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**TEACHING BUSINESS IMMIGRATION:
THE LAW AND THE REALITY**

DA'NIEL ROWAN*

ABSTRACT

Business immigration addresses representing employers as they seek to fulfill their labor needs. In our global economy, U.S. businesses depend on being able to obtain employees to fulfill their labor needs, often requiring hiring non-U.S. workers. In addition, international companies doing business in the United States must be able to move their international employees between countries to best meet the needs of the organization. The process by which companies meet these needs is business immigration, and immigration lawyers are an essential link in that process. My course seeks to educate students on the numerous provisions of U.S. immigration law under which foreign professionals, workers, traders, investors, and their families, can enter the United States on either a temporary or permanent basis.

The course has been shaped and adapted by my personal experience and the impacts of COVID-19. The goal of the course is to give students an understanding of U.S. business immigration laws, regulations, and policies, and to prepare them for entry into law firms or companies who have an immediate need for new attorneys knowledgeable in this area. In this article I discuss the balance of substantive and procedural law, and teaching the knowledge and skills required to obtain needed information, work with clients, prepare necessary applications, and guide clients through the immigration process.

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INTRODUCTION

Business immigration is an administrative practice of law. While it is deeply rooted in the law and regulations, much of what is utilized in the day-to-day practice is practical and historical knowledge. When I began to teach business immigration in spring of 2020, I was faced with a dilemma that I continue to face today. How much of what I teach should be purely factual and based in the law and regulations, and how much should I add in the practical knowledge and actual cases which truly bring the regulations to life and shape the practice.

In teaching business immigration, my primary goal is to provide a strong foundation of the law and regulations, but I quickly learned that doing so alone is difficult to present in an engaging way. I have adapted the course with a goal of presenting a mix of the law and real-world experience to provide students with hands-on experience and an introduction into a career as a business immigration attorney.

While this has always been my goal, my first semester teaching the course, the spring of 2020, challenged me in a way I could not have anticipated. At that time, I had been practicing business immigration law for eight years, I felt confident in my knowledge of the law and was excited to embark upon my first semester teaching the course which was being offered at Santa Clara University School of Law for the first time. The challenges presented by the spring of 2020 were unfathomable. After teaching the course in person for six weeks, the global pandemic began, and the U.S. went into lockdown. The course shifted from a graded course to pass/no pass and the course was completed virtually.

I was well versed in online meeting tools, as I used them every day to meet with clients and their employees, I had however, never utilized the tools for a class of law students to teach them substantive law. This directive presented a unique challenge and pushed me to look at the course I was teaching, how I was teaching it, and ways I could engage the students differently. Since that first semester as the global pandemic has continued, each time I have taught the course has been in a different format. The first time, in-person for six weeks, then virtually for the remainder of the semester. The second time I taught the course fully virtual. Finally, the third time in spring 2021 the course was hybrid, with both remote and in-person options. The different formats have allowed me to look closely at the materials and how it is best presented to the students in an engaging way. Doing so has shaped the course for me as I continue to teach the course each spring semester. I am currently embarking upon my fourth iteration of the course this spring. I do not claim to be an expert in pedagogy. I know that I have more to learn and am excited by doing so each semester. My hope here is to share my experiences and challenges which have shaped my strategy and teaching methodologies. This article proceeds in three parts. In Part I, I discuss how I introduce students to the basic foundation of business immigration. In Part II, I discuss how I present nonimmigrant visas to the students. Finally, in Part

III, I discuss how I present immigrant visas. Throughout the article I discuss how my methods and experience have been shaped by COVID-19.

Overall, my experience has made me confident that business immigration cannot be taught in a vacuum. It must take into consideration the world in which it is being practiced, the agencies involved in the adjudications, and both the regulatory intent and the day-to-day practice of each visa type. My hope is that by presenting this area of the law wholistically and practically, students feel empowered in their knowledge and understanding of the field and that doing so allows them to explore the potential for a career in immigration law.

I. INTRODUCING STUDENTS TO BUSINESS IMMIGRATION LAW

The first class of my immigration law course focuses on the big picture of the immigration process, the involved government agencies, and the critical documents which shape business immigration. U.S. business immigration is a journey from being a nonimmigrant with the temporary right to live and work in the U.S., to being an immigrant (Legal Permanent Resident or Green Card Holder) with the permanent ability to live and work in the U.S. This overall two-step process is easy to lose sight of as you dive into the substantive areas of business immigration and for this reason, I start each class with a graphic to show the two steps and clearly note which section we are covering that day. I find this to be a good reminder to students to think about the bigger picture process and where the substantive area of law we are covering is situated within the bigger picture. I generally structure the class into two large sections covering nonimmigrant categories first and immigrant categories second, with a short open-book mid-term dividing the two. The mid-term focuses only on the nonimmigrant categories while the final intends to take a wholistic look at both sections and primarily explore the intersections of the two.

