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# Immigration Problems Confronting Foreign Personnel in the United States

by Charles Gordon\*

## I. General Considerations

In recent years immigration law has increasingly engaged the interest of the legal profession. The organization of immigration practitioners, known as the American Immigration Lawyers Association (AILA), has 1500 members throughout the United States. A growing number of law schools are offering courses in immigration law and symposia dealing with this subject attract substantial audiences.

Business concerns have shared in this explosion of interest. Their involvement with immigration law is attributable to some extent to the growth of multinational corporations, the development of rapid transportation and communication networks, and the complexity of the immigration laws themselves. Because many companies constantly are faced with immigration problems, some large corporations have established their own immigration departments.

This article will provide a review of certain basic concepts of immigration law. Special emphasis will be placed upon the immigration problems and procedures encountered by foreign business personnel.

The immigration laws of the United States apply almost exclusively to aliens.<sup>1</sup> Under U.S. law an "alien" is defined as any person who is not a citizen or national of the United States.<sup>2</sup> A major device for controlling the flood of aliens into the United States is the classification of all entrant aliens as either immigrants or nonimmigrants. Section 101(a)(15) of the Immigration and Nationality Act (IN Act) defines "immigrant" as "every alien" except those who are within one of twelve specified nonimmigrant groups.<sup>3</sup> The IN Act also declares that every

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<sup>1</sup> See, e.g., preambles to 8 U.S.C. §§ 1182(a), 1251(a) (1976 & Supp. IV 1980).

<sup>2</sup> 8 U.S.C. § 1101(a)(3) (1976).

<sup>3</sup> Immigration and Nationality Act, ch. 477, tit. 1, § 101(a)(15), 66 Stat. 166 (1952), as amended by Pub. L. No. 87-256, 75 Stat. 534v; Pub. L. No. 91-225, 84 Stat. 166 (1970) (codified

alien is presumed to be an immigrant unless he specifically qualifies as a nonimmigrant.<sup>4</sup>

This system of classification is of major importance to both the acquisition and the retention of lawful immigration status. An immigrant must comply with applicable numerical restrictions.<sup>5</sup> In addition, if the immigrant seeks to qualify for a preference as an employee of an American employer,<sup>6</sup> he must comply with the labor certification requirements of the U.S. Department of Labor.<sup>7</sup> Immigrants who satisfy these preliminary requirements, and who are not otherwise excludable,<sup>8</sup> may be granted admission as residents either by obtaining an immigrant visa from an American consul<sup>9</sup> or, if they are within the United States, through a discretionary process known as adjustment of status.<sup>10</sup> Once an alien has obtained lawful admission for permanent residence in the United States he may remain indefinitely, may be employed, and may travel outside the United States.<sup>11</sup> Having obtained such lawful admission the alien also is guaranteed many constitutional protections,<sup>12</sup> and eventually may qualify for American citizenship.<sup>13</sup>

In contrast, a nonimmigrant is accorded a much more restrictive status. The duration and terms of his stay are fixed by the Attorney Gen-

at 8 U.S.C. § 1101(a)(15) (1976 & Supp. IV 1980)). Briefly described, the designated nonimmigrant classes are: diplomats (A); visitors (B); transits (C); crewmen (D); treaty traders or investors (E); students (F); international organization representatives and personnel (G); temporary workers (H); foreign media representatives (I); exchange visitors (J); fiancées and fiancés of American citizens (K); and intracompany transferees (L). The lettered symbols were devised by the State Department as a means for ready reference, and correspond with pertinent paragraph designations in id. § 101(a)(15) (codified at 8 U.S.C. § 1101(a)(15) (Supp. IV 1980)). See 22 C.F.R. § 41.12 (1981) (visa classification system).

<sup>4</sup> Immigration and Nationality Act, *supra* note 3, § 214(b) (codified at 8 U.S.C. § 1184 (1976)).

<sup>5</sup> The Act prescribes a worldwide annual limitation for immigrants of 270,000. Immigration and Nationality Act, *supra* note 3, § 201(a) (codified at 8 U.S.C. § 1151(a) (Supp. IV 1980)), with a ceiling of 20,000 for each country. *Id.* § 202(a) (codified at 8 U.S.C. § 1152(a) (Supp. IV 1980)). Immediate relatives of U.S. citizens (spouse, children, and parents of adult citizens), *id.* § 201(b) (codified at 8 U.S.C. § 1151(5) (1976)) and special immigrants (principally returning lawful residents), *id.* § 101(a)(27) (codified at 8 U.S.C. § 1101(a)(27) (1976 & Supp. IV 1980)) are excluded from the annual quotas and can be admitted without numerical limitation. *Id.* § 201(a) (codified at 8 U.S.C. § 1151(a) (Supp. IV 1980)).

