement office
- recruitment through a "local" or "ethnic" newspaper
- radio and television advertisements.

PROCESS: "College and University Teachers"

- "College and university teachers" are those who engage in "some classroom teaching"
 - No specific course load requirement
- Commonly referred to as "special handling" as it was known before PERM

RECRUITMENT

- One advertisement in a national PRINT (not online-only) professional journal
- Employer must have chosen **most qualified applicant**
 - *No need to prove that no minimally qualified U.S. applicants applied*
 - Documentation includes statement by employer's official with hiring authority setting forth the total number of applicants and job-related reasons why the foreign national is most qualified, copy of the advertisement

REQUIREMENT

- File the labor certification application within 18 months of "selection of the alien" (usually job offer letter)

Keys to Success

- Make sure job requirements are “normal” (per DOL) or justifiable
 - If employer can require master’s or bachelor’s plus five years of experience, EB-2 and shorter queue
- Don’t require more qualifications than employee had at start of employment
 - Employer cannot require more education or experience for the job than the employee had when she/he started
- Careful recruitment and filing
 - Carefully establish job requirements
 - Gather documents (diplomas, experience letters) establishing that employee met requirements before accepting job
 - Create advertisements and conduct mandatory recruitment carefully
 - Choose additional recruitment vehicles strategically
 - Post notice for 10 consecutive business days (or provide notice to union), and note dates and place of posting
 - If employer usually posts such notices in in-house media (intranet, newsletter), post there
 - Employer must carefully review applications to see if applicants meet requirements and reject in writing if not (interview if they seem to qualify)
 - Prepare thorough “recruitment report” and audit file
 - Wait 30 days (but not more than 180 days) and file ETA-9089 online
 - Meticulous attention to detail in filing ETA-9089
 - If audited, respond timely and with thorough required evidence

Self-Petitioning for EB-LPR

- Most common options for those without a permanent job offer and/or those not sponsored by their employer:
 - Persons of extraordinary ability (EB-1)
 - Requires no job offer or labor certification
 - Very difficult: must be among “the small percentage who have risen to the very top of the field of endeavor”
 - National Interest Waiver (EB-2)
 - Waives of permanent job offer and labor certification requirements
 - *Matter of NYSDOT* sets difficult eligibility criteria

▪ *NYSDOT* criteria

- The employment must be in an area of “substantial intrinsic merit”
- The benefit of the employment must be national in scope; and
- The national interest would be adversely affected if labor certification were required
 - This is the problem!
 - Must show that applicant is specially qualified for the work, key member of a team, could not be replaced, or that job could not be performed by person meeting usual minimum requirements (for instance, researcher with just Ph.D. could not do the job, special skills/experience required)
 - Footnote to NYSDOT indicates that applicant must have exerted “influence on the field as a whole”
 - Use similar kinds of evidence as that for “outstanding” and expert opinion letters are crucial

▪ *Pre-NYSDOT* criteria

- While the NYSDOT case criteria replaced the criteria stated in the “Mississippi Phosphate” case, these areas are probably still worth consideration:
 - In determining whether the work is in the national interest, consider:
 - Does it improve the U.S. economy
 - Does it improve the wages and working conditions of U.S. workers
 - Does it improve education and training programs for children and underqualified workers in the U.S.
 - Does it improve U.S. health care
 - Does it provide more affordable housing to those in need
 - Does it improve the environment of the U.S. and make more effective use of natural resources
 - Is it of interest to a U.S. government agency?

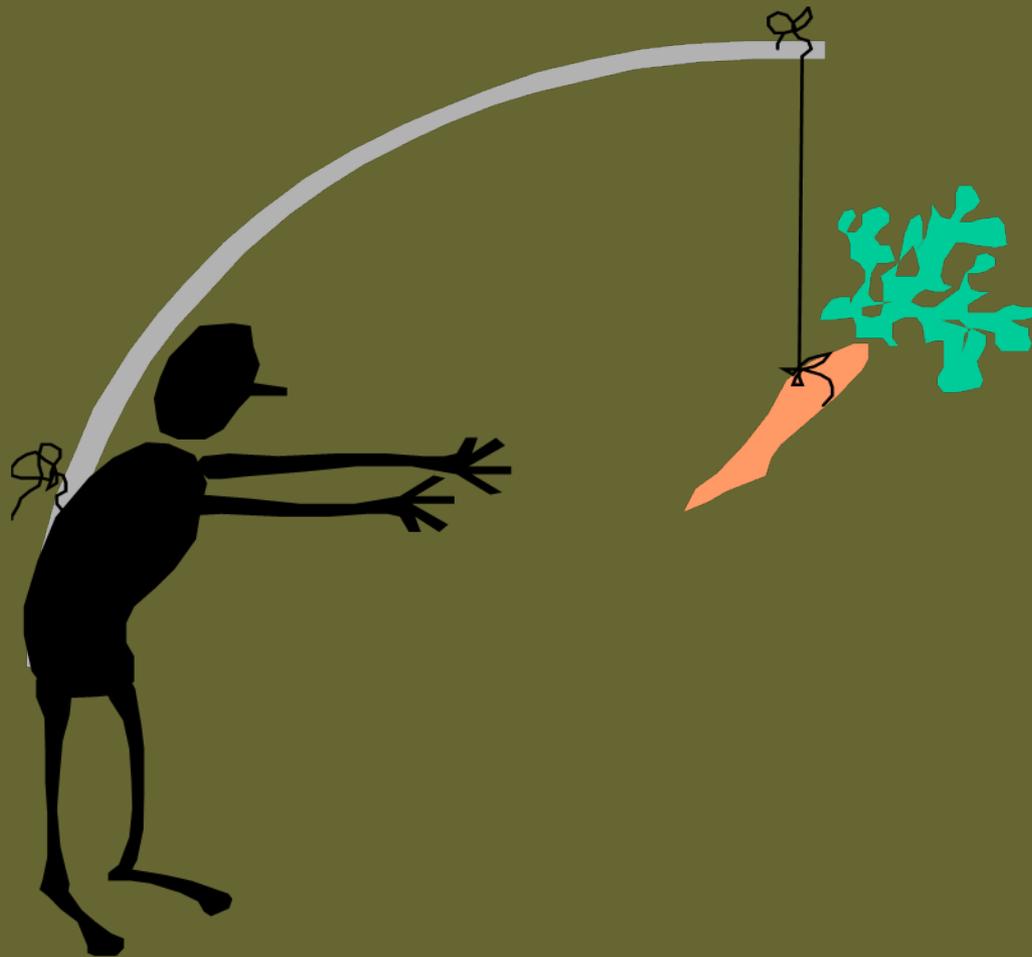
Which Route is Best?



Adjustment of Status

- **Last step in LPR process**
 - A request that USCIS “adjust” applicant’s status to LPR (alternative to “consular processing” an immigrant visa)
 - Must have current “priority date” to file adjustment of status
 - Priority date established by filing of first step in LPR process
 - May file after immigrant petition approved or “concurrently” with petition (as long as you’re “current”)
 - Depending on country, category, and demand for “green cards,” the wait can be a long one
 - Dependents (spouse, unmarried children under 21), called “derivatives,” may apply for AOS with “principal”
 - Adjustment applicants get travel document and work card
 - Filing adjustment application (not petition or labor cert.) gives person the right to remain in the U.S. to wait for “green card”

So . . . approval of Petition gives right to LPR, but you can't get it until your priority date is "current"



Introduction to Backlogs

"Immigrant visa must be immediately available" in order for you to apply for adjustment of status (in U.S.) or to consular process visa abroad

How do you know when an immigrant visa is available for you?

State Dept. Visa Bulletin provides monthly update

http://www.travel.state.gov/visa/frvi/bulletin/bulletin_1360.html

- 140,000 employment-based LPR visas each year
 - Allocated among preferences, EB-1 - 28.6% EB-2 - 28.6%, etc.
 - Per country limit in each category 7%, so--for example--persons from China can only have 7% of EB-1 visas
- Your place in the queue is determined by your "priority date," and that is the date first step (labor cert. or petition) is filed
- Movement in availability depends on the demand for "immigrant visas" or how many petitions are approved each month

May Visa Bulletin

http://travel.state.gov/visa/frvi/bulletin/bulletin_4454.html

Emp- Based	All Chargeability Areas Except Those Listed	CHINA- mainland born	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C
2nd	C	15 FEB 05	15 FEB 05	C	C
3rd	U	U	U	U	U
Other Workers	U	U	U	U	U
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th	C	C	C	C	C

April Visa Bulletin

http://travel.state.gov/visa/frvi/bulletin/bulletin_4438.html

Emp- Based	All Chargeability Areas Except Those Listed	CHINA- mainland born	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C
2nd	C	15 FEB 05	15 FEB 05	C	C
3rd	01 MAR 03	01 MAR 03	01 NOV 01	01 MAR 03	01 MAR 03
Other Workers	01 MAR 03	01 MAR 03	01 MAR 03	01 MAR 03	01 MAR 03
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th	C	C	C	C	C

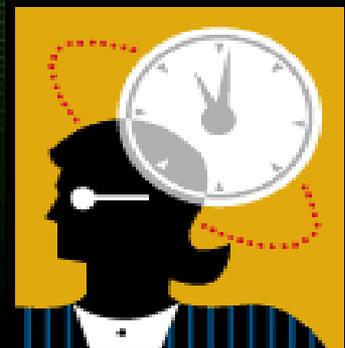
What Happens after Petition is Filed?

- Two kinds of waiting!
 - Immigrant petition (I-140) and adjustment application (I-485) processing
 - Depending on country and category, maybe a visa backlog wait
- Once adjustment of status application is filed, applicant can get work card and travel document and/or continue to maintain H-1B status
- If labor cert. application or immigrant petition is filed more than 365 days before 6th year of H-1B expires, H-1B and H-4s can be extended beyond 6 years (start LPR process early!)
- If I-140 is approved but backlog prevents filing of adjustment, H-1B/H-4 status can be extended beyond 6 years
- After adjustment of status application has been pending 180 days, employee can move to a new employer, similar employment, and not "cancel" application, but complicated and risky
- Employee and family may be called for interview at DHS office, but this is rare in EB cases

How Long Will It Take?



- Depends . . .
 - How long to gather documentation?
 - Dept. of Labor processing time?
 - USCIS processing times?
 - Current best guess (may change tomorrow)
 - 9 months for labor certification (if no audit)
 - 6-12 months for I-140
 - 6-18 months for I-485
 - This is JUST processing time and does not account for Visa Bulletin delays
 - Visa Bulletin changes each month, backlogs difficult to predict



Review of the Process

- EB-1 "outstanding" route
 - Evidence is gathered and immigrant petition (I-140) submitted to USCIS
- EB-2 or EB-3 with labor certification route
 - For professional occupation, PERM-compliant recruitment/selection conducted
 - For "special handling" re-recruitment usually not required
 - Labor Certification is filed by employer in PERM system
 - If approved, immigrant petition (I-140) submitted by employer to USCIS
- Adjustment of Status application is filed by employee (with/after petition)
 - May face wait if backlogs for country/category
 - Dependents' adjustment applications are filed with principal's
- Begin the process early
 - 18 month window for "special handling" labor certification
 - Start well before one year has passed from offer of employment to professor
 - For H-1Bs, make sure petition is filed during 5th year of H-1B status
 - Post-6-year H-1B extensions available if petition is pending 365 days or more

Wrap-Up



- Questions?
- For more information
 - E-mail
 - Steve Springer -- *steve@David-Ware.com*
 - Subscribe to our newsletter and "breaking news" alerts
 - <http://www.david-ware.com/subscribe.html>
 - See www.David-Ware.com