

INTERNATIONAL LAW

QUARTERLY

www.internationallawsection.org

Focus on Immigration

winter 2023 • volume XXXIX, no. 1

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Features

10 • Developments in U.S. Business and Employment-Based Immigration

On 11 March 2020, when the World Health Organization declared COVID-19 a pandemic, the practice of U.S. immigration law changed forever. From virtually a complete halt of operations at U.S. Consulates around the globe to practically a grinding standstill of operations stateside, the pandemic triggered significant and long-lasting consequences in immigration policies and procedures. Despite continued delays in overall operations and adjudications, this year brought positive developments to the U.S. Citizenship and Immigration Services' (USCIS's) premium processing service and the EB-5 Regional Center program. This article will discuss the expansion of premium processing and various key provisions of the new EB-5 law.

12 • Basic Primer on Nonimmigrant and Immigrant Visas

The U.S. immigration process for both nonimmigrant temporary visitors and immigrants is complex and convoluted, with a number of federal agencies working together and independently to enforce and determine an individual's eligibility to visit or immigrate to the United States. Immigration practitioners interpret the law and guide clients through every step of the complicated immigration process. This article provides an overview of immigration and nationality law as it relates to nonimmigrant and immigrant visas.

14 • The Consular Conundrum – Options for Processing Employment-Based Immigrant Visas

While the U.S. Department of State (DOS) Bureau of Consular Affairs has optimistically announced that it is "back in business worldwide" after the pandemic's impact on visa processing, the historically significant DOS immigrant visa processing backlog has created a difficult conundrum for foreign nationals and their U.S. employers. Recent trends reveal that a foreign national's choice between consular processing and adjustment of status inevitably impacts a U.S. employer's ability to timely employ the foreign national in the United States. This article analyzes how the reverberations of the pandemic are affecting the two methods of processing employment-based immigration visas today and proposes a solution to this conundrum.

16 • Offshoring U.S. Services After the Pandemic

Since the 1980's, at least half of U.S. manufacturing jobs have moved offshore to countries with cheaper labor. The COVID-19 pandemic prompted implementation of new videoconferencing software, online payment options, electronic signature apps, and similar internet-based technologies to accommodate work from home and remote transactions. Will this shift in paradigm result in service companies following the manufacturing model? This article explores traditional challenges of offshoring services, and how information and communication technologies have addressed those challenges, as well as potential implications to the U.S. workforce if service-based companies follow manufacturers offshore.

18 • U.S. Immigration Laws and the Peril of Using the United States as a Venue for International Arbitration Proceedings

Working without proper employment authorization in the United States can have serious consequences for an employer and for a foreign national. This article presents the potential issues for the development of international arbitration in the United States, as there are no visas that specifically allow a foreign national to be employed as an arbitrator, an attorney, or an expert witness in an arbitration proceeding, thus jeopardizing the enforcement of an arbitral award.

20 • Obtaining a U.S. Investor Visa With Crypto

Many immigration professionals are wary of and stay away from cases where Bitcoin and other cryptocurrencies are used as an investment for E-2 visa purposes. The author and her firm's experience suggest, though, that it is possible to use Bitcoin and other digital assets in a U.S. business under the E-2 visa regulations, and the investment of cryptocurrencies by itself should not result in a denial of an E-2 visa. This article discusses how to obtain an E-2 Treaty Investor visa for entry into the United States by using cryptocurrency as an investment in a U.S. business.



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Message From the Chair

A Complex and Controversial Labyrinth



JACQUELINE VILLALBA

In 1828, Noah Webster tailored variations of the phrase “to migrate” to create the word “immigration,” which, interestingly, sounds similar in many different languages: Spanish – *inmigracion*; Italian – *immigrazione*; Creole – *imigrayson*; Ukrainian – *иміграція* (immihratsiya);

Dutch – *immigratie*; and Japanese – *imin*. Although Merriam-Webster’s definition of the word appears simple—to “travel into a country for the purpose of permanent residence there”—the essence of the word is remarkably complex.

In *Castro-O’Ryan v. INS*, the 9th Circuit Court stated, “[w]ith only a small degree of hyperbole, the immigration laws have been termed ‘second only to the Internal Revenue Code in complexity.’” (quoting E. Hull, *Without Justice for All*, 108 (1985)). In its decision, the court further explained that “[a] lawyer is often the only person who could thread the labyrinth.” Often, the paths within the labyrinth are not clearly marked. Instead, immigration attorneys must strategically navigate a maze of constantly changing regulations and policies in order to achieve a client’s objectives.

In addition to being complex, immigration laws are often controversial. Both support for immigration and opposition to it can be traced back to a period in time long before Webster coined the vastly debated term. Whichever side of the debate you find yourself, we all must remember that our country is bound by international and domestic laws to provide protection to those seeking refuge from persecution. While many may consider the phrase cliché, America is, as John F. Kennedy said, “a nation of immigrants.” Immigrants have started businesses in the United States, created employment for U.S. workers, developed cutting-edge technologies, discovered medical breakthroughs, and made many other significant contributions that enhance the American values on which our country was founded.

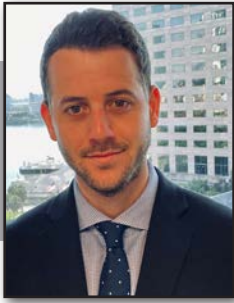
I am proud that the editors of the *International Law Quarterly (ILQ)* chose *immigration* as the focus for this edition. It is the area of law most near and dear to my heart as it is the field in which I focus my practice. I am thankful for the ability and opportunity to assist fascinating individuals navigate the intricate immigration labyrinth. Although immigration law is considered a niche area of practice, the interplay between statutes and regulations, treaties, policies, and even criminal law creates a multitude of facets to the area of practice. This issue of the *ILQ* features informative articles on recent changes to our immigration laws and policies, updates in consular processing, innovative options for investors, the fundamentals of immigration for international law practitioners, humanitarian issues, and the intersection of immigration law and arbitration, among other timely and related topics. The editorial staff has done an extraordinary job in publishing this issue, and I am confident it will become a desktop reference on the subject for international law practitioners.

Whether investing in the United States by starting up a business or purchasing one, reuniting with family members, seeking refuge, studying, or working for a U.S. company, immigrants enrich our country and our daily lives in many positive ways. Although the U.S. immigration process is arduous and history tells us the national dialogue on the issue of immigration will continue, Lady Liberty remains steadfast in welcoming all those who seek freedom and opportunity, as she reminds us: “[g]ive me your tired, your poor, your huddled masses yearning to breathe free. . . .” The path to freedom may be a complicated maze, but the reward of successfully navigating the maze can be life changing.

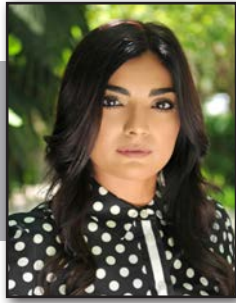
Best regards,

Jacqueline Villalba
Chair, International Law Section of The Florida Bar
Board Certified in Immigration & Nationality Law
Harper Meyer LLP

From the Editors . . .



JEFFREY S. HAGEN



NEHA S. DAGLEY

The year 2022 was another astoundingly unique year posing yet more challenges for the entire world. In the Fall 2022 edition of the *International Law Quarterly (ILQ)*, we brought you a diverse range of insights and legal ramifications on the evolving landscape related to Russia and Ukraine. In this edition of the *ILQ*, we focus on a topic that has long been the cornerstone of legal and political debates in the United States, drawing in business, financial, security, diplomatic, and human rights issues—immigration law. Our chair’s message aptly titled “A Complex and Controversial Labyrinth” artfully highlights that immigrants are vital to this country’s very foundation and that immigration laws and policies are as essential as they are controversial.

An array of immigration law issues are captured in this *ILQ* edition. First, we are proud to present an article titled “Developments in U.S. Business and Employment-Based Immigration” authored by our chair, Jacqueline Villalba, who focuses her practice on immigration law. Her article provides an in-depth discussion of positive developments in the area with key highlights of the EB-5 Reform and Integrity Act of 2022. Next, Larry S. Rifkin gives us a “Basic Primer on Nonimmigrant and Immigrant Visas” covering nonimmigrant visas, temporary visitor visas, treaty trader and treaty investor visas, temporary worker visas, and more.

The next two articles consider the impact of the COVID-19 pandemic through two different lenses. Daniel Casamayor and Christina Ackemjack, in their article titled “The Consular Conundrum – Options for Processing Employment-Based Immigrant Visas,” aptly analyze how the COVID-19 pandemic impacted two methods of processing employment-based immigration visas, and further, propose a solution to the conundrum.

On the other hand, Jeff Harrington writes about “Offshoring U.S. Services After the Pandemic,” noting the changing mindset toward overseas and remote employment, and its immigration implications.

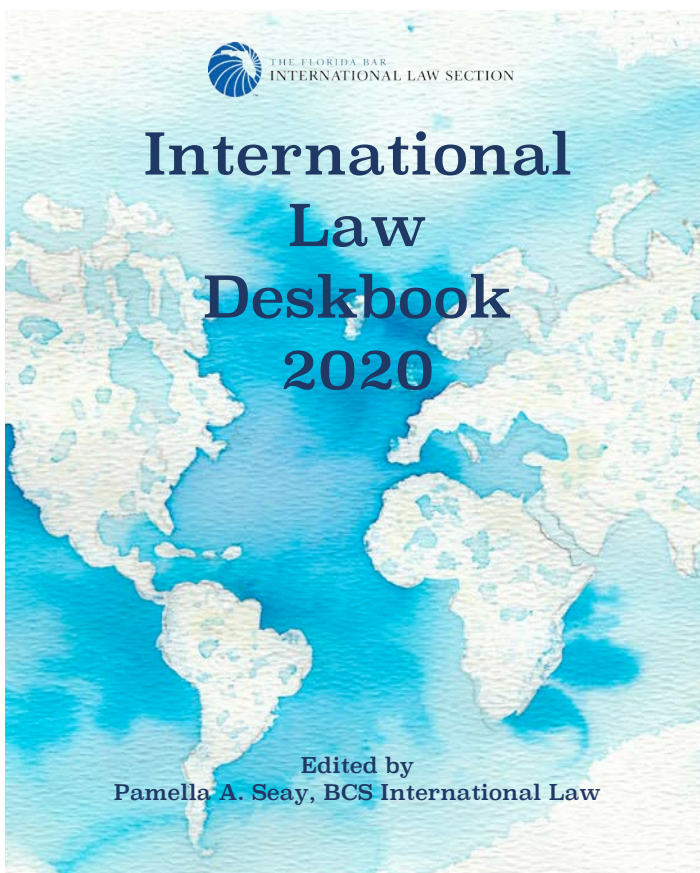
Additionally, in his article titled “U.S. Immigration Laws and the Peril to the United States as a Venue for International Arbitration Proceedings,” Angel Valverde captures a unique view in international arbitration and the lack of visas allowing a foreign national to be employed as an arbitrator, attorney, or expert witness in an arbitration proceeding. Finally, Anda Malescu brings us another interesting perspective involving the use of cryptocurrency for immigration purposes in her article titled “Obtaining a U.S. Investor Visa With Crypto.”

With every issue of the *ILQ*, we are pleased to present our “Quick Take” and “Best Practices” columns. In this issue’s Quick Take, Elina Santana makes the case for “Why the United States Needs an Independent Immigration Court.” For Best Practices, Paula Black zeroes in on why finding a niche can lead to powerful business development strategies. The World Roundup and Section Scene make their regular appearances, providing our readers with legal updates from around the world, and news and photos from around the section. In special section news, we have the results of the inaugural ILS Fantasy Football League.

