

Exhibit J

# Kane Legal Immigration Law Handbook

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David Kane, R.Ph, J.D.  
*Professor of Pharmacy Law, Rutgers University*

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PRACTICE AREAS.....

## Section 1 - Non-Immigrant: Temporary Status

### **B-1/B-2 Visitor: B-1 - for Business / B-2 - for Pleasure**

For coming to the U.S. for business or pleasure. B-1 business visitor visas are for brief visits and do not allow employment. Nationals of some countries are allowed to visit the U.S. for up to 90 days without a visa

### Visit USA.....

Nonimmigrants apply to come to the U.S. on a temporary basis on either a B-1 Visa for business (e.g. attending conferences, business meetings) or on a B-2 Visa for pleasure (e.g. tourism, visit friends or relatives). These visas require that the applicant has permanent residence in the home country, which s/he has no intention of abandoning, that the person enters the U.S. for a temporary period, and that s/he engages in activity relating to business or pleasure (no employment).

### **What We Can Do For You**

We, at the Kane Legal Law Firm, can consult with you to discuss the strengths and weaknesses of your case and provide guidance on the kind of paperwork that we would suggest you (or your relative) file in order to obtain the B-1 or B-2 visa. In some instances, we can help with drafting the paperwork for the visa. In appropriate circumstances, we can assist with the filing for extensions of stay for persons already in the U.S.

### **E-1 - Treaty Trader / E-2 - Treaty Investor**

Investors / traders and their employees may receive status to carry on their business in the U.S. if the home country has a commercial treaty with the United States conferring such eligibility.

The Treaty Trader / Investor Visa (nonimmigrant E classification) is designed for the benefit of nationals of a country with which the U.S. has a treaty of commerce and navigation, or a similar agreement. The E classification is divided into two categories.

- E-1 is for individuals coming to the U.S. to carry on substantial trade.
- E-2 is for individuals coming to the U.S. to invest a substantial amount of capital or to direct and develop the business operations of an entity in which the individual has already invested funds

A person may qualify as the principal trader or investor or as an employee of a trader or investor company having the same nationality. There are no numerical limitations on E-1/E-2 admissions.

### **Requirements that apply to both E-1 and E-2:**

- The person has the nationality of a treaty country. Additionally, if the person will be employed and doing business on behalf of a company, the employing company must be from the same treaty country.
- The company's nationality is almost always determined by its ownership, though there are special rules for publicly traded companies. A company must be at least 50 percent owned by persons with nationality from the treaty country who are not lawful permanent residents of the U.S. If these owners are in the U.S., they must be in E-1 or E-2 status.

- In general, unskilled workers and workers with ordinary skills do not usually qualify for the E-1 or E-2 category. Rather, these visas would be for executives, managers or others with skills and experience that are "essential" to the success of the operation.

**Additional Requirements specific to E-1 traders:**

- The international trade must be substantial in the sense that there is a sizable and continuous flow of trade. More than half of the trade activity must be between the U.S. and the treaty country.
- The trade may be in a variety of items such as products, services, or technology but these items must already exist.
- The E-1 visa holder can be an independent trader or an agent or employee of a trader or of a trading company.

**Additional Requirements specific to E-2 investors:**

- The investment must come from the investor. The money must be "at risk," so for example it cannot be a loan that is secured by the assets of the business itself.
- The investment must also be "substantial," meaning that it is enough to provide a sufficient infusion of capital or credit to permit the business undertaking to be successful.
- The investment must be active; this means that a bank account, undeveloped land or stocks, or a not-for-profit organization will not be sufficient to be considered.
- The E-2 visa holder can be the investor, or an employee of the individual or company that is making the investment.

Please note that a spouse and children (under 21 and unmarried) accompanying the principal E holder are usually given the same classification, irrespective of their nationality.

**Note that the list of treaty countries changes often** as new treaties are continually signed and ratified. Find the most recent list on the U.S. Department of State Website.

**F-1 - Academic Student**

Persons enrolling in a full course of study at an educational institution in the United States may be eligible for F-1 status for the course of their study and a period for practical training (P/T) in their field.

The U.S. attracts many foreign nationals to its diverse and strong institutions of learning. The **F-1 Visa** (Academic Student) allows one to enter the U.S. as a full-time student at an accredited (U.S. government- approved) college or university. The student must be enrolled in a program or course of study that culminates in a degree, diploma, or certificate. The **M-1 Visa** (Vocational Student) is issued to students who want to pursue non-academic programs (health care technician, machinist, dental hygienist, etc.) in an established institution. The **J-1 Visa** (Exchange Student) is for students pursuing graduate / post-graduate studies, visiting scholars, medical doctors undergoing training, etc.

**What We Can Do For You**

At Kane Legal, we can consult with you to discuss your case in detail and guide you on the paperwork we suggest you file in order to obtain the F-1 visa for the principal student and dependent family members. We can advise the International Student Advisor of your college or school regarding all viable options and paperwork requirements of the different student statuses. If appropriate, we can help with

submitting the forms, etc., for the visa at the consulate or with the USCIS for change of status or extension of stay.

### **Basic Requirements**

The basic criteria that an F-1 visa applicant will need to establish in order to obtain an F-1 visa are the following:

- a. Evidence of strong family and home ties in the foreign country with intent to depart from the United States and return to his/her residence after completion of the educational program.
- b. Evidence that s/he possesses the skill level, ability or credentials to qualify her/him for the intended course of study in the U.S.
- c. Evidence that the school selected and which has offered admission for the full course of study is approved by the Attorney General.
- d. Should not apply for a public elementary school or a publicly funded adult education program. The candidate may attend a public secondary school in limited circumstances as long as the funds for the program from outside sources and the duration of attendance is less than 1 year.
- e. Should be proficient in English or is receiving training to become proficient unless the school can explain why English language is not important.
- f. Evidence of sufficient funding or that other financial arrangements have been made to attend school and live in the U.S. during the course of the program.

Consular officers in reviewing financial self-sufficiency of a candidate would like the applicant to demonstrate that the candidate will be able to study in the United States and not have to resort to working illegally to support him/herself.

Some methods that may be used to provide proof of financial stability include the following :

- a. Financial aid from the school in the form of a scholarship, fellowship, assistantship, grant or loan. If the candidate chooses to use this route s/he would require a confirmation that similar financial aid will be available as long as the program is pursued;
- b. Financial aid from the student's home government;
- c. Financial aid from private organizations or institutions;
- d. Applicant's personal resources;
- e. Funds from close family members. In some countries restrictions exist on the export of currency. The candidate must check to see whether any such restrictions exist, because consular or immigration officers may be aware of them.

An F-1 visa may be issued by the Consul within 60 days of a school term. When entering the United States the candidate will receive an arrival / departure card (I-94) indicating F or student status and will be marked that it is valid with the notation of "D/S." "D/S" stands for "duration of status" and permits the student to remain in the United States until the completion of the educational program. This can include completing an academic program and moving on to a higher academic program such as a Bachelors degree to a Masters degree, as long as the transfer is documented properly with the Immigration and Naturalization Service.

### **Employment**

A student may not work off-campus during the first academic year, but may accept on-campus employment subject to certain conditions and restrictions.

## **a. Employment While Maintaining the Academic Student Status:**

### **On-Campus Employment**

During the student's first academic year, the only employment that may be accepted is on-campus employment. At most schools, on-campus employment opportunities are rather limited. Prospective students should check with the school for specifics. It may be that most of the on-campus jobs are reserved for those U.S. students who are participating in certain types of financial aid programs, so there may not be anything available for foreign or other students. Policies vary from school to school.

### **Off-Campus Employment in General**

Off-campus employment requires a full time student to have completed at least one academic year of study before being eligible to apply. A student who is on an Academic Student Visa (F-1) may obtain permission to work in four circumstances:

1. Curricular Practical Training,
2. Optional Practical Training,
3. Unforeseen Economic Hardship, and
4. Internship with an International Organization.

Students wishing to obtain either curricular or optional practical training must obtain employment that is related to the student's course of study, and the position must be explicitly for the purpose of practical training. This training cannot include English language training.

As indicated above, there are two types of practical training:

- i. Curricular Practical Training; and
- ii. Optional Practical Training.

### **Curricular Practical Training**

Curricular practical training (CPT) refers to programs that are a fundamental or an integral part of the existing curriculum. The training must be alternate work-study (alternating between classes and working); an internship; cooperative education; or any other type of required internship or practicum that is offered by a sponsoring employer through an agreement with the school.

Students enrolled in a college, university, conservatory, or seminary are eligible to apply to the Designated School Official (DSO), often referred to as the International Student Advisor, for authorization to participate in a curricular practical training program. In order to qualify for CPT the proposed curricular practical training must be listed in the school's course catalogue with the number of credits awarded on completion, along with information about faculty supervision and a description of the course featuring a clear definition of the course objectives.

CPT can last as long as required or justified by the program. Students who have completed more than one year of full-time CPT, however, are ineligible to participate in post-completion optional practical training.

Please note that for graduate students, some CPT programs may be authorized even during the first academic year. The DSO would be able to tell you what types of programs are available.

### **Optional Practical Training**

Optional Practical Training (OPT) refers to practical training in two time periods: before the completion of the student's course of study, and after completion of degree requirements or the course of study. Such temporary employment may be authorized in the following situations:

- When the school is not in session if the student is currently enrolled and intends to register for the next term or session.
- While school is in session, provided that practical training does not exceed 20 hours a week.
- After completion of all requirements for the degree (excluding thesis, if applicable).
- After completion of the course of study.

OPT is available for a total of 12 months of full-time employment. Any period or increment of OPT will count toward the total 12 months. For example, part-time practical training for 20 hours per week for a six-month period will be counted toward the 12 months allowed at a rate of half the time. This means that 3 months will have been used up of the total 12 months allowed (6 months of employment X half time  $\frac{1}{2}$  = 3 months of full time employment).

### **Miscellaneous Points on OPT**

- All practical training must be completed within 14 months after the completion of study.
- OPT is available only in an occupation that is directly related to the student's major area of study.
- Students in English language, elementary, or secondary programs are ineligible for OPT.
- Transfer to another school automatically terminates authorization of practical training employment.
- Even with approval from the DSO, a student must obtain separate work authorization from the INS.
- Post-completion OPT is for full-time employment only and must be applied for between 90 days before completion to 30 days after completion of the course requirements.

### **Severe Economic Hardship**

After the first academic year, if a student can demonstrate that a "severe economic hardship" was caused by unforeseen circumstances beyond her/his control, it may be possible to obtain work authorization. To qualify for off-campus work, the student must pursue a full course of study (12 credit hours) and be in good standing with the college or university. During the semester s/he is permitted to work up to 20 hours per week. During the summer and holidays the student may pursue full-time, temporary employment.

Severe economic hardship is decided on a case-by-case basis. The more documentation that can be provided, the better. An example of severe economic hardship is if the financial support program that is sponsoring the student becomes defunct or the family member that has provided the financial backing is no longer able to provide the support offered.

In addition, the INS Commissioner may suspend all or some of the student employment rules for emergent reasons by issuing a notice in the Federal Register. This occurred with respect to students from Indonesia, South Korea, Malaysia, Thailand and the Philippines a few years back when a currency devaluation crisis left the students without financial support from their sponsors back home.

## **Internship with International Organization**

A student may also accept a paid internship from a qualified international organization. The organization must state in writing that the student's employment is within the scope of the organization's sponsorship. The application must be made in person, directly to the local INS office.

### **b. Family of an F-1 Holder**

The immediate family of an F-1 holder may accompany or "follow to join" the student on dependent F-2 status, if the student is or will be enrolled in a full course of study or participating in an approved practical training program within 60 days. If the student is a minor, his/her parents may attempt to enter on a B-2 visitors visa and seek and obtain extensions as long as they can demonstrate their intent to return, i.e. not remain permanently in the U.S. Practically speaking, it may be difficult to obtain the B-2 visa for this purpose.

- Maintenance of status;
- Reinstatement of status; and
- Overstaying.