A. *The Agencies*

To understand immigration the students must understand the different government agencies and their roles within the overall process. The primary government agencies involved in business immigration are housed within the Department of Homeland Security (“DHS”)¹ and include United States

1. Department of Homeland Security (“DHS”) is the umbrella agency created after 9/11 to oversee and coordinate a comprehensive national strategy to safeguard the country against terrorism and respond to any future attacks. “With the passage of the Homeland Security Act by Congress in November 2002, the Department of Homeland Security formally came into being as a stand-alone, Cabinet-level department to further coordinate and unify national homeland security efforts, opening its doors on March 1, 2003.” *Creation of the Department of Homeland Security*, DEP’T. OF HOMELAND SEC., <https://www.dhs.gov/creation-department-homeland-security> [<https://perma.cc/HQ5E-JKSP>] (last updated June 3, 2022).

Citizenship and Immigration Services (“USCIS”),² Department of State (“DOS”),³ Customs and Border Protection (“CBP”),⁴ and Immigration and Customs Enforcement (“ICE”).⁵ In addition to DHS, business immigration also interacts with Department of Labor (“DOL”)⁶ throughout the immigration journey to ensure the protection of U.S. workers. Each agency has their own important role within the overall process, and it is important for students to understand the role and purpose of each agency and how they fit into the overall process of business immigration.

B. *The Law*

After a brief introduction to the agencies, I then introduce students to the locations of the law and regulations. While I don’t go into the deep and rich history of U.S. immigration law, it is important to understand the legal framework. Modern day immigration law was created and passed by Congress through the Immigration and Nationality Act (“INA”), first passed by Congress in 1952 and updated most recently in The Immigration Act of 1990.⁷ The INA

2. “On March 1, 2003, U.S. Citizenship and Immigration Services (“USCIS”) assumed responsibility for the immigration service functions of the federal government. USCIS was founded to enhance the security and efficiency of national immigration services by focusing exclusively on the administration of benefit applications.” USCIS is the most utilized agency in any administrative immigration practice. *Our History*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/about-us/our-history> [<https://perma.cc/GG6U-R5MS>] (last updated Nov. 18, 2022).

3. Department of State (“DOS”) encompasses the Bureau of Consular Affairs and U.S. Embassies and Consulates. These agencies are charged with “keep[ing] our country safe and help[ing] foreign nationals connect with the United States by issuing visas to qualified visitors, workers, and immigrants.” *Our Mission*, U.S. DEP’T OF STATE, <https://www.state.gov/bureaus-offices/under-secretary-for-management/bureau-of-consular-affairs/> [<https://perma.cc/5Z79-NYHL>] (last visited Nov. 6, 2022).

4. “CBP, is one of the world’s largest law enforcement organizations and is charged with keeping terrorists and their weapons out of the U.S. while facilitating lawful international travel and trade.” *About CBP*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/about> [<https://perma.cc/EVQ4-MTJ9>] (last updated Dec. 30, 2022).

5. ICE is the enforcement arm of DHS. ICE focuses on locating those who are present in the U.S. without authorization and detention of that same population. *U.S. Immigration and Customs Enforcement*, U.S. IMMIGR. & CUSTOMS ENF’T., <https://www.ice.gov/about-ice> [<https://perma.cc/U5V4-C5MB>] (last updated Jan. 18, 2023).

6. Employment-based immigration works with the Office of Foreign Labor Certification (“OFLC”), PERM Processing Centers, National Prevailing Wage Center (“NPWC”), and State Workforce Agencies (“SWA”). DOL focuses on ensuring that Foreign Labor is not being underpaid and driving down the wages of U.S. workers and certifies PERM applications which serves as a certification of no minimally qualified U.S. workers. *Frequently Asked Questions*, U.S. DEP’T OF LAB., <https://webapps.dol.gov/dolfaq/go-dol-faq.asp?faqid=478&faqsub=General+Information&faqtop=About+DOL&topicid=9> [<https://perma.cc/XYK2-TJJ9>] (last visited Nov. 6, 2022).

7. USCIS History Office and Library, *Overview of INS History*, U.S. CITIZENSHIP & IMMIGR. SERVS. (2012), <https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf> [<https://perma.cc/2AA8-QVET>].

is interpreted by each government agency within the Code of Federal Regulations (“C.F.R.”) published in the Federal Register. Business immigration looks most to Title 8 of the Code of Federal Regulations (Aliens and Nationality), the regulations of USCIS, Title 20 of the Code of Federal Regulations (Employee Benefits), the regulations of DOL, Title 22 of the Code of Federal Regulations (Foreign Relations), and the regulations of DOS. While the INA has not changed since 1990, there have been significant changes in policies and interpretations which have formed the practice of immigration law. These changes can come in the form of a memorandum from the agency, updates to agency policy manuals or an executive order.

The skeleton of immigration law can be found within the INA and should serve as the guiding principle of any immigration legal analysis. That framework is then interpreted by the C.F.R. which provides the practical analysis and regulations for each government agency. It is important for students to understand the interaction of the INA and C.F.R. as we move through the semester.

C. *The Documents*

The final area covered during the introductory session is the documents which are a vital part of business immigration and provide the legal basis for evidencing the ability to live and work in the U.S. I discuss the critical documents and provide samples to illustrate what each document should look like. I focus on the legal requirements of INA⁸ to ensure that the documents and their importance are well understood.

It is important for students to have a full understanding of the I-94 document. This is a document that all nonimmigrants in the U.S. are provided when they enter the U.S. and must always remain valid.⁹ This document can be updated either by CBP when making a new entrance into the U.S. or by USCIS in issuing an extension on form I-797A. It is important that students understand the importance of this document, the ways in which it can be updated, and the legal issues¹⁰ which can occur if a person either knowingly or unknowingly overstays their I-94.

Having this basis of knowledge in immigration, particularly as it relates to a person’s ability to work in the U.S. and the documents which evidence that legal right, forms the foundation of business immigration. This shapes the

8. *See* Immigration and Nationality Act (INA) § 212(a)(7)(B)(i)(I–II), 8 U.S.C. § 1182(a)(7)(B)(i)(I–II) (outlining required documents for nonimmigrants).

9. *See* 8 C.F.R. § 235.1(h) (2021).

10. For example, INA § 222(g), 8 U.S.C. § 1202(g) notes that the overstay of an I-94 results in cancellation of their visa stamp and requires that the new visa be obtained in the persons home country. Even more concerning, INA § 212(a)(9)(B), 8 U.S.C. § 1182(a)(9)(B) contains provisions for a three-year and ten-year bar from the U.S. if a person overstays his or her I-94 for more than 180 days or 1 year, respectively.

students' understanding of the law and each additional topic covered throughout the semester.

II. NONIMMIGRANT VISAS

Following the natural immigration process, I first introduce the primary nonimmigrant visas utilized by business immigration attorneys. Observing the legal framework, I first present the INA, then the C.F.R., and finally follow that up with case law, real case examples and hypotheticals to illustrate each of the primary concepts within each visa type. I have adjusted the balance of law and case examples each semester to expose students to the technical aspects of immigration law but not overwhelmed them with the nuance. I have also found that some topics are best presented by bringing in colleagues to share their experiences. I have found that this breaks up the course in a way that is helpful for students to hear stories and perspectives other than mine.

A. *H-1B Nonimmigrant Visas*

As the H-1B is the most utilized visa in business immigration, it is the first nonimmigrant visa type covered. To cover this important topic in detail, I spend two days discussing the H-1B visa. My goals are to present the legal requirements of an H-1B, the challenges which can be present, outline the process to obtain an H-1B, and finally the legal attestations made to DOL regarding the H-1B.

The basic requirements of an H-1B are outlined within the INA.¹¹ This statute is long and encompasses every type of "H" visa. I focus on the H-1B defined as issued to someone who is coming "temporarily to the United States to perform services . . . in a specialty occupation . . ." ¹² Specialty occupation is a legal term which is defined by USCIS in the C.F.R. to be a position which requires "attainment of a U.S. bachelor's degree or higher in a directly related specific specialty"¹³ and where specialty occupation is defined by the need for a degree or the complexity of the duties.¹⁴ Once the substantive law is covered and understood, I present case law which is useful to illustrate the requirements of the H-1B.¹⁵ I then present students with a sample H-1B filing, a Request for

11. See INA § 101(a)(15)(H), 8 U.S.C. § 1101(a)(15)(H).

12. *Id.*

13. 8 C.F.R. § 214.2(h)(4)(ii) (2021).

14. See *id.* § 214.2(h)(4)(iii).

15. Some examples include: *Residential Fin. Corp. v. USCIS*, 839 F. Supp. 2d 985, 997 (S.D. Ohio 2012) ("The knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge."); *Innova Sols., Inc. v. Baran*, 983 F.3d 428, 432 (9th Cir. 2020) (USCIS focused the denial upon the differences between the words "typically" and "normally" and

Evidence (“RFE”) which the government has issued on that sample, and a final decision on an H-1B case not to approve.

The sample H-1B filing is a good tool for the students to see how the initial arguments and evidence of qualification of an H-1B are presented to the government. The RFE is a great tool to show the language of the government when requesting additional information because they have concerns about the qualification of the beneficiary or petitioner for the H-1B category. I ask students to break into small groups to review the RFE and to outline a response to the request. This activity is a great discussion point for the regulations and helps students to think through what the law requires and what evidence can be presented to demonstrate satisfaction of the regulatory requirements. Finally, the decision notice is a tool to understand the rationale used by USCIS when a decision is made not to approve a case. It helps to see the justification of USCIS as to why a petition may not qualify for the classification being requested and helps facilitate a discussion of the requirements.

The first time I taught the course I was able to have the students break into small groups to discuss the samples cases. This worked well for students to review the sample filing, analyze the RFE, and discuss the strategy for a response in small groups and then present their findings to the larger group. The second time the course was done virtually, and this exercise was a bit more difficult. I provided the RFE to the students ahead of the class and then broke them into small groups utilizing the Zoom small room function. While this was a good tool and students were able to have a good discussion, it felt more difficult to get the discussions started and engage with the entire class. The next time the course was hybrid with some students in the room and others on the Zoom platform. With this split, I found it difficult to maintain the same level of engagement from those on the Zoom as those in the classroom. Based on the different formats in which I have taught the course, I have found that I prefer to have the whole class in the same format as it is easiest to facilitate engagement either through a virtual platform or in person, but the combinations of the two has proven difficult to navigate effectively. My preference is to have the class in-person as it is the easiest way to engage with the students and have meaningful discussions of the law and case samples.

Once students are comfortable with the H-1B law and regulations, it is important to understand the practical ability to obtain an H-1B, which is done through a process known as the H-1B lottery. H-1B petitions are limited each fiscal year to 85,000 new H-1Bs, 20,000 of which are reserved for beneficiaries with a U.S. Master’s degree.¹⁶ This process must be used to obtain the first H-

the court found there is “no daylight between typically needed, per the [Occupational Outlook Handbook], and normally required, per the regulatory criteria.”)

16. INA § 214(g)(1)(A), 8 U.S.C. § 1184(g)(1)(A); 8 C.F.R. § 214.2(h)(8).

1B for each nonimmigrant in the U.S., but is not needed for subsequent extensions, amendments, or concurrent H applications.

The final point of law I focus on is the Labor Condition Application (“LCA”) and the employer attestations which are associated with it. This is a critical piece of an H-1B in which the employer must obtain from DOL a certified LCA to include with the H-1B petition submitted to USCIS. The LCA serves as the employer attestation to pay at least the prevailing wage for the position, provide working conditions for the H-1B employee that will not adversely affect U.S. workers, and that notice of the filing has been properly executed by the employer for ten days.¹⁷ This is an important legal concept associated with the H-1B as DOL has the legal ability to hold employers accountable to these attestations and give fines to employers who do not properly comply with the attestations of the LCA.

B. *L-1 Visa*

The next visa type covered is the L-1, available to people who have been employed by a company continuously for one year and who seeks to enter the U.S. to temporarily render services to the same employer in a “capacity that is managerial, executive, or involves specialized knowledge”¹⁸ The general purpose of this visa is to allow multi-national companies the flexibility to transfer employees into the U.S. and further promote notions of global mobility.

Some of the other areas of the L regulations that I highlight to students is the process a company and individual pursue to obtain an L-1. The L-1 category is a unique category in which a company has the ability in certain circumstances to obtain a blanket L-1 approval from USCIS.¹⁹ This approval allows qualifying beneficiaries to go directly to a U.S. Consulate outside of the U.S. In order to obtain a visa stamp without the need for obtaining an approval from USCIS, which is required with most other visa types. This is a benefit to further promote the intent behind the L-1 to encourage global mobility.

Within the L-1 context there are several complex areas of the law which could be explored further. Some of these areas include what it means to be an entity of company, specific provisions allowing for “new office Ls” and each of the qualifying capacities.²⁰ I choose to focus the class primarily upon the qualifying capacities and the law and regulations which define each qualifying capacity.

17. See 20 C.F.R. § 655.730(d) (2021).

18. INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

19. See 8 C.F.R. § 214.2(l)(4) (2021).

20. *Id.* § 214.2(l)(1)(ii)(F).

1. L-1B

The L-1B is for people who are entering the U.S. to temporarily render services to the same employer in a capacity that involves “specialized knowledge.”²¹ Specialized knowledge has a limited definition within the C.F.R.²² but is a heavily used and highly scrutinized category.

Because the regulations contain limited information defining specialized knowledge, in 2015 USCIS issued a memorandum “L-1B Adjudications Policy,” which defined specialized knowledge into two categories: special knowledge and advanced knowledge.²³ This twenty-three-page memo does little to provide clarity into specialized knowledge but does provide a framework to analyze the knowledge and lists of factors to consider and potential evidence within each category of specialized knowledge. It is important for students to read the memo in order to understand what rises to the level of specialized knowledge.

2. L-1A

The L-1A visa is for those who are entering the U.S. to temporarily render services to the same employer in a capacity that is managerial or executive.²⁴ The analysis of managerial is one that I explore with the class to understand exactly what this means. The regulations allow for both people management positions and functional manager positions.²⁵ The most difficult L-1A case is one for a functional manager position in which there are no direct reports but the argument rests upon the person having authority over a function which is critical to the business.²⁶ This is an area of the law discussed with the class about how USCIS often interprets functional management and what are the most probative pieces of evidence for an L-1. In 2016, USCIS issued a memorandum adopting a decision from the Administrative Appeals Office (“AAO”) discussing qualifying for an L-1A when the beneficiary will primarily manage an essential function.²⁷ This memo, along with hypothetical positions of project managers and program managers, provides meaningful discussions around the law and requirements.

21. INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

22. See 8 C.F.R. § 214.2(l)(1)(ii)(D) (2021).

23. USCIS, *Policy Memorandum, L-1B Adjudications Policy PM-602-0111*, U.S. DEP’T OF HOMELAND SEC. (Aug. 17, 2015), <https://www.aila.org/infonet/uscis-provides-l-1b-adjudications-policy-memo> [<https://perma.cc/E9DL-D4T9>].

24. See INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L).

25. See 8 C.F.R. § 214.2(l)(1)(ii)(B) (2021).

26. See *id.*

27. USCIS, *Policy Memorandum, Matter of Z-A-, Inc., Adopted Decision 2016-02*, U.S. DEP’T OF HOMELAND SEC. (Apr. 14, 2016), https://www.uscis.gov/sites/default/files/document/memos/Matter-of_Z-A-Inc_Adopted_Decision-2016-02.pdf [<https://perma.cc/FFY5-J4XY>].

C. *Regulatory Limits on Time Spent in H-1B and L-1*

An important aspect to be understood about H-1B and L-1 is that they are the only two visa categories classified as “dual-intent” in which there are no concerns with a person holding these visa types and simultaneously pursuing permanent residency in the U.S.²⁸ Because a person is allowed to pursue permanent residency and there is no requirement of showing ties to their home country, the law limits how long a person can be in the U.S. holding the visa status. This exists presumably under the assumption that the immigrant intent should be established within the regulatory limit and permanent residency pursued prior to reaching the limit within the category.

The regulations allow a person to hold H-1B for a maximum period of six years.²⁹ They also, however, allow for extensions beyond the six-year limit if a person is the beneficiary of certain steps taken towards obtaining a green card application.³⁰ Much of a business immigration attorney’s practice is dedicated to monitoring the six-year limit of individuals and ensuring that they retain the ability to extend their H-1B until they can secure their green card. It is important for students to understand this important concept within business immigration law as this is the intersection of nonimmigrant and immigrant visas.

A person admitted in a managerial or executive capacity has a period of authorized stay not to exceed seven years and a person admitted in a specialized knowledge capacity shall not exceed five years.³¹ The L-1B is the only category besides H-1B which has a limit, but unlike the H-1B the L-1 has no ability to extend beyond their period of authorized stay.³² This is an important concept in immigration law and students must understand the relationship of the L-1 and H-1B and be able to conceptualize the strategies around changing from an L-1 to H-1B (by entering in the H-1B lottery) and how the timing of the green card case could impact the legal strategy around that change.

D. *O’s and P’s*

The O and P visas are categories with the intention of bringing the best, brightest, and most talented nonimmigrants into the U.S. This is an area of the law where I have found that bringing in a colleague who can share additional experience and case examples with students is helpful. The law centers around unique cases and interesting fact patterns, and having a perspective beyond just my own, provides meaningful examples and discussions for the students.

28. See 8 C.F.R. §§ 214.2(h)(16), (l)(16), 245.2(a)(4)(ii)(C) (2021).

29. *Id.* § 214.2(h)(13)(iii)(A).

30. See *id.* § 214.2(h)(13)(iii)(D-E).

31. INA § 214(e)(2)(D), 8 U.S.C. § 1184(e)(2)(D).

32. See 8 C.F.R. § 214.2(l)(12) (2021).

The O-visa is for persons who have extraordinary ability in the fields of science, education, business, or athletics.³³ The requirements state a person can either have received a major, internationally recognized award, such as the Nobel Prize; or have at least three of the eight potential qualifying categories.³⁴ The O-visa category mostly involves an analysis of the qualifications of an individual beneficiary and how/if they can be made into arguments for one of the eight categories. I have found the most interesting aspect of O-1 visas for students is hearing real-life O-1 stories come to life. Stories of video game developers, movie stars, and musicians who have successfully utilized the O-1 category to obtain nonimmigrant visas into the U.S.

The P-visa is an interesting visa category specifically designed for internationally recognized athletes or members of an internationally recognized entertainment group.³⁵ This is again an area where discussing fact patterns and cases is the best way to present this interesting area of the law.

E. Other Nonimmigrant Visa Types

With this same methodology of presenting the law and then coloring it with case examples, I introduce the remaining visa categories covered in the class to the students.

1. Treaty-Based Visas

These visa types include treaty-based nonimmigrant visas such as TN,³⁶ E,³⁷ and a brief description of H-1B³⁸ and E-3.³⁹ The H-1B (Singapore and Chile) and E-3 (Australia) visas have identical requirements to the H-1B but are only available for citizens of the treaty country. The TN visa is a narrow visa available only to Canadian and Mexican citizens who are in specific occupations covered by the United States–Mexico–Canada Agreement (“USMCA”).⁴⁰ My goal in covering each visa type is for students to understand the provisions of the agreements and have an ability to generally identify each visa as an option for analyzing available visa types.

33. See INA § 101(a)(15)(O), 8 U.S.C. § 1101(a)(15)(O).

34. See 8 C.F.R. § 214.2(o)(3)(iii) (2021).

35. See *id.* § 214.2(p).

36. USMCA, U.S.-Mexico-Canada, at ch. 16: Temporary Entry for Business Persons, July 1, 2020, 134 Stat. 11, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [<https://perma.cc/A54Z-SFKR>] [hereinafter USMCA].

37. See INA § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E).

38. See INA § 101(a)(15)(H), 8 U.S.C. § 1101(a)(15)(H).

39. See INA § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E).

40. See USMCA, *supra* note 36.

2. Exchange Visa

The J-1 is intended to be a cultural exchange which can come in many forms.⁴¹ In some instances, it involves an internship with work authorization. The intent of the J-1 is for individuals to immerse themselves in the culture and then to return to their home country to share what they have experienced in the U.S. To promote the exchange of information, the J-1 sometimes has a requirement for individuals to return to their home country for at least two years before they return to the U.S.⁴² This requirement, and any waiver of the requirement, is the subject of much analysis and specialty amongst immigration attorneys. I present this category briefly such that students can understand the visa type and the basis of the home-residency requirement to identify it as a potential issue.

3. Training Visa

The final work-authorized type of visa presented in the class is the H-3 visa, which provides authorization to enter the U.S. for the primary purpose of training.⁴³ There are specific requirements which must be shown to obtain the H-3 visa, such as the training not being available in their home country and evidence that the training will benefit the beneficiary in their career outside of the U.S.⁴⁴ The H-3 is presented as an optional visa type to consider if the primary purpose of entering the U.S. is for a finite temporary period to obtain training not available elsewhere and to bring that knowledge back to the home country.

4. Nonimmigrant Visas without Work Authorization

There are visa types which business immigration attorneys encounter and use, but which do not have the primary intent of working in the U.S. These include the F-1 student visa⁴⁵ and B-1 business visitor visa.⁴⁶ These visas are presented so students have a general understanding of the visa without going into extensive detail.

Determining the list of visa types presented to students has been a point of consideration for me. I am aware that the list is not comprehensive and leaves out visa types of practitioners may use regularly. When initially preparing to teach the course, I grappled with presenting students with all possible business visas or diving deeper into the categories presented. In recognizing that business immigration is an area of the law that contains nuance and significant opportunity for areas of specialization, I choose to focus on the most common

41. See 8 C.F.R. § 214.2(j) (2021).

42. See INA § 212(e)(iii), 8 U.S.C. § 1182(e)(iii).

43. See INA § 101(a)(15)(h), 8 U.S.C. § 1101(a)(15)(H).

44. See 8 C.F.R. § 214.2(H)(7)(ii) (2021).

45. See *id.* § 214.2(f).

46. See INA § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B).

visa types with an aim to provide as much detail and case examples as I can within each category presented.

III. IMMIGRANT VISAS

After going through the nonimmigrant visas during the first half of the semester, the second half of the semester is spent talking about immigrant visas. The process of obtaining a green card through employment sponsorship can take on many forms and it is important for students to understand each option to complete an analysis on which option might be the best in different scenarios.

A. *Overview: Priority Dates and Visa Bulletins*

It is first important for students to understand the overall concepts around immigrant visas and obtaining a green card through employment-based sponsorship in the U.S. The most important concept to understand is that immigrant visa issuance is limited on a per country basis.⁴⁷ To limit the issuance and distribute the available immigrant visas equitably, there is a system by which a beneficiary receives a priority date, which serves as their “place in line” for the immigrant visa.⁴⁸ Immigrant visa numbers are monitored by DOS who issues a new visa bulletin in advance of each month dictating who is eligible to complete the final stage of the green card process within a given month.⁴⁹ When their priority date becomes “current” and they are in the U.S., they are eligible to file their green card application. If that application is already pending, they are eligible for their pending application to be adjudicated.⁵⁰

To illustrate the visa bulletin and the availability of immigrant visas to my students, I use a real-life scenario from October of 2020. As the result of several complicated factors including COVID-19 and the Trump administration’s ban on immigrant visa processing abroad, the visa bulletin advanced significantly. This advancement allowed thousands of people who had been waiting for this opportunity in the U.S. since 2012 to file their green card application. It also meant a windfall of applications to be filed in a short amount of time for business immigration practitioners. To illustrate the chaos, innovation, and comradery which occurred during that time I take much of the class to explain the legal complexities which resulted in the significant advancement. I also share my personal experiences and photos taken of the thousands of cases prepared during that time. I discuss what happened legally with those cases in the subsequent months when the priority date was no longer current and how the cases still

47. See 8 C.F.R. § 245.1(g) (2021).

48. See 22 C.F.R. §§ 42.32(a)(1), 42.53(a) (2021); 8 C.F.R. § 204.5(d) (2021).

49. See 22 C.F.R. § 42.51(b) (2021).

50. See 8 C.F.R. § 245.2(a)(2)(i)(A) (2021).

remain a hot topic in business immigration, as many cases remain pending two years later.⁵¹

Once students understand the process of business immigrant visa issuance, I present the most common categories used which include EB-1, EB-2, EB-3, and EB-5. Each of the Employment-Based Preference Categories provide a basis for an I-140 immigrant petition filing. The approval of the I-140 application results in a priority date being established within one of the preference categories and is used to determine a person's ability to file the third and final step of the permanent residency process.⁵² The I-485 Application to Register Permanent Residence or Adjust Status is the final step discussed in more detail in a later section.

Finally, it is important for students to understand the impact the per-country limits have on the overall process. Once a priority date is established through approval of an I-140 application, individuals must then wait for their EB category and country of birth to be "current." This wait varies dramatically based upon a person's country of birth. As demand in the employment context is primarily from India and China, those countries experience the most visa backlog and accompanying wait times. The wait time as of the writing of this article is over ten years for EB-2 and EB-3 from India and three to four years for EB-2 and EB-3 from China.⁵³ This wait time forms the need for the H-1B to be extended beyond the six-year limit and is an important point for students to understand the intersection of nonimmigrant and immigrant visas.

B. EB-1

EB-1 is often the fastest route to a green card from an employment visa perspective as it avoids an arduous process of testing the labor market. The EB-1 categories provide two primary benefits that there is no labor market test requirement, and the category historically has small or often no wait times for immigrant visa issuance.

1. Extraordinary Ability and Outstanding Researcher

The EB-1 Extraordinary Ability category looks much like the O-1 visa but provides the longer-term immigrant visa option which is the first step in the path to a green card. Intended for the best and the brightest, extraordinary ability is defined as "a level of expertise indicating that the individual is one of that small

51. See *Fiscal Year 2023 Employment-Based Adjustment of Status FAQs*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 26, 2022), <https://www.uscis.gov/green-card/green-card-processes-and-procedures/fiscal-year-2023-employment-based-adjustment-of-status-faqs> [https://perma.cc/H8X5-SQ7B].

52. See 8 C.F.R. § 204.5(e) (2021).

53. See *Visa Bulletin For February 2023*, U.S. DEP'T OF ST. (Jan. 11, 2023), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2023/visa-bulletin-for-february-2023.html> [https://perma.cc/9G3H-6DNL].

percentage who have risen to the very top of the field of endeavor.”⁵⁴ Like the O-1 category a successful application must show that a person meets at least three of the ten qualifying categories.⁵⁵

In similar fashion the outstanding researcher category is defined as someone who is recognized internationally as an outstanding researcher in his or her academic field.⁵⁶ The outstanding researcher category has six qualifying categories and only requires a finding that a person meets two to be classified as an outstanding researcher.⁵⁷

While much of the discussion of the EB-1 category is similar to that of the O-1, the EB-1 has the added benefit of analysis in the case of *Kazarian v. U.S. Citizenship & Immigration Services*,⁵⁸ and a USCIS memorandum.⁵⁹ The purpose of the memo is to implement standards for adjudication and to adopt the two-part adjudicative approach used by the court in *Kazarian*.⁶⁰ The two-part approach first determines whether the petitioner or self-petitioner has submitted the required evidence and second determine whether the evidence is sufficient to demonstrate that the beneficiary or self-petitioner meets the required high level of expertise for the classification during a final merits determination.⁶¹ The memorandum provides detailed analysis of each category and the evidence which is most probative within each.⁶² The case and memorandum provide an opportunity to discuss different points of evidence which could be presented to show extraordinary ability or outstanding research, and analyze how USCIS may view each piece of evidence. It is an opportunity to discuss the fact that while evidence could be presented which prima facie meets each category, it is still possible for USCIS to deny the application based upon a final merits determination. This is an important concept for students to understand within the EB-1 framework.

2. Multinational Manager

The multinational manager category is the green card category which mirrors that of the L-1A regulations. This is a green card category specifically for people who have been managers or executives outside of the U.S. and have

54. 8 C.F.R. § 204.5(h)(2) (2021).

55. *Id.* § 204.5(h)(3).

56. *Id.* § 204.5(i)(1).

57. *See id.* § 204.5(i)(3)(i).

58. 596 F.3d 1115, 1119 (9th Cir. 2010).

59. USCIS, *Policy Memorandum, Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator’s Field Manual (AFM) Chapter 22.2, AFM Update AD11-14*, U.S. DEP’T OF HOMELAND SEC. (Dec. 22, 2010), <https://www.aila.org/infonet/uscis-evaluation-of-evidence-submitted-i-140> [<https://perma.cc/4AWK-BKC2>].

60. *Id.*

61. *Id.*

62. *Id.*

a long-term job offer of a managerial or executive position in the U.S.⁶³ Since this category substantively mimics the L-1A, I have found this is best presented by reviewing hypotheticals and discussing the strengths and weaknesses within each scenario.

I have considered structuring the course to have the EB-1 categories presented at the same time as their nonimmigrant counterpart, but I have instead chosen to keep the class separated into nonimmigrant and immigrant sections. While some of the material may overlap, I believe it is best for students to keep these two areas distinct.

C. PERM: EB-2 and EB-3

The Program Electronic Review Management (“PERM”) is a challenging area to teach. It is arguably the most important stage of the employment based green card process, as it is used by most people who obtain their green card through their employer. The regulatory steps required to prepare a PERM are very technical. The overall intent of the PERM process is to test the labor market and determine if there is a minimally qualified U.S. worker. The INA has little to say about the process and what it should look like only noting that a person is inadmissible as an immigrant unless the Secretary of Labor has determined and certified that “there are not sufficient workers who are able, willing, qualified . . . and available”⁶⁴ and that the employment of the person “will not adversely affect the wages and working conditions of workers in the United States similarly employed.”⁶⁵ Congress left the implementation of this determination solely up to the Department of Labor.

The PERM process is outlined in 20 C.F.R. § 656.17 and went into effect in its modern form on March 28, 2005.⁶⁶ The regulations require that the company first determine the minimum requirements for the position, then obtain a prevailing wage determination from DOL, and finally test the labor market based upon the requirements set forth in 20 C.F.R. § 656.17(e).

The labor market test consists of running ads and determining if any applicants for the position meet the minimum requirements. If there are no minimally qualified U.S. workers identified for the position, the company can proceed with filing the PERM application. Throughout this process there are many nuances and factors to consider which are focused on ensuring equity between hiring a foreign employee and protecting U.S. workers.⁶⁷ In practice,

63. See 8 C.F.R. § 204.5(j) (2021).

64. INA § 212(a)(5)(A)(i)(I), 8 U.S.C. § 1182(a)(5)(A)(i)(I).

65. INA § 212(a)(5)(A)(i)(II), 8 U.S.C. § 1182(a)(5)(A)(i)(II).

66. See Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 69 Fed. Reg. 77,325, 77,326 (Dec. 27, 2004) (to be codified at 20 C.F.R. pt. 656).

67. See 20 C.F.R. § 656.17(i)–(k) (2021).

the PERM process is an exacting process in which several moving parts must be tracked and monitored to ensure a timely filing. Presenting these different parts and timelines to students has proven to be difficult as the content can very quickly become nuanced and dry.

Instead of focusing on the parts of the PERM process and the timeline, I have shifted this portion of the class to be larger in scope. Specifically, to look at the intent of Congress in promulgating the law. This provides an opportunity for rich discussion with students about the intent of immigration, the goals of the system and steps, and if the current regulations further promote the intent and goals of our current immigration system.

D. National Interest Waiver (NIW)

If the PERM process seems arduous, employers and individuals do have an option to file a National Interest Waiver (“NIW”) which serves as a waiver of the job offer requirement, and thus the labor certification, because it is in the interest of the U.S. This process allows qualifying individuals to skip the PERM process and immediately file an immigrant visa petition in the EB-2 category. This is another area of immigration law in which the INA provides few details about the requirements and process simply stating, “the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien’s services in the sciences, arts, professions, or business be sought by an employer in the United States.”⁶⁸

For decades, the NIW was governed by the case *In re New York State Department of Transportation*⁶⁹ which provided the framework for the NIW. In 2016, the NIW was forever changed by the case *Matter of Dhanasar*.⁷⁰ USCIS then adopted the decision as precedent and updated the NIW requirements to be easier to satisfy.⁷¹ Looking at the case and the requirements provides the opportunity for a discussion of the requirements and how they could be met.

The NIW provides an important and additional path for a visa sponsored employee to obtain an I-140 approval in the EB-2 category and has an added benefit of being available as a self-petitioner without a job offer. This is an important option for students to understand and consider within the overall immigrant visa framework.

68. INA § 203(b)(2)(B)(i), 8 U.S.C. § 1153(b)(2)(B)(i).

69. 22 I. & N. Dec. 215 (B.I.A. 1998).

70. 26 I. & N. Dec. 884 (AAO 2016).

71. *Id.* at 889. The requirements as established by *Dhanasar* are:

(1) that the foreign national’s proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

Id.

E. EB-5

The Employment-Based Fifth preference category (EB-5) was created by Congress to stimulate the economy by encouraging foreign investments to create jobs.⁷² The EB-5 area of the law is a specific and nuanced area which can form the basis for an entire immigration practice. This is another area where I have found that bringing in a colleague who has substantial experience with these types of cases provides the additional context and experience needed for students to gain a full understanding of the category.

EB-5 requires individuals to make a substantial investment⁷³ in a new commercial enterprise in a way that benefits the U.S. economy and creates ten full-time positions for U.S. workers.⁷⁴ This area of law is best brought to life through case law,⁷⁵ hypothetical scenarios, and discussions of each element of the EB-5 requirements.

F. Final Step of the Employment-Based Green Card Process

The final step of the permanent residency process is the filing of the I-485 application. This is an application to adjust a person's status to that of an immigrant. Approval of this application effectively changes a person from a nonimmigrant to an immigrant in the U.S. In my class we cover the different ways in which it is possible to obtain permanent residency—namely through an I-485 or a process known as consular processing.⁷⁶ I discuss the pros and cons of each option and the overarching requirements for a person to become a permanent resident in the U.S.⁷⁷

While this final step of the process tends to be more procedural with the purpose being a determination of admissibility into the U.S., it is important for students to understand the different options which could be pursued to achieve permanent residency and the considerations which may go into choosing one option over another.

72. See INA § 203(b)(5)(A)(i)-(ii), 8 U.S.C. § 1153(b)(5)(A)(i)-(ii).

73. See 8 C.F.R. § 204.6(f) (2021).

74. See *id.* § 204.6(g)(1).

75. See *In re Ho*, 22 I. & N. Dec. 206 (B.I.A. 1998); *In re Izummi*, 22 I. & N. Dec. 169 (B.I.A. 1998); *In re Soffici*, 22 I. & N. Dec. 158 (B.I.A. 1998); *Zhang v. U.S. Citizenship & Immigr. Servs.*, 978 F.3d 1314, 1316 (D.C. Cir. 2020).

76. U.S. DEP'T OF ST., 9 FOREIGN AFFAIRS MANUAL § 504.1-3 (Dec. 13, 2021).

77. See 8 C.F.R. § 245.1(a) (2021).

CONCLUSION

The final topics presented to conclude the course focus on compliance with the laws, ethics, and different employment paths for a business immigration attorney. At this stage it is my hope that students understand the law and the framework surrounding the law. I hope to then present the tools used by Department of Homeland Security to ensure compliance with the laws. These include USCIS adjudications, USCIS Fraud Detection and National Security (“FDNS”) site visits to ensure compliance with approved applications, and DOL I-9 and LCA audits. These are again complex and nuanced areas of the law which can form the basis of an entire immigration practice. My goal is to provide students with basic knowledge surrounding each area such that they can identify the need for compliance and spot issues around non-compliance.

The completion of these topics concludes the business immigration course. I conclude the course with a final exam where my hope is that students can identify potential nonimmigrant visa categories which may be available within a fact pattern, discuss the steps necessary to obtain permanent residency, and illustrate an understanding of the intersection between the nonimmigrant visa held and the pursuit of permanent residency.

Teaching this course has challenged me in ways I never expected. It is an exciting addition to the practice of business immigration law. Presenting the law to students brings the law to life in ways practicing the law cannot. I improve upon the course with each iteration, and I look forward to continuing teaching, learning, and growing as a professor.

