Employment-Based Immigration

- Employment-Based INA § 203 (b)

  1\textsuperscript{st} Preference – Priority Workers:
  a) Extraordinary ability in the sciences, arts, education, business or athletics
  b) Outstanding professors and researchers
  c) Multinational executives and managers

  2\textsuperscript{nd} Preference –
  a) Members of the professions holding advanced degrees.
  b) Alien of exceptional ability

  3\textsuperscript{rd} Preference – Skilled workers, professionals (w/o advanced degrees)

  4\textsuperscript{th} Preference – “special immigrants” – religious workers, government employees

  5\textsuperscript{th} Preference – “employment creation”- investments of $1,000,000 that employ 10 Americans.
Priority Workers:

a) Extraordinary ability in the sciences, arts, education, business or athletics

   “Extraordinary ability” - a level of expertise indicating that the individual is one of the small percentage who have risen to the very top of their field.

b) Outstanding professors and researchers

c) Multinational executives and managers
Applicant must show that he or she has a level of expertise that makes him or her one of that small percentage of individuals who is at the very top of his/her field of endeavor. The applicant can demonstrate this by providing evidence that he or she has received a major, international award. 8 C.F.R. 204.5(h)(2)

In the absence of a major international award, the applicant must present evidence of at least three of the following criteria:

1. Receipt of a lesser nationally or internationally recognized prize or award for excellence in the field.
2. Membership in an association which requires outstanding achievement of its members as judged by experts in the field.
3. Published materials about the individual in professional journals, major trade publications or other major media.
4. Evidence of the individual’s participation, either individually or on a panel, as a judge of the work of others in the same or a related field.
5. Evidence of the individual’s original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.
6. Evidence of the individual’s authorship of scholarly articles in the field in professional or major trade publications.
7. Evidence of the display of the individual’s work in artistic exhibitions or showcases.
8. Evidence that the individual has performed a leading or critical role for organizations or establishments that have a distinguished reputation.
9. Evidence that the individual has commanded a high salary or other significantly high remuneration for services.
10. Evidence of commercial success in the performing arts.
Outstanding Professors and Researchers

Minimum Requirements for All Applicants

Three years of research experience subsequent to completing a degree.

Applicant must hold a "permanent" position with the employer or have offers for a permanent position. Position must be a tenure track teaching position or permanent research position at university or college; or a position at private company that employs at least three individuals in full-time research positions.

If position is with private employer, employer must document that it has accomplishments in an academic field.

Categorical Requirements for Applicants

The applicant must satisfy at least two of the following criteria to show that his or her research as been recognized, internationally, as outstanding in the particular academic field.

Evidence that the applicant has received a major prize or award for outstanding achievement.

Evidence that the applicant is a member of an association or organization which requires outstanding achievement of its members.

Published material in professional publications written by others about the applicant’s work.

Evidence that the applicant has participated, either individually or on a panel, as a judge of the work of others in the particular academic field or a related academic field.

Evidence of original scientific or scholarly research contributions in the field.

Evidence of authorship of scholarly books or articles in scholarly journals with international circulation.

8 C.F.R. 204.5(i)(3)
a) Members of the professions holding advanced degrees.
   - above a bachelor’s degree

b) Alien of exceptional ability in the sciences, arts or business

Requires a showing that able, willing and qualified American workers are not available and that the applicant’s employment will not adversely affect the wages and working conditions of similarly employed United States Workers. (Labor Certification) (INA §212(a)(5)(A).

c) National Interest Waiver - Either a) or b), but does not require a job offer or Labor Certification.
The applicant must show either that he or she is a person of exceptional ability or that he or she possesses an advanced degree (master's or Ph.D.) and

The applicant must demonstrate that his or her work is in the "national interest."

The statute and the regulations do not define the term "national interest," nor do they provide any specific criteria. Prior case law states that the Immigration Service should be as flexible as possible and should make a case-by-case determination as to whether the applicant's work is in the national interest. However, a 1998 case (NYSDOT) outlined very strict criteria to obtain a national interest waiver. Specifically, NYSDOT creates a three-prong test as follows:

a) the work must be of intrinsic national merit;
b) the work must be national in scope; and

c) that it would be adverse to the national interest to require the applicant to complete a labor certification through which the applicant would have to prove that there is not an interested and qualified U.S. citizen or permanent resident for the job.

The applicant must prove all three prongs in order to qualify for the national interest waiver.
3rd Preference Category (EB3)

a) Skilled Laborers – for which qualified U.S. workers are not available

b) Members of a profession requiring only a bachelor’s degree

c) Unskilled Laborers- for which qualified U.S. workers are not available

All three require a Labor Certification, no National Interest Waiver available for EB3 preference.
Absence of U.S. workers who are able, willing, qualified and available is shown by specific recruitment steps.

Must make sure job requirements are not “unduly restrictive”:
1) Other than those normally required for the job in the U.S.
2) Exceed the requirements listed in the Dictionary of Occupational Titles
3) Require a foreign language
4) Involve a combination of duties or
5) Require the worker to live on employer’s premises

Business Necessity Requirement:  *Matter of Information Industries*

To establish a business necessity, an employer must demonstrate the job duties and requirements bear a reasonable relationship to the occupation in the context of the employer’s business and are essential to perform the job in a reasonable manner.
# Recruitment Requirements for Labor Certification

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<tr>
<th>SPECIAL HANDLING - College/University Teacher (for a position with any teaching involved)</th>
<th>STANDARD (for any position without any teaching involved)</th>
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<tr>
<td>Recruitment ad must be in a national professional journal and must be in PRINT. Ad must have job title, job duties, and job requirements.</td>
<td>Recruitment must be in 2 Sunday papers, a Job Order, and three other recruitment methods as specified by the U.S. Department of Labor.</td>
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<td>Demonstrate that the alien was the best qualified for the position.</td>
<td>Must demonstrate that there was no one else (U.S. citizen or permanent resident) able, willing, qualified and available for the position.</td>
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<td>Must file within 18 months of the job offer.</td>
<td>Must file within 180 days of the first recruitment advertisement.</td>
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1. Job Fair
2. On-campus recruitment
3. Employer’s Website
4. Trade journal
5. Private employment firm
6. Employee referral program
7. Campus placement office
8. Local/Ethnic newspaper
9. Radio/TV ads

Labor certification under PERM is now an attestation based process. Documents need not be submitted at the time of filing but must be kept in case of an audit.