### Maintenance of Status

In order to maintain academic student visa status a student must pursue a full course of study, not work without authorization, not transfer to a new school without authorization, and complete the full course of study in the time allotted for a particular program. The inverse of any of these criteria would cause a student to be out of status and subject to removal proceedings. Thus a student who:

- Is not pursuing a full course of study; or
- Works without authorization; or
- Transfers to a new school without prior authorization,

could be placed in removal proceedings.

### *Exception:*

Students who fall into the following categories are considered to be maintaining their status:

- a. A student who remained in the United States during the annual / summer vacation as long as s/he is eligible to register for the next semester and has the intention of doing so
- b. A student taking less than a full course of study on the advice of the Designated School Official (DSO) for a valid academic reason.
- c. A student who falls ill and must drop courses or suspend full academic studies until s/he has recovered.
- d. A student with a disability that prevents her/him from pursuing a full course of study.
- e. A student who is having difficulty adjusting in the United States due to language or cultural barriers or has difficulty adjusting to the style of education in the United States.

The key in many of these exceptions is prompt documentation and disclosure of the student's situation to the DSO and the INS, so that arrangements can be made to maintain the student's status BEFORE s/he falls out of status.

### Reinstatement

A student who is out of status can be reinstated if the basis for the lapse in status was:

- a. beyond the student's control or if not reinstating the student would result in an extreme hardship;
- b. s/he is pursuing or intends to pursue a full course of study;
- c. s/he has not worked without authorization; and
- d. is not otherwise deportable.

If the INS reinstates the student, the INS will endorse the I-20 identification document and return it to the student with a carbon copy to the school. If the INS chooses not to reinstate the student, there is no right to appeal the decision.

### Overstays

In general, an F-1 student is admitted for "duration of status," with the notation "D/S" on the I-94 arrival / departure card. Duration of status means the end date on the I-20, or, for those on practical training work authorization, the end date on the work authorization card, plus 60 days. Students are in valid status during the additional 60-day grace period; during that period a person is not deemed to have overstayed the authorized period of admission.

In general, a person who fails to maintain her/his status for over 180 days and leaves the United States will be subject to a 3-year bar from entering the United States. The rule states that a person who stays in the United States for over a year out of status and leaves the United States will be barred from returning for a period of 10 years. This is known as the 3/10-year bar. Nevertheless, persons with the D/S (duration of status) I-94 card, common for F-1 students and J-1 exchange visitors, are not considered "unlawfully present" for purposes of being barred from the United States for any length of time, unless an INS official or an Immigration Judge has made an official determination of unlawful presence or overstay.

## **G Visas - Representatives of International Organizations**

"G" classification: foreign nationals identified with certain international organizations, and their dependents.

### Designated International Organizations:

The Immigration and Nationality Act (INA) grants G status to aliens who are associated with international organizations that are recognized by an Executive Order of the President. The following organizations have been designated for this purpose: African Development Bank; African Development Fund; Asian Development Bank; Caribbean Organization (formerly Caribbean Commission); Commission for the Study of Alternatives to the Panama Canal; Commission for Environmental Cooperation; Commission for Labor Cooperation; Border Environmental Cooperation Commission; North American Development Bank; Customs Cooperation Council; European Bank for Reconstruction and Development; European Space Agency (formerly European Space Research Organization); Food and Agriculture Organization; Great Lakes Fishery Commission; Inter-American Defense Board; Inter-American Development Bank; Inter-American Institute for Cooperation on Agriculture (formerly Inter-American Institute of Agricultural Sciences); Inter-American Investment Corporation; Inter-American Statistical Institute; Inter-American Tropical Tuna Commission; Intergovernmental Committee for Migration (ICM) (formerly Intergovernmental Committee for European Migration (ICEM)); Intergovernmental Maritime Consultative Organization; International Atomic Energy Agency; International Bank for Reconstruction

and Development; International Boundary and Water Commission, United States and Mexico; International Center for Settlement of Investment Disputes; International Civil Aviation Organization; International Coffee Organization; International Committee of the Red Cross; International Cotton Advisory Committee; International Criminal Police Organization; International Development Association; International Fertilizer Development Center; International Finance Corporation; International Food Policy Research Institute; International Hydrographic Bureau; International Institute for Cotton; International Joint Commission-United States and Canada; International Labor Organization; International Maritime Satellite Organization; International Monetary Fund; International Organization for Migration (formerly Intergovernmental Committee for European Migration); International Pacific Halibut Commission; International Secretariat for Volunteer Service; International Telecommunications Satellite Organization; International Telecommunication Union; International Wheat Council; Multinational Force and Observers; Multilateral Investment Guarantee Agency; North Pacific Anadromous Fish Mission; North Pacific Marine Science Organization; Organization of African Unity; Organization of American States (includes Pan American Union); Organization for Economic Cooperation and Development; Pacific Salmon Commission; Pan American Health Organization (includes Pan American Sanitary Bureau); South Pacific Commission; United International Bureau for the Protection of Intellectual Property; United Nations; United Nations Educational, Scientific and Cultural Organizations; United Nations Industrial Development Organization; Universal Postal Union; World Health Organization; World Meteorological Organization; World Intellectual Property Organization; and World Tourism Organization.

#### G Categories:

Aliens in the G category can enter the United States to perform duties relating to the above-mentioned international organizations and agreements. G status is further divided into the following categories:

- **G-1** - Principal resident representatives of a recognized foreign member government to an international organization, their staffs, and members of their immediate families.
- **G-2** - Other representatives of a recognized foreign member government to an international organization, and members of their immediate families.
- **G-3** - Representatives of a non-recognized or nonmember foreign government to an international organization, and members of their immediate families.
- **G-4** - International organization officers or employees, and members of their immediate families.
- **G-5** - Attendants, servants, or personal employees of G-1, G-2, G-3 and G-4 classes, and members of their immediate families.

"Immediate family" includes persons who are closely related to the principal alien by blood, marriage or adoption, and who reside regularly in the alien's household. (In contrast, for most other visa categories, only spouses and minor children (under 21) can obtain dependent status.) "Attendants" are individuals who are paid from public funds of the foreign government or the international organizations, and accompany or follow the principal G visa holder, to whom they owe a duty or service. However, "Servants" and "personal employees" are paid from the principal's private funds and are employed solely in a domestic or personal capacity.

Eligibility for G Classification:

In order to be eligible for G classification, the principal applicant must be coming to the United States in pursuance of official duties and not on personal business or pleasure.

Terms of Admission:

International organization visa holders in the G-1 to G-4 classifications are admitted without time limitation and are permitted to remain as long as the Secretary of State continues to recognize them as members of this class. There is no requirement that they must have a foreign residence to which they intend to return.

Attendants, servants, and personal employees, who are grouped under the G-5 category, are usually admitted initially for a period not exceeding three years. However, they may apply for extensions in two-year increments by attaching a written statement from the principal describing the current status and intended employment of the applicant.

Employment Authorization for Spouses and Dependents of G Visa Holders:

Employment by family members of G visa holders may be considered a violation of status, unless permission is obtained as follows. Dependents of G-1 and G-3 foreign nationals may apply for permission to work if there is a reciprocal work arrangement between the United States and the principal's state of nationality. However, a G-4 dependent of an officer or employee of an international organization may obtain approval to accept employment whether or not there is any such reciprocal work agreement in force.

**H1B - Specialty Occupation**

Professionals with at least a bachelor's degree or its equivalent in work experience may be eligible for H1B status if the position requires that particular degree. Their employers should demonstrate that they are paid at least the prevailing wage for the job.

**H1B Visa.....**

The strength of U.S. companies lies largely in the quality of their employees. Many U.S. employers actively recruit worldwide for professional talent in fields ranging from Information Technology (IT) specialists, accountants, and market research analysts, to professors and scientists. The H1B Visa (Professional in a Specialty Occupation) allows a U.S. employer to fill a position requiring the minimum of a baccalaureate in the particular field with a qualified worker from abroad. The foreign worker must possess that U.S. degree or an acceptable foreign alternative. In some cases, a combination of studies and relevant experience may substitute for the degree if it is determined by a credentials expert to qualify the foreign professional.

**What We Can Do For You**

At Kane Legal, we can consult with you to determine that the nature of the position and the beneficiary's background are appropriate for the H1B, and suggest alternatives if the initial proposal is not a viable option. We can advise both the employer and prospective employee regarding the H1B documentation requirements and legal issues. We can also prepare paperwork and submit it to the Department of Labor and USCIS. If applicable, we can prepare and file applications for dependent family

members, as well. For those who require or choose consular processing, we can assist with applying for the H1B and H-4 (dependent) visas at the appropriate consulate abroad if needed.

### Specialty Occupation

The H1B status is for foreign workers who will hold specialty occupations. A specialty occupation is one which "requires theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation AND which requires the attainment of a bachelor's degree or higher in a specific specialty as a minimum for entry into the occupation in the United States."

Thus, there are two requirements:

1. First, the employer must demonstrate a need for someone in a specialty occupation as the minimum capability to perform the job; and
2. Second, the foreign national must have the required degree, or its equivalent, in a subject closely related to the position.

Under the regulations, the need for a person in a specialty occupation can be shown by one of the following:

- a. a bachelor's or higher degree is normally the minimum requirement for entry into the particular position;
- b. the degree requirement is common in the industry in parallel positions among similar organizations, or the position is so complex or unique that it can be performed only by an individual with a degree;
- c. the employer normally requires the degree for the position; or
- d. the nature of the duties are so specialized and complex that knowledge required to perform them is usually obtained through a bachelors level or higher education.

### Employer's Responsibilities:

The employer must first file a "labor condition application" (LCA) with the U.S. Department of Labor in the region where the foreign national will work. The employer must attest to certain wage and working conditions..

The employer must give notice of the LCA to the relevant collective bargaining unit, if the job is unionized, or otherwise post a notice in a conspicuous location to enable other employees to see it.

The employer must pay certain costs and expenses on behalf of an H1B employee. The employer must also keep certain records. Further details on the above requirements will be included in subsequent overview articles.

### Basic Outline of the Process

The first step in H1B cases is to locate "prevailing wage" information for the area in which the employment is to be located. It is possible to have the state issue a prevailing wage determination or, if there is a reputable and reliable published survey that would meet the labor department requirements, to use that instead. The prevailing wage data as well as other basic information is then entered on the LCA form that is submitted to the Department of Labor.

The next step is to submit to the INS a form, along with the LCA, and a letter describing the operations of the company, the job opening, and the prospective employee's background. It is also necessary to document the beneficiary's degree and to show that the company is viable. A person who is already in

H1B status may accept new employment and start working for the new employer immediately upon filing the new H1B petition if the person has:

- a. been previously granted H1B status,
- b. been lawfully admitted into the US;
- c. filed a non-frivolous H1B or other non-immigrant petition which is pending for new employment; and
- d. never been employed without authorization in the U.S. before the filing of the H1B petition.

Depending upon the location of the employment, it can take 1 to 6 months for the INS to approve the petition.

If the person is already in the country in some other valid legal status, then his or her status would usually be changed to H1B status with the H1B Petition approval, assuming the correct box was marked on the Form I-129 submitted to the INS. This also holds true for a person who has an H1B through another employer. Under AC21, a person who is working with another employer in H1B status is now allowed to work with a new employer upon filing the H1B Petition with the INS. This is a reversal of previous INS regulations. If the H1B applicant is in the foreign country, then it is necessary for him or her to go to the U.S. consulate and apply for an H1B visa at the U.S. consulate in that country based upon INS approval of the H1B Petition.

In future H1B overview articles, we will go into more detail about prevailing wage issues, employer record-keeping requirements, and other H1B issues.

### **Wage and Record Keeping Requirements and Regulations**

#### Wage Requirement

On the Labor Condition Application (LCA) the employer must attest that it will pay "no less than the greater of the following":

- a. The actual wage level paid to all other individuals at the work site with similar experience and qualifications for the position in question; OR
- b. The prevailing wage for the occupational classification in the area of intended employment.

The above is only one of the attestations, or promises that the employer must agree to on the LCA.

#### Proving the Actual Wage Paid to Other Similar Workers

The actual wage can be proved by documenting the wages paid to other employees holding similar positions to the H1B worker/s and having similar qualifications. In determining such wage level, the following factors may be considered: experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors. If there is an official wage scale, either as a result of a collective bargaining agreement or based upon employer policy, that information is also considered. Actual wage documentation is not submitted to INS or the DOL when filing an LCA or petitioning for an H1B worker; however, DOL can request it from the employer if needed, such as in the context of an investigation of the employer's practices.

#### Determining the Prevailing Wage in the Locality

Determining the prevailing wage can be accomplished in one of several ways. One way is to contact the state department of labor / department of employment security (actual name of the agency varies from state to state) and ask them for the recommended wage. There is generally a form to request this

information, and the state labor office will make the wage determination based upon data that the U.S. Department of Labor (DOL) has collected. This data is also available on the internet, but legally it is safest for the employer if an actual determination is made. If the employer or attorney makes an independent judgment based on viewing the data on the internet, it is possible that the different job category or experience level that is chosen would be different from the ones that the officials who do the wage determinations would choose for the position. If relying on the prevailing wage determined by DLLR, the employer must file the LCA within ninety (90) days from the date of DLLR's determination of the prevailing wage.

Alternative sources of wage information that can also be accepted under the law include:

- a. a wage survey from an independent authoritative source published in a book, newspaper, periodical, loose-leaf service, newsletter or other medium within 24 months prior to filing the application. There are other detailed requirements in the DOL regulations regarding these sources.
- b. another legitimate source of wage data, such as a custom survey commissioned by the employer, or perhaps a survey conducted by the employer itself. The employer may be called upon to prove the legitimacy of the source.
- c. a union contract which was negotiated at arms length between the union and the employer if it contains wage information applicable to the occupation in question.

In any of these wage determination situations, the company needs to keep on file for inspection the documentation upon which the company relied to determine the wage to be paid. The LCA can be filed no earlier than six months before the beginning date of the period of employment, as indicated on the LCA.

The LCA is valid for a maximum period of three years at one time. This means that the validity period of an LCA may not exceed the validity period of an H1B petition which is also three years for the first six years of the H1B stay in the U.S.

#### Notice Requirement

Notice of the filing of the labor condition application must be provided to the bargaining representative for the employees in the occupational class of the foreign national's proposed position. If there is no bargaining representative, i.e. the job is not unionized, then notice to the employees is required.

The notice must be posted in at least two conspicuous locations in the employer's establishment/s in the area of intended employment. The notice must be posted for 10 days but the first day of the posting must start BEFORE filing the LCA.

ACWIA states that electronic posting of the LCA is allowed as one of the two locations. The electronic notification needs to be sent to the employees who are employed in positions similar to that of the prospective H1B worker/s.

#### Recordkeeping Requirements

- a. Upon request by any person, the employer must make available for inspection certain documentation about the LCA. The specific documents that must be available for public examination are:
- b. a copy of each completed Labor Condition Application filed (Form ETA 9035); and
- c. the wage paid the H1(B) worker/s; and

- d. the system used to set the actual wage for the occupation; and
- e. a copy of the documents used to establish the prevailing wage of the H1(B) occupation/s; and
- f. documents showing compliance with the notice requirement.

This folder must be retained for one year beyond the end of the period of employment specified on the LCA.

In addition to the public access documentation, the employer must maintain certain payroll records for DOL to review. The DOL requires that the employer:

- a. Retain payroll records of all employees in the occupational classification of the H1(B) worker from the time the LCA is filed throughout the period of employment;
- b. The payroll records must contain:
  - 1. full name and home address of employee/s;
  - 2. occupation, rate of pay, and hours worked each week by employee/s;
  - 3. overtime earnings each week of employee/s;
  - 4. total additions and deductions from each pay period and total wages paid for pay period, date of pay and period covered for employee/s;
- c. Retain documentation regarding the basis the employer used to establish the actual wage.

The employer must maintain the payroll records for a period of three years from the date of the creation of the records. The prevailing wage is valid for three (3) years during the validity of the H1B Petition.

## **6-year Limit, Portability, Etc.**

### Duration of Stay in H1B Status

The maximum duration of stay in H status is six years. If a person has held more than one type of H status, or has held L status, then stays in all of these statuses are added together to determine how much time remains available. For example, if a person came to the U.S. on an L1 visa, later changed to H1B, and then to H4, it is necessary to add up the period of time spent on all three of those categories towards the 6 year stay allowed.

The law provides for certain exceptions to the limit on stay. If the beneficiary's work in the U.S. is seasonal or intermittent, or s/he spends six months or less per year in the U.S., then the six year limit does not apply. The law also permits one to apply for one-year incremental extensions of H1B status if s/he has remained in status and has had a labor certification or I-140 pending for 365 days or more.

### Ability to Start Work Upon Filing the H1B Petition

Prior to October 17, 2000, an H1B Beneficiary was not allowed to work until the INS had approved the H1B Petition. Under AC21, a person who is already in H1B status is allowed to accept new employment and start working for the new employer immediately upon filing the H1B petition as long as the person satisfies all of the following three criteria:

- a. has been lawfully admitted to the U.S.,
- b. filed a non-frivolous H1B or other non-immigrant petition which is pending for new employment; and
- c. has never been employed without authorization in the U.S. before the filing of the H1B petition.

This clause is retroactive and applies to all H1B petitions that were filed before, on, or after the date of the enactment of AC21 i.e. October 17, 2000. However, if the H1B Petition is denied, the person can no longer work for the petitioning employer. This new rule would therefore create practical problems for the employee if the petition is denied, since the prior employer may have terminated the prior job offer or revoked the previously approved H1B Petition.

#### H1B Quota and Counting

H1B workers in the following situations will not be subject to the annual H1B quota of 195,000 (as increased under AC21) for fiscal years 2001, 2002, 2003 or 65,000 thereafter.

- a. Persons employed at a university, affiliated non-profit entity, non-profit research organizations, or government research organization;
- b. Persons who have previously been counted against the H1B quota (a person would only be counted once against the cap unless s/he has a year outside the U.S., thereby resetting the clock on the six-year limit).
- c. Physicians who obtained a Conrad 20 waiver of the J-1 two-year home residency requirement; Extensions of stay for those already on H1B status;
- d. H1B amendments with the same employer which are not requesting an extension of stay;
- e. Change of employers by a person already on H1B status; and
- f. Persons already engaging in H1B employment who are applying to work concurrently / simultaneously for an additional employer while maintaining their current employment.

#### Return Transportation Costs

The employer must pay the return transportation costs of the H1B employee if the employee is dismissed prior to completion of the approved H1B term.

#### Benching Rule

If H1B employees are “benched” due to the employer’s business reasons (such as the lack of available work), then they must still be paid for the full hours specified on the H1B petition. If an employee is absent based on issues not work related, such as personal or health reasons, then the above provision does not apply.

#### Departure Penalties Prohibited

It is illegal to require an H1B employee to pay a penalty merely for leaving the employer. However, it is permissible to require an employee to reimburse the employer for actual expenditures incurred by the employer if the employee leaves the employer within certain timeframes agreed to by the parties. Examples where the employer may require reimbursement include airline tickets to enter the U.S. for the H1B employee and family members, tuition for attending seminars while on the job, hotel costs while locating a home or rental property, etc.

#### **H1C Visas - Registered Nurses**

H1C status is granted to no more than 500 nurses per year at pre-qualified hospitals and health care facilities.

There are many ways a foreign nurse can enter the U.S. First level registered nurses may enter the U.S. on lawful permanent resident (LPR) or green card status. **LPR status** allows a nurse and his or her family to permanently enter the U.S. through a sponsor after meeting certain requirements. Generally, these

include an evaluation of the nurse's academic credentials and license by a designated credentialing organization (such as the Commission on Graduates of Foreign Nursing Schools - CGFNS) and successful completion of an English language proficiency test.

Some registered nurses who have advanced practice certifications, management skills, or practice in a nursing specialty area may be able to enter the U.S. on the **H1B Visa**.

The **H1C Visa** allows a nurse to enter on a temporary work visa for employment by hospitals or employers that are pre-qualified by the U.S. as having a special need for nurses that is greater than the general need across the country. However, this category is limited to only 500 nurses each year for the pre-qualified hospitals or health care facilities and so is restrictive.

Those RNs who are already in the U.S. may now file for LPR status and receive work authorization within approximately 90 days of filing the I-140 petition and adjustment application based on a sponsor.

In addition, each nurse must satisfy the requirements of the state board of nursing for the state in which s/he intends to practice. Additional criteria may vary on a state-by-state analysis.

### **What We Can Do For You**

At Kane Legal, we consult with nurses, hospital administrators, contracting agencies, and others to discuss case strategies, help determine the most appropriate options, and provide guidance on the paperwork to file in order to obtain the status most suitable under the circumstances for the nurse or the program. We also outline critical pre-filing strategies that will help assure prompt, efficient filing and processing. We at the Murthy Law Firm are familiar with the services of the **CGFNS**, the requirements for VisaScreen, state licensure, and the overall challenges with the **TOEFL/TWE**, **TSE**, **TOEIC**, and **IELTS** English language proficiency exams. If appropriate, we can help with submitting the applications and documentation to the CGFNS (including aggressive follow-up), and submitting forms for the visa at the consulate or with the BCIS for temporary work status or LPR status in the U.S.

### Employee Requirements

To qualify for H1C status, the beneficiary must:

- a. have a full and unrestricted nurse's license in his or her home country, or have received nursing education in the United States;
- b. have passed an appropriate examination (as determined by the U.S. Department of Health and Human Services (HHS)), or have a full and unrestricted license to practice as a registered nurse in the state of intended employment; and
- c. be fully qualified and eligible under all state laws and regulations to practice as a registered nurse in the state of intended employment immediately upon admission to the United States.

### Employer's Responsibilities

Facilities wishing to hire H1C nurses must file an attestation with the Employment and Training Administration (ETA) of the U.S. Department of Labor (DOL) indicating the following:

1. the facility was a hospital located in a designated health professional shortage area as of March 31, 1997, and (for the cost-reporting period beginning during fiscal year 1994) had at least 190 licensed acute care beds with at least 35 percent of its acute care patients entitled to Medicare,

and at least 28 percent entitled to Medicaid, thereby meeting the definition of "subsection (d) hospital" found in the Social Security Act;

2. employment of the H1C nurse will not adversely affect the wages and working conditions of similarly employed nurses;
3. the H1C nurse will be paid the same wages as other similarly employed nurses;
4. the facility has taken and is taking timely and "significant steps" to recruit and retain U.S. citizen or eligible immigrant nurses;
5. there is no strike or lockout in the course of a labor dispute, the facility did not and will not lay off a registered nurse employed by the employer within the 90-day period before or after the filing of the H1C petition, and the employment of the H1C nurse is not intended or designed to influence an election for a bargaining representative for registered nurses at the facility;
6. notice of the H1C petition has been provided to the designated union bargaining representative or, if there is no bargaining representative, has been posted in conspicuous places within the facility;
7. H1C nurses at the facility will never number more than one-third of the total registered nursing staff; and
8. the H1C nurse will not work at a worksite other than a worksite controlled by the petitioning facility, or transfer from one worksite to another.

Under the NRDA, "significant steps," as used in item 4 above, may include, but are not limited to, the following:

1. establishing a training program for nurses at the facility or participating in a program elsewhere;
2. providing career development programs to encourage other health care workers to become registered nurses;
3. paying registered nurses at a rate higher than the prevailing wage; and
4. providing registered nurses with reasonable opportunities for meaningful salary advancement.

An attestation by an employer expires at the end of the one-year period beginning on the date of filing with the DOL, or the end of the period of admission of the last H1C nurse with respect to whose admission the attestation was filed, whichever is later. The attestation applies to petitions filed during the one-year period beginning on the date of its filing with the DOL if the facility states in each petition that it continues to comply with the conditions of the attestation. The filing fee for the attestation may not exceed \$250 per application.

#### Basic Information

The procedure for an H1C is somewhat similar to the procedure for an H1B. In addition to the attestation that must be filed with the DOL, a petition must also be submitted to the INS. More than one nurse may be included on a petition. H1C nurses may be approved for a period of admission to the United States of up to three years. Upon the expiration of the admission period, the status may not be extended.

Five hundred H1C visas may be issued each fiscal year. States with a population of less than 9 million as of 1990 may have no more than 25 H1C visas annually. States with more than 9 million may have no more than 50 H1C visas annually. If all available visas in a fiscal year quarter are not used, the visas may be issued to states regardless of population or the state cap during the last fiscal year quarter.

The H1C visa category is based on the former H1A visa category for nurses, which expired on September 30, 1997. The H1C classification is more restrictive due to its numerical cap on the number of visas

issued annually and its application only to underserved areas. The NRDA, the law that created the H1C classification, expires in 2003. By 2003, HHS and DOL must jointly submit to Congress a report of recommendations on a program to eliminate the dependence of understaffed facilities on H1C nurses. The report is supposed to provide a permanent solution to the shortage of registered nurses in the U.S. and also recommend a method of enforcing the requirements imposed on facilities by filing more effective attestations for H1C nurses.

## **H2A Visas - Agricultural Labor**

There are many types of work visas, each with specific requirements as to type of position, type of employer, duration, etc. The

- **E-1** (Treaty Trader) and **E-2** Visas (Treaty Investor) allow nationals of countries having commercial treaties with the U.S. to engage in trade or business investment activities.
- **H2B Visa** allows for entry of certain short-term, temporary workers;
- **O Visa** is for persons of extraordinary ability in the arts, sciences, education, business, or athletics;
- **P-1, P-2, and P-3 Visas** are for certain types of performers and athletes;
- **R Visa** is for religious workers.

There are other special categories, as well.

## **What We Can Do For You**

At Kane Legal, we can consult with you to determine what category/ies may be the most suitable, considering the nature of the position, your background, goals, and other factors. We can advise both the employer and prospective employee regarding the documentation requirements and legal issues, and we can prepare and submit paperwork to the USCIS. If applicable, we can also prepare and file applications for dependent family members. We can assist with applying for certain types of visas at the consulate abroad as needed.

## **Overview**

This category is for temporary workers performing “agricultural labor or services...of a temporary or seasonal nature,” as defined in the Immigration and Nationality Act (INA). Workers under this definition typically are farm workers, orchard workers, and ranch hands. The requirements for this category are narrowly defined, stipulating that the applicant must be coming temporarily to the U.S. in order to undertake work of a temporary nature. A crucial element of the H2A category is that there be a temporary need on the part of the employer. Also the work must not be part time. The INS has denied H2A petitions where it has found that there was a chronic shortage of workers, giving rise to a continuous temporary need; such a continuous need was the equivalent of a permanent need. In addition, workers under this category must prove that they have a nonimmigrant, i.e. temporary, intent. There are several special requirements for employers of H2A workers, including providing housing, meals, and transportation costs.

To process an H2A application, the employer must also show that there are no U.S. workers in the local area who are capable of performing such services. The H2A process therefore involves a labor certification (LC), somewhat similar to that used for permanent, employment-based immigration.

Approval of the labor certification constitutes a finding that:

- a. there are no U.S. workers available, and

- b. the employment of the foreign worker will not affect the wage rate and working conditions of similarly employed workers in the U.S.

The temporary labor certification application is filed with the local state-level labor office, and processed in a relatively expedited manner. There is also what is known as a "50% Rule," which requires the employer to hire U.S. farm workers who apply for the job until 50% of the work contract period has been completed. In this regard, the employer must make concerted efforts to hire U.S. workers, including the use of electronic data banks. Advertising the job and consulting with local unions is required, and efforts to recruit U.S. workers must be documented.

The U.S. Department of Labor (DOL) usually grants applications for no more than 1 year, although in practice it may be nearly impossible to obtain approvals for longer than 10 months. The DOL may even consider 6 months to be too long. Much is left to the discretion of the individual DOL officer.

Upon approval of the LC, a petition is then submitted to INS. Multiple beneficiaries can be included on the same petition as long as they are performing the same services, for the same time period and in the same location.

A U.S.- based agent is required for the petitioner in order to file the petition, in the case where the employer is a foreign entity.

As noted below, DOL will shortly be taking over the processing of H2A petitions. Hopefully, handling the entire process through the one agency will reduce the overall processing time.

#### Admission and Extension

H2A workers are admitted for the time on the Labor Certification, with a maximum of 1 year. Extensions may be granted, but for not more than 12 months at a time and with a maximum stay of 3 years. If an extension is required, a new Labor Certification is required or a notice that the Labor Certification cannot be made.

#### **H2B - Other Temporary Labor**

The H2B category is quite similar to the H2A, in that both require the worker to be temporary and a labor certification is required to demonstrate the unavailability of U.S. workers. For both categories, the work must not be part time. In addition, workers under these categories must prove that they have a "nonimmigrant" or temporary intent.

#### Temporary Need for Services

As mentioned above, for both the H2A and the H2B, the employer's need for the worker's services must be temporary. For the H2A, the work should be seasonal. For the H2B, there are four basic types of temporary need. These are:

- a. one-time occurrence
  - a. The employer must show that it has not previously employed workers to fill the position, and that it will not need such services in the future. Rather, there must be a temporary event of short duration.
  - b. Examples:
    - i. Commercial remodeling projects; or
    - ii. Special events such as international conferences or sporting events.

- b. seasonal need
  - a. The services are traditionally connected to a particular time of year because of a recurring event or pattern. The employer must specify the time of year when the workers are needed, and the dates the services are not needed. Therefore, the period of time each year when the workers are not needed must be fixed and predictable.
  - b. Examples:
    - i. Landscaping and
    - ii. Fishery workers
- c. peak-load need
  - a. The employer must show that it regularly employs permanent workers to perform the services but has a temporary need for additional staff because of a short-term demand.
  - b. The temporary workers must not become a permanent part of the employer's workforce; that is, the need must not be ongoing.
- d. intermittent need
  - a. The employer must demonstrate that it has an occasional need for workers, from time to time but not on a regular basis.
  - b. As can be seen from the above description, each case must be carefully documented and the U.S. Department of Labor (DOL) makes determinations on a case-by-case basis.

#### Labor Certification

The employer must also show that there are no U.S. workers in the local area who are capable of performing such services. The H2B process therefore involves a labor certification (LC), somewhat similar to that used for permanent, employment-based immigration. Please note that though many people get confused with the terms Labor Condition Application (LCA) and the LC, the former is used only with the H1B program and does not generally require an employer to go through the elaborate and time-consuming LC process.

Approval of the labor certification constitutes a finding that

- a. there are no U.S. workers available, and
- b. the employment of the foreign worker will not affect the wage rate and working conditions of similarly employed U.S. workers.

In contrast with the H2A, the labor certification approval for the H2B category is only advisory, so the INS could arrive at its own conclusion when processing the petition.

The temporary labor certification application is filed with the local state-level labor office, and processed in a relatively expedited manner. In this regard, efforts to recruit U.S. workers must be documented. As with the permanent LC, the regional office of the U.S. Department of Labor (DOL) makes the final determination. DOL usually grants applications for no more than 1 year, although in practice it may be nearly impossible to obtain approvals for longer than 10 months. The U.S. Department of Labor (DOL) may even consider 6 months to be too long. Much is left to the discretion of the individual DOL officer.

The Department of Labor has published the following guidelines, which need to be followed for H2B cases:

- a. Is the job in question in the employer's regular business and are/is the duties / equipment similar to regular work?

- b. Is the time period for the visa reasonable?
- c. Is the number of foreign workers requested reasonable for the job?
- d. Does the employer frequently request this category?
- e. Are there any alternatives?

Upon approval of the LC, a petition is then submitted to INS. Multiple beneficiaries can be included on the same petition as long as they are performing the same services, for the same time period and in the same location. For the H2B, all beneficiaries must be named, except in emergency situations. In contrast, for the H2A, multiple beneficiaries outside the U.S. do not need to be named.

#### Admission and Extension

H2B workers are admitted for the time on the Labor Certification, with a maximum of 1-year. Extensions may be granted but for not more than 12 months at a time and with a maximum stay of 3 years. If an extension is required, a new Labor Certification is required or a notice that the Labor Certification cannot be made. The H2B category has a quota of 66,000 per year.

#### **H-3 – Trainee**

H-3 visa is for temporary workers who come to the USA to receive training other than graduate medical education or training. The eligibility requirements for the training program are narrowly defined. The H-3 category is not to be used for the purpose of providing employment in the U.S.

#### **General Requirements for H-3:**

- a. The beneficiary must have a foreign residence to which s/he will return.
- b. The training in question must not be available in the beneficiary's home country.
- c. The H-3 Beneficiary must not be placed in an employment position that is regularly filled by a citizen or legal permanent resident.
- d. There must be no productive employment, unless incidental and necessary to the training program.
- e. The training must be of benefit to the beneficiary in pursuing a career outside the U.S.

#### **Specifics of the H-3 Training Program**

There are strict guidelines that must be followed in order for the Training Program to be suitable for the H-3 category.

- a. The program must have a fixed schedule and be compatible with the Petitioner's business.
- b. This must be the first substantial training that the Beneficiary is undergoing in the proposed field.
- c. The knowledge and skills acquired under the program must be for use outside the U.S.
- d. The Petitioner must have sufficient resources to provide the training specified and must not be intending to offer training for the purpose of hiring for operations in the U.S.
- e. The Training Program must not have the effect of providing a nonimmigrant with an extension of a practical training period previously allowed by another visa category.

#### **In addition, the INS regulations require the petitioning company to provide the following specific information about the training program:**

- a. The type of training offered.
- b. Amount of classroom instruction hours. A minimum of 15% of the total training program should be allocated to classroom hours.
- c. Number of hours of on-the-job training.

- d. How the training prepares the person for a type of work that is new to the home country. For example, the training is in a new product or service.
- e. The reason the person cannot obtain training in the home country and must instead be trained in the U.S. It should be specified that the program does not exist in the home country; that it exists in the U.S. and is not readily available in any other country.
- f. The reason the program is of benefit to the Petitioner training company.
- g. The source of remuneration received by the trainee.

**Qualification for Externs and Nurses Under H-3 Program.** Externs may qualify if attending residency or internship at an AMA or AOA hospital and the externship will take place during the school vacation. Nurses may qualify as long as they possess a license in the country where they received their medical education or, alternatively, if they received their education in Canada or the U.S. and there is a certification for INS purposes that they are qualified under state law to receive the training.

**Admission Under the H-3 Program.** Generally, admission is for the duration of the training program but no more than 2 years. There is no extension, change of status, or readmission granted after 2 years unless the person resided outside the U.S. for 6 months. This rule does not apply if the training is seasonal, intermittent or less than 6 months. Also, extensions may be possible if the original period of stay was less than 2 years.

**Special Education Exchange Program.** There exists a special education exchange program by which a person receives training and experience in the education of children with physical, mental, or emotional disabilities. This program has an 18-month maximum duration and is limited to 50 visas per year. The H-3 petition must be filed by the facility offering the training. There must be evidence that the applicant has nearly completed a B.A. or higher degree or has extensive prior training or experience. If the applicant has already been in the U.S. for 18 months under any H or L status, s/he may not seek change / extension or readmission unless s/he has resided outside the U.S. for the 6 months immediately prior.

## **J - Exchange Visitor**

### **Overview**

People coming to the U.S. through an approved exchange program may be eligible for the J-1 Exchange Visitor's visa. These are students, scholars, job trainees, faculty, professors and research scholars, specialists, medical residents, government visitors, etc. Sometimes, a J-1 program will require that the beneficiary spend at least two years outside of the U.S. before being permitted to switch to a different nonimmigrant visa or to permanent residency.

The U.S. attracts many foreign nationals to its diverse and strong institutions of learning. The **F-1 Visa** (Academic Student) allows one to enter the U.S. as a full-time student at an accredited (U.S. government- approved) college or university. The student must be enrolled in a program or course of study that culminates in a degree, diploma, or certificate. The **M-1 Visa** (Vocational Student) is issued to students who want to pursue non-academic programs (health care technician, machinist, dental hygienist, etc) in an established institution. The **J-1 Visa** (Exchange Student) is for students pursuing graduate / post-graduate studies, visiting scholars, medical doctors undergoing training, etc.

