Immigration Law

WEEK THREE

IMMIGRANT v. NONIMMIGRANT VISAS

Immigrant Visa

- Permission to enter and reside within a country to live and work permanently

Nonimmigrant Visa

- Permission to enter the country and remain for a temporary period
- Foreign national seeking visa possesses **"nonimmigrant intent"**

Nonimmigrant Intent: Proven intent to return to country of origin following expiration of stay

VISA APPLICATION PROCESS

Applying for a visa from abroad at a U.S. Consulate is known as, **"Consular Processing"**

- Embassies and Consulate General offices are controlled by the
- Department of State or **"DOS"**
- Each Embassy has a consular section where officers decide whether a particular visa application should be approved

Consular Processing: applying for an Immigrant or nonimmigrant visa from abroad

CASE FOR DISCUSSION, pg. 45

Alberto is a foreign national from Brazil. He was issued a B-2 visa to come to the United States as a visitor for pleasure in 2012. However, since the time his visa was issued, Alberto started doing some work for a distributor located in Miami, Florida. Alberto has business cards listing his job as an Importer and it carries the Miami company's contact information. When showing his B-2 visa to the CBP officer at the Miami airport on a recent trip, one of Alberto's business cards falls out of his wallet and the CBP officer picks it up and examines it, noticing the address in the United States.

- **What types of questions do you think the CBP officer will ask?**
- **Do you think Alberto will be admitted to the United States as a B-2 visitor?**

VISA APPLICATION INTERVIEW

- The final step - appear at the embassy or consular office for the visa application interview itself
  - For most visa classifications, evidence in support of the application is required at this time
- If the consular officer finds that the foreign national meets the criteria for visa issuance, they will place a **visa sticker** inside the foreign nationals passport
  - The foreign national may then present themselves for entry at a **Port of Entry**, so that a CBP officer can decide whether to grant permission to enter and for how long

CHANGING OR EXTENDING NONIMMIGRANT STATUS

- Once a foreign national is present in the U.S. for a temporary purpose, it is possible for him or her to change from one nonimmigrant classification to another or to extend the stay in the current class of admission
  - This is completed on **Form I-539**, Application to Extend/Change Nonimmigrant Status
- In order for an application to change or extend status to be deemed timely filed, it must be received on or before the date the foreign national's current stay expires

DOCTRINE OF CONSULAR NON-REVIEWABILITY

- Application denied at a consular section? No appeal rights. Submit a new application
  - This is because of the "**Doctrine of Consular Non-reviewability**," which prevents the appeal of consular decisions
  - Refiling, however, effectively functions as an appeal as foreign nationals will often include further additional evidence to argue why they should be granted the visa
  - However, there is still no official mechanism of judicial review

Doctrine of Consular Non-reviewability: The doctrine that a decision by a consular Officer is final and may not be appealed

TEMPORARY VISITORS FOR BUSINESS (B-1) AND PLEASURE

- The visitor B visa classification is one of the most versatile nonimmigrant visa classifications available to foreign nationals
- It permits entry for a number of purposes, for example:
  - To attend business meetings or conferences
  - Or to vacation in the United States
- It cannot however be used to engage in "**productive work**"

Productive Work: Involves duties or activities that would normally be performed by a U.S. worker, and/or activities that result in financial gain for the U.S. employer

B VISA FACTORS FOR APPROVAL 9 FAM 402.2-2(B)

1. In determining whether visa applicants are entitled to temporary visitor classification, the consular officer must assess whether the applicants:
    a) Have a residence in a foreign country, which they do not intend to abandon;
    b) Intend to enter the United States for a period of specifically limited duration; and
2. Seek admission for the sole purpose of engaging in legitimate activities relating to business or pleasure.
    a) If an applicant for a B1/B2 visa fails to meet one or more of the above criteria, consular officers must refuse the applicant

NONIMMIGRANT INTENT

- Proving that the Foreign National has a home they do not intend to abandon.
- Best evidence includes:
  - A letter from the individual's employer abroad, if any
  - Evidence of the existence of a business, for those who are self-employed
  - Proof of property or land ownership in the applicant's home country, and
  - Evidence of family members that the foreign national will return to following his or her visit to the United States