<sup>6</sup> *Id.* § 212(a)(14) (codified at 8 U.S.C. § 1182(a)(14) (Supp. IV 1980)) makes the labor certification requirement applicable only to Third and Sixth Preference and nonpreference immigrants. At present, nonpreference immigrant visas are hopelessly in arrears and are unlikely to become available in the foreseeable future. Third and Sixth Preference immigrants will be discussed at text accompanying notes 74-86 *infra*.

<sup>7</sup> See 20 C.F.R. § 656 (1981).

<sup>8</sup> At present there are 33 grounds for exclusion, some with numerous subcategories, set forth in § 212(a) of the Immigration and Nationality Act (codified at 8 U.S.C. § 1182(a) (1976 & Supp. IV 1980)).

<sup>9</sup> *Id.* §§ 221, 222 (codified at 8 U.S.C. §§ 1201, 1202 (1976)).

<sup>10</sup> *Id.* § 245 (codified at 8 U.S.C. § 1255 (1976)).

<sup>11</sup> *Id.* §§ 101(a)(20), 223 (codified at 8 U.S.C. §§ 1101(a)(20), 1203 (1976)); 8 C.F.R. § 211.1(b) (1981).

<sup>12</sup> *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

<sup>13</sup> Immigration and Nationality Act, *supra* note 3, § 318 (codified at 8 U.S.C. § 1429 (1976)).

eral, acting through the Immigration and Naturalization Service.<sup>14</sup> Ordinarily, the nonimmigrant is not allowed to engage in gainful employment without the authorization of the Immigration and Naturalization Service, unless such employment is inherent in the status for which he was admitted to the United States.<sup>15</sup> Moreover, a nonimmigrant is subject to deportation for remaining beyond the period of his authorized stay or for violating the terms of his admission.<sup>16</sup> While he is still in lawful nonimmigrant status, however, the nonimmigrant may apply for an extension of the period of his authorized stay,<sup>17</sup> or for a change from one nonimmigrant status to another, as from business visitor (B-1) to intracompany transferee (L-1).<sup>18</sup>

The concept underlying a grant of nonimmigrant status is that the alien plans to come to the United States to complete a temporary mission and then intends to leave the United States once that mission is completed. The bestowal of nonimmigrant status, however, does not preclude the alien from later changing his mind and seeking permanent residence status, if he is qualified for admission as an immigrant or for adjustment of status.

## II. Nonimmigrant Classes

There are several nonimmigrant classes that may be relevant to the problems of foreign personnel in the United States. The following discussion will seek to highlight some of the problems inherent in each of these classes.

### A. *Temporary Visitors-(B)*

The IN Act describes a temporary visitor as "an alien having a residence in a foreign country, which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure."<sup>19</sup> There are, therefore, three elements in this statutory formula: an unabandoned residence in a foreign country, a temporary visit, and a mission for business or pleasure.

The visitor for pleasure category (B-2) is comprised largely of tourists, but it also includes aliens who come to the United States for health purposes or who come to participate in conventions and conferences.<sup>20</sup> Visitors for pleasure are absolutely prohibited from engaging in employ-

<sup>14</sup> Id. § 214(a) (codified at 8 U.S.C. § 1184(a) (1976)).

<sup>15</sup> 8 C.F.R. § 214.1(e) (1981).

<sup>16</sup> Immigration and Nationality Act, *supra* note 3, § 241(a)(2), (9) (codified at 8 U.S.C. § 1251(a)(2), (9) (1976)).

<sup>17</sup> 8 C.F.R. § 214.1(c) (1981).

<sup>18</sup> Immigration and Nationality Act, *supra* note 3, § 248 (codified at 8 U.S.C. § 1258 (1976)).

<sup>19</sup> Id. § 101(a)(15)(B) (codified at 8 U.S.C. § 1101(a)(15)(B) (1976)).

<sup>20</sup> 9 Foreign Affairs Manual (FAM) § 41.25 n.5, reprinted in 6 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* 32-49 to -50 (1981).

ment in the United States and may not even be granted permission by the INS for that purpose.<sup>21</sup> Therefore, although this group represents by far the most numerous nonimmigrant category, it has little relevance to the subject of our discussion.

The situation of the visitor for business (B-1) is generally very different from that of the visitor for pleasure. As the title suggests, the visitor for business comes to the United States for a business purpose. Although the exact parameters of this category remain nebulous, it is clear that the B-1 business visitor may not ordinarily be employed by a U.S. employer.<sup>22</sup> Therefore, the B-1 visitor generally continues his employment for his foreign employer while he is on his business trip in the United States. Indeed, as a general rule, the touchstone for this category is whether the B-1 business visitor continues to be employed and paid by a foreign employer during his temporary stay in the United States.

The B-1 visitor may be admitted for an initial period not exceeding one year. Thereafter, the B-1 visitor may be granted extensions of stay in increments of not more than six months each.<sup>23</sup>

### *B. Temporary Workers-(H)*

The Immigration and Nationality Act sets forth three categories of temporary nonimmigrant workers.<sup>24</sup> These temporary workers are known as "H" nonimmigrants and come to the United States to work for American employers. Within each of the three categories the Act requires that the alien have a residence in a foreign country that he has no intention of abandoning.<sup>25</sup>

The H-1 category is comprised of aliens of "distinguished merit and ability" who come to the United States temporarily to perform services requiring such merit and ability.<sup>26</sup> This category includes all professionals, except foreign doctors.<sup>27</sup> Foreign doctors may, however, utilize this category if they are coming to the United States to teach or to conduct research at "a public or nonprofit private educational or research institution or agency in the United States."<sup>28</sup>

The H-2 category applies to temporary workers who come to the United States to perform temporary work that will not displace American labor.<sup>29</sup> Before approval of H-2 status may be granted, a certifica-

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<sup>21</sup> 8 C.F.R. § 214.1(e) (1981).

<sup>22</sup> 9 FAM § 41.25 n.4, reprinted in 6 C. Gordon & H. Rosenfield, *supra* note 20, at 32-45 to -49.

<sup>23</sup> 8 C.F.R. § 214.2(b) (1981).

<sup>24</sup> Immigration and Nationality Act, *supra* note 3 (codified at 8 U.S.C. § 1101(a)(15)(H) (1976)). There is also a fourth category that applies to spouses and minor, unmarried children of H-1, H-2, and H-3 nonimmigrants.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Matter of Essex Cryogenics Indus., Inc.*, 14 I. & N. Dec. 196 (1972).

<sup>28</sup> 8 U.S.C. § 1101(a)(15)(H)(i) (1976).

<sup>29</sup> *Id.* § 1101(a)(15)(H)(ii) (1976).

tion must be obtained from the Department of Labor stating that unemployed persons capable of performing such work cannot be found in the United States.<sup>30</sup> Foreign doctors are also excluded from this classification.

The H-3 category encompasses alien trainees, coming to be trained for foreign employment.<sup>31</sup> Once again, foreign doctors are excluded.

Before H-1, H-2, or H-3 status may be granted, a verified petition by the employer, known as a visa petition,<sup>32</sup> must be submitted to and approved by the Immigration and Naturalization Service.<sup>33</sup> The visa petition is submitted in duplicate, accompanied by a \$10 fee, to the INS district director in the area in which the temporary services are to be performed.<sup>34</sup> The H nonimmigrant is admitted for the period of established need, not exceeding one year. Extensions of temporary stay may be requested at one-year intervals.<sup>35</sup>

### C. *Treaty Aliens-(E)*

The treaty alien classification relates to an alien entitled to enter the United States under the provisions of a bilateral treaty of commerce and navigation between the United States and the foreign state of which the alien is a national.<sup>36</sup> Such treaties grant reciprocal rights to nationals of the signatory countries to reside and conduct business within each other's boundaries. Two types of entrants are included in this group. The first type is the so-called treaty trader (E-1), who comes solely to conduct substantial trade between the United States and the foreign state of which he is a national.<sup>37</sup> The other is the so-called treaty investor (E-2), who

<sup>30</sup> 8 C.F.R. § 214.2(h)(3)(i) (1981).

<sup>31</sup> 8 U.S.C. § 1101(a)(15)(H)(iii) (1976).

<sup>32</sup> See 8 C.F.R. § 214.2(h)(1) (1981).

<sup>33</sup> Immigration and Nationality Act, *supra* note 3, § 214(c) (codified at 8 U.S.C. § 1184(c) (1976)); 8 C.F.R. § 214.2(h)(1) (1981). No separate petition is submitted on behalf of H-4 dependents, who automatically are granted H-4 status upon approval of the H status for their principals. However, H-4 dependents thus admitted may not accept employment without having a separate visa petition approved.

<sup>34</sup> 8 C.F.R. § 214.2(h)(1) (1981).

<sup>35</sup> *Id.* § 214.2(h)(11).

<sup>36</sup> Immigration and Nationality Act, *supra* note 3, § 101(a)(15)(E) (codified at 8 U.S.C. § 1101(a)(15)(E) (1976)).

<sup>37</sup> *Id.* § 101(a)(15)(E)(i) (codified at 8 U.S.C. § 1101(a)(15)(E)(i) (1976)); 22 C.F.R. § 41.12 (1981). At the present time treaty trader status is available under treaties of commerce and navigation to nationals of Argentina, Austria, Belgium, Bolivia, Borneo, China, Colombia, Costa Rica, Denmark, Estonia, Ethiopia, Finland, France, Germany, Greece, Honduras, Iran, Ireland, Israel, Italy, Japan, Korea, Latvia, Liberia, Luxembourg, The Netherlands, Nicaragua, Norway, Pakistan, Paraguay, the Philippines, Spain, Sultanate of Muscat and Oman, Switzerland, Thailand, Togo, Turkey, United Kingdom of Great Britain and Northern Ireland, Vietnam, and Yugoslavia. Similar treaty provisions permit treaty investor status for nationals of Argentina, Austria, Belgium, China, Colombia, Costa Rica, Ethiopia, France, Honduras, Italy, Liberia, Luxembourg, Norway, Paraguay, Spain, Switzerland, Thailand, Togo, Yugoslavia, United Kingdom of Great Britain and Northern Ireland, Germany, Iran, Japan, Korea, The Netherlands, Nicaragua, Pakistan, Sultanate of Muscat and Oman, Vietnam, and the Philippines. 6 C. Gordon & H. Rosenfield, *supra* note 20, at 32-75 to -79, 32-81 to -84.

comes solely to develop and direct operations of an enterprise in which he has made, or is about to make, a substantial investment.<sup>38</sup> The spouse and unmarried minor children of the treaty alien are entitled to the same nonimmigrant status as their principal, regardless of the nationality of such spouse and children.<sup>39</sup>

The nonimmigrant treaty trader is usually self-employed. If, however, the treaty trader is to be employed by another, his employer must be of the same nationality. Moreover, the individual must himself maintain nonimmigrant treaty trader status. If employed by an organization, an employee will qualify as a treaty trader if the organization employing him is owned by a person or persons who have the nationality of the treaty country and, if not residing abroad, who maintain nonimmigrant treaty trader status.<sup>40</sup> The nationality of a corporation, foreign or domestic, is determined by the nationality of the persons who own fifty-one percent or more of its stock.<sup>41</sup> In addition, the employee must be engaged in supervisory or executive duties, or if employed in a minor capacity, he must have special qualifications needed by the employer's enterprise.<sup>42</sup>

The statutory requirement of "trade" is construed to mean trade that is international in scope. Therefore "trade" includes international banking, insurance, transportation, tourism, and the exchange of goods or monies.<sup>43</sup> The requirement that the trade must be principally with the alien's country is construed to mean that such trade must constitute at least fifty-one percent of the total trade conducted by the alien or his employing firm.<sup>44</sup> If that requirement is met, the balance of the trade may be either domestic or foreign.<sup>45</sup> A treaty investor can be employed by another treaty investor, but he must be employed in a responsible capacity.<sup>46</sup> An employee will qualify as a treaty investor if the organization employing him is owned by a person or persons who have the nationality of the treaty country and, if not residing abroad, who maintain nonimmigrant treaty investor status.<sup>47</sup> The nationality of a corporation, foreign or domestic, is determined by the nationality of the persons who own fifty-one percent or more of its stock.<sup>48</sup>

<sup>38</sup> Immigration and Nationality Act, *supra* note 3, § 101(a)(15)(E)(ii) (codified at 8 U.S.C. § 1101(a)(15)(E)(ii) (1976)); 22 C.F.R. § 41.72 (1981).

<sup>39</sup> Immigration and Nationality Act, *supra* note 3, § 101(a)(15)(E) (codified at 8 U.S.C. § 1101(a)(15)(E) (1976)); 22 C.F.R. §§ 41.40(c), 41.41(b) (1981).

<sup>40</sup> 22 C.F.R. § 41.40(a) (1981).

<sup>41</sup> 9 FAM § 41.40 n.8, reprinted in 6 C. Gordon & H. Rosenfield, *supra* note 20, at 32-73.

<sup>42</sup> 22 C.F.R. § 41.40 (1981); *Tokyo Sansei (New York), Inc. v. Esperdy*, 298 F. Supp. 945 (S.D.N.Y. 1969) (electronic technician's skills not essential enough to efficient operation of employer's enterprise to qualify him for treaty trader status); *Nippon Express U.S.A., Inc. v. Esperdy*, 261 F. Supp. 561 (S.D.N.Y. 1966) (bookkeeper's skills not so special or essential as to qualify petitioner for treaty trader status).

<sup>43</sup> 9 FAM § 41.40 n.5, reprinted in 6 C. Gordon & H. Rosenfield, *supra* note 20, at 32-72.

<sup>44</sup> *Id.* § 41.40 n.6, reprinted in 6 C. Gordon & H. Rosenfield, *supra* note 20, at 32-72 to -73.

<sup>45</sup> *Id.*

<sup>46</sup> 22 C.F.R. § 41.41(a) (1981).

<sup>47</sup> *Id.* § 41.41(b) (1981).

<sup>48</sup> 9 FAM § 41.41 n.5, reprinted in 6 C. Gordon & H. Rosenfield, *supra* note 20, at 32-81.

The enterprise in which the applicant wishes to invest must actually be in existence or in the active process of formation.<sup>49</sup> When the treaty investor relies on his own investment rather than employment by an investor, he must show that the enterprise is bona fide and that he is not merely investing "a small amount of capital in a marginal enterprise solely for the purpose of earning a living."<sup>50</sup> Investment in small businesses is not discouraged, however.<sup>51</sup>

There are no reliable benchmarks to consult in determining whether an investment is "substantial" within the contemplation of the statute. Therefore, whether an investment is substantial is resolved on a case-by-case basis.<sup>52</sup> While it is said that substantial investment depends on the nature of the enterprise and not necessarily on the size of the investment,<sup>53</sup> one may suppose that the minimum acceptable amount will be \$50,000 to \$100,000.

Approval of treaty alien status does not require submission to the Immigration Service of a preliminary visa. An E visa may be issued by an American consul, if the consul is satisfied that the statutory requirements have been met. If the alien is already in the United States, the E visa may be approved by the Immigration Service in passing on an application for change from another lawful nonimmigrant status. Treaty alien admissions are granted for a one-year period, but the alien can apply for one-year extensions indefinitely, so long as he continues to satisfy treaty alien requirements.<sup>54</sup>

#### *D. Intracompany Transferees-(L)*

The intracompany transferee category is particularly relevant to our discussion. This nonimmigrant category was enacted in 1970 primarily to facilitate the transfer of personnel by multinational corporations. It may, however, also apply to the personnel of any organizations who qualify under its terms. The IN Act confers nonimmigrant status on:

an alien who, immediately preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him.<sup>55</sup>

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<sup>49</sup> Id. n.2, reprinted in 6 C. Gordon & H. Rosenfield, *supra* note 20, at 32-80.

<sup>50</sup> 22 C.F.R. § 41.41(a) (1981); see, e.g., *Kim v. Dist. Director*, 586 F.2d 713 (9th Cir. 1978).

<sup>51</sup> 9 FAM § 41.41 n.3, reprinted in 6 C. Gordon & H. Rosenfield, *supra* note 20, at 32-80.

<sup>52</sup> 586 F.2d at 717.

<sup>53</sup> 9 FAM § 41.41 n.3, reprinted in 6 C. Gordon & H. Rosenfield, *supra* note 20, at 32-80.

<sup>54</sup> 8 C.F.R. § 214.2(e) (1981).

<sup>55</sup> Immigration and Nationality Act, *supra* note 3, § 101(a)(15)(L) (1976) (codified at 8 U.S.C. § 1101 (a)(15)(L) (1976)).

The intracompany transferee is designated as L-1 and his spouse or minor child as L-2.

This category of nonimmigrants has certain important requirements. First, the alien must have been employed abroad continuously for at least one year immediately preceding his application for admission to the United States by "a firm or corporation or legal entity or an affiliate or subsidiary thereof."<sup>56</sup> "Firm" and "legal entity" obviously are expansive terms, and may include partnerships and other associations, and possibly even sole proprietorships.

Second, the transferee must be coming to work for that same organization, or for a subsidiary or affiliate thereof.<sup>57</sup> There is no requirement that this organization be an American concern, or that the transferee be coming to an existing office,<sup>58</sup> a bona fide purpose to set up a new office to conduct operations in the United States will be acceptable.<sup>59</sup> Assessment of alleged subsidiary or affiliate relationships has provoked some debate, but the test is generally whether mutual control is present.<sup>60</sup> Usually this mutual control is expressed as ownership of at least fifty-one percent of the common stock.

Third, the statute's benefits cover only employment "in a capacity that is managerial, executive, or involves specialized knowledge."<sup>61</sup> By its language, therefore, the statute covers employment that is either managerial or that involves specialized knowledge.<sup>62</sup>

Fourth, while the statute requires that the alien be coming "temporarily," it does not require, as in some other nonimmigrant categories, that the alien retain an unabandoned residence in a foreign country. An unabandoned foreign residence is not required because the transferee is normally expected to move to another post in a foreign country after his tour of duty in the United States is completed. There is, however, no obstacle to the alien subsequently changing his plans and deciding to seek permanent residence in the United States.

A prerequisite to the acquisition of nonimmigrant status in the L-1 category is the approval of a visa petition submitted by the alien's employer.<sup>63</sup> The employer must file a petition for approval of such status, together with supporting documents. The petition must be submitted on Form I-129B, in duplicate, to the INS office having jurisdiction over the

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> See 1 C. Gordon & H. Rosenfield, *supra* note 20, § 2.16B(2) (Supp. 1981).

<sup>59</sup> See, e.g., *Matter of Leblanc*, 13 I. & N. Dec. 816 (1971); *Matter of Chartier*, 16 I. & N. Dec. 284 (1977).

<sup>60</sup> See 1 C. Gordon & H. Rosenfield, *supra* note 20.

<sup>61</sup> Immigration and Nationality Act, *supra* note 3, § 101(a)(15)(L) (codified at 8 U.S.C. § 1101(a)(15)(L) (1976)).

<sup>62</sup> *Matter of Vaillancourt*, 13 I. & N. Dec. 644 (1970).

<sup>63</sup> Immigration and Nationality Act, *supra* note 3, § 214(c) (codified at 8 U.S.C. § 1184(c) (1976)).

place in the United States where the alien will be employed.<sup>64</sup> Upon approval of the L-1 petition, the beneficiary's spouse and minor children, accompanying or following him, are entitled automatically to derivative L-2 status.<sup>65</sup>

The L-1 nonimmigrant may be admitted for an initial period of three years.<sup>66</sup> Thereafter, he may request extensions of temporary stay in one-year increments until his temporary mission in this country is completed.<sup>67</sup>

### III. Immigrants

#### A. Qualification

Foreign personnel who seek permanent residence as immigrants must qualify under the applicable provisions of the immigration laws. First, such aliens must qualify under the prescribed numerical limitations.<sup>68</sup> Immediate relatives of American citizens, defined as spouses, minor unmarried children, and parents of citizen children at least twenty-one years of age, are exempt from such numerical limitations.<sup>69</sup> Other aliens may qualify for a quota preference as close relatives of American citizens or resident aliens.<sup>70</sup> In addition to complying with the numerical restrictions, aliens seeking permanent residence status must establish that they are not inadmissible under one of the thirty-three grounds for exclusion set forth in the IN Act.<sup>71</sup>

Aliens not entitled to exemption or visa preference on the basis of familial relationship may seek admission as immigrants under the Third or Sixth Preferences.<sup>72</sup> The Third Preference is for professionals or aliens with exceptional ability in the sciences or arts; the Sixth Preference is for other immigrants capable of performing skilled or unskilled labor, for which there is a shortage of employable and available persons in the United States.<sup>73</sup> Professional is defined to "include but not be limited to

<sup>64</sup> 8 C.F.R. § 214.2(f)(1) (1981).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* § 214.2(f)(3).

<sup>68</sup> Immigration and Nationality Act, *supra* note 3, §§ 201-203 (codified at 8 U.S.C. §§ 1151-1153 (1976 & Supp. IV 1980)).

<sup>69</sup> *Id.* § 201 (codified at 8 U.S.C. § 1151(b) (1976)).

<sup>70</sup> *Id.* § 203 (codified at 8 U.S.C. § 1153(a)(1), (2), (4), (5) (1976 & Supp. IV 1980)). The four preferences that benefit such relatives are adult unmarried sons and daughters of American citizens, spouses and unmarried sons and daughters of lawful residents, married sons and daughters of American citizens, and brothers and sisters of adult American citizens.

<sup>71</sup> *Id.* § 212(a) (codified at 8 U.S.C. § 1182(a)(1)-(33) (1976 & Supp. IV 1980)).

<sup>72</sup> *Id.* § 203(a)(3), (6) (codified at 8 U.S.C. §§ 1153(a)(3), (6) (Supp. IV 1980)). The law also sanctions a nonpreference group, who would be entitled to any remainder of the annual 270,000 quota after the six preferences are used. *Id.* § 203(a)(8) (codified at 8 U.S.C. § 1153(a)(8) (Supp. IV 1980)). Enormous backlogs in recent years, however, have ended any realistic prospect that a nonpreference immigrant will ever be reached. See 1 C. Gordon & H. Rosenfield, *supra* note 20, § 2.27 at 2-212.

<sup>73</sup> Immigration and Nationality Act, *supra* note 3, § 203(a)(3), (6) (codified at 8 U.S.C. § 1153(a)(3), (6) (Supp. IV 1980)).

architects, engineers, lawyers, physicians, surgeons, and teachers."<sup>74</sup> This open-ended definition has left a large area to be defined by the familiar process of inclusion and exclusion.<sup>75</sup>

Permanent residence status can be acquired in one of two ways. Outside the United States the alien can apply for an immigrant visa at an American consulate in a foreign country.<sup>76</sup> Within the United States the alien can apply to the Immigration and Naturalization Service through a process known as adjustment of status, which is available only to persons who have been inspected and admitted as nonimmigrants or paroled.<sup>77</sup>

Persons seeking Third or Sixth Preference status must first obtain a labor certification from the U. S. Department of Labor, certifying that American workers are unavailable and that prevailing wages are to be offered.<sup>78</sup> Labor certifications usually involve a dilatory and complicated process of advertising, posting, recruitment, and submission of an application (Form ETA 750) to the local State Employment Service office for eventual transmission to the U. S. Department of Labor.<sup>79</sup> Advertising and Labor Department consideration is not necessary, however, for L-1 managerial and executive personnel (but not personnel qualifying because of specialized knowledge), who are covered by Schedule A of the Department of Labor regulations.<sup>80</sup> These regulations enable the employer to submit the labor certification application directly to the Immigration and Naturalization Service.<sup>81</sup>

If the Third or Sixth Preference immigrant has received a labor certification or is on Schedule A, the employer then submits a visa petition, Form I-140, on the employee's behalf to INS, seeking approval of Third or Sixth Preference status. Approval of the petition confers derivative Third or Sixth Preference status on the alien's spouse and children. It also entitles the alien to apply for permanent residence when his priority date is reached, by either seeking an immigrant visa from an American consul, or, if he is in the United States, by submitting an application for adjustment of status to INS.<sup>82</sup>

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<sup>74</sup> Id. § 101(a)(32) (codified at 8 U.S.C. § 1101(a)(32) (1976)). Special restrictions adopted in 1976 have radically curtailed immigration opportunities for foreign doctors. Act of Oct. 12, 1976, § 601, Pub. L. No. 94-484, 90 Stat. 2243, 2300; 1 C. Gordon & H. Rosenfield, *supra* note 20, § 2.27d at 2-199.

<sup>75</sup> 1 C. Gordon & H. Rosenfield, *supra* note 20, § 2.27d(2), *Immigration Law and Procedure*, at 2-198 to 2-204.2.

<sup>76</sup> See 1A C. Gordon & H. Rosenfield, *supra* note 20, § 3.7d at 3-107 (1981).

<sup>77</sup> Immigration and Nationality Act, *supra* note 3, § 245 (codified at 8 U.S.C. § 1255 (1976)); 8 C.F.R. § 245 (1981).

<sup>78</sup> Immigration and Nationality Act, *supra* note 3, § 212(a)(14) (codified at 8 U.S.C. § 1182(a)(14) (1976)).

<sup>79</sup> 20 C.F.R. § 656 (1981).

<sup>80</sup> Id. § 656.22.

<sup>81</sup> Id.

<sup>82</sup> Immigration and Nationality Act, *supra* note 3, § 203(c) (codified at 8 U.S.C. § 1153(c) (1976)). An alien's priority date ordinarily is fixed by the date of submission of a visa petition to INS. In the case of an alien with an approved labor certification, an earlier priority date is

The timing of the acquisition of permanent residence status depends on the quota situation. There are often long waiting lists and delays.<sup>83</sup> The Third Preference immigration quota usually is current, except for some areas with exceptionally heavy demand, such as Mexico, the Philippines, and Hong Kong. Therefore, most Third Preference immigrants can seek permanent residence immediately after their Third Preference visa petition has been approved. If they are already in the United States, the visa petition and the application for adjustment of status, Form I-485, can be submitted to INS simultaneously.<sup>84</sup>

In contrast, the Sixth Preference quota is currently over a year in arrears and an alien usually is delayed in acquiring permanent residence. The alien's priority date, however, is fixed when he submits his application for a labor certification. Completion of the labor certification process usually takes many months, depending on the area of the United States where it is submitted. Therefore, the Sixth Preference immigrant ordinarily faces a waiting period of only three to six months after ap-

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allowed: the date the labor certification (later approved) is submitted to the local State Employment Service office or to INS. 8 C.F.R. § 204.1(c)(2) (1981).

<sup>83</sup> State Department Monthly List of Immigration Quota Availabilities (Sept. 1981) states:

3. Section 203(b) of the Immigration and Nationality Act provides that visas be given to applicants in order of preference classes. Section 202(e) of the Act provides, however, that whenever the maximum number of visas have been made available to natives of a foreign state or dependent area in any fiscal year, in the next following fiscal year visas will be made available by applying the preference limitations to the foreign state (20,000) or dependent area (600) limitations. Foreign states and dependent areas listed below benefit under the provisions of Section 202(e) of the Act.

4. On the chart below, the listing of a date under any class indicates that the class is oversubscribed (See paragraph 1): "C" means current, i.e., that numbers are available for all qualified applicants; and "U" means unavailable, i.e., that no numbers are available.

| FOREIGN STATE  | <i>PREFERENCE</i> |          |          |          |     |     | NONPREFERENCE |
|--|-------------------|----------|----------|----------|-----|-----|---------------|
|  | 1ST               | 2ND      | 3RD      | 4TH      | 5TH | 6TH |               |
| ALL FOREIGN STATES AND DEPENDENT AREAS EXCEPT THOSE LISTED BELOW | C                 | C        | C        | C        | U   | U   | U             |
| CHINA  | C                 | 01-15-81 | 05-22-80 | 03-22-79 | U   | U   | U             |
| INDIA  | C                 | C        | 02-22-76 | C        | U   | U   | U             |
| KOREA  | C                 | 01-08-81 | C        | C        | U   | U   | U             |
| MEXICO   | C                 | U        | C        | 05-08-78 | U   | U   | U             |
| PHILIPPINES  | C                 | 01-01-79 | 05-22-69 | 10-22-74 | U   | U   | U             |
| ANTIGUA  | C                 | 03-24-80 | C        | C        | U   | U   | U             |
| BELIZE   | C                 | 06-15-79 | C        | C        | U   | U   | U             |
| HONG KONG  | C                 | 09-30-76 | 03-24-70 | 03-22-77 | U   | U   | U             |
| ST. CHRISTOPHER-NEVIS  | C                 | 03-17-80 | C        | C        | U   | U   | U             |

Allocations in the fifth and sixth preference categories will resume for October 1981, the first month of the new fiscal year. The Department of State has instituted a recorded message with visa availability information which can be heard at (202) 632-2919. This recording will be updated in the middle of each month with information on cut-off dates for the following month.

<sup>84</sup> 8 C.F.R. § 45.2(a)(2) (1981).

proval of his labor certification application before he can apply for permanent residence.

#### **IV. Conclusion**

The foregoing summary demonstrates the complexities of the immigration law that confront foreign personnel seeking lawful status in the United States. In the vast majority of cases, however, these complexities can be overcome, and the desired result achieved, by careful planning and by knowledgeable utilization of the prescribed procedures.