## **What We Can Do For You**

At Kane Legal, we can consult with you to discuss your case in detail and guide you on the paperwork we suggest you file in order to obtain the F-1 visa for the principal student and dependent family members. We can advise the International Student Advisor of your college or school regarding all viable options and paperwork requirements of the different student statuses. If appropriate, we can help with submitting the forms, etc., for the visa at the consulate or with the USCIS for change of status or extension of stay.

## **Overview**

The J-1 program was established to "increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchanges. Educational and cultural exchanges assist [the U.S. Department of State] in furthering the foreign policy objectives of the United States."

### General Definitions

The J-1 visa is a nonimmigrant status for an exchange visitor wishing to stay temporarily in the U.S. Within the J-1 category there are a number of different programs. These include: Trainee, physician, international visitor, teacher, government visitor, camp counselor, au pair, and summer student in travel/work program.

The foreign visitor must be entering the U.S. to take part in an exchange visitor program that has been designated by the U.S. Department of State (DOS).

There is a requirement that the 'J-1' applicant be fluent in English and maintain sufficient funds and adequate medical insurance.

### General Procedures

The applicant needs to obtain the Certificate of Eligibility for Exchange Visitor, Form IAP-66, from the program sponsor. On admission to the U.S., the applicant will receive a Form I-94 that is marked for 'Duration of Status' (D/S). The program sponsor, not the INS, has the responsibility to ensure that the 'J-1' holder maintains a valid Form IAP-66.

'Duration of Status' is defined as the completion of the J program plus 30 days. The total length of time that a 'J-1' holder is permitted to stay in the U.S. depends on the exchange visitor program. These durational requirements are set forth below:

- Post-Secondary Student: length of stay is time needed to complete the degree plus 18 months practical training
- Post-Doctoral Degree: length of stay is the degree plus 36 months practical training
- Business / Industrial Trainees: length of stay is 18 months
- Professors / Scholars: length of stay is 3 years maximum. Extension of 3 years only in exceptional or unusual circumstances
- Short-term Scholars: length of stay is 4 months
- Flight School Trainees: length of stay is 24 months
- Summer Work / Travel: length of stay is 4 months

A 'J-1' holder must extend status by completing Form IAP-66 through a responsible representative of the program. INS Form I-539 is not required.

Certain J-1 holders are subject to the two-year home residency requirement (HRR). If one is subject to the HRR, s/he must return to the home country for two years before being eligible to return to the U.S. The exception to this would be a case in which one is eligible for and obtains approval of a waiver of the two-year home residency requirement. A person in J-1 status, if subject to the two-year HRR, is not eligible to change or adjust his/her status from within the U.S. (other than to A or G status) until the two-year requirement is met or waived. Such a person may obtain approval in the O-1 category but will have to apply for the O-1 visa at a consulate outside the U.S. Included in the category of individuals who are subject to the home-residency requirements are medical doctors.

### **What is the HRR?**

Under section 212(e) of the Immigration and Nationality Act, certain J-1 holders are required to return to the home country for two years before being eligible to obtain green card status or H1B status. Persons in J-1 status, if subject to the two-year HRR, are not eligible to change or adjust their status from within the U.S. (other than to A or G status) until the two-year requirement is met or waived. These individuals may obtain approval in a category other than H1B, such as O-1, E-1, etc., but instead of changing status from within the U.S. they have to exit and apply for the visa at a consulate.

### **Who is Subject to the Requirement?**

The HRR applies in the following situations:

- a. if either the U.S. or the home country's government provided financial support for the person's J-1 program;
- b. if the person's field of endeavor appears on the "skills list" (list of fields in which experts are critically needed) for his/her country; or
- c. if the J-1 was obtained for the purpose of graduate medical training, typically a residency or fellowship.

### **How to be Certain Whether One is Subject to the HRR**

An applicant may know that one of the three situations listed above applies to his or her circumstance. However, there are many who are not sure. It is a good idea to check with the program sponsor to clarify whether there was any government funding involved and to consult the skills list issued by the U.S. Department of State (DOS), which is a publicly available document. Usually the information on the Certificate of Eligibility, Form IAP-66, is the most reliable indication of the applicability of 212(e). There is a special place on the IAP-66 to indicate whether a person is subject to the HRR but often that section of the form is blank or illegible. The J-1 visa stamp itself should also have a notation that the "Bearer is subject to 212(e)" or "Bearer is not subject to 212(e)." However, these visa notations are often incorrect – sometimes the consulate issues a visa indicating a person is subject to the HRR when, in fact, there is no legal basis for such a determination.

If it appears that, based upon the three above-listed criteria, a person should not be subject to the requirement but the visa indicates that the "bearer is subject to 212(e)," it may be possible to obtain

confirmation from the DOS. There is a procedure to submit a detailed letter to DOS requesting an official opinion based upon the particular person's file. If the opinion states that the HRR does not apply, then the person would show a copy of that letter in lieu of a waiver approval whenever needed, when applying for an H1B or adjustment of status to permanent residence, for example.

### **Going Abroad to Comply with the HRR**

If it is clear that one is subject to the HRR, the first option, of course, is to comply with the requirement by spending two years in the country of last residence. Note that it is not just a matter of being outside the U.S. to meet this requirement. Rather, in order to satisfy the HRR, one must be in the country of last residence. We have been asked, for example, whether a person who came as a J-1 from India and later obtained Canadian permanent resident status could comply with the HRR by going to Canada. The answer is, "No."

### **Obtaining a Waiver**

An alternative to the HRR may be to obtain a waiver. There are several types of waivers and some are easier than others. The simplest type of waiver is based upon a statement of "No Objection" from the home country government. The applicant would generally initiate the waiver process by contacting his/her country's consulate in the U.S. After obtaining the required letter/s, there are DOS forms to complete for the waiver. Applicants typically handle this type of waiver without an attorney, though, of course, they can choose to hire an attorney if they prefer.

Sometimes, however, the home country's government does object. Furthermore, the "No Objection" waiver is not available to those in graduate medical education / training programs. Thus, many people must look to other options. In our next article in this J-1 overview we will cover waivers based upon an "Interested Government Agency," both in general as well as those programs specifically designed for medical doctors. We also address waivers that are based on hardship or a fear of persecution.

### **K - Fiancé/e of U.S. Citizen**

The Fiancé/e of a U.S. citizen is eligible for a nonimmigrant visa in order to marry within 90 days of entry to the U.S.

#### **Overview : K Visas for Fiancé/es and Spouses of USCs**

There are a number of ways to bring close relatives to the U.S. and we provide here a brief summary of the 'K' visa provisions, which allow for bringing fiancé/es and spouses of U.S. citizens and their dependents to the U.S.

#### **K-1 / K-2 Visas**

A U.S. citizen may bring his/her foreign-born fiancé/e to the U.S. by means of a 'K-1' Visa. This type of visa requires the U. S. citizen first submit a petition to the INS.

There are several requirements for a successful filing of this K-1 / K-2 petition:

There must be proof of a bona fide intention to marry and proof that the parties have met in person within two years of filing the petition. The latter requirement may be waived for reasons of extreme hardship or custom. In addition, the parties must be legally able to marry.

Once approved, the petition is sent to the Consulate abroad, which will issue the K-1 visa. The consulate must determine that the foreign fiancé/e would be eligible to receive an immigrant visa, before approving the K-1 Visa. The terms of the visa require that the fiancé/e enter the U.S. solely for the purpose of marriage to the petitioner and that marriage must be concluded within 90 days after entry.

Children (under 21) of the fiancé/e may accompany on a K-2 visa. K-1 and K-2 holders can obtain authorization to work under that visa status.

Once the marriage has taken place in the U.S., the K visa holders apply to adjust to residency status. Note that the K holder would first generally obtain a two-year conditional residency and would have to file additional paperwork later for the conditions to be lifted.

### **K-3/K-4 Visas**

The K-3 and K-4 visas were introduced by the Legal Immigration and Family Equity (LIFE) Act of 2000 and allow for the spouses of U.S. citizens and the children of those spouses to come to the U.S. on K-3 / K-4 nonimmigrant visas. Once in the U.S., they would file to adjust to resident status. The reasoning behind the introduction of these visa categories was to enable qualified family members to wait for their immigrant visas in the U.S., reunited with their U.S. citizen family member, rather than awaiting an immigrant visa abroad.

These categories of visas have only recently been implemented through INS regulations.

The U.S. citizen spouse must have first filed a permanent Petition on Form I-130. Once that petition is pending, then the petitioner submits the Fiancé/e petition to a special address in Chicago that is allocated for the 'K-3 / K-4' visa categories and other types of LIFE Act cases.

There is no need to submit separate petitions for the dependents of the foreign-born spouses who will obtain K-4 visas. The K-4 visa is a derivative visa that is obtained through the K-3 holder. Children of the foreign spouse who are under 21 years of age are eligible for this type of visa.

## **L - Intra Company Transferee**

### **Overviews : L-1 Visas | Blanket L-1 Petitions**

L-1 visas are available to executives, managers and specialized employees moving to their employer's U.S. affiliate sites. Executives and managers with valid L-1 status may be eligible for permanent residency without the need for a labor certification.

Overseas companies that have or wish to establish U.S. offices may need to transfer executive, managerial, or specialized personnel to the U.S. The **L-1 Visa** (Intra-company Transferee) enables these key employees to be posted temporarily at the U.S. parent, subsidiary, affiliate, or branch office. The foreign professional must have worked for the foreign company for at least one year within the three years prior to coming to the U.S. in an executive, managerial, or specialized-knowledge capacity, and the U.S. position must also fit into one of those three categories. For a large, multinational company needing to transfer people frequently, a **Blanket L-1** approval pre-qualifies the employer to bring in L-1 professionals relatively quickly. Closely related to the L1A classification is the **Multinational Executive / Manager Transferee** immigrant category. This category permits an employer to file for permanent residence (green card) under requirements that mirror the L1A requirements.

## **What We Can Do For You**

At Kane Legal, we can consult with the employer and/or employee to determine whether the L-1 is suitable, considering the nature of the position, the company structure, the worker's background as well as other factors. If it is not, we can suggest alternatives. We can advise you regarding the L-1 documentation requirements and legal matters, and we can prepare and submit paperwork to the USCIS. If applicable, we can also prepare and file applications for dependent family members. As needed, we can assist with applying for the L-1 and L-2 (dependent) visas at the consulate abroad.

## **Overview of L-1 Visa Category**

### **General Definition and Requirements**

The L-1 visa category is for an "intra-company transferee." An "intra-company transferee is an employee of a company abroad who is to be transferred to a U.S. affiliate, parent, or subsidiary entity on a temporary work basis. In order to be eligible, the employee must have worked for the company abroad for one continuous year out of the preceding three years. The employee must be coming to the U.S. in order to continue working for the same employer or the affiliate, subsidiary, or parent company.

### **Qualifying Employment Position**

To be eligible for the L-1 category, the employee must be offered a position in the U.S. as either a "Manager," "Executive" (referred to as an L1A), or a person with "Specialized Knowledge" (referred to as an L1B). These defined terms are discussed in greater detail below. Demonstrating that the offered, U.S. position and the prior, foreign position fit within these categories is vital to the success of the L-1 petition.

It is not necessary for the employee to have held the same position abroad as the intended job in the U.S., as long as s/he held the job either as a manager, executive, or worked with specialized knowledge. For example, a person who was in a specialized knowledge position abroad could be offered a position in the U.S. as an executive under the L-1 category. However, one who worked in a routine, clerical position could not qualify, even if offered a position within one of the above categories.

An L1B worker in the specialized knowledge category can only remain up to 5 years in the U.S. as opposed to the 7 years allowed to those who are executives or managers on the L1A.

### **Payment of Salary**

There is no prevailing wage requirement for the L-1 category. That is, L-1s can be paid any agreed-upon salary, without having to meet U.S. government standards. The salary offered is, instead, considered from a common-sense point of view by INS in the context of whether it seems to be consistent with an offer of a specialized, managerial, or executive job. Payment can be by the U.S. entity or the foreign entity.

### **Relationship Between Foreign and U.S. Entities**

It is necessary to document both the existence of the two business entities (domestic and foreign) and the necessary "qualifying relationship" between the foreign and U.S. companies. Key corporate documents are, therefore, needed with the application. The 'qualifying relationship' between the foreign and U.S. companies means that the relationship is either one of parent / subsidiary or affiliate. While the L-1 can be used for new companies, these L-1s will only be granted for one year. It is

necessary to show proof of physical premises in the U.S., and, for new companies, proof that, after the first year, the company will have the need for a full-time executive / manager.

### **Qualifying Positions**

The definitions of the required categories of "manager," "executive," and "person with specialized knowledge" are narrowly defined for L-1 immigration purposes.

Managers are limited to higher-level managers. First-line level managers are not eligible for L-1 status, unless they fit within the "specialized knowledge" category. The **qualifying L-1 Manager** must:

- a. Personally manage the organization, department, subdivision, or function or component.
- b. Supervise and control work of other supervisory, professional, or managerial employees OR manage an essential function within the organization, department, or subdivision. Note that those who manage a function do not necessarily need to be managing other people.
- c. Have authority to hire and fire or recommend personnel actions or, if there is no direct personnel supervision, function at a senior level and exercise discretion over day-to-day operations of the activity or function.

A person in L-1 managerial or executive capacity can remain in the U.S. for up to seven years.

As with managers, the executive category is limited to higher-level executives. **The qualifying L-1 Executive** must:

- a. Direct the management of an organization or a major component or function of an organization as primary duties
- b. Establish organizational goals and policies; exercise wide latitude of discretionary decision-making.
- c. Receive only general supervision or direction from higher-level executives, the board of directors, or shareholders of the company
- d. The executive must supervise the work of others or supervise a function.

The person with **specialized knowledge** within the organization must:

- a. Have 'special' knowledge of the company product and its application in international markets, OR
- b. Have an 'advanced' level of knowledge of the processes and procedures of the company. Note that, a person with only one year of experience with the foreign company would likely not qualify under this provision.

"Specialized knowledge" is for other vital company employees who do not meet the definition of Manager or Executive. The term "specialized knowledge" should not be confused with the term "specialty occupation," used in connection with H1B status.

### **Restrictions on Offsite Work**

Changes were put into place in 2005 that restrict offsite work by L1B employees. The employer cannot place the L1B at a worksite other than the petitioning employer's physical location in certain

circumstances. Placement of an L1B working primarily at a worksite other than the petitioner's premises is not allowed where either (a) the work is primarily controlled and supervised by an employer other than the petitioner or (b) the work performed is essentially labor-for-hire, rather than related to specialized knowledge pertaining to the petitioning employer.

### **Green Card Advantages**

L1As in the executive / managerial category are eligible, under employment-based first preference, to obtain Permanent Residency on an expedited basis. The cases are significantly faster, as there is no labor certification required. The labor certification is the first, and often most difficult, stage in the majority of employment-based permanent residence cases.

Additionally, the L-1 category (whether L1A or L1B), as with the H1B category, enjoys the benefit of "dual intent," meaning that individuals can apply for Permanent Residency without jeopardizing their L-1 status.

### **Procedure for Obtaining L-1 Status**

The employer must file a petition with USCIS together with the sponsoring employer's detailed letter and supporting documentation. The petition must be filed with the USCIS service center having jurisdiction over the place of intended employment.

After approval of the petition, presuming the employee is working abroad, the employer must send the approval notice to the employee. The employee then uses this in connection with an application for an L-1 visa at the appropriate U.S. Consulate.

### **Overview : Blanket L-1 Petitions**

The "blanket" L-1 is so called because it enables a petitioning multinational corporation to transfer managers, executives, and specialized-knowledge professionals to the U.S. on work assignments under a single, "blanket" petition. Thus, it eliminates the need to separately petition for each individual whom the company desires to bring to the U.S. The L-1 employee must have worked for the company abroad for one continuous year out of the preceding three years. The work must have been performed in the three years immediately preceding entry to the United States. This requirement had been reduced to six months in 2001, but was returned to one year in 2005. Those individuals on L-1s based upon the six-month requirement will be able to extend their status for the allowed 5- or 7-year period, but all new L-1s will need to meet the one-year requirement for work abroad.

Blanket petitions are essentially available only to larger corporations. All others must use the individual petition. The blanket petition is initially valid for a 3-year period and can then be extended. Employees are admitted for the same periods as for regular L-1s, with extensions possible up to the maximum allowable time periods. These time periods are the same as with the individual L: a seven-year maximum for managers and executives and a five-year maximum for specialized knowledge.

## **PETITIONER QUALIFICATIONS**

In order to be eligible for the blanket procedure, the Petitioning employer must meet these requirements:

- a. Be engaged in commercial trade or services;
- b. Have an office in the U.S. that has been doing business for at least one year;
- c. Have 3 or more domestic and foreign branches, subsidiaries, or affiliates; and
- d. Have done at least 1 of the following:
  1. Obtained approval of petitions for at least 10 "L" beneficiaries during the previous 12 months
  2. Have a combined U.S. annual sales of \$25 million, or
  3. Have a U.S. workforce of 1,000 employees.

In addition, the petitioner must provide proof that all the corporate entities listed in the petition are 'qualifying organizations,' namely that they are connected to each other through the required parent, branch, affiliate, or subsidiary relationships.

## **BENEFICIARY QUALIFICATIONS**

As with the individual L petition, the beneficiaries (employees) must be executives, managers, or possess "specialized knowledge" regarding the company. These terms have very specific meanings and limitations, as was discussed in

### **Overview of L-1 Visa Category.**

Specialized knowledge for individual petitions is defined as including persons who "have special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company." For a blanket petition, the individual must both meet this definition and be a professional. The term "professional" is defined in immigration law to include, but is not limited to: architects, engineers, lawyers, physicians, surgeons, and teachers in elementary school or above. This limitation does not exist in the individual L category. This requirement is important for companies considering use of the blanket procedure in order to bring specialized-knowledge individuals to the U.S.

## **PROCEDURE**

- A. The petitioner files the blanket petition with the Service Center. The petition is initially approved for 3 years and may be extended indefinitely.
- B. Once the petition is approved, further forms must be sent to the beneficiary in order to obtain the L-1 visa at the consulate abroad. Note that the beneficiary must prove to the consulate that s/he is either a manager / executive or a specialized-knowledge professional. In order to obtain the blanket L-1 visa the beneficiary must also show proof of the following:
  1. The blanket petition has been approved; and
  2. The beneficiary is being transferred from one listed blanket entity to another; and
  3. The beneficiary has been employed abroad with a listed blanket organization for at least six months in the three years before the transfer to the U.S.

## **FACTORS TO CONSIDER**

### **❖ Processing Times**

The blanket L petition can initially take time to prepare and submit to INS. However, once approved, it enables the petitioning corporation to transfer to the U.S. executive, managerial, and specialized-knowledge professionals on a relatively expedited basis. The intending L-1 transferee merely submits the INS form and supporting documentation to the consulate and may be able to enter the U.S. a week or so after applying to the consulate for a visa, depending on the processing times of the particular consulate.

### **❖ Qualifying Corporate Relationship**

The blanket program establishes a qualifying relationship between the U.S. and foreign entities. Once this relationship has been proven, there is no need for the individual beneficiary to prove that relationship when applying to the consulate for a visa. The beneficiary need only prove his/her eligibility for an L-1 visa. This is in contrast to the L-1 individual process, whereby the beneficiary must show the qualifying corporate relationship, if requested, at the time of applying for a visa.

### **❖ Corporate Merger / Ownership Change / Transfer to Another U.S. Organization Under the Petition**

With the blanket program, a new / amended petition may not be required when the ownership of the firm changes or there is a merger. The beneficiary is also able to transfer to any other U.S. organization listed on the approved petition without filing an amendment with the INS as long as the duties remain “virtually the same.”

### **❖ Appeals**

Usually, blanket L employees file paperwork with the Consulate only. Note that Consular decisions are not appealable. In contrast, for individual L beneficiaries the INS adjudicates the petition. An INS petition denial can be appealed.

### **❖ Extensions**

There are two procedural options for extending the stay under a blanket L-1. The first is to have the L beneficiary travel abroad and apply for a new visa at the U.S. consulate. This is not technically an extension but rather a fresh application by the beneficiary for admission into the U.S. This method is advantageous because processing by the consulate is usually relatively speedy. The second method involves filing with the INS Service Center having jurisdiction over the blanket petition. The petitioner files Form I-129S, copy of the previously endorsed Form I-129S plus Form I-129, the L supplement, and filing fee with the Service Center plus supporting documentation. Note that it is possible to file an extension of stay for the beneficiary as long as the blanket petition remains valid and un-expired. This includes a situation where the blanket petition extension or amendment is pending.

### **❖ Spouses**

The spouse of an L-1 visa holder is entitled to L-2 status that now permits one to apply for authorization to work in the U.S. This rule applies to blanket ‘L’ petitions as well as individual ‘L’ petitions.

In sum, the blanket petition is a useful tool for multinational corporations who wish to transfer their employees from abroad for assignments in the U.S. It can ultimately expedite and facilitate the

movement of managers, executives, and specialized-knowledge professionals by avoiding the need to file separate petitions and establish the 'qualifying relationship' between the U.S. and foreign entities each time the corporation seeks to transfer an employee to the U.S.

### **M - Vocational Student**

M-1 visas are available for students who wish to attend vocational schools. The U.S. attracts many foreign nationals to its diverse and strong institutions of learning. The **F-1 Visa** (Academic Student) allows one to enter the U.S. as a full-time student at an accredited (U.S. government- approved) college or university. The student must be enrolled in a program or course of study that culminates in a degree, diploma, or certificate. The **M-1 Visa** (Vocational Student) is issued to students who want to pursue non-academic programs (health care technician, machinist, dental hygienist, etc) in an established institution. The **J-1 Visa** (Exchange Student) is for students pursuing graduate/post-graduate studies, visiting scholars, medical doctors undergoing training, etc.

### **O-1, O-2 - Extraordinary Ability**

The O-1 category is for foreign nationals with extraordinary ability in the arts, sciences, athletics, education, or business.

### **O-1 Visas : Nonimmigrant Visas for Aliens of Extraordinary Ability**

The O category is a nonimmigrant visa category for nonimmigrants of extraordinary ability. Generally O visas are used either because the person is subject to the two year home residency requirement, has not yet obtained a waiver and cannot apply for the H1B but can apply for the O visa, or when the H1B cap has been reached, it is a good alternative for those who qualify.

The initial period of stay can be approved for the time necessary to complete the activity for which the nonimmigrant is admitted, up to a period of three years. Extensions of stay can be granted in increments of up to one year to continue or complete the activity for which the person of extraordinary ability is admitted. The real benefit of the O1 over a simple H1B is that an educational or professional degree is not essential for approval and no prevailing wage requirement exists.

The O category is for those of extraordinary ability in the sciences, arts, education, business or athletics, and those accompanying or assisting such persons and their family members.

There are three different standards for the O1 category:

1. the most exacting standard applies to aliens in the sciences, education, business and athletics;
2. a much less rigorous standard applies to individual aliens in the arts;
3. an intermediate standard applies to aliens of extraordinary achievement in the motion picture or television industries.

The standard and criteria are similar to the EB1: First Preference Employment Based immigrant category. The highest standard requires that the alien demonstrate sustained national or international acclaim and recognition of achievements in the field by providing:

- a. evidence of a one-time achievement of a major internationally recognized award like the Nobel Prize; or
- b. evidence which will satisfy at least three of the following forms of documentation:
  1. Receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
  2. Membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
  3. Published material in professional or major trade publications or other major media about the alien;
  4. Participation, either individually or on a panel, as a judge of the work of others;
  5. Original scientific, scholarly, artistic, athletic or business-related contributions of major significance in the field;
  6. Alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;
  7. Employment in a critical or essential capacity for organizations and establishments that have a distinguished reputation;
  8. High salary or other significantly high remuneration for services, in relation to others in the field; or
  9. Other comparable evidence.

Besides meeting the above criteria, a consultation with an appropriate peer group, labor organization and/or management organization regarding the type of work to be performed and the qualifications of the proposed beneficiary must be completed. The peer group must provide a written opinion to the INS. If the application does not include a peer group the INS will attempt to contact the peer group directly, or, if no peer group exists, the INS will make a decision without a peer group consultation. The INS will not require a new consultation if the beneficiary is reentering the U.S. in the O1 category within two years of a previous peer group consultation. Unlike the EB1 category, the O category requires employment and sponsorship by the employer.

Another noteworthy benefit of the O1 Visa over the H1B is that individuals currently on J1 visas can transfer to the O category without having completed the 2 year home residency requirement or having received the waiver of the 2 year home residency requirement. Such individuals will be required to travel abroad to apply for the O1 Visa after approval of the Petition.

### **P-1, P-2, P-3 - Athletes and Group Entertainers**

#### **P-3 Visas for Artists or Entertainers of Culturally Unique Programs**

The most appropriate visa for a person who performs as an artist or entertainer, in an individual capacity or as part of a group where such a person is an integral part of the performance and is planning to enter the United States temporarily and solely to perform, teach or coach in a program that is culturally unique is referred to as the "P-3" visa. It is temporary in that it is only available for the period of time in which the beneficiary or beneficiaries will be actively engaged in performances. It is not the appropriate visa for permanent status. That would require filing for a "green card" or lawful permanent residence. However, due to processing delays and possible quotas, the earliest a green card could be obtained would be about one to two years.

### **P-3 Visa**

The P-3 visa is filed by a sponsoring organization or U.S. employer for foreign persons who wish to perform, teach or coach in a commercial or noncommercial program that is "culturally unique." A culturally unique program is one which the

- a. artist or entertainer has achieved excellence in developing, interpreting, representing, coaching or teaching a unique or traditional ethnic, folk, cultural, musical, theatrical or artistic performance; and
- b. the artist or entertainer is coming to the U.S. to promote and facilitate that art form.

Thus, there are two major requirements:

- a. First, it must be demonstrated that the persons have achieved excellence in their field; and
- b. Second, the artist's trip is for the sole purpose of promoting and facilitating the art form.

These requirements seem fairly straightforward. However, there is documentation that is required to substantiate the claims that the person is acting in the context of a culturally unique program. The necessary documents must establish the following:

1. The person/s have been involved in a culturally unique program for a substantial period.
2. The person or group has achieved national or international recognition or acclaim.
3. The person/s or group/s skills are authentic and excellent as attested through letters, expert opinions or testimonials.
4. The majority of the performances will be culturally unique events.

It is also necessary to note that if there exists more than one geographic area in which the Beneficiary will perform, there must be a submission of the itinerary. If the agent of the group is the Petitioner, there must be submission of the itinerary and the contract.

The P-3 visa is not as common in comparison to the many employment based / nonimmigrant visas in the United States. There is a burden to prove that the performers are highly respected and well-known in their field of art. It is also necessary to prove that the artist or troupe will be working within the context of a culturally unique program.

### **R - Religious Vocation or Profession**

Religious workers include ordained clergy and those who have taken religious vows, as well as religious professionals such as choral directors, teachers of religion, and so forth.

### **TN - Trade NAFTA Professionals**

A special visa category for nationals of Canada / Mexico under the North American Free Trade Agreement (NAFTA).

## Section 2- Immigrant: Permanent Status, Employment Based

### Green Card

The green card (Alien Registration Receipt Card) is obtained upon the approval of the immigrant visa or the adjustment of status. This permanent residency can be obtained through **Family Sponsorship, Labor Certification** through an employer in the U.S., by **National Interest Waiver**, or other special category for persons of Extraordinary Ability or the **Green Card Lottery** (Diversity Visa). With a green card, the applicant can work legally in the U.S. and it is proof of lawful residence within the U.S. (See also, **Other Green Card Issues** for helpful information.)

### What We Can Do For You

We at Kane Legal, can process any green card application or petition, **whether on behalf of the company or the self-petitioning individual**. We carefully analyze your case and make recommendations on the most appropriate process for you or your company to pursue. We then assist with preparing documents and letters, continuing the case through the adjustment of status or consular processing stage, until the principal applicant and family members receive the green card!

### EB1 - First Preference

- **Persons of Extraordinary Ability**

#### Employment-Based First Preference (EB1) or Priority Workers

##### Extraordinary Ability

##### Employer and Labor Certification not required

The general requirement is that the individual should have risen to the "top of her/his field of endeavor."

1. as demonstrated by national or international acclaim
2. which should be recognized through extensive documentation and
3. the alien should continue the work in the same field and
4. would substantially benefit the U.S. prospectively.

The definitions, being broad, could apply to a number of situations. The general requirement is that the individual should have risen to the "top of her/his field of endeavor."

The law states that receipt of the Nobel Prize or at least three types of evidence from the list below are needed to satisfy the criteria. Note that the submitted documentation must relate to and support the specific case presented to the USCIS.

1. Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.
2. Documentation of the alien's membership to associations in the field for which classification is sought, which require outstanding achievements of their members as judged by recognized national or international experts in their disciplines or fields.
3. Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.

4. Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.
5. Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.
6. Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.
7. Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.
8. Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disc, or video / DVD sales.
9. Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.
10. Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

**An advantage of this category is that an employer is not required to sponsor this Petition.**

Our office has filed many successful petitions on behalf of such extraordinary persons. In many cases, the Murthy Law Firm will submit petitions in two or three different categories for the applicant, assuming the applicant can qualify under two separate categories. This will increase the chance of a successful result especially in the case of nationals from China and India with such a backlog in the employment-based, second preference petitions, including the national interest waiver petitions.

Our firm has successfully convinced the USCIS that an applicant satisfies the criteria as a person of extraordinary ability. Examples are: medical researchers, a professor of engineering and a software developer who has a Ph.D. in two areas and has been responsible for state-of-the-art innovations that have significantly advanced the field as a whole.

• **Outstanding Professors and Researchers**

**Employment-Based First Preference (EB1) or Priority Workers**

**Outstanding Professor or Researcher Employer required but Labor Certification not required.**

This category is for "outstanding" academicians - professors and researchers who can establish a high level / degree of achievement in their fields.

The E12 immigrant category is for outstanding academicians - professors and researchers who can establish a high level / degree of achievement in their fields. This category is available to individuals who can prove that they are "recognized internationally as outstanding in a specific academic area," have at least 3 years of teaching or research experience in their field of endeavor, and intend to teach or carry out research in that particular field in the United States.

The individual must have an offer of employment in his/her field. Employment from an accredited university must be for a tenure-track position. The employment can also be for a permanent research position with an employer who has at least three full-time researchers and has documented accomplishments in that field.

In order to qualify for the E12, it is necessary to produce at least two of the following:

Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation.

1. Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field.
2. Documentation of the alien's membership in associations in the academic field, which require outstanding achievements of their members.
3. Evidence of the alien's original scientific or scholarly research contributions to the academic field.
4. Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.
5. Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or allied academic field.

In addition to the above, the petition to the USCIS must be accompanied by an offer of employment for the applicant to work in his or her field from either an institution of higher education or a company with a research department / facility.

As stated above, if employment is from an academic institution, it needs to be a tenure or tenure-track position. If from a company, the employer should have in its employ at least three full-time researchers and have documented achievements by the company or its research personnel.

- **Multinational Executives and Managers**

In these categories, the candidate can petition for permanent residency without the time-consuming process of labor certification.

**Employment Based First Preference (EB1) or Priority Workers**

**Multinational Executive or Manager Employer required but Labor Certification not required**

This immigrant visa category is designed to facilitate international transfer of executive or managerial personnel within multinational companies.

The E13 immigrant visa category is designed to facilitate international transfer of executive or managerial personnel within multinational companies. The transfers can be between different branches of the same company, or between different companies with one of the following types of relationship:

1. parent-subsidiary;
2. home office-branch office; and
3. affiliate-affiliate.

In this category, the employee must have worked in either a managerial or executive capacity, for the related company abroad, for at least a one-year period in the three years preceding the transfer.

The employee should be coming to the United States company to function in an executive or managerial capacity. The employee may already be in the United States in a nonimmigrant visa status such as the L1A visa or one of the E visa classifications.

The U.S. company must show that it is either the parent, subsidiary, affiliate, or branch office of the company abroad and the relationship between the U.S. and overseas operations must be documented and proved.

The Murthy Law Firm has successfully helped such personnel obtain the immigrant visa (green card) through this classification.

### **EB2 - Second Preference**

Members of Professions holding Advanced Degrees or Aliens of Exceptional Ability. Most EB2 candidates must have a job offer and the employer must complete the labor certification process. The labor certification involves testing of the job market to show that the potential visa holder is not taking away a job from a U.S. worker. If the individual can show that his/her entry is in the interest the job offer and LC requirements can be waived.

### **The Employment Based Second Preference (EB2)**

#### **Employer & Labor Certification required unless in the National Interest**

This immigrant visa category is for "members of the professions holding advanced degrees," and "aliens of exceptional ability."

#### **Members of the Professions Holding Advanced Degrees Employer and Labor Certification Required**

The USCIS defines an advanced degree as a professional or academic degree, given by a U.S. institution, beyond that of a baccalaureate. A foreign degree from an overseas institution may also be acceptable if the USCIS determines it to be equivalent to a U.S. degree.

After the baccalaureate degree five years of employment experience, involving incremental responsibility in the profession, may be used in place of the advanced degree to qualify for the second preference category. This is provided the position requires the advanced degree.

In this EB2 category, the applicant must have a job offer in the profession for which s/he is academically prepared. The employer must obtain appropriate "labor certification (LC)" from the U.S. Department of Labor.

The LC must indicate that the position offered is one that requires the advanced degree to perform the job. If the profession as a rule requires a doctoral degree, the job offer and the credentials of the applicant must indicate / reflect it.

#### **Aliens of Exceptional Ability in the Sciences, Arts, or Business Employer and Labor Certification Required**

The USCIS has specified "exceptional ability" in the sciences, arts, or business as "a degree of expertise significantly above that ordinarily encountered." To prove such exceptional ability, USCIS regulations propose submitting at least three of these kinds of documentation:

- A license to practice the profession or certification for a particular profession or occupation

- Evidence in the form of letter/s from current or former employer/s showing that the alien has at least ten years of full-time experience in the occupation for which s/he is being sought
- An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning, relating to the area of exceptional ability
- Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability
- Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.
- Evidence of membership in professional associations. Here, the applicant must have a job offer in the profession for which s/he is academically prepared.

The employer must obtain a permanent labor certification (LC) from the Department of Labor. The LC must indicate that the position offered requires the advanced degree to perform the job duties.

### **National Interest Waiver**

#### **Employer and Labor Certification not Required**

The national interest waiver (NIW) involves a standard higher than that required to establish a prospective national benefit. Since there are no criteria specifically outlined in the law as to what constitutes national interest waiver, seven factors have been suggested.

### **EB3 - Third Preference**

Skilled Workers, Professionals and other Workers.

Most EB3 candidates must have a job offer and the employer must complete the labor certification process.

#### **The Employment Based Third Preference (EB3)**

##### **Employer and Labor Certification required**

This is for individuals who are "skilled workers, professionals, and other workers."

There must be a job offer by a United States employer for skilled workers and professionals. The job must be in the occupation for which s/he has received training or education, or a closely related occupation. The employer must obtain a labor certification (LC) from the U.S. Department of Labor.

The LC must indicate that the position offered requires the education, training, or experience of the prospective employee. After the LC is approved, the employer may file an employment-based immigrant petition on behalf of the prospective employee.

The category of "skilled," "unskilled," or "professional" is determined by the type of job and the background of the prospective employee.

#### **Skilled Workers**

The applicant must show capability in an occupation that requires at least two years of training or experience in order to qualify for the third-preference category under "skilled worker."

### **Professionals**

Applicants must demonstrate the accomplishment of at least a U.S. baccalaureate degree (or its foreign equivalent) to be classified as "professional" for the third-preference category. The degree should be a minimum requirement in order to enter the profession. Qualifying jobs for E3 are similar to the specialty occupation for H-1B.

### **Other Workers**

The other worker category is for occupations that require less than two years training / experience. The quota for this category is severely backlogged due to large numbers of applicants and low numbers of visas issued each fiscal year.

### **EB4 - Fourth Preference - Special Immigrants**

The EB4 category includes persons such as Religious Workers, Commuters from Border, Retired G-4 (Employee of international Organizations), Returning Residents and Ministers of religion. This preference is for special immigrants, as explained here:

Immigrants in this category include religious ministers, certain long-time employees of the U.S. government (or of certain international organization) employed abroad, and some physicians who have resided in the U.S. for a number of years, court dependants, etc.

### **EB5 - Fifth Preference - Employment Creation Investors**

With the 1990 Immigration Act, Congress has kept aside up to 10,000 visas per year just for alien investors in new commercial enterprises, who will create employment for at least ten individuals. There are two investor groups under the program - people who invest at least \$500,000 in "targeted employment areas" (rural areas or areas experiencing high unemployment of at least 150% of the national average) and those who invest \$1,000,000 in other areas. Not less than 3,000 of the annual allotment of visas in this category must go to the targeted employment areas.

This visa category is designed for those who invest one million dollars in a new enterprise that employs ten U.S. workers (exclusive of the immigrant, his/her spouse, and any sons and daughters) or \$500,000, if the investment is in certain rural areas or an area of unemployment of at least 150 percent of the national average. Investor visas for those investing in rural or high unemployment areas are limited to a maximum of 3,000 every year. EB5 investors obtain permanent resident status on a conditional basis for two years and then must apply to remove the condition.

### **What We Can Do For You**

At Kane Legal, we can consult with you to determine whether the Immigrant Investor category/ies might be the most suitable, considering the nature of the investment, your background and goals, and other factors. If it is not, we can suggest alternatives. We can advise you regarding the documentation requirements and legal issues, and we can prepare and submit your paperwork to the USCIS. We can assist you and your family with your entire green card process, up through and including **Adjustment of Status or Consular Processing**.

## Section 3 – Immigrant: Permanent Status, Family Based

**Nonimmigrant :** The U.S. has provisions for certain visa holders to bring dependents (their spouses and children) on accompanying visas. These dependent visas do not allow for the same privileges as the primary visa or status.

**Family-Based Immigration** ranges from bringing in immediate relatives of U.S. citizens (spouse and minor, unmarried children and parents) to "preference" relatives in several categories (unmarried sons and daughters of green card holders and U.S. citizens, married sons and daughters of citizens, and brothers and sisters of U.S. citizens).

### What We Can Do For You

At Kane Legal, we can consult with you on your options and help you to plan ahead. We can advise both the beneficiary and the petitioning relative regarding the documentation requirements and legal issues. We can prepare and submit the necessary paperwork for the USCIS and Department of State. We can also help in preparation for the USCIS or consular interview and, if you are in our local area, one of our attorneys can represent you at the interview.

### Overviews : Through Immediate Relatives | Through Marriage

U.S. citizens can petition for parents, spouses, siblings, and children. Permanent Residents (LPR) can petition for spouses and children only. There is no quota or limit and, therefore, no waiting list for "Immediate Relatives" of U.S. Citizens - Unmarried children under 21, Spouse, Parent, Widow / Widower (under certain circumstances). Relatives in the following "preference" categories are subject to limits on the number of visas that can be issued each year.

- **First Preference** - Unmarried sons or daughters (over age 21) of U.S. citizens.
- **Second Preference** – (2A) Spouses and unmarried children (under age 21) of LPRs; (2B) Unmarried sons and daughters (over age 21) of LPRs.
- **Third Preference** - Married sons and daughters of U.S. citizens.
- **Fourth Preference** - Brothers and sisters of U.S. citizens.

Immediate relatives of U.S. citizens are spouses, children, and parents. In this case "children" are defined as unmarried and under 21 years of age. For parents of a U.S. citizen, the petitioning son or daughter must be at least 21 years of age.

The definition of "immediate relative" includes widows of U.S. citizens, provided that the foreign national was the spouse of the citizen for at least 2 years prior to the citizen's death and was not legally separated from the citizen at the time of his/her death.

**NB :** The petition for permanent residence has to be filed within 2 years after the citizen's death and before re-marriage.

The advantage of qualifying as an immediate relative is that there is no numerical limitation or backlog for sponsorship.

The Family preference categories are :

- 1st Pref - unmarried sons and daughters (any age) of U.S. citizens,
- 2nd Pref - spouses and unmarried sons and daughters of lawful permanent residents,
- 3rd Pref - married sons and daughters of U.S. citizens,
- 4th Pref - brothers / sisters of U.S. citizens.

### **Marriages within the United States**

The U.S. citizen needs to submit a visa petition to the appropriate local USCIS office or the Regional Service Center to prove that the marriage was not entered into for the sole purpose of obtaining a green card. (Effective since November 29, 1996, the application is now submitted to the USCIS Regional Service Center for processing for Maryland residents, and to the local USCIS office for everyone else.) The burden is on the parties to establish the bona fides of the marriage.

At the same time, the non-citizen spouse should submit an application for adjustment of status, green card-type photographs, and numerous other USCIS forms, plus USCIS filing fees.

The USCIS schedules an interview and the timeframe depends upon the location. The Service Centers take about 90 days for the employment card (EAD) and local office processing times for EADs range from 1 to 90 days. If the interview occurs within 90 days, it is possible that no work or travel permit will be issued.

### **Marriages Outside the United States**

The non-citizen spouse usually must remain in her/his country until s/he obtains the green card. On the other hand, if the parties are not yet married, then the foreign fiancé/e can enter the U.S. on the K-1 fiancé/e visa but is required to get married to the sponsoring U.S. citizen and file the adjustment of status application package for the green card within 90 days of entry.

If the marriage takes place abroad, then, after the marriage, the citizen spouse submits a visa petition to either the appropriate USCIS office or directly to the U.S. embassy or consulate in the country where the non-citizen spouse lives. Embassies / consulates may impose various restrictions on who is eligible to file petitions there. Depending on the location, it could take several months to obtain the approval.

Once the visa petition has been approved, the non-citizen spouse will receive a packet from the National Visa Center (NVC). The packet will inform that spouse of the various documents required at the immigrant visa interview abroad and the packet will also include documents requesting biographic data that need to be completed and forwarded to the U.S. embassy or consulate abroad. The process can take a further three to six months. In order to expedite the immigrant visa process after filing the visa petition (I-130), the U.S.-citizen spouse can also file a K-3 petition. As with the immigrant visa process, NVC notifies the consulate of the approval of the K-3 petition. Often the spouse is able to come to the U.S. on the K-3 in only half the time it would take to wait for the whole immigrant visa process to be completed.

In order to avoid a long separation, sometimes the spouse returns to the U.S. after marriage, depending upon the type of visa for which s/he may qualify, and files the necessary applications only after they are both in the United States. However, depending upon what type of visa is used, it is common for the USCIS to stop the non-citizen spouse at the border and exclude him/her from entering the U.S. on the ground that s/he is an intending immigrant. Since spouses of U.S. citizens are considered "immediate relatives" under immigration laws, they are exempt from all numerical quota limitations for the green card, so there is no waiting list.

## Section 4 – Diversity Visas: DV1 Visas (“Green Card Lottery”)

Started in October 1994 as the permanent Diversity Program for natives of certain countries that have provided relatively few immigrants to the U.S. in recent years. Annually, 55,000 visas are given away in a random drawing to individuals from countries underrepresented in the total immigrant pool. If the marriage is less than two years old when the non-citizen spouse becomes a permanent resident, the green card will expire after a two-year period. Both spouses must submit a joint petition to remove the two-year condition within the 90-day period immediately preceding the end of the two-years. If the marriage has terminated by reason of divorce, death of the citizen spouse, or spousal abuse, the non-citizen spouse may apply for a waiver of the joint petition requirement.

Since October 1994, there has been an annual permanent lottery program in place (**Diversity Visa Lottery Program**). India and Pakistan, however, are excluded because they are over-represented among immigrants in the U.S. Persons born in Bangladesh as well as many other countries do qualify. Natives of India or Pakistan may apply only if, for example, they were born in what was India but is now Bangladesh, or born in any country that is eligible to participate in the lottery program, or if they are married to someone who is eligible to apply for the lottery under the principle of cross-chargeability. Certain other narrow exceptions may also apply.

Lottery visas are distributed among six geographical regions. A greater proportion of visas goes to those regions with lower immigration rates in the U.S. The regions are :

- **Africa** : All countries on the continent of Africa and adjacent islands.
- **Asia** : From Israel to all North Pacific Islands, including Indonesia.
- **Europe** : From Greenland to Russia - includes all countries of the former Soviet Union.
- **North America** : Tends to include only one qualified country, The Bahamas.
- **Oceania** : Includes Australia, New Zealand, Papua New Guinea, and all countries and islands in the South Pacific.
- **South America** : Includes Central America, Mexico and the Caribbean countries.

Individuals born in countries that have significant numbers of immigrants to the United States are considered "high admission" and are not eligible for the program. "High admission" countries are defined as those from which the United States has received 50,000 or more immigrants during the last five years in the immediate relative, or family, or employment preference categories. The high admission countries vary from one year's lottery to the next.

**Requirements** : In addition to being born in a qualifying country, applicants must have either a high school education or its equivalent, or within the past five years have two years of work experience in an occupation that requires at least two years of training or experience.

Only one entry for each applicant may be submitted during the registration period. Duplicate or multiple entries will disqualify individuals from registration for this program.

Entries received before or after the specified registration dates, regardless of postmark, and entries sent to an address other than one indicated in the Department of State's instructions are all void. All entries received during the registration period will be individually numbered. Entries will be randomly selected by computer, regardless of the time of receipt. Only successful registrants will be notified by mail at the address listed on their entry.

No outside service can improve an applicant's chance of being chosen or guarantee an entry will win and any service that claims it can, is promising something it cannot deliver. Outside agencies can only help in the proper filing of the application - paying attention to the details involved.

Persons who think they have been defrauded by a United States based company / consultant in connection with the Diversity Visa Lottery may wish to contact their local consumer affairs office or the National Fraud Information Center at 1.800.876.7060.

## Section 5 – Asylum/Refugee

People with a real fear of persecution because of race, religion, nationality, membership in or identification with a particular social group, or political opinion can apply for asylum or refugee status.

## Section 6 – Citizenship Matters

Representation to file citizenship applications U.S. Citizenship is obtained either by birth or naturalization. There are certain benefits to becoming a U.S. citizen, such as higher estate tax exemptions, federal job benefits, greater freedom of travel to other countries and most importantly, the right to vote. In addition there are certain federal grants and scholarships available only to U.S. citizens.

### What We Can Do For You

At Kane Legal, we can help you to prepare and file your citizenship application. We can advise as to whether there are any issues in your case that need to be addressed or that may pose a problem in expediting your process of becoming a part of the "land of the free!"

## Section 7 - USCIS Representation and Consular Practice

Representation before the USCIS throughout the United States and U.S. Consulates worldwide. The final stage of the green card process, whether employment-based, family-based, asylum, lottery, etc, is either **Adjustment of Status (AOS)** or **Consular Processing (CP)**. Adjustment of Status, processed through the USCIS, is available only to persons present in the U.S. CP is processed through the U.S. Department of State (DOS) and involves an interview at a consulate abroad. Applications for spouses and children of U.S. citizens are processed in 1 step, so that the petition would be filed simultaneously with the AOS application. Other types of family-based cases involve two steps, and most employment-based cases are

a 3-step process. Before the AOS or CP application can be filed, the prior stages have to be approved, and the priority date must be current.

#### **What We Can Do For You**

At Kane Legal, we can consult with you to help you decide whether AOS or CP may be the better choice. We take into account your preferences as well as factors such as your legal status, your marital status, and your employment situation. We can prepare and submit paperwork for either process, whether the AOS through USCIS or the CP through the DOS. If completing your green card application through AOS, we provide advice on when it may be appropriate to apply for employment and travel authorization. We can also help in preparation for any USCIS or consular interview and, if you are in our local area, one of our attorneys can represent you at the USCIS interview.

## **Section 8 – Other Immigration Matters**

Representation and counsel in other general immigration matters.

#### **What We Can Do For You**

At Kane Legal, we can consult with you and advise on any legal or procedural matters involved in your green card process - for example: status problems, priority date or waiting-list issues, the "aging-out" of family members (children turning 21 years), and possible ineligibility on grounds such as health or a criminal record. We can assist you and your family with your entire green card process, whether **employment-based** or **family-based**, through and including **Adjustment of Status or Consular Processing**.