B-1 VISAS FOR BUSINESS VISITORS

Versatile visa for Business Meetings & Transactions

- Maximum stay: 6 months and req. 100% nonimmigrant intent
- Apply directly at the consulate abroad (or use ESTA)

Permissible activities include (but are not limited to):

- Sales initiatives
- Installation / service related to contractual agreement
- Prospective investment activities
- Short stay professional work on behalf of foreign entity (B-1 in lieu of H-1B)

B-1 VISAS FOR BUSINESS VISITORS

!!—Short stay trainees (B-1 in lieu of H-3)

Upcoming Change:

- Starting in Nov. 2016, Chinese nationals will need to register online
- (EVUS) before using the B visa (similar to ESTA registration)

ALERT:

- 2013 Infosys settles investigation into B visa abuse for record $34
- million fine. B-1 is NOT a substitute for working visa

B-2 VISAS FOR PLEASURE VISITOR

- **Maximum stay 6** *months* and req. 100% nonimmigrant intent
- Apply directly at the consulate abroad
- Permissible activities include (but are not limited to):
  - Tourism or family visits
  - To seek medical treatment
  - Participating in a social event
  - Short courses of study
  - Performing as Amateur Entertainer (no compensation provided)
  - Co-habiting partners of foreign nationals present in other nonimmigrant visa classifications

B-1 IN LIEU OF H-1B 9 FAM 402.2-5(F)

- Useful when a U.S. employer is interested in bringing an employee of a foreign affiliate to the U.S. for a job requiring a short time commitment that will directly benefit the overseas employer. A Foreign National must:
  - Hold the equivalent of a U.S. bachelor's degree
  - Plan to perform H-1B caliber work or training
  - Be paid only by the foreign employer, except for travel reimbursement
  - Will maintain a position as a permanent employee of the foreign employer

ALERT:

Because of the shortage of H-1B visas available, applications for this version of B-1 are met with close scrutiny

COMMERCIAL OR INDUSTRIAL WORKERS 9 FAM 402.2-5(E)(1)

- A foreign national "coming to the United States to install, service, or repair commercial or industrial equipment or machinery purchased from a company outside the United States or to train U.S. workers to perform such services"
- The key lies in the wording of the contract between the entity in the United States purchasing the equipment and the foreign company that manufactured it
  - Specifically, the contract must require the foreign company to provide these services or training
  - In addition, the foreign national entering the U.S. to perform such services must be able to demonstrate that s/he possesses knowledge that is essential to achieving this goal

INVESTORS SEEKING INVESTMENT IN THE U.S. 9 FAM 402.2-5(C)(7)

- B-1 (Prospective E-2) classification acts as a preliminary step towards filing for E-2 status.
  - – It is unlikely that a foreign national would want to invest thousands of dollars without being able to first visit and secure a proper location for the enterprise, meet with legal and accounting professionals to discuss the structure of the business, and interview potential candidates for future hire
- This classification allows the investor to enter the United States for six months to begin "business establishment activities"

CASE FOR DISCUSSION, pg. 65

Jorge is the marketing manager for a small software company located in Madrid, Spain, and is entering the United States for a series of meetings and congresses across the country. He expects to be in the country for approximately two months. His schedule is as follows:

a. meet with a small U.S. software company about working together to translate and customize Jorge's product for sale in the U.S. market;
b. attend a small convention for medical software, where he will man the booth and answer questions about the company's products and services, possibly taking orders as well;
c. meet with a larger software company which is interested in purchasing the entire business of Jorge's company;
d. investigate the possibility of opening a U.S. subsidiary of the European business, including looking at property and meeting with a corporate lawyer;
e. meet with a current client about some issues they are having with the software they purchased; and
f. review and modify the marketing materials for a former employer of his in the US who is interested in selling his product in Spain.

- **Does Jorge come from a country that makes him eligible for VWP admission?**
- **Do you have concerns or questions about the schedule or any of the activities Jorge will be engaged in?**

TRANSIT (C-1) AND CREW (D) VISAS INA §101(A)(15)(C); INA §101(A)(15)(D); 8 C.F.R. §214.2(c); 8 C.F.R. §214.2(d); 9 FAM 402.4-6; 9 FAM 402.8-3

- The **C-1** and **D visa classifications** for foreign nationals traveling in transit through the U.S. or working on international airlines or sea vessels
- For the **D classification**, the foreign national must be providing services that support the normal operations of the airline or sea vessel, for instance, a Ship Captain, and must intend to depart the United States within twenty-nine days of arriving in the country
- Similar to the **VWP**, those that enter the United States in C-1 or D classification cannot change status under any circumstances

VISAS FOR STUDY: F-1 VISA AND M-1 VISA

INA §101(A)(15)(F); INA §101(A)(15)(M); 8 C.F.R. §214.2(f); 8 C.F.R. §214.2(m); 9 FAM 402.5

- To facilitate cultural and educational exchange, the United States allows foreign nationals to enter the country for the purposes of study.
  - The **F-1 student classification** is available to foreign nationals wishing to enroll in academic or language studies in a private primary, secondary, or a public or private post-secondary school.
  - The **M-1 student classification** is available to foreign nationals wishing to pursue a vocational education in the United States, for example, a trade school.

F-1 AND M-1 VISA REQUIREMENTS

- Students in **F-1 or M-1 classification**, must:
  - Be accepted to an approved institute with a full-time course load of at least twelve credit hours,
  - Possess sufficient funds for their stay,
  - And intend to depart the United States at the conclusion of their course of study (and possess nonimmigrant intent)
- Admission to the educational institute first be secured before a visa application can be submitted

F-1 EMPLOYMENT ELIGIBILITY

- **The primary employment options for F-1 students are:**

- On-Campus Employment
  - 20 hr/week when school is in session.
  - 40 hr/week when school not in session

- Off-Campus Employment
  - Must demonstrate unforeseen ‘sever economic necessity’;
  - 20 hr/week maximum;

F-1 EMPLOYMENT ELIGIBILITY

Curricular Practical Training (CPT)

- Employment must be directly associated with the foreign national's major or primary course of study.
- Time spent in CPT is not automatically deducted from the time allowable for post-completion OPT. However, if a CPT holder exceeds 364 days of employment authorization under this provision, s/he cannot receive post-completion OPT

F-1 EMPLOYMENT ELIGIBILITY

Optional Practical Training (OPT)

- Students are afforded a total of twelve months of OPT time. Any pre-completion OPT time is subtracted from the permitted twelve months of optional practical training. H
- However, if a student has a degree in a STEM field and his or her employer participates in E-Verify, OPT status can be extended by twenty-four additional months.

F-1 EMPLOYMENT ELIGIBILITY

- M-1 vocational students are only eligible for employment considered practical training in a related field of study and which takes place after the student's graduation.
- M-1 students must apply to the USCIS for an EAD no later than thirty days after completion of the full course of study
- The student may only begin employment on receipt of the EAD. The maximum period of employment for an M-1 is six months.

F-1/M-1 DURATION OF STAY

- F-1 and M-1 students are admitted for **Duration of Status** or D/S
- Duration of status means that as long as the student preserves a valid Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, and up-to-date records in SEVIS, s/he can remain in the United States
- Once course of study is completed, grace period of additional time permitted to remain in valid status even though the course of education has been completed.
  - For **F-1 students** the grace period is sixty days
  - For **M-1 students** the grace period is thirty days

Duration of Status: Admission to the United states for an unspecified duration as long as student status is maintained.

CASE FOR DISCUSSION, pg. 74

Kimiko is a foreign national from Japan currently in valid F-1 classification studying at a large U.S. state university. Kimiko is a chemical engineer major and a number of local employers want her to work for them during the summer. While only a sophomore, Kimiko has published a paper in an industry leading journal and is already considered an up and coming star in her field. ChemEngPlus, a local industrial solvent company, has offered Kimiko a position in their summer leadership development program that will be good for her career.

- **What options does Kimiko have for accepting this summer employment?**
- **Do you see any potential issues for Kimiko in working for ChemEngPlus?**

VISAS FOR EXCHANGE VISITORS (J-1)

- **J-1 visa classification** is one of the most versatile nonimmigrant visa category.
- The purpose of the J-1 visa is to facilitate educational and cultural exchange programs which promote the interchange of persons, knowledge, and skills in the field of education, arts, and sciences
- The Exchange Visitor Program is run through the Department of State and therefore follows a unique scheme for obtaining permission to apply for a J-1 visa
- **J-1 visa program** carries separate and distinct requirements and can be issued for different durations. Can be used for study in the United States
- There are currently fourteen broad exchange visitor programs to which the foreign national may apply, they can be found in Table 2.5 on page 81 of the text

CULTURAL EXCHANGE VISITOR REQUIREMENTS FOR SPECIFIC J-1 PROGRAMS

- J-1 classification requires that the foreign national display **nonimmigrant intent** in order to gain admission to the United States. In addition, the foreign national must have sufficient funds or have a scholarship or stipend to ensure the ability to cover the expenses associated with his or her stay in the United States

- A primary difference between the F-1 or M-1 classifications and the J-1 classification, besides purpose, is that approval for participation in a J-1 program must occur through a DOS approved cultural exchange program and is demonstrated by **Form DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status**

J-1 INTERN AND TRAINEES PROGRAMS

- Similar in purpose and orientation. Used to provide the foreign national with skills related to his or her education and experience that will prove beneficial when the foreign national ultimately returns home
- The host company must provide a very detailed training program for the foreign national by completing and submitting **Form DS-7002, Training/Internship Placement Plan**, to the Program Sponsor who thereafter uses the SEVIS system to register the internship or training program with the Department of State
- The foreign national must be currently enrolled and pursuing a baccalaureate or higher degree or studying with a certificate granting institution outside of the United States
- The maximum duration for a J-1 intern program is twelve months while a trainee program is eighteen months

TWO-YEAR RESIDENCE REQUIREMENT

Because the J-1 programs are based on the notion of a cultural and educational exchange, some J-1 holders ultimately become subject to what is known as the two-year home residency requirement.

Can be waived. A waiver can be granted under the following broad categories:

- Receipt of a No-objection letter from the foreign national's home country
- Exceptional hardship to a U.S. Citizen or lawful permanent resident spouse or child
- Fear of persecution, or
- Interested Government Agency (IGA)

TWO-YEAR RESIDENCE REQUIREMENT

2 Year Home Residency Requirement:

J-1 visa holders return to their home country or place of last residence abroad for a two-year period after completing a J-1 program before seeking other immigration benefits in the U.S.

CASE FOR DISCUSSION, pg. 84

Harra is from Laos and has been in the United States in J-1 status for the past eighteen months, training on industrial engineering with a well-known manufacturer. The manufacturer now wishes to hire Harra on a long-term basis because their business needs have changed. Harra is subject to the J-1 two-year home residency requirement because his training appears on Laos's skills list. Harra contacted his local Laos consular section and was told they do not mind if he stays in the United States.

- **Which would be the best type of waiver to try to get and why?**

RELATED CULTURAL EXCHANGE VISA: Q VISA

Q visa - founded on the concept of cultural exchange. Administered by the USCIS

Requirements:

- The employer must also show that the program activities occur in a setting where the foreign national's culture can be shared with the American public
- The employer must show that the wages and working conditions provided to the foreign national will be the same as those provided to similarly situated U.S. workers and that the employer has the ability to pay the offered wages.

RELATED CULTURAL EXCHANGE VISA: Q VISA

- A foreign national in Q visa classification can remain in the United States for up to fifteen months.
- The foreign national must be eighteen years old in order to obtain the Q visa and must have the ability to communicate “effectively about the cultural attributes of his or her country of nationality to the American Public.”

RELATED CULTURAL EXCHANGE VISA: H-3 VISA

- The H-3 visa classification - centered on the concept of providing training to foreign nationals who wish to further their careers abroad by spending time in the United States in a professional setting.
- One of the main differences between the H-3 and the J-1 is that under the H-3 classification, a petitioner can file for multiple beneficiaries using one single filing. This option is particularly advantageous for large international companies seeking to train a “class” of foreign workers.

RELATED CULTURAL EXCHANGE VISA: H-3 VISA

In order to obtain **H-3** approval a petitioner must show:

- The proposed training is not available in the foreign national's own country
- The beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed
- The beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training, and
- The training will benefit the beneficiary in pursuing a career outside the United States

RELATED CULTURAL EXCHANGE VISA: H-3 VISA

The emphasis here is that any productive work performed must be incidental to the training. The H-3 cannot be used as a substitute for a true working visa classification such as a H-1B