Don’t miss the special insert featuring the International Bar Association (IBA) Annual Conference. The ILS hosted several events with our colleagues and friends from around the world, including the International Arbitration Battle Royale, networking with the UK Bar, and signing of bar cooperation agreements with the Milan and Bergamo Bars and the Paris Bar. As a bonus, copies of the bar cooperation agreements are included in this edition.

We proudly present our first issue of 2023 to our readers and hope that the content and substance put forth by our authors in this *ILQ* edition enrich your practice in a multitude of ways. We will continue our important work in the months ahead and strive to bring you fresh viewpoints throughout 2023 and beyond.

Jeffrey S. Hagen and Neha S. Dagley
Co-Editors-in-Chief



Watch the *ILQ* and the *Gazette* for information on the second edition of the *International Law Deskbook*. Authors are members of the International Law Section and most are board certified attorneys, all with countless years of experience. This is an invaluable reference, both in preparation for the board certification exam and in your practice.



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QUICK TAKE

Why the United States Needs an Independent Immigration Court

By Elina M. Santana, Miami



It is the cornerstone of our democratic system and a staple of every eighth-grade civics lesson on the United States branches of government: an independent judiciary is essential to ensure the rule of law. The judiciary must be independent from the executive branch of government so that judges are not subject to improper influence. This well-known lesson is the reason most people look at me dumbfounded when I explain that the United States' immigration courts, unlike other U.S. courts, are part of the Department of Justice (DOJ), an agency under the purview of the executive branch of government. They are not real courts, and immigration judges are not real judges, at least not in the way most people think of U.S. courts and judges.

Immigration judges are not judges under Article III or Article I of the United States Constitution. Immigration judges are not independent decision-makers, and instead are DOJ employees who are appointed and overseen by the U.S. attorney general (AG).¹ The Code of Federal Regulations specifically mandates that immigration judges “act as the Attorney General’s delegates in the cases that come before them.”² The AG also supervises the DOJ attorneys who serve as opposing counsel, representing the enforcement interests of the government in removal proceedings against immigrants.³

Most of the challenges faced by the immigration court

Quick Take, continued

system stem from lack of independence. While immigration regulations state that immigration judges should exercise judicial independence, the AG (a political appointee) often unilaterally recertifies decisions (with which he does not agree) to himself and issues new decisions altering case law and making sweeping changes to immigration practice. As a result, the immigration court system is at the mercy of whatever political party wins the presidential election and appoints the AG. The system's lack of independence and autonomy is thus not specific to one administration. With each new administration, the court docket is reshuffled to align with political interests and new law-enforcement priorities.

Shifting political priorities over many years have thus caused insurmountable backlogs in immigration courts. Taking asylum applications as an example, “[o]ver four out of every ten Immigration Court cases in which asylum applications have been filed since October 2000 are still pending. That means that of the 1.6 million Court cases in which asylum applications were filed, two-thirds of a million asylum seekers (667,229) are still waiting for hearings to resolve their cases.”⁴ In other words, the immigration court system rarely issues a decision in a timely matter, and it is unlikely it will ever “catch up” in any meaningful way without significant structural change, especially if it continues to be subject to the ever-shifting political priorities of the executive branch.

Public confidence in the immigration court's decisions has been similarly eroded by the shifting political waves that impact a non-independent court. In 2020, under the Trump administration, immigration judges in the United States denied 72% of all asylum claims that came before them—an all-time high.⁵ In 2021, after Biden secured the presidency, denial rates declined to 63%.⁶ Fairness, and the perception of fairness, is eroded when judicial approval and denial rates so obviously shift with national election outcomes.⁷

The only true solution to fix the immigration court system is to make it an Article I court. This structure would offer increased efficiency and overall fairness. An independent court system would attract the brightest minds to serve on a respected bench and would increase confidence in

results, among many other benefits.⁸ Overhauling the immigration court system need not be part of a larger immigration reform. Regardless of political affiliation, it is time for us to come together and make due process a priority by creating independent immigration courts.



Elina Magaly Santana is a shareholder of Santana Rodriguez Law, PA, located in Miami, but serving clients throughout the United States. She focuses her immigration practice on removal defense in immigration court, family/marriage-based residency,

and humanitarian applications. Ms. Santana is the immediate past president of the American Immigration Lawyers Association's South Florida Chapter. She is a native Spanish speaker and was raised in Miami by a proud Cuban American immigrant family. You may contact her at elina@srlawpa.com.

Endnotes

1 8 C.F.R. § 1003.10(a).

2 *Id.*

3 ABA Commission on Immigration, *Reforming the Immigration System, Proposals to Promote the Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* (2010), available at https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report_authcheckdam.pdf [hereinafter “ABA Report”].

4 TRAC, *A Mounting Asylum Backlog and Growing Wait Times* (2021), available at <https://trac.syr.edu/immigration/reports/672/>.

5 TRAC, *Asylum Denial Rates Continue to Climb* (2020), available at <https://trac.syr.edu/immigration/reports/630/>.

6 TRAC, *Asylum Grant Rates Climb Under Biden* (2021), available at <https://trac.syr.edu/immigration/reports/667/>.

7 See Paul W. Schmidt, Speech to the ABA Commission on Immigration, *Caricature of Justice: Stop the Attack on Due Process, Fundamental Fairness, and Human Decency in Our Captive Dysfunction U.S. Immigration Courts!* (4 May 2018), available at <https://www.aila.org/infonet/former-chairman-of-the-bia-paul-w-schmidts-speech>; see also NAIJ, Letter to House CJS Appropriations Subcommittee (12 Mar. 2019), available at https://www.naij-usa.org/images/uploads/newsroom/NAIJ_letter_to_House_Approps_Cmte_3_12_19.pdf.

8 American Immigration Lawyers Association, *Why America Needs an Independent Immigration Court System* (2022), available at <https://www.aila.org/infonet/aila-submits-statement-for-congressional-hearing>.

Developments in U.S. Business and Employment-Based Immigration

By Jacqueline Villalba, Miami



On 11 March 2020, when the World Health Organization declared COVID-19 a pandemic, the practice of U.S. immigration law changed forever. From virtually a complete halt of operations at U.S. Consulates around the globe to practically a grinding standstill of operations stateside, the pandemic triggered significant and long-lasting consequences in immigration policies and procedures. Nearly three years later, we are still dealing with prolonged processing times. Many U.S. Consulates remain under limited operations, with some still not processing applications for certain types of visas. Despite continued delays in overall operations and adjudications, this year brought positive developments to the U.S. Citizenship and Immigration Services' (USCIS's) premium processing service and the EB-5 Regional Center program. This article will discuss the expansion of premium processing and various key provisions of the new EB-5 law.

Expansion of Premium Processing Service

On 1 October 2020, the Continuing Appropriations Act, 2021 and other Extensions Act (H.R. 8337) was signed into law.¹ The Act contained a section titled the Emergency Stopgap Stabilization Act (USCIS Stabilization Act), which increased the filing fees for premium processing and expanded the immigration benefits that can be designated for premium processing service.² Premium processing

is expedited processing for a fee.³ Under the premium processing service, USCIS guarantees it will review a petition within fifteen or forty-five calendar days, depending on the classification. During this time, USCIS may either approve the petition, deny the petition, request additional evidence, issue a notice of intent to deny, or launch a fraud investigation.⁴ If some type of adjudicative action is not taken within the prescribed timeframe, the filing fee will be refunded. If additional information is requested, the adjudication clock will stop until the information is received. Once USCIS receives the requested information, a new fifteen- or forty-five-day period will commence, within which time a final decision will be made. Petitioners who wish to request expedited processing are required to file Form I-907, Request for Premium Processing, and pay an additional US\$2,500 filing fee.⁵

Prior to the expansion of the premium processing program, expedited processing was only primarily available for employment-based nonimmigrant petitions and a limited number of immigrant petition classifications. Specifically, in the nonimmigrant context, expedited service was limited to the following visa classifications: E-1, E-2, H-1B, H-2B, H-3, L-1A, L-1B, LZ, O-1, O-2, P-1, P-1S, P-2, P-2S, P-3, P-3S, Q-1, R-1, TN-1, and TN-2.⁶ These business and employment-based classifications cover foreign investors, workers in specialty occupations, multinational executives

Developments in U.S. Business and Employment-Based Immigration, continued

or managers, individuals with extraordinary ability, athletes, entertainers, cultural performers, cultural exchange participants, religious workers, and North American Free Trade Agreement (NAFTA) professionals.⁷ On the immigrant petition side, expedited service was only available to those seeking classification as an alien of extraordinary ability; outstanding professors or researchers; members of the profession with advanced degrees or exceptional ability not seeking a national interest waiver; and certain skilled, professional, or other workers.⁸

While the existing general structure remained in place, the USCIS Stabilization Act significantly amended the Immigration and Nationality Act by changing aspects of premium processing that had previously been established by regulation.⁹ It established distinct processing times depending on the immigration benefit sought and for the first time, authorized expedited processing for immigrant petitions filed on behalf of EB-1C multinational executives or managers as well as those filed under the EB-2 national interest waiver category. It also authorized expansion of expedited service to applications for change of status or extension of stay for all nonimmigrant categories and applications for employment authorization.

Although USCIS increased the filing fees approximately nineteen days after the law was enacted, expedited processing for the newly expanded benefits was not immediately available. Approximately a year and half later, on 29 March 2022, the Department of Homeland Security amended the premium processing regulations to codify the statutory changes enacted in the fall of 2020¹⁰ and announced that the expanded premium processing services would be implemented in a phased approach.¹¹ On 24 May 2022, USCIS implemented the expanded premium processing and advised that on 1 June 2022 it would begin accepting premium processing applications for applications filed on behalf of multinational executives or managers on or before 1 January 2021.¹² It also announced that beginning 1 July 2022, it would begin accepting premium processing applications for applications filed by individuals seeking national interest waivers on or before 1 June 2021, as well as premium processing applications for applications filed on behalf of multinational executives or managers on or before 1 March 2021.¹³ On 15 September 2022, USCIS



announced the beginning of phase 3 of the premium processing expansion in which it began accepting expedited requests for multinational executive or manager petitions filed on or before 1 January 2022 and national interest waiver petitions filed on or before 1 February 2022.¹⁴

It is unknown when expedited processing will be implemented for applications to change or extend the other nonimmigrant classifications or for applications for employment authorization, but once it is, it will likely be utilized by many petitioners and applicants.

Reauthorization of EB-5 Program

On 15 March 2022, Congress passed the EB-5 Reform and Integrity Act of 2022, reauthorizing the EB-5 Regional Center Program through 30 September 2027. This long-awaited event was a major accomplishment for regional centers and investors with pending cases, as this subcategory of the EB-5 Immigrant Investor Program had been suspended since 30 June 2021 when its congressional authorization expired. While the new law brought many significant changes, it also brought safeguards for current and future investors.

The new law increased the investment minimums from US\$1 million to \$1,050,000 for standard investments and from US\$500,000 to US\$800,000 for investments in targeted employment areas.¹⁵ Previously, targeted employment areas were “a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate).”¹⁶ For cases filed after 15 March

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Basic Primer on Nonimmigrant and Immigrant Visas

By Larry S. Rifkin, Miami



The Department of State is responsible for the adjudication of nonimmigrant and immigrant visas to enhance U.S. border security. Domestically, three federal agencies that are all part of the Department of Homeland Security are charged with administering and enforcing immigration laws. Immigration and Customs Enforcement (ICE) is responsible for the enforcement of more than 400 federal statutes, and its powers include investigating, apprehending, arresting, detaining, prosecuting, and removing foreign nationals. U.S. Citizenship and Immigration Services (USCIS) oversees lawful immigration to the United States. Customs and Border Protection (CBP) is responsible for protecting the American people and the national economy and for keeping the borders secure.

The immigration process for both nonimmigrant temporary visitors and immigrants is complex and convoluted, with a number of federal agencies working together and independently to enforce and determine an individual's eligibility to visit or immigrate to the United States. Immigration practitioners interpret the law; counsel clients about their legal rights and obligations related to immigration; help individuals, families, and businesses analyze their eligibility for certain visas and/or relief; suggest courses of action and legal strategies based on their knowledge of immigration law; and guide clients through every step of the complicated immigration process.

This article provides an overview of immigration and nationality law as it relates to nonimmigrant and immigrant visas. We will also review the practical aspects of filing cases and consular processing.

I. Nonimmigrant Visas and Grounds of Inadmissibility

Nonimmigrant visas (NIVs) are issued to foreign nationals seeking to enter the United States on a temporary basis for tourism, business, medical treatment, and certain types of temporary work. NIV classifications are defined by immigration law and relate to the principal purpose of travel.¹ A nonimmigrant may remain only for a specific period of time in the United States and may engage only in activities allowed for the assigned NIV classification under INA § 101(a)(15).²

Issuance of a visa does not guarantee entry to the United States. The NIV allows the bearer to travel to a U.S. port of entry and request permission from the Department of Homeland Security (DHS) Customs and Border Protection (CBP) immigration officer to enter the United States.³ CBP will conduct an inspection to determine if the individual is eligible for admission under U.S. immigration law and decide for how long the individual may remain in the United States in nonimmigrant status.⁴

The most common grounds of inadmissibility, as listed in the Immigration and Nationality Act (INA), are:

- The criminal grounds of inadmissibility, which include “crimes of moral turpitude” or a controlled substance violation; convictions of two or more offenses of any type and received aggregate sentences of five or more years; trafficking or assisting in the trafficking of controlled substances; coming to the United States to engage in prostitution or commercialized vice; or has engaged in money laundering or is coming to the United States to launder money;⁵
- Persons who are present in the United States without being admitted or paroled, or who arrive in the United States at a place other than a designated port of entry are inadmissible;⁶

Basic Primer on Nonimmigrant and Immigrant Visas, continued

- Persons who made a material misrepresentation of fact or falsely claimed U.S. citizenship in order to obtain immigration or other government benefits are inadmissible;⁷ and
- Persons who are unlawfully present in the United States for more than 180 days and depart the country are inadmissible.⁸ Depending on the length of the individual's unlawful presence in the United States, the person may be subject to a three-year or ten-year bar to reentry after departure.

The most common ground of denial for nonimmigrant visas is under INA § 214(b). This ground of inadmissibility states that, with limited exceptions, all visa applicants are presumed to be intending immigrants and are ineligible for an NIV.⁹ INA § 291 places the burden of proof on the applicant, which means the applicant must convince the consular officer that he/she is qualified for the requested visa.¹⁰

Temporary Visitors (B-1 and B-2)

To qualify for a temporary visitor visa, the foreign national must comply with the following criteria:

- Have the intention to depart at expiration of requested stay and time period must be temporary and consistent with purpose of trip;¹¹
- Have a residence in a foreign country;¹²
- Have no intention of abandoning foreign residence (established by providing evidence of employment, family, and social ties to residence abroad);¹³ and
- Provide evidence of financial ability to support oneself during the trip.¹⁴

The common purposes of travel for B-1 visitors for business are engaging in commercial transactions, which do not involve gainful employment in the United States; negotiating a contract; consulting with business associates; litigation; traveling for a scientific, educational, professional, or business convention, or a conference on specific dates; and undertaking independent research.¹⁵

The common purposes of travel for B-2 visitors are tourism or family visits; medical reasons (coming to the United States to receive medical treatment); participation in social events; Armed Forces dependents; short course of study

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where Form I-20 is not required; and amateur entertainers or athletes.¹⁶

Any B-1 visitor for business or B-2 visitor for pleasure may be admitted for not more than one year and may be granted extensions of temporary stay in increments of not more than six months each year.¹⁷ B-2 visitors are admitted for a minimum period of six months, regardless of whether less time is requested.¹⁸

E Visas (Treaty Traders and Investors)

Treaty Trader (E-1) and Treaty Investor (E-2) visas are for citizens of countries with which the United States maintains treaties of commerce and navigation.¹⁹ The visa applicant "must be coming to the United States solely to engage in substantial trade, including trade in services or technology, in qualifying activities, principally between the United States and the treaty country (E-1), or to develop and direct

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The Consular Conundrum – Options for Processing Employment-Based Immigrant Visas

By Daniel Casamayor and Christina Ackemjack, Miami



On 21 October 2022, the U.S. Department of State (DOS) Bureau of Consular Affairs—the federal department responsible for processing visa applications abroad—optimistically announced that it is “back in business worldwide.”¹ This update came nearly two and a half years after the COVID-19 pandemic “forced profound reductions in the Department’s visa processing capacity” and, consequently, the immigrant visa backlog grew almost eight times greater than pre-pandemic levels.² In its announcement, the DOS contends that office closures, staff reductions, and social distancing measures are largely to blame for the backlog.³ Afflicted by the pandemic’s disastrous effects, U.S. embassies and consulates around the world paused processing visas in March 2020—with certain exceptions for mission critical and emergency services—and did not start a slow, phased reopening until the latter half of that year.⁴ As a result, during this interim period of limited operations, the DOS Bureau of Consular Affairs became weighed down by the significant demand for visa processing, creating a difficult conundrum for U.S. employers and foreign nationals that persists today.

DOS data shows that while the DOS may be poised to resume worldwide operations, it is only gradually climbing

out of the red in terms of immigrant visa processing.⁵ Since reaching a peak backlog of 566,384 applicants in June 2021, the DOS’s immigrant visa backlog remained extraordinarily high in November 2022, with 384,760 applicants pending the scheduling of an interview.⁶ Comparing the present backlog to the average monthly backlog of 60,866 applicants pending the scheduling of an interview during 2019, there is validity to the DOS’s assertion that “the pandemic continues to severely impact the number of visas” that U.S. embassies and consulates abroad are able to process.⁷ Hence, as the effects of the pandemic continue, the DOS’s processing of immigrant visas will continue to progress slower than before the pandemic, a trend that will likely continue to negatively impact U.S. employers and foreign nationals well into 2023.

Comparatively, employment-based immigrant visa processing by the U.S. Citizenship and Immigration Services (USCIS)—the federal department responsible for processing immigrant visas for applications from *within* the United States—while initially slowed by the COVID-19 pandemic, has been full steam ahead since Fiscal Year (FY) 2021. In that same year, USCIS approved more than 172,000 employment-based adjustment of status applications,

Options for Processing Employment-Based Immigrant Visas, continued

122,000 of which were unused by the DOS as a direct result of the pandemic and the DOS's paused visa processing issues.⁸

During FY 2022, in conjunction with allocating unused family-based visa numbers from FY 2021 (an excess also resulting from the COVID-19 pandemic) for available employment-based visas in FY 2022, USCIS announced “a trio of efforts to increase efficiency and reduce burdens to the overall legal immigration system.”⁹ Trending toward pro-employment-based immigration policies, USCIS implemented a triad of measures for (1) reducing processing backlogs; (2) expanding premium processing; and (3) improving access to employment authorization documents. At the end of FY 2022, USCIS approved more than 220,000 employment-based adjustment of status applications.¹⁰ This “all-hands-on-deck effort” lends credibility to the agency’s commitment to “ensuring” the issuance of as “many available employment-based visas as possible in FY 2023”¹¹ and therefore highlights an immigrant visa processing trend that will likely continue to positively impact U.S. employers and foreign nationals well into 2023.

The U.S. permanent immigration system established by federal law—the Immigration and Nationality Act (INA)—provides foreign nationals with a variety of ways to obtain lawful permanent resident (LPR) status, or green cards, through employment in the United States. Under this system, generally, employment-based immigrants acquire green card status based upon their qualifications and skills under one of the employment-based (EB) preference categories. In this manner, green card processing proceeds in two stages. During Stage 1, an Immigrant Petition for Alien Worker is filed on behalf of a prospective immigrant, seeking their classification under one of the EB preference categories. As the beneficiary of an approved Immigrant Petition for Alien Worker, the prospective immigrant is then eligible for green card status, during Stage 2. There are only two routes for processing LPR status, commonly referred to as (i) consular processing and (ii) adjustment of status.

The historically significant DOS immigrant visa processing backlog has created a difficult conundrum for foreign nationals and their U.S. employers at Stage 2. Recent trends reveal that a foreign national’s choice between consular

processing and adjustment of status inevitably impacts a U.S. employer’s ability to timely employ the foreign national in the United States. This article analyzes how the reverberations of the pandemic are affecting the two methods of processing employment-based immigration visas today and proposes a solution to this conundrum for eligible candidates.

Stages of Processing

There are two stages of acquiring LPR status. In Stage 1 (not the focus of this article), employers and prospective immigrants must complete a multistep process that can involve several federal agencies. The steps required, and consequently the Stage 1 processing times, can vary based on the immigrant visa classification being sought (most commonly EB-1 priority workers, EB-2 aliens with exceptional degrees, and EB-3 skilled workers).

Regardless of the steps taken in Stage 1, once the foreign national becomes the beneficiary of an approved immigrant petition, there are only two methods for processing Stage 2, better known as green card processing. Practitioners and immigration officials commonly refer to these two pathways as consular processing, which allows the foreign national to apply for an immigrant visa with the DOS Bureau of Consular Affairs from a location outside of the United States; and adjustment of status, which allows the foreign national to apply to adjust status by filing his or her application with USCIS while remaining in the United States.

Prospective immigrants of an approved EB immigrant petition may only apply for an immigrant visa, or apply to adjust their status, if there is an immigrant visa immediately available to them in their preference category. Each month the DOS publishes current immigrant visa availability information in a monthly Visa Bulletin. The Visa Bulletin is used to determine whether there are immediately available visas for prospective immigrants based on their individual priority date. The DOS National Visa Center (NVC) assigns a priority date to each EB immigrant petition after USCIS’s approval of the petition. As such, the priority date represents the prospective immigrant’s place in the employment-based immigrant visa line.

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Offshoring U.S. Services After the Pandemic

By Jeff Harrington, West Palm Beach



The term “offshoring” encompasses both goods and services obtained from foreign sources. Since the 1980’s, at least half of U.S. manufacturing jobs have moved offshore to countries with cheaper labor.¹ The supply chain interruptions and shortages felt in the United States during and after the COVID-19 pandemic called attention to the practice and, perhaps, gave pause for reconsideration. Somewhat ironically, just the opposite may be true for offshoring of services.

The pandemic prompted implementation of new videoconferencing software, online payment options, electronic signature apps, and similar internet-based technologies—sometimes collectively referred to as information and communication technologies (ICTs)—to accommodate work from home and remote transactions.² Perhaps even more importantly, mandated social distancing forced us all, even the courts, to deal with the learning curve and become more comfortable with working remotely. Will this shift in paradigm result in service companies following the manufacturing model? Are we likely to see an uptick in service-related jobs, even whole departments, moving offshore?

This article explores traditional challenges of offshoring services, and how ICTs have addressed those challenges,

as well as potential implications to the U.S. workforce if service-based companies follow manufacturers offshore.

Practical Considerations for U.S. Services Companies

Language skills. Perhaps the most obvious challenge with offshoring services is language. We have all had the experience at this point. Some U.S. clients are tolerant of accents, repeating themselves, etcetera, and some are not. The English fluency of foreign company representatives is surely the single biggest reason services industries have lagged behind manufacturers in moving offshore. Also, it may be one thing to move low-level customer support offshore, but what about professional services?

Professionals have to be concerned not only with the quality of the services provided but also more subjective factors, such as company image and client confidence. To be fair, the same issue exists to some extent regardless of where workers are based. Just as certain important clients might be shielded from the company’s less experienced staff, as is commonly the case in the legal industry, protocols can be put in place to monitor and limit client exposure to foreign personnel.

One ICT that can mitigate language barriers is modern-day

Offshoring U.S. Services After the Pandemic, continued

“chat” messaging. Non-native speakers tend to be more proficient at reading and writing English than with oral communication, and the printed word gives one an opportunity to reread and look up unfamiliar terms. Nowadays, everyone uses at least one chat platform as part of everyday life, and businesses commonly employ an internal messaging system based on the same concept.³ The ability to communicate fluidly, instantaneously, and in writing with company personnel comes with distinct advantages, one of which is improved communication with non-native English speakers. No more repeating yourself. For the same reasons, there is a growing trend toward business “chatting” with customers. There will always be a certain percentage of the population that prefers to communicate orally rather than in writing, but that number seems to be diminishing.

Time zones. Offshoring to South or Central America minimizes the effect of differing time zones. The same is not true for Europe or Asia. Even U.S. companies located on the East Coast will find their European workers—if adhering to the company’s regular work hours—working until midnight. In fact, that is the *best* case scenario. The farther east the workers are located, or the farther west the U.S. employer, the further into the small hours they have to work.

As of yet, there is no technological solution for the rotation of the Earth. Foreign workers must simply decide whether the irregular workday is acceptable or not; however, it is possible to resolve the date discrepancy resulting from offshore personnel being a day ahead.

Remote desktop software and server applications allow offshore staff to work off the same system as their U.S. counterparts. Many offices are set up for staff to work off a single central server. For those that are set up this way, there is no perceptible difference whether a worker is in a home office or halfway around the world. For purposes of generating documents, sending emails, making time entries, and most other typical office functions, everyone works off the same platform and everything matches up.

There is a potential upside to both differing time zones and differing languages worth mentioning. If a U.S. company provides services internationally, or is open to doing business with foreign clients, having offshore staff can be

an important advantage. For example, Asia, India, and Latin America are each *massive* markets. If hiring offshore staff permits a company to tap into an overseas market—thanks to common languages, cultures, and time zones—that is an added benefit that could potentially offset any and all detriments.

Privacy and security. In this regard, some businesses have more flexibility than others. To name a few obvious examples, banks are subject to federal standards and regulations that expressly restrict the geographical location of company data, as well as limit or prohibit international access to the same.⁴ Similarly, title companies, tax preparers, mortgage brokers, and insurance underwriters are subject to rules promulgated by the Consumer Financial Protection Bureau.⁵ Health care providers have the HIPAA Privacy Rule.⁶ And of course, law firms have the client confidentiality rules of their respective state bar associations.

In some cases, companies can maintain compliance simply by crafting worker contracts with specific confidentiality provisions. In other cases, creating a foreign branch or hiring workers as employees, rather than independent contractors, can be a solution. In some areas, such as the IT industry, it has become common practice to contract with third-party staffing firms that, in turn, act as employers of the offshore workforce.⁷ For a few businesses and governmental entities, there may be some tasks that simply cannot be performed by offshore personnel, but this category is shrinking.

Whether there exists a compliance workaround or not is one consideration. Whether offshoring is a good idea for a particular business is an entirely separate question. Obviously, business owners and managers consider offshoring as a means for savings, and some of the cheapest labor can be found in countries with varying levels of security and stability. Might that create a risk to valuable intellectual property?

While foreign bribery and violence are hard issues for any single U.S. employer to address, one thing that can mitigate risk is the use of a secure virtual private network (VPN).

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U.S. Immigration Laws and the Peril of Using the United States as a Venue for International Arbitration Proceedings

By Angel Valverde, Miami



This article presents the potential issues for the development of international arbitration in the United States, as there are no visas that specifically allow a foreign national to be employed as an arbitrator, an attorney, or an expert witness in an arbitration proceeding, thus jeopardizing the enforcement of an arbitral award. Working without proper employment authorization in the United States can have serious consequences for an employer and for a foreign national. The key is to determine whether or not a foreign national is considered to be employment authorized and working (or employed) in the United States.

International arbitration is an alternative dispute resolution method used mainly to resolve public or private matters involving international business transactions. In recent decades, the United States has led the international arbitration field, enacting rules and regulations that facilitate the disinvolvement of international arbitration proceedings within its territory.¹ States such as California, Connecticut, Florida, Georgia, Illinois, Louisiana, Oregon, and Texas have passed legislation adopting the UNCITRAL Model Law on International Commercial Arbitration.² Cities such as Miami, New York, and Washington, D.C., are among the principal venues for conducting international arbitration proceedings. Every year foreign parties, attorneys, experts, and witnesses come to the United States to participate

and work in these proceedings even though under U.S. immigration law, there are no specific visa categories that allow foreign nationals to work in these proceedings. Any foreign citizen employed without the proper work authorization is in breach of U.S. immigration laws, and any person working or employed in an international arbitration proceeding without proper authorization to work in the United States could jeopardize the enforcement of an arbitral award.

Article 5 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, establishes that recognition and enforcement of an award may be refused, among other reasons, because “[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with . . . the law of the country where the arbitration took place,” or “[t]he recognition or enforcement of the award would be contrary to the public policy of that country.”³ Pursuant to Article 5 of the New York Convention, an argument can be made that an award may not be recognized or is unenforceable because the arbitrators, attorneys, or expert witness were not authorized to be employed in the United States. This issue has not yet been decided by a U.S. court.

U.S. Immigration Laws and the Peril of Using the U.S. for International Arbitration, continued

U.S. immigration laws represent an intricate body of rules and regulations intended to restrict, control, and govern the influx of foreign individuals as visitors, temporary workers, permanent residents, and the path to citizenship.⁴ There are a vast number and categories of visas available to temporarily visit the United States for pleasure or business (nonimmigrant, nonemployment-based visas) or for work (employment-based nonimmigrant visas). Most foreign nationals will find that “shopping” for a U.S. visa can be similar to visiting a tailor’s shop; there may be a visa that after adjustment will fit, but each case is fact specific. For example, foreign athletes may have at their disposition and depending on the intentions a diverse group of visa options, such as B-1, B-2, Visa Waiver (Electronic System for Travel Authorization (ESTA) depending on the foreign national citizenship), P-1, and O-1 visas.

Most employment-based nonimmigrant visas require employer sponsorship. That is, the employer, on behalf of the prospective employee, files a petition/application for a specific type of nonimmigrant visa with the U.S. Citizenship and Immigration Services (USCIS) at a U.S. Consulate (L-blanket visas) or at the United States-Canada border for some Canadian citizens’ applications. Under most employment-based nonimmigrant visas, foreign nationals may work only for their sponsor. Among the most common employment-based nonimmigrant classifications are H-1B (workers in specialty occupations), L-1A and L-1B (intracompany transferees in executive, managerial, or specialized knowledge positions), O-1 (persons with extraordinary ability in sciences, arts, education, business, or athletics and motion picture or TV production), and TN (USMCA temporary professionals from Mexico and Canada). These employment-based nonimmigrant classifications have their own nuances and require substantial documentation. Factors such as qualification, nationality, duration of the planned stay, defined by U.S. activity, and company affiliation play a decisive role in determining which category works best for the U.S. employer and the foreign national.

Additionally, there are nonimmigrant visas that will allow a foreign national to enter the United States with no employer sponsorship. For a temporary stay in the United

States, the most well-known nonimmigrant visas are the B-1 (temporary business visitor)/B-2 (tourism),⁵ and the Visa Waiver Program (Electronic System for Travel Authorization (ESTA)). Under the B-1 (temporary business visitor) visa or the ESTA,⁶ foreign nationals may travel to the United States for (i) scientific, educational, professional or business convention, or a conference on specific dates; (ii) settling an estate; (iii) negotiating a contract; or (iv) consulting with business associates, etc.⁷ Note these options do not allow one to be employed or to work in the United States. As noted previously, there is no specific nonimmigrant visa category that will allow a foreign national to travel to the United States and be employed as an arbitrator, an expert witness, or an attorney in an international arbitration proceeding.

Unauthorized employment in the United States has serious consequences under the U.S. immigration laws. Even if the foreign national is compensated through a foreign bank account for activities performed in the United States, it is still perceived as U.S. employment. The definition of an employee under the Immigration and Nationality Act is open-ended, as it defines an employee as someone who receives remuneration for services rendered. Meeting this definition is in essence a two-tiered approach, requiring both factors to be considered “employment”: (i) the provision of services, and (ii) the receipt of remuneration for such services, which is considered to be more than just simply wages.

Engaging in unauthorized work/employment can lead to penalties, which include deportation, ineligibility to extend or change status, inadmissibility grounds for future entry, and ineligibility for status adjustment. U.S. companies employing unauthorized foreign nationals may also be exposed to civil penalties or criminal charges.

Unfortunately, U.S. immigration regulations do not provide for a visa that specifically applies to foreign nationals being employed for a short period in an international arbitration proceeding. Each case is fact specific to the circumstances of their entry. Until the U.S. Congress passes legislation creating a specific visa category for foreign nationals

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Obtaining a U.S. Investor Visa With Crypto

By Anda Malescu, Miami



Many immigration professionals are wary of and stay away from cases where Bitcoin and other cryptocurrencies are used as an investment for E-2 visa purposes. Our firm’s experience suggests, though, that it is possible to use Bitcoin and other digital assets in a U.S. business under the E-2 visa regulations, and the investment of cryptocurrencies by itself should not result in a denial of an E-2 visa. This article discusses how to obtain an E-2 Treaty Investor visa for entry into the United States by using cryptocurrency as an investment in a U.S. business.

The E-2 Treaty Investor visa is a nonimmigrant visa designed for individuals who make a substantial investment in a commercial enterprise in the United States. The E-2 visa allows a national of a treaty country to come to the United States, together with their spouse and children, to manage and direct the business enterprise.

To qualify for an E-2 Treaty Investor visa, the applicant must meet the following requirements:

1. There must be a treaty of commerce and navigation between the United States and the country of the foreign national applying for the visa;
2. The investor, individual, or business must hold the nationality of the treaty country;
3. The visa applicant “has invested or is actively in the process of investing” in a U.S. commercial enterprise;

4. The enterprise “is a real and operating commercial enterprise”;
5. The visa applicant’s “investment is substantial”;
6. The applicant’s investment is “more than a marginal one solely for earning a living”;
7. The visa applicant is in a position to “develop and direct” the enterprise; and
8. The applicant intends to depart the United States when the E-2 status terminates.¹

To understand if the use of cryptocurrency or other digital assets to invest in an E-2 enterprise is permissible under the E-2 visa regulations, immigration practitioners must examine if the cryptocurrency or digital assets can be used as a source of funds and if the cryptocurrency or digital assets satisfy the investment requirement above (#3).

According to the Foreign Affairs Manual, “[t]he source of the investment may include **capital assets or funds from** savings, gifts, inheritance, contest winnings, loans collateralized by the applicant’s own personal assets (see paragraph c below) **or other legitimate sources.**”² Additionally, the source of funds for the investment in a U.S. commercial enterprise does not need to be from outside the United States. Further, the source of the investment must not be the result of illicit activities, and so consular

Obtaining a U.S. Investor Visa With Crypto, continued

staff may request whatever documentation is needed to properly assess the source of the funds. Finally, the applicant must demonstrate possession and control of the invested capital assets and funds.³

To summarize, the most important requirements regarding the use of cryptocurrency or other digital assets for E-2 visa purposes are that crypto must be a permitted source of funds, the investment must not be the result of illicit activities, and the applicant must demonstrate possession and control of the invested capital assets and funds.

Below we examine scenarios when crypto can be used as an investment for the E-2 visa and how immigration practitioners can demonstrate that their clients' use of crypto meets the E-2 visa investment requirement.

Liquidating Cryptocurrency to Use as the Investment

The most likely scenario involves the use of proceeds from the sale of cryptocurrency and/or other digital assets, such as non-fungible tokens (NFTs), as a source of funds for the investment in a U.S. commercial enterprise to qualify for the E-2 visa.

Cryptocurrencies have appreciated substantially in the last five years, and even with the recent decline in prices, early crypto investors would have made quite substantial gains on their investment. That means a practitioner is very likely to encounter clients whose main source of funds for an E-2 Investor visa is derived from capital gains on investments in cryptocurrency, i.e., selling crypto for more than they paid for it. Other investors may have used crypto as a store of value, e.g., converting dividends, salary, and/or other income to crypto instead of using a traditional savings account.

In either case, the immigration practitioner will have to document the source of the initial capital that was used to purchase the cryptocurrency. That could be salary, dividends, allowance from parents, inheritance, sale of property, and other sources.

Capital gains or losses also need to be documented, meaning the investor must be able to provide details about every sale and/or purchase of cryptocurrency. That should not be

hard if the investor has been using a single crypto exchange, but it can be complicated in cases where the investor has used multiple exchanges, peer-to-peer trading, and crypto ATMs.

In cases where the initial investment in cryptocurrency was small and the return very high, the emphasis on documenting the initial capital will be less important and showing how the capital gains occurred will take precedence. On the other hand, if crypto was used simply as a temporary store of value, the main emphasis will be on showing the source of funds for the crypto investment.

Immigration practitioners should also document that the crypto transactions were legal in the jurisdiction where it was purchased or transacted, and the applicant was compliant with the tax laws in the country where the income was derived.

Contributing Cryptocurrency to a U.S. Business as the Investment

In rare cases, the E-2 applicant will want to contribute the cryptocurrency or other digital asset directly to the balance sheet of a U.S. commercial enterprise in lieu of contributing fiat currency. This could be appropriate in cases where the contemplated U.S. business is related to crypto and cryptocurrency such as Bitcoin or Ether can be held as inventory. Other cases could involve a business that expects to be able to use cryptocurrency to make purchases from suppliers.

When contributing crypto assets to a U.S. business, the E-2 applicant must demonstrate possession and control of the assets. With fiat currency that is as easy as providing a personal bank statement. With crypto stored in cold wallets (i.e., a digital wallet that stores cryptocurrency offline), it could be a bit more challenging to prove. Further challenges include documenting the transfer to the business and showing that the crypto now belongs to the U.S. business, is put at risk of loss, and does not belong to the investor personally.

When using crypto assets for an E-2 visa, investors should

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Special Insert:

The Florida Bar
International Law Section

Activities at the
**International Bar Association
(IBA) Annual Conference**

30 October – 4 November 2022



International Bar Association (IBA) Annual Conference 30 October - 4 November 2022

The International Bar Association (IBA) Annual Conference took place at the Miami Beach Convention Center from 30 October to 4 November 2022, leading hundreds of attorneys and other legal professionals from around the globe to visit Florida. The IBA Annual Conference is one of the leading conferences for international legal minds to meet, share knowledge, build contacts, and develop their practices. The IBA itself “serves to advance the development of international law and its role in business and society to provide members with world-class professional development opportunities to enable them to deliver outstanding legal services.” While the IBA was hosting its annual conference, the International Law Section (ILS) was also proud to host a number of related events with our colleagues and friends from around the world.



ILS-Milan/Bergamo Bars Cooperation Agreement



International Arbitration Battle Royale



ILS-UK Networking Event



ILS-Paris Bar Cooperation Agreement

ILS-Milan/Bergamo Bars Cooperation Agreement 28 October 2022

On 28 October 2022 at the offices of Akerman LLP in Miami, colleagues from the ILS, including the ILS Europe Committee, and their Italian counterparts from the Milan Bar (Ordine degli Avvocati di Milano) and the Bergamo Bar (Ordine degli Avvocati di Bergamo) met to sign a Bar Cooperation Agreement to promote the sharing of ideas and programming and further the development of the rule of law. At a signing ceremony and luncheon, colleagues in person and appearing remotely from Italy celebrated the achievement and discussed hopes for collaboration in the future.



ILS Europe Committee Vice Chair Davide Macelloni (right) listens as Giacomo Bossa shares his thoughts on the ILS-Milan-Bergamo agreement on behalf of the Italy-America Chamber of Commerce Southeast.



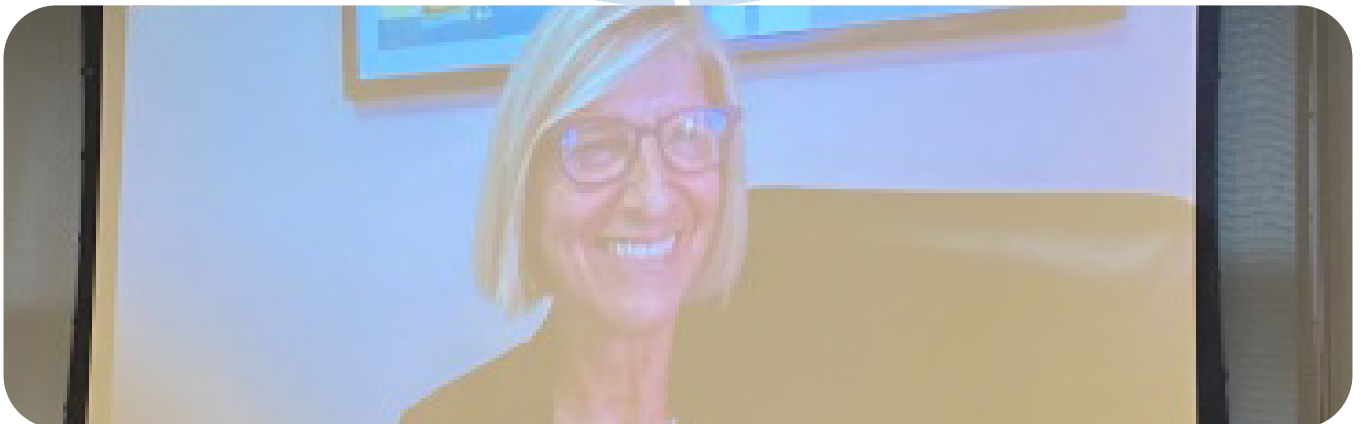
ILS Chair Jacqueline Villalba welcomes comments from Vice Counsel of Italy in Miami Marta Balestrini.



Representatives of the ILS and the Milan and Bergamo bar associations network and sign a cooperation agreement, laying the groundwork for collaboration on events and opportunities in the future.



ILS Chair Jacqueline Villalba and Bergamo attorney Omar Hegazi



Milan attorney Cinzia Calabrese joins the meeting via Zoom to sign on behalf of the Milan Bar (Ordine degli Avvocati di Milano).



Members of the International Law Section, the Milan Bar, and the Bergamo Bar celebrate the signing of their Bar Cooperation Agreement.

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International Arbitration Battle Royale

29 October 2022

The International Law Section, along with the General Council of the Bar, CIArb, and Club Español del Arbitraje, hosted an exciting and informative International Arbitration Battle Royale: Civil vs. Common Law on 29 October 2022 at the Miami office of ReedSmith. Observers of this cross-examination exhibition between common and civil law lawyers had the opportunity to see how the Tribunal managed different styles between major worldwide traditions. After the demonstration, participants and attendees met in the lobby of ReedSmith for a reception to network and discuss the program.



Frederico Singarajah welcomes the attendees.



Gary Birnberg from JAMS introduces the guest presenters, the arbitration panel, and the expert witness.



ILS Chair Jacqueline Villalba welcomes the participants and audience members to the International Arbitration Battle Royale as Javier Fernandez-Samaniego, Mark Fenhalls QC, and Daniel Jacob Nogueira look on.



The distinguished panel of guest arbitrators, Jose Astigarraga, Chiann Bao, and Eduardo Silva Romero, offer thoughts on differences in cross examination style from civil law and common law practitioners.



The audience observes the proceedings with interest.

A large graphic featuring a network of glowing blue nodes connected by thin white lines, overlaid on a view of Earth from space. The Earth's horizon is visible, with a bright blue glow. The network pattern extends across the entire image.

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ILS-UK Networking Event 31 October 2022

On the morning of 31 October 2022, the ILS hosted representatives of the UK Ministry of Justice and Bar Council of England and Wales for a breakfast networking meeting at the offices of Harper Meyer in Miami. Somehow, all of the attendees resisted the urge to wear their Halloween costumes to the meeting! In a far-reaching discussion, spanning topics from criminal justice reforms to the current trans-Atlantic business environment, the attendees shared a number of different viewpoints and enjoyed getting to know one another.



ILS Past Chair James Meyer, ILS Chair Jacqueline Villalba, and Kyri Kyriacou of the UK Ministry of Justice



Joshua Horsman and Kyri Kyriacou of the UK Ministry of Justice participate in the discussion.



Andrea Villa and Richard Montes de Oca



ILS members join representatives of the UK Ministry of Justice and Bar Council of England and Wales for a group photo.

ILS-Paris Bar Cooperation Agreement 1 November 2022

On the evening of 1 November 2022, over forty people gathered for a signing ceremony and reception to welcome representative from the Paris Bar (the Avocats Barreau Paris) at the offices of Harper Meyer in Miami. After enjoying a selection of wines and light refreshments, representatives of the ILS, including the ILS Europe Committee, and the Paris Bar signed a Bar Cooperation Agreement before an appreciative crowd. During the signing ceremony, the signatories expressed their excitement for the newly revived relationship between the ILS and the Paris Bar. The event was well-attended and signified a solid start to the beginning of a collaborative relationship between the two bar organizations.



Paris Bar President Julie Couturier, ILS Chair Jacqueline Villalba, and ILS Europe Committee Chair Susanne Leone sign the agreement by and between the Paris Bar and The Florida Bar International Law Section.



Paris Bar President Julie Couturier and ILS Chair Jacqueline Villalba



Ali Al Ameen, Paris Bar President Julie Couturier, and Thierry Aballea



Guillaume Amiel, Laura Reich, Lyubov Zeldis, Jamie Finizio Bascombe, and Clarissa Rodriguez



James Meyer, Guillaume Amiel, Lyubov Zeldis, Jamie Finizio Bascombe, and Clarissa Rodriguez



Alexis Werl, Christian Brugerolle, Julie Couturier, Susanne Leone, and Thierry Aballea



Jeff Hagen, Christian Brugerolle, Alexis Werl, and Davide Macelloni



Paris Bar President Julie Couturier, ILS Chair Jacqueline Villalba, and ILS Europe Committee Chair Susanne Leone pose with their signed copies of the agreement.



Members of the International Law Section and the Paris Bar celebrate the signing of the Agreement by and between the Paris Bar and The Florida Bar International Law Section.



THE FLORIDA BAR
INTERNATIONAL LAW SECTION



ORDINE DEGLI
AVVOCATI DI MILANO



COOPERATION AGREEMENT

by and between

THE FLORIDA BAR INTERNATIONAL LAW SECTION

represented by

its Chair, Jacqueline Villalba, Esq.,

ORDINE DEGLI AVVOCATI DI MILANO

represented by

its delegate, Avv. Cinzia Calabrese,

on behalf of its President, Avv. Vinicio S. Nardo,

and

ORDINE DEGLI AVVOCATI DI BERGAMO

represented by

its delegate, Avv. Omar Massimo Hegazi,

on behalf of its President, Avv. Francesca Pierantoni

WHEREAS:

The Florida Bar International Law Section, the Ordine degli Avvocati di Milano, and the Ordine degli Avvocati di Bergamo (hereinafter the "Bars" or "Institutions"), wishing, as they do, to build up a special relationship, and moved by a common concern over the future of the legal profession, deem it desirable to establish close links between the Bars in response to certain common needs, and specifically:

- a) To enable members of the Bars to enjoy ideal arrangements for becoming acquainted with the ever more complex and varied legal relationships arising through the economic, cultural, and legal bonds between the United States, the State of Florida, the Italian Republic, and the Cities of Milano and Bergamo, and the social relationships arising between their respective citizens; and

- b) To improve the service provided for legal-service users under American law and Italian law through enhanced reciprocal acquaintance with the legal and court systems of the relevant jurisdictions.

This common stance is also to respond to the following professional needs:

- i) To facilitate the exercise of the profession between the relevant jurisdictions, enabling exchanges and meetings to be arranged, particularly in the area of professional training and exchanges between young or aspiring lawyers;
- ii) To facilitate relationships between the Bars, particularly through the reciprocal provision of information on matters relating to ethics, professional deontology, the fundamental rules of the profession and professional training;
- iii) To foster personal and professional contact between members of the Bars on a long-term basis, through the organization of events regarding legal issues of common interest, which may be hosted in Bergamo, Milan, Miami, or online; and
- iv) To enable common stances or initiatives to be formed in matters relating to the defense of the common interests of the profession, or to any other matter requiring such an approach.

NOW THEREFORE, ALL INSTITUTIONS AGREE AS FOLLOWS:

Article 1. THE EXCHANGE OF INFORMATION

- 1.1 The Florida Bar International Law Section, the Ordine degli Avvocati di Milano, and the Ordine degli Avvocati di Bergamo each agree to organize meetings from time to time between delegations of members to exchange points of view and information relating to the legal practice, the professional rights of lawyers, and their professional organizations.

These Institutions, through their representatives, shall jointly decide how often these meetings are to be held and what fundamental topics are to be dealt with therein.

- 1.2 The Florida Bar International Law Section, the Ordine degli Avvocati di Milano, and the Ordine degli Avvocati di Bergamo each agree to keep the others informed of relevant developments in legal and court systems pertaining to the practice of the legal profession, including but not limited to new provisions coming into force in their respective jurisdictions.
- 1.3 The Florida Bar International Law Section, the Ordine degli Avvocati di Milano, and the Ordine degli Avvocati di Bergamo each agree to exchange information on trends, systems, and developments in provisions for entry into the profession and for initial and continuous training for the profession.

Article 2. COURSES ON THEORY AND PRACTICE AND RECIPROCAL PROMOTION

- 2.1 The Florida Bar International Law Section, the Ordine degli Avvocati di Milano, and the Ordine degli Avvocati di Bergamo each agree to share information relating to courses on theory and practice that they may sponsor, provide or otherwise make available to their members and agree, to the extent practicable, to open those courses on theory and practice to members of the other Institutions on similar conditions and terms as those offered to their own members or other members of the Bar in the relevant jurisdictions.
- 2.2 The Florida Bar International Law Section, the Ordine degli Avvocati di Milano, and the Ordine degli Avvocati di Bergamo each agree, to the extent practicable, to promote each other's courses on theory and practice and other programming through their websites, publications, and social media channels to bring them to the attention of their members.
- 2.3 The Florida Bar International Law Section, the Ordine degli Avvocati di Milano, and the Ordine degli Avvocati di Bergamo each agree, to the extent practicable, to invite

members of the other Institutions as presenters or speakers at events and programming on topics related to the law and legal developments in the relevant jurisdictions.

- 2.4 The Florida Bar International Law Section, the Ordine degli Avvocati di Milano, and the Ordine degli Avvocati di Bergamo each agree, to the extent practicable, to open sponsored events, seminars, and courses on theory and practice to law students and other aspiring lawyers, and also members of academic institutions, on similar conditions and terms as those offered to their own members or other members of the Bar in the relevant jurisdictions.
- 2.5 The Florida Bar International Law Section, the Ordine degli Avvocati di Milano, and the Ordine degli Avvocati di Bergamo each agree, to the extent practicable, to support the involvement of law students and other aspiring lawyers in activities, projects, and events promoted or organized by the Institutions, and to encourage the exchange of ideas, knowledge, and skills among law students and other aspiring lawyers to foster the development of experienced and versatile professionals.

Article 3. AMENDMENT OF THE AGREEMENT

- 3.1 This Agreement may be amended by joint written agreement between the parties hereto by means of an appendix. Any request involving such amendment put forward by one of the Institutions shall be submitted in writing at least six months in advance to the other for consideration.

Article 4. EFFECTIVE DATE OF THE AGREEMENT

- 4.1 This Agreement is drawn up in the English language and will be translated into Italian for execution by the Ordine degli Avvocati di Milano and Ordine degli Avvocati di Bergamo, the two versions having equal validity and dignity.
- 4.2 This Agreement shall become effective upon ratification by the Institutions that are parties hereto through their respective authorized persons or bodies.

SIGNED AND ENTERED INTO ON THIS 28TH DAY OF OCTOBER, 2022, BY:

The Florida Bar International Law Section

Jacqueline Villalba, Esq., *Chair of the Florida Bar International Law Section*



Ordine degli Avvocati di Milano

Avv. Cinzia Calabrese, *Delegate of Consiglio dell'Ordine degli Avvocati di Milano*



Ordine degli Avvocati di Bergamo

Avv. Omar Massimo Hegazi, *Delegate of Consiglio dell'Ordine degli Avvocati di Bergamo*





AGREEMENT

By and between,

PARIS BAR

Represented by

its President Julie Couturier

And

THE FLORIDA BAR INTERNATIONAL LAW SECTION

Represented by

its Chair Jacqueline Villalba

and its Europe Committee Chair Susanne Leone

WHEREAS:

The above-named organizations have signed a bar cooperation agreement on January 22, 2002. The Florida Bar International Law Section and the Paris Bar (collectively, the “Associations” or “Bar Associations” and individually “Association” or “Bar Association”), wishing now to renew and expand this special relationship and moved by a common concern over the future of the legal profession on the international level, deem it desirable to establish closer links between the two Associations, and specifically with the aim:

- to enable members of both Bar Associations to become acquainted with the permanent and constructive legal relationships arising from the existing economic and social interaction between the two countries and their citizens;
- to improve the quality of legal services provided to clients under American law and French law through enhanced reciprocal understanding of the legal systems and court procedures of the two countries.

This common stance also aims to attain the following professional objectives:

- to foster an increased movement of lawyers, facilitate the practice of the profession between the two countries, and enable exchanges and meetings particularly in the area of professional training among aspiring lawyers;
- to facilitate relationships between the two Associations, through the exchange of information on matters relating to professional ethics, particularly in areas which will assist each Association's members and their respective clients to understand the laws and legal systems of the other Association's state or country;
- to foster long-term personal and professional contact between members of the two Bar Associations; and
- to enable the emergence of common ideas or initiatives to be formed on matters relating to the defense of the principles of the profession and other matters requiring such an approach.

NOW THEREFORE, BOTH ASSOCIATIONS AGREE AS FOLLOWS:

**ARTICLE 1.
EXCHANGE OF INFORMATION**

Article 1.1.

The Florida Bar International Law Section and the Paris Bar shall endeavor to organize meetings from time to time between delegations of members of both Associations to exchange points of view and information relating to the legal practice, the professional rights of lawyers and their professional organizations.

Article 1.2.

The Florida Bar International Law Section and the Paris Bar shall exchange information on trends, procedures and developments regarding access to the legal profession through their respective legal and court systems.

Article 1.3.

Both Associations undertake to exchange information on new and critical legal trends, developments and procedures that come into force in their respective countries.

Article 1.4.

Each Association may distribute information regarding this Agreement to its members and gather comments and suggestions from its members for the purpose of an exchange of such information between the Associations.

Article 1.5.

The Florida Bar International Law Section and the Paris Bar shall exchange relevant information to enable them to reliably inform their members on the required conditions and basic consequences regarding the establishment of their respective members in the other State, particularly regarding the professional and ethical standards prevailing in the host jurisdiction.

Each Bar Association shall assist the members of the other Association to become affiliated members of its Association, subject to compliance with the affiliation requirements in force in both Associations.

**ARTICLE 2.
COURSES ON THEORY AND
PRACTICE****Article 2.1.**

The Florida Bar International Law Section contemplates coordinating a program in order to welcome lawyers from the Paris Bar who are competent in use of the English language and who wish to acquaint themselves with, or deepen their knowledge of, American law through work experience terms in recognized law firms in Florida. Such lawyers shall also be encouraged to attend events and pursue continuous training arranged for lawyers from the Paris Bar.

The Paris Bar contemplates coordinating a program, as part of their international internship program, in order to welcome lawyers from The Florida Bar International Law Section who are competent in the use of the French language and who wish to acquaint themselves with, or deepen their knowledge of, French law through work experience terms in recognized law firms in France. Such lawyers shall also be encouraged to attend events and pursue continuous training arranged for lawyers from the The Florida International Law Section.

Article 2.2.

The Associations (based on their respective hosting capacity) shall inform each other of the number of places to be offered each year, where appropriate, and the members to whom the study-visits are awarded. The structure and organization of these study-visits (reception, accommodation, registration, fees, remuneration, etc.) shall be determined based on mutual agreement.

**ARTICLE 3.
AMENDMENT OF THE
AGREEMENT****Article 3.1.**

This Agreement may be amended by joint agreement between the Parties hereto by means of an appendix.

**ARTICLE 4.
EFFECTIVE DATE OF THE
AGREEMENT**

Article 4.1.

This Agreement is drawn up in both the French and English languages with both versions having equal legal validity.

Article 4.2.

This Agreement shall become effective once signed by an authorized representative of each Bar Association, both of which are Parties to this Agreement.

Article 4.3.

This Agreement shall be valid for a duration of one year and thereafter shall automatically be renewed for intervals of a one-year duration unless either party unilaterally provides notice of termination at least two months prior to the then applicable termination date pursuant to the provisions set forth in this article.

**ARTICLE 5.
PERFORMANCE**

Article 5.1.

The President of the Paris Bar and the Chair of The Florida Bar International Law Section hereby agree to facilitate the enactment and administration of the provisions set forth in this Agreement, without prejudice to their power to delegate their responsibilities to any members of their respective Associations.

In Miami, USA on November 1, 2022

On behalf of the Paris Bar:



Name: Julie Couturier
Title: President

On behalf of The Florida Bar International Law Section:



Name: Jacqueline Vivalba
Title: Chair



Name: Susanne Leone
Title: Europe Committee Chair

WORLD ROUNDUP

AUSTRALIA



Donald Betts, Jr., Melbourne

donald.betts@bettslawco.com

The Australian budget commits A\$25 billion to clean energy and renewables projects.

The Australian government has released its budget for October 2022–23 and commits record clean energy spending, providing greater direction and backing the government’s net zero commitment by 2050. It includes funding for projects that unlock opportunities for clean energy and renewables investors.

Its Powering Australia plan is focused on projects that reduce emissions by boosting renewable energy. This creates significant opportunities for investment across Australian renewables and the country’s growing green economy.

AUSTRADE (the Australian Trade and Investment Commission) identifies nine major projects under the plan:

1. Modernising Australia’s electricity grid. The A\$20 billion Rewiring the Nation plan is an ambitious program to modernise Australia’s electricity grid. It includes investing in the Marinus Link to connect Tasmania’s Battery of the Nation pumped hydro and renewables to the East Coast transmission network. Another project will fast-track Victoria’s Renewable Energy Zones and its industry-leading offshore wind developments.

2. Reducing transport emissions. The Driving the Nation fund invests A\$500 million to help reduce transport emissions. This includes building electric vehicle charging infrastructure at 117 highway sites and hydrogen highways for key freight routes. The government is also cutting taxes on electric cars.

3. Installing community batteries and solar banks. The government has earmarked over A\$300 million for community batteries and solar banks. The A\$224.3 million Community Batteries for Household Solar program will deliver up to 400 community batteries to store excess solar energy. The A\$102.2 million Community Solar Banks program will help Australian households access cheap solar-powered energy.

4. Transforming regional communities. The government will establish the A\$1.9 billion Powering the Regions fund. The fund will support Australian industry to decarbonise, develop new clean energy industries, and help build Australia’s new energy workforce.

5. Skilling the clean energy workforce. The government is committing over A\$100 million to the New Energy Apprenticeships and New Energy Skills programs. This will address growing skills demand in the clean energy sector.

6. Australia partners with Singapore and Japan in transition to net zero. As part of its commitment to transitioning to net zero, Australia has recently signed landmark agreements with Singapore and Japan. We recognise that the world cannot transition to clean energy without collaboration across borders.

7. Australia and Singapore sign Green Economy Agreement. On 18 October 2022, Australia and Singapore signed a landmark Green Economy Agreement (GEA) to strengthen trade and investment in clean energy. The budget sets aside A\$19.6 million over four years for initiatives under the agreement. These initiatives include reducing nontariff barriers and promoting collaboration between Australian and Singaporean businesses to build capability in new green growth sectors.

8. Australia and Japan strengthen critical minerals cooperation. On 22 October 2022, Australia and Japan signed a Critical Minerals Partnership to help build secure supply chains for critical minerals. These crucial elements of clean energy technologies are needed to help both countries meet net-zero commitments. The partnership will promote opportunities for information sharing and collaboration, including research, investment, and commercial arrangements between Japanese and Australian projects.

9. Investment opportunities in Australian clean energy and renewables. Overall, Australia is ranked sixth in the world on EY’s latest Renewable Energy Country Attractiveness Index for renewable energy investment and deployment opportunities. There is significant potential for both renewable investment and broader green economy investment in Australia, driven by growth in government funding, abundant natural resources, and Australia’s ability to develop solutions for global supply chains, especially in critical and battery minerals.

According to fDi Markets, Australia has already attracted ten renewable energy projects in the first half of 2022, worth a total of US\$6.4 billion. This includes investments by Italy’s Enel Green Power and Belgium-based Nyrstar. These companies recognise that Australia’s natural advantages offer extensive investment opportunities in:

- Clean hydrogen;
- Renewables—wind, solar, energy storage;
- Microgrids and storage solutions; and
- Future fuel technologies.

Donald Betts, Jr., is a corporate lawyer at Australia's first national majority owned Indigenous law firm, *Jaramer Legal* (Norton Rose Fulbright joint venture). He specializes in commercial transactions, corporate advisory, and corporate structuring in relation to community modelling, capacity building, and infrastructure projects in the energy and agriculture sectors. Mr. Betts is a former Kansas state senator and U.S. congressional candidate. He is cofounder and president of the North American Australian Lawyers Alliance (NAALA) and a director at *Desert Springs Octopus*.

CARIBBEAN



Fanny Evans, Panama City, Republic of Panama

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The British Virgin Islands Business Companies (Amendment) Act comes into force.

The amendments to the British Virgin Islands Business Companies (Amendment) Act, 2022 (No. 6 of 2022) (BC Act) are well measured. They are designed to ensure that the British Virgin Islands (BVI) business companies legislation continues to meet international standards and best practice as a leading offshore financial center without prejudicing the fundamental qualities of BVI companies law. The BVI BC Act came into force on 1 January 2023.

End of bearer shares

The bearer shares regime is abolished; therefore, bearer shares cannot be issued and existing bearer shares that were immobilized because they were held by a licensed custodian are deemed converted to registered shares on or before 1 July 2023.

Residency requirement for liquidators

The new requirement to qualify as a voluntary liquidator is that the individual must have physically lived in the BVI for at least 180 days, either continuously or in aggregate, prior to their appointment.

The reasoning behind this new requirement is to facilitate the collection and retention of liquidation records within the territory.

For companies that are required to have a locally based liquidator due to the nature of the business or policies of the company, it will be possible to appoint joint liquidators where only one of the liquidators meets the residency test and the other can be located anywhere in the world.

Director names publicly available

The BVI Registrar of Corporate Affairs (the Registrar) will

make available only to registered users of the online VIRRGIN system, upon request and payment of a fee, a list of directors contained in a company's registry of directors filed with the Registrar, with the following five restrictions:

1. A company's full registry of directors will not be available to the public.
2. Directors' names will only be available by way of a search against a particular company. It will not be possible to search against names of individuals to see if a person is a director of any company.
3. Only the director's name as it appears in the registry filed at the Registrar will appear in the search.
4. Directors' date of birth, nationality, and address will not be disclosed.
5. The names of former directors of the company will remain confidential.

Continuation outside the BVI

To continue or to re-domicile a company outside the BVI, it must comply with the following two requirements:

1. Provide advance notice of the intention to continue outside the BVI to its members and creditors at least fourteen days before filing to re-domicile.
2. Publish the notice in the Gazette and on the company's website (if applicable).

Resignation of registered agent

The period of notice a registered agent needs to give before resigning from that role has been reduced from ninety days to sixty days.

Struck-off companies and dissolution

The amendments essentially put an end to the company struck-off regime.

Struck-off companies as of 1 January 2023: Such companies will be automatically dissolved on the date the Registrar publishes a notice of striking off in the BVI Gazette. Companies will be given ninety days' notice to regularize their status and obligations before they become liable to be struck off and dissolved by the Registrar. If the company is dissolved by the Registrar, following striking off, the company may still apply to the Registrar to be restored within five years of the dissolution provided that certain requirements and obligations are met.

Struck-off companies prior to 1 January 2023:

Transitional arrangements will apply to companies that are currently struck off, such that if they wish to apply to be restored to the Register, they must do so as soon as possible.

New financial reporting rules

All BVI companies are required to maintain financial records and underlying documentation that show (and explain) their transactions. These records must be

sufficient to enable the company's financial position to be determined with reasonable accuracy, at any time. Financial records must be kept for a minimum of five years.

Additionally, as of 1 January 2023, BVI companies are required to file an annual return, which will include specific financial information with their registered agent. The actual form of return remains under development as of this writing.

The changes in the BCA and BCA regulations require the annual return to be filed with the registered agent within nine months following the end of the company's financial year. It is important to note:

- The return will not be made public (though the registered agent will have an obligation to inform the BVI Financial Services Commission if it has not received the return); and
- The BCA does not require the financial information included in an annual return to be audited.

The requirement to file an annual return does not apply to companies whose shares are listed on a recognized exchange or to certain BVI-regulated entities and companies that file tax returns in the BVI. Certain concessions are also made for companies whose accounts or financials are consolidated into group accounts.

Registry of persons with significant control

Essentially, "persons with significant control" means beneficial owners. The amendment introduces the framework by which the BVI might introduce a public registry of persons with significant control. The amendment does not indicate the date when the public registry will come into force; however, the BVI government has previously committed to introduce some form of publicly accessible beneficial ownership registry in 2023, subject to a number of caveats and qualifications, which include that such registries must have become an international standard by that time.

Fanny Evans is a partner at Morgan & Morgan and is admitted to practice law in the Republic of Panama. She focuses her practice on corporate services, estate planning, and fiduciary services. Her portfolio of clients includes banks and trust companies, family businesses, corporate practitioners, and private clients. From 2011 until mid-2017, Mrs. Evans served as executive director and general manager of MMG Trust (BVI) Corp., the Morgan & Morgan Group's office in British Virgin Islands. Prior to becoming head of the BVI Office, she served as fiduciary attorney in a local firm focusing on corporations and trusts. Mrs. Evans is member of the Society of Trust and Estate Practitioners (STEP). She is fluent in Spanish, English, and Italian.

CHINA



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People's Republic of China revises women's protection law.

On 30 October 2022, the latest revision of the Law of the People's Republic of China on the Protection of Women's

Rights and Interests was approved by the Standing Committee of the National People's Congress (NPC). Originally adopted in 1992, the law has been previously amended on two occasions, in 2005 and 2018. The new version entered into force on 1 January 2023.

The law was adopted in accordance with China's Constitution, which holds that women in China "shall enjoy equal rights with men in all spheres in life" and that "the state shall protect the rights and interests of women" (Art. 48). According to Article 1 of the latest version of the women's protection law, it seeks "to protect the legitimate rights and interests of women, promote equality between men and women and the all-round development of women, give full play to the role of women in building a modern socialist country in an all-round way, and carry forward the core socialist values."

Many of the notable changes made as part of the 2022 amendment of the women's protection law concern workplace discrimination. This was of course a concern in earlier versions of the legislation, but the new text expands the scope of protection and provides added specificity on what constitutes unlawful behavior by employers. For instance, the new Article 43 prohibits employers from requiring pregnancy tests as part of pre-employment medical examinations. Employment contract provisions that seek to prevent women from marrying or bearing children were already prohibited, but employers will now be barred from conditioning hiring on marital or parental status.

The new law also features more extensive language on issues of workplace discrimination against pregnant women and new mothers. Employers were already prohibited from firing or reducing wages on the basis of marriage, pregnancy, or parental status. Now Article 48 forbids employers from using those same grounds to limit promotions and similar benefits. Moreover, Articles 43 and 48 have been given additional teeth, through the imposition of fines ranging between 10,000 yuan (~US\$1,400) and 50,000 yuan (~US\$6,700) for noncompliant employers.

Another significant feature of the updated legislation is the considerable degree of attention given to the problem of sexual harassment, when compared to the previous iteration of the law. The new text contains twelve references to sexual harassment, as opposed to only two in the 2018 version. Article 25 requires employers to take

certain measures to address sexual harassment, among them instituting procedures to investigate allegations of sexual harassment and handling complaints in a timely fashion. In addition, Article 80 now establishes liability for supervisors and other responsible personnel for failing to take measures to prevent sexual harassment.

According to Chinese media sources, more than 700,000 comments on the draft of the new law were received by the NPC during the public consultation phase, highlighting the great interest sparked by this legislation. The changes to the women's protection law appear to be a clear response to societal concerns, in turn suggesting that enforcement of the new provisions will be robust. International businesses operating in China must ensure that their workplace practices are in line with the new requirements.

Frederic Rocafort is an attorney at Harris Bricken Sliwoski, LLP, where he specializes in intellectual property and serves as coordinator of the firm's international team. He is also a regular contributor to the firm's China Law Blog. Previously, Mr. Rocafort worked in Greater China for more than a decade in both private and public sector roles, starting his time in the region as a U.S. consular officer in Guangzhou. Mr. Rocafort is licensed in Florida, Washington State, and the District of Columbia.

INDIA



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Reserve Bank of India issues a Concept Note on Central Bank Digital Currency (CBDC)—the e₹ (e-Rupee).

In October 2022, the Reserve Bank of India (RBI) issued a Concept Note on Central Bank Digital Currency (CBDC). A statement issued by the FinTech Department disclosed that “[t]he Concept Note refers to the CBDC as an e₹” (e-Rupee or digital rupee), which will “provide an additional option to the currently available forms of money.” The e-Rupee is to represent legal tender and is not substantially different from banknotes. Not to be mistaken with cryptocurrency, the e-Rupee (unlike crypto) is one that is centralized at its core.

Recognizing the transactional benefits of other forms of digital money, on 31 October 2022, the RBI announced the launch of the digital rupee pilot, stating, “[t]he use case for this pilot is the settlement of secondary market transactions in government securities. The use of the digital rupee-wholesale segment is expected to make the inter-bank market more efficient.” Nine banks, including State Bank of India, Bank of Baroda, Union Bank of India, HDFC Bank, ICICI Bank, Kotak Mahindra Bank, Yes Bank,

IDFC First Bank, and HSBC were identified for participation in the RBI's pilot program. On 1 November 2022, the wholesale CBDC was introduced by India's central bank, and the retail companion was introduced on 1 December 2022.

Delhi High Court sets aside an arbitral award exceeding US\$1 billion against Antrix Corp. Ltd.

This marks the latest update in the years-long *Devas v. Antrix* saga reported in *ILQ* vol. XXXVII, no. 1 (Winter 2021).

In a notable decision, on 29 August 2022, the Delhi High Court set aside the US\$562.5 million ICC arbitral award, accruing simple interest from 14 September 2015 at \$331,787.64 per day. The ICC arbitral award was confirmed by the Western District of Washington on 27 October 2020. Subsequently, on 4 November 2020, the Supreme Court of India stayed execution of the award stating, “[w]e consider it highly iniquitous to permit the party to execute an award without the objections under section 34 of the [Arbitration and Conciliation] Act to the Award itself being heard.” In the same opinion, the SCI held that the award was to be held in abeyance until the Delhi High Court decides the application for stay in the application under Section 34.

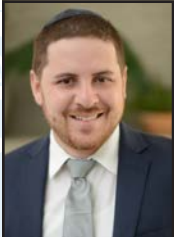
In an eighty-seven-page opinion, Justice Sanjeev Sachdeva held that the arbitral award dated 14 September 2015 “suffers from patent illegality on the face of it.” Citing extensively to the apex court's judgment dated 17 January 2022 (dismissing certain appeals filed by an ex-director of Devas), the Delhi High Court noted, “if the seeds of the commercial relationship between Antrix and Devas were a product of fraud perpetrated by Devas, every part of the plant that grew out of those seeds, such as the Agreement, the disputes, arbitral awards, etc., are all infected with the poison of fraud. A product of fraud is in conflict with the public policy of any country including India.” Based on these findings of fraud by the Supreme Court of India in its judgment dated 17 January 2022, the Delhi High Court rendered its decision to set aside the significant arbitral award—stating in clear terms that the award “suffers from patent illegalities and fraud and is in conflict with the Public Policy of India.”

Neha S. Dagley is a commercial litigation attorney in Miami, Florida. For the last eighteen years, she has represented foreign and domestic clients across multiple industries and national boundaries in commercial litigation and arbitration matters. A native of Mumbai, Ms. Dagley is fluent in Hindi and Gujarati. She is the cofounder and president of the Australia United States Lawyers Alliance, Inc. (AUSLA), and serves as chair of the Asia Committee of The Florida Bar's International Law Section.

LATIN AMERICA


Cintia D. Rosa, Rafael Szmid, and Thomas Abboadalla, São Paulo, Brazil

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It's a new era for antitrust private litigation in Brazil.

The Brazilian Competition Authority (CADE) is one of the world's most important and active competition authorities, being responsible, among other functions, for prosecuting and punishing individuals and legal entities that commit antitrust violations, including international cartels, affecting the Brazilian market. The stakes for violations of the economic order are high as they involve substantial fines and restriction of rights and apply to legal entities and individuals in both the civil

and criminal spheres.

More recently, the Brazilian antitrust law was amended to include provisions that promote private litigation within antitrust and increase the advantages of entering into a leniency agreement. Published on 16 November 2022, these are the relevant alterations introduced by Law 14,470/2022:

- Those harmed as a result of antitrust violations will be entitled to pursue double compensation for damages through private claims. The double compensation applies in addition to administrative fines applied for antitrust violations.
- The statute of limitations for pursuing a damages action will be suspended at the start of an investigation. It will start running after CADE publishes a final judgment of the administrative procedure. Upon the commencement of such period, the statute of limitations will be five years.
- A conviction from CADE's tribunal will be enough proof to allow a judge to issue a preliminary judgment in favor of the defendant.
- Those signing a leniency agreement will not be subject to the payment of double damages.
- Leniency agreement signatories will not be held jointly liable for damages alongside other defendants, being accountable only for the damages caused explicitly by them.
- The burden of proof in a "pass-on defense" (i.e., when the defendant argues that the overprice caused by the anticompetitive conduct was "passed on" to indirect

customers, so the plaintiff is not entitled to receive damages) lies with the defendant.

These legal changes may increase investigations of anticompetitive behavior as these promote private damage claims and incentivize self-reporting by increasing the already existing benefits of entering into a leniency agreement in Brazil, such as pardon in the criminal sphere and eliminating or reducing sanctions, such as fines.

A potential increase in antitrust prosecution in Brazil might very well be reflected in other jurisdictions as local investigations in sectors that have a cross-border application (e.g., technology, pharmaceutical, and electronics) could inadvertently bring the spotlight to that market and behavior and might result in cooperation between international enforcement. CADE has focused intensely on combating national and international cartels and has maintained a close cooperative relationship with international agencies, such as the U.S. Department of Justice and the European Commission. In addition, leniency agreements may contain information on cross-border activities, and the granting of private damage claims may serve as the basis for damage claims in other locations.

Colombia approves tax reform bill.

One of the main projects of the first one hundred days of President Gustavo Petro's government, the tax reform project was approved by the Colombian Senate on 17 November 2022. With 122 votes in favor and 27 against, the project is expected to be approved when the president signs the legislation into law.

Among the changes, the text foresees taxation of large fortunes, with rates that vary between 0.15% and 1.15%, and that churches must also pay taxes. The project also foresees an increase in taxes on single-use plastics and products from the extractive sector. In addition, there is a forecasted increase in taxes on ultra-processed foods and sugary drinks as well as increases in taxes for foreigners residing in Colombia and for streaming services.

It should be noted that, in its original version, the legislation was even bolder, with extra fees for the export of oil and other minerals—proposals that ended up being withdrawn during discussions that caused great discontent in the industry.

Tax reform is one of the pillars of funding for President Petro's projects, including agrarian reform based on the State purchasing unproductive land and creating job opportunities in the public administration itself. Although the opposition to the project—mainly represented by the Democratic Center led by former president Alvaro Uribe—has stated its intention to go to court to contest the reform "an attempt against the pockets of Colombians," the project likely will be approved in early 2023.

Cintia D. Rosa focuses her practice on internal corporate investigations and compliance matters, leveraging her experience with criminal proceedings and white-collar crime from when she worked at the Brazilian Federal Police. She earned her law degree (LL.B.) from the Pontifical Catholic University of São Paulo (PUC-SP), has a specialization in compliance and economic law from the GV São Paulo Law School, and an M.B.A. in data science and analytics from the University of São Paulo.

Rafael Szmid is a dual qualified lawyer (NY/USA and Brazil) with ten-plus years of experience advising clients on anticorruption, antitrust, compliance, and corporate governance matters. He also has experience working at the Brazilian Competition Authority and as a compliance lawyer of a Fortune 100 multinational conglomerate. He holds a Ph.D. from the University of São Paulo, an LL.M. from Stanford Law School, and a Master of the Science of Law from the University of São Paulo. He was a visiting student at the University of Barcelona, Spain.

Thomas Abboadalla advises clients in anticorruption, corporate governance, internal investigations, mergers and acquisitions, and antitrust matters. He received training in economic law and regulation in Brazil at Fundação Getúlio Vargas in Sao Paulo; extended that training to a broad range of jurisdictions during his LL.M. in European and international business, regulatory and competition law at Freie Universität Berlin, Germany; and pursued a Ph.D. in antitrust and regulation in markets of disruptive innovation at Universidad de Cordoba, Argentina. hoganlovells.com

MIDDLE EAST



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French company pleads guilty to providing support to ISIS.

French companies Lafarge S.A. and its subsidiary, Lafarge Cement Syria (LCS) S.A., headquartered in Damascus, Syria, pled guilty in U.S. District Court to conspiring to pay ISIS in exchange for permission to operate a cement plant in Syria from 2013 to 2014. According to court documents, the operation of the cement plant allowed LCS to obtain approximately US\$70.3 million in revenue.

Spanish company initiates ICSID claim against Morocco.

Spanish company Comercializadora Mediterránea de Viviendas S.L. (formerly Marina d'Or-Loger) has filed a request for arbitration with the International Center for Settlement of Investment Disputes (ICSID) against the Kingdom of Morocco for a claim of more than €400 million.

Marina d'Or participated in the initiative launched by Morocco in 2004 to decongest overcrowded urban centers through the creation of satellite cities. Marina d'Or would recover its investment through the sale of real estate complexes built in the satellite city where its project was located. Marina d'Or claims that the inaction of the Moroccan government to provide facilities and infrastructure has led to the city comprising only a few isolated buildings, which do not even have garbage collection as a city-provided service. The request for arbitration is based on the investment protection guarantees established in the Bilateral Treaty for the Promotion and Protection of Investments signed between Spain and Morocco on 11 December 1997, which includes an international arbitration clause before the ICSID.

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NORTH AMERICA



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Canadian Immigration Authority on track for a record year in 2022.



After prioritizing efforts to resolve delay and backlogs, Immigration, Refugees, and Citizenship Canada (IRCC) expects 2022 to be a record year for the department. For example, as of 30 November 2022, IRCC had processed more than 670,000 study permits, compared to approximately 500,000 by the same date in 2021. The majority of those permits were also processed within sixty days. Also by 30 November, IRCC processed nearly 700,000 work permits, more than triple its pre-pandemic level. ICCR reports that visitor visa applications are being processed at higher rates than pre-pandemic. These improvements in processing time and reductions in backlog—even as overall application numbers grow—have been achieved by transitioning most ICCR applications to digital, increased departmental hiring, and streamlining or automating processes.

Mexico's minimum wage and mandatory vacation days increase on 1 January 2023.

On 1 December 2022, the Mexican National Minimum Wage Commission agreed to increase Mexico's general minimum wage to \$207.44 Mexican pesos per day (and to \$312.41 Mexican pesos per day in the Free Economic Zone of the Northern Border) as of 1 January 2023, representing an approximately 20% increase in the

daily minimum wage. Then, in mid-December 2022, the Mexican Congress of the Union (Congreso General de los Estados Unidos Mexicanos) announced and approved increases in the number of vacation days workers are entitled to based on years of work for their employer. The amendment has been published in the Diario Oficial de la Federación and became effective 1 January 2023.

FTX, a major cryptocurrency exchange, and its U.S. subsidiary file for Chapter 11 bankruptcy protection.

On 11 November 2022, major cryptocurrency exchange FTX Trading Ltd. (FTX) and its U.S. subsidiary FTX.US filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Delaware. FTX's downfall apparently resulted from a critical lack of liquidity and mismanagement of corporate funds, followed by major withdrawals by investors. Newly appointed FTX CEO John J. Ray III cited a "complete failure of corporate controls" and a "complete absence of trustworthy financial information" as the factors behind the collapse.

Founder and former CEO Sam Bