



PETER J. JAENSCH IMMIGRATION LAW FIRM, P.A.
2198 MAIN STREET
SARASOTA, FLORIDA 34237

TEL: 941-366-9841
FAX: 941-951-0677

EB-2 and EB-3 Green Cards

1. Overview:

A “green card” is the common name for the document that permits a non-U.S. citizen to live in the U.S. permanently. Green cards are awarded to non-U.S. citizens mostly based on sponsorship by a family member or sponsorship by a *current or prospective employer*.

Green cards based on sponsorship by a current or prospective employer are called “employment-based” or “EB” green cards. There are three categories of employment-based green cards.

The first category, called EB-1, is for Priority Workers. Priority Workers include aliens with extraordinary ability, outstanding professors and researchers, and multinational executives and managers (the term “alien” means a person who is not a U.S. citizen).

The second category, called EB-2, is for professional workers with advanced degrees or aliens with exceptional ability. In general, “professional workers with advanced degrees” are workers with Masters or Ph.D. degrees and, in some cases, workers with Bachelors degrees plus five years of work experience in the same field. “Aliens with exceptional ability” are aliens with a high level of professional achievement, but slightly less than what is required for aliens with “extraordinary ability” under the EB-1 category.

The third category, called EB-3, is for professional workers, skilled workers, and unskilled workers. “Professional workers” are workers in positions that normally require a Bachelors degree. “Skilled workers” are workers in positions that normally require at least two years of professional training or work experience. “Unskilled workers” are workers in position that normally require less than two years of training or prior work experience.

The procedures for filing EB-2 and EB-3 green cards applications are very similar. Normally, a U.S. business must agree to serve as the employer. The employer can be a business that the foreign worker *already works for* (usually with a temporary visa, such as an H-1B Visa) or it can be a business that does not currently employ the foreign worker, but *would like to employ the worker in the future when the green card is approved*.

The employer is also sometimes called the “petitioner,” because the employer signs and submits a “petition” (application) with the government on behalf of the foreign worker. The foreign

worker is often called the “beneficiary,” because he or she is the person who will receive the benefit when the green card petition (application) is approved.

2. Application Process for EB-2 or EB-3 Application

An EB-2 or EB-3 Green Card application is normally a three step process. The following information is only a summary. It does not constitute legal advice and should not be used by applicants as filing instructions.

The EB-2 and EB-3 Green Card application consists of the following steps:

- Step 1: Labor Certification
- Step 2: I-140 Skilled Worker Petition
- Step 3: Adjustment of Status or Consular Issuance of Green Card

STEP 1: LABOR CERTIFICATION:

Labor Certification is a process in which the employer proves that it cannot find a U.S. worker who is available and qualified to fill the position that has been offered to the foreign worker.

The Labor Certification process is *not* controlled by the U.S. Citizenship and Naturalization Service (USCIS) (formerly called the INS). It is controlled by the U.S. Department of Labor (DOL) with assistance from individual state government employment agencies.

The purpose of Labor Certification is to prove that permanent employment of the foreign worker will not (a) affect the wages and working conditions of similarly situated U.S. workers or (b) take away jobs from qualified and available American workers.

The DOL protects “the wages and working conditions of similarly situated U.S. workers” by requiring that an EB-2 or EB-3 employer pay the “prevailing wage” for the position. The DOL determines the required wage, usually based on a government wage survey. We have access to the wage survey data, so we can often tell ahead of time what wage will apply in a case.

The DOL makes certain that the foreign worker will not take away jobs from qualified and available American workers by requiring that an EB-2 or EB-3 employer conduct a recruiting process to fill the position. The recruiting process is designed to test whether any qualified American workers apply for the position and are immediate available to work in the position.

The specific recruiting procedures required by the government differ, based on whether the job is classified as “professional.” If the position is not classified as professional, then the recruiting procedures required are as follows:

1. The employer must place a 30-day “job order,” (notice of an available job) with the local office of the state employment agency.
2. The employer must place an advertisement in a local newspaper on two Sundays.

3. The employer must post a notice in a conspicuous location at the place where the foreign worker would work.

Our law firm will assist the employer with each of these steps. We place the job order, we place the advertisements (with the employer's permission) and we provide the posting notice.

If any U.S. workers apply for the position based on any of the recruiting steps described above, then the employer must evaluate the applicants. Applications from workers who clearly do not meet the minimum requirements listed for the position can be disregarded. Applications from workers who may possibly be qualified for the position require further action. In many cases, the employer will have to interview these applicants to determine whether they are qualified and available for the open position. We provide the employer with detailed instructions on how to handle job applications from U.S. workers.

If no qualified U.S. workers apply for the open position within 30 days after the 30-day job order expires, then the employer may submit the Labor Certification application to the Department of Labor. Processing of the application may be as fast as 45 days. However, the Department of Labor reserves the right to "audit" certain applications, which can delay processing times significantly.

If the position is classified as professional, then the employer must do more recruiting steps in addition to those listed above. Specifically, the employer sponsor must recruit for the open position using at least three of the following methods: job fairs, employer web site, job search engine, on-campus recruiting, private employment agency, employer's referral incentive program, campus placement office, local/ethnic papers, and radio/TV ads. This additional recruiting must occur between 180 and 30 days before filing the application. We can assist the employer with this additional recruiting.

When considering a Labor Certification application, please note that ALL of the following rules and procedures apply:

- **The job offered to the foreign worker must be full-time.**
- **The job description and job requirements cannot be "unduly restrictive."**
The job opportunity cannot be described with unusually restrictive requirements or duties that are out-of-the ordinary. Requirements that seem tailored to the foreign worker's particular education or work experience may be rejected by the DOL or may trigger an audit. Foreign language requirements are reviewed by the DOL very carefully and are best avoided unless the employer can prove that the foreign language is a "business necessity." The job description cannot seem to be a combination of two jobs in one.
- **The wage offered to the foreign worker must be 100% of the "prevailing wage."**
The DOL normally determines the "prevailing wage" for the position offered, by using a wage survey. The survey breaks down each job into four wage levels based on the level of training and supervision required. We have access to the wage data and can usually tell ahead of time what wage and wage level will apply, but the DOL makes the final determination. The employer must agree to pay 100% of the prevailing wage as determined

by the DOL.

- **Employer must comply with government recordkeeping requirements.**
The employer must retain all documents related to the Labor Certification application for five years. This includes copies of newspaper advertisements, evidence of other forms of recruiting (if required), the 10-day job posting, applications from workers, a written summary of the results of the employer's recruiting efforts, etc.
- **In-house media requirements:**
If the employer has an in-house media (e.g. electronic or print newsletters), information about the job offer must be posted in the media using the employer's customary procedures for job openings.
- **Standard recruiting procedures required in ALL cases:**
The employer must place a 30-day job order with the state workforce agency (we do this for the employer). Also, the employer must post information about the job offer in a conspicuous place for 10 consecutive business days. Finally, the employer must place two Sunday advertisements for the position in a local newspaper.
- **Special recruiting procedures required for PROFESSIONAL jobs:**
In addition to the standard procedures listed above, the employer ALSO must perform three other forms of recruiting from the following list: job fairs, employer web site, job search engine, on-campus recruiting, private employment agency, employer's referral incentive program, campus placement office, local/ethnic papers, radio/TV ads. This must occur between 180 and 30 days before filing the application. We will prepare the ad copy for the employer's approval. We have a list of jobs that are considered "professional."
- **Additional recruiting requirements when there have been layoffs:**
Additional recruiting steps will be required if the employer has had layoffs in the past six months. If this applies to you, please notify us immediately.
- **The employer cannot be owned or controlled by a family member who is related to the foreign worker (and the employer cannot be owned or controlled by the foreign worker).**
A Labor Certification application will likely not be approved, if there is a family relationship between the foreign worker and employer (this includes the employer's shareholders, officers or key employees). For companies with less than 10 workers, the government may also seek information on the family relationship between the foreign worker and *any* employee.
- **The employer must prove that it has "the ability to pay" the foreign worker.**
During the application process, the employer must prove that it can pay the salary of the foreign worker starting in the year that the Labor Certification application is filed. To prove this, the government usually requires the employer's business income tax return for the year that the Labor Certification application was filed. The tax return should conclusively show that the employer's net income (profit) or net assets (assets minus liabilities) are higher than the prevailing wage required for the position. Alternatively, an employer can show that the foreign worker is already on payroll and already earns the prevailing wage. This requirement

can make an application difficult when the employer is a new business, or a small business, or a business where the owner refuses to provide a copy of the business tax return.

- **A Labor Certification application does not make a foreign worker “legal” or provide employment authorization.**

The Labor Certification process is a prerequisite to obtaining a green card for a foreign worker, but it is not work authorization in and of itself. Unless the foreigner has permission to work through some other means, such as a temporary visa that authorizes employment, the employer cannot legally employ the foreign worker while the Labor Certification application is pending. Employer can be subject to fines and other penalties for providing unlawful employment to foreign workers.

- **Information for foreign workers already working in the U.S. illegally:**

Under current law, the U.S. government will not issue an employment based green card to a foreign worker who has been living and working in the U.S. illegally for more than six months. In the past, there was a legal exception to this rule called “section 245(i).” Some workers may still qualify for section 245(i) if the worker filed a previous Labor Certification application or green card application prior to April 30, 2001 and was living in the U.S. in December 2000.

- **What happens when qualified American workers are available?**

A Labor Certification application will not be approved if the recruiting process reveals that there are qualified and available American workers for the position—even if the foreign worker is better qualified. While this effectively terminates the application process, the employer is not required to hire the American worker. And, the employer may try another application using a different strategy.

Our law firm guides the employer and the foreign worker through all parts of the Labor Certification process. This includes developing case strategy, assisting with the recruiting procedures, assisting with recordkeeping and posting requirements, providing prevailing wage information, reviewing job applicants and advising the employer on interview procedures.

STEP 2: I-140 GREEN CARD PETITION:

Once the Labor Certification application is approved by the DOL, the employer must file an I-140 Green Card Petition with the USCIS (formerly called the INS). The primary purpose of this petition is (a) to make certain that a Labor Certification application has been approved, (b) to make certain that the employer has the ability to pay the foreign worker the wage offered, and (c) to make certain that the foreign worker is qualified to fill the position offered.

In the I-140 Green Card Petition, proving the employer’s ability to pay the wage offered is an extremely important issue. The USCIS normally verifies the employer’s ability to pay using the employer’s business income tax return. If the tax return does not conclusively show net income (profit) or net assets (assets minus liabilities) that exceeds the prevailing wage required for the foreign worker, then the petition can be denied. Alternately, an employer can show that the foreign worker is already on its payroll and already earns the prevailing wage. In some cases,

other forms of evidence may be submitted to show ability to pay, but this is rare. We can provide more information about this, if it is an issue in a case.

STEP 3: ADJUSTMENT OF STATUS AND CONSULAR PROCESSING:

The final step in the green card application process is called either “adjustment of status” or “consular processing.” In this final step, the USCIS makes certain that the foreign worker is eligible for green card issuance. It is like a background check. The USCIS tries to determine whether the foreign worker is living in the U.S. legally, working with authorization (if applicable), has a criminal background, or has any other problems that would make the foreign worker inadmissible under U.S. immigration law.

If the process occurs inside the U.S, it is called “adjustment of status.” If the process occurs outside the U.S. (at a U.S. embassy or consular abroad), it is called “consular processing.” We can provide more detailed information about this process at a later date. However, it is important to understand the following points:

- **A temporary Employment Authorization Document (EAD card) and Advance Parole (travel document) are available to the worker and his or her family members while an adjustment of status application is pending.**
- **EAD cards and Advance Parole documents are approved for 12 months only, but can be renewed. Renewal application should be submitted at least four months prior to expiration to ensure continuity of employment authorization and permission to travel.**
- **Concurrent filing of I-140 petition (step 2) and adjustment of status (step 3) is now possible. Formerly, adjustment of status (step 3) could only be filed after I-140 petition (step 2) was approved. But, due to retrogression of the EB-3 category, concurrent filing will become increasingly rare, see more about retrogression below.**
- **During adjustment of status process, the employer must continue to exist and operate and will have to certify that job opportunity is still available to the foreign worker.**
- **When an adjustment of status has been pending for six months or more, the foreign worker is authorized to accept another job if it is in a “same or similar” occupation as the job offered by employer.**

Special note on retrogression of the EB-3 category: Due to limits in the number of employment based green cards that the government issues each year, the USCIS recently announced that there would be long waiting times to file an adjustment of status or consular processing application. For the foreseeable future, only applicants who started their Labor Certification in 2001, will be able to file. All others will go on a waiting list, which could last more than three additional years. It is too soon to say whether the U.S. government will take steps to improve the situation.

3. Costs and Processing Times

Either the foreign worker or the employer can pay the costs of the EB-2 or EB-3 Green Card application. The cost is divided into three stages, which follow the three-step application process.

The chart below indicates the current costs and other fees associated with the EB-2 or EB-3 Green Card. It also estimates the current processing times for each step of the application process. Please note that the chart does not include the administrative fee charged for every case for copies, mail and other costs; express mail fees, or finances charges.

	<i>What you pay:</i>	<i>When you pay:</i>	<i>Processing time:</i>
<u>Step 1:</u> Labor Certification (PERM Procedures)	<p>Legal fee: \$4,500 for non-professional jobs; \$5,000 for professional jobs. Government fee: \$0 Cost of recruiting: 2 Sunday advertisements in local newspaper; for professional level workers, three other recruiting sources. Cost is variable</p> <p>NOTE: With PERM Procedures, DOL may select an application for audit and may require new, supervised recruitment to confirm employer's assertions. If this is required, there will be an additional legal fee of \$1,900 plus the cost of new recruiting.</p>	<ol style="list-style-type: none"> 1. Retainer payment of \$2,000 when case is opened. 2. Cost of recruiting <i>prior to</i> placement of advertising 3. Remainder of fees after case is filed 	<p>The recruiting process will take at least 60 days. After recruiting, the application can be filed.</p> <p>Processing of the filed application will be as fast as 45 days, but may be significantly longer if the application is subject to an audit.</p>
<u>Step 2:</u> I-140 Green Card Petition	<p>Legal fee: \$2,000 Government fee: \$190 If necessary, evaluation of foreign education or work experience for degree equivalency: \$100-\$650</p>	<ol style="list-style-type: none"> 1. Retainer payment of \$1,000 when case is opened 2. Cost of government fee or credential evaluation <i>prior to</i> filing of case 3. Remainder of fees after petition filed. 	<p>Currently 3-12 months.</p>
<u>Step 3:</u> Adjustment of Status to Permanent Resident	<p>Legal fee: \$1,500 Legal fee for family members: \$750 each Government fees: up to \$915 per person If applicable, 245(i) penalty for illegal aliens; \$1,000 per person.</p>	<ol style="list-style-type: none"> 1. Retainer payment of \$500 when case is opened 2. Cost of government fee or penalties <i>prior to</i> filing of case 3. Remainder of fees after application filed. 	<p>Extremely variable at the moment, but generally between 3 and 12 months. Due to retrogression in the EB-3 category, this step cannot be filed until an EB-3 applicant's priority date is current, which could take 3+ years.</p>

Or

Consular Processing of Permanent Immigrant Visa	Legal fee: \$1,000 Legal fee for family members: \$500 each Government fees: up to \$375 per person	1. Retainer payment of \$500 when case is opened 2. Cost of government fee or penalties <i>prior to</i> filing of case 3. Remainder of fees after application filed.	Normally 6-12 months, depending on the consulate. Due to retrogression in the EB-3 category, this step cannot be filed until an EB-3 applicant's priority date is current, which could take 3+ years.
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- Note 1 regarding adjustment of status and consular processing: Each applicant and family member must have a medical exam by a government authorized doctor. The fee for this is approximately \$100-\$200 per person.
- Note 2 regarding adjustment of status and consular processing: Applicants from China, India and the Philippines can expect longer waits than applicants from other countries, due to per country limits on green card issuance. These applicants may have to wait an additional year or more to file their application. However, H-1B visa holders are permitted to extend their H-1B status beyond the 6 year limit.
- Note 3 regarding adjustment of status only: temporary Employment Authorization Document (EAD Card) and Advance Parole travel documents are available for the applicant and his or her family members while application is pending. These documents usually take 3 months to be approved. Each document will be for 12 months, but can be renewed in 12 months increments. Our firm charges \$200 to renew both documents. The government fee is \$175 (for the EAD) and \$165 (for the travel document) per person.



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EB-2/EB-3 Green Card Checklist – Employer

I. Please send or fax us the following:

1. Articles of Incorporation or most recent Corporate Annual Report
2. Financial information about the company (best evidence: 2005 corporate income tax return).
3. Information about the business activity of the company (best evidence: brochures, sales material that explain what the company does, list of properties owned by the company)
4. List of company's current employees with job title
5. 4 pages of blank company letterhead
6. A detailed job description of the position that the prospective foreign worker will fill at your company. The job description should answer the following questions:
 - a. What duties will the worker have?
 - b. At what address will the worker work?
 - c. How much will the worker be paid?
 - d. What are the minimum requirements for the position?
 - e. List the work schedule for the position (what hours and what days?)(note: the position must be full time)

II. Please fill in the blank spaces below. Then, fax this form back to us as soon as possible to (941) 951-0677.

1. Location where employee will work: _____

2. Federal Tax I.D. Number: _____

3. Estimated Salary of Foreign Worker: _____
 (Note: During the labor certification process, your company must agree to pay the “prevailing wage” for the foreign worker’s position, which is determined by the State of Florida. The salary information you are providing on this form only helps us plan our legal strategy.

4. Company official who will sign all immigration forms:

Name: _____

Title: _____

Tel.: _____

Fax: _____

Email: _____

5. The work days and hours for the position each week: _____

6. Does the position include benefits: []Yes []No If yes, list them:

7. Will the employee supervise? []Yes []No

III. Employer Should Initial Below to Acknowledge Its Understanding of the Labor Certification Recruiting Procedures and Rules:

<ul style="list-style-type: none"> ▪ The employer will have to retain all documents related to the labor certification application for 5 years (applications from workers, results of recruiting, evidence of recruiting and job posting, etc.) 	
<ul style="list-style-type: none"> ▪ The employer must post information about the job offer in a conspicuous place for 10 consecutive business days (we will provide the posting notice) 	
<ul style="list-style-type: none"> ▪ If the employer has an in-house media (e.g. electronic or print newsletters), information about the job offer must be posted in the media using the employer’s customary procedures for job openings. 	
<ul style="list-style-type: none"> ▪ The employer will have to place a 30-day job order with the state workforce agency (we do this for the employer). 	
<ul style="list-style-type: none"> ▪ The employer will have to run 2 Sunday advertisements in the local paper for the job offered. <u>If the job is professional-level</u> the employer ALSO will have to engage in 3 other forms of recruiting from the following list: job fairs, employer web site, job search engine, on-campus recruiting, private employment agency, employer’s referral incentive program, campus placement office, local/ethnic 	

papers, radio/TV ads. This must occur between 180 and 30 days before filing the application. We will prepare the ad copy for the employer's approval.	
<ul style="list-style-type: none"> ▪ The employer must retain all applications that result from its recruiting efforts. It is recommended that large employers should start using job codes, so that unsolicited resumes are not considered part of the application pool. 	
<ul style="list-style-type: none"> ▪ The employer should not contact applicants until given instructions by the attorney and should avoid discussing the case with anyone other than the lawyer. Any inquiring parties from the One Stop Job Center should be referred to the lawyer. Interested applicants should be told ONLY to mail resumes to you directly. 	
<ul style="list-style-type: none"> ▪ Additional recruiting steps will be required if the employer has had layoffs in the past six months. 	
<ul style="list-style-type: none"> ▪ The application may not be possible, if there is a family relationship between the foreign worker and shareholders, officers or key employees of the employer. For companies with less than 10 workers, the government will seek information on a family relationship between the foreign worker and any employee. 	

IV. When the employer signs the Labor Certification application, it must make the "10 Attestations" listed below. The employer should initial each attestation below to confirm its understanding and acceptance of the applicable rules:

<ul style="list-style-type: none"> ▪ The offered wage equals or exceeds the prevailing wage determined pursuant to Sec. 656.40 and Sec. 656.41, and the wage the employer will pay to the alien to begin work will equal or exceed the prevailing wage that is applicable at the time the alien begins work or from the time the alien is admitted to take up the certified employment; 	
<ul style="list-style-type: none"> ▪ The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a prevailing wage paid on a weekly, bi-weekly, or monthly basis that equals or exceeds the prevailing wage; 	
<ul style="list-style-type: none"> ▪ The employer has enough funds available to pay the wage or salary offered the alien; 	
<ul style="list-style-type: none"> ▪ The employer will be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States; 	
<ul style="list-style-type: none"> ▪ The job opportunity does not involve unlawful discrimination by race, creed, color, national origin, age, sex, religion, handicap, or citizenship; 	
<ul style="list-style-type: none"> ▪ The employer's job opportunity is not: (i) Vacant because the former occupant is on strike or locked out in the course of a labor dispute involving a work stoppage; (ii) At issue in a labor dispute involving a work stoppage. 	
<ul style="list-style-type: none"> ▪ The job opportunity's terms, conditions and occupational environment are not contrary to Federal, state or local law; 	
<ul style="list-style-type: none"> ▪ The job opportunity has been and is clearly open to any U.S. worker; 	
<ul style="list-style-type: none"> ▪ The U.S. workers who applied for the job opportunity were rejected for lawful job-related reasons; 	
<ul style="list-style-type: none"> ▪ The job opportunity is for full-time, permanent employment for an employer other than the alien. 	



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EB-2/EB-3 Green Card Checklist – *Employee*

1. Copy of every page of passport.
2. Copy of current I-94 Card (small white card in your passport or attached to bottom right corner of your INS approval notice).
3. Copies of INS Approval Notice (if you have one).
4. Detailed, updated resume: The resume must be divided into two sections:
 - Section 1 should list your education experience after high school. It should begin with the oldest school and end with the most recent school attended. For each school, you must provide all of the following:
 - *Name and address of the school,*
 - *Your dates of enrollment* (from what month/year to what month/year),
 - *The degree or diploma earned,* and
 - *The field or area of study.*
 - Section 2 should list all jobs held during the past three years. If you have work experience in your field prior to three years ago, then you should list those jobs too (if you do this, you should not leave any gaps; you must explain periods of unemployment or periods where you were in school). The resume should list your oldest jobs first and end with your current job. For each position, you must provide all of the following:
 - *The name and address of your employer,*
 - *Your job title,*
 - *The month and year you started and the month and year you left* (remember, explain all gaps in time!),
 - *A brief description of the type of business your employer was involved in,*
 - *A brief list of the duties you had at the job.*
5. Copies of all diplomas, degrees, and licenses.
6. Confirmation of your prior employment in the form of letters from your employers stating your job title, dates of employment and specific job duties.
7. Please provide your current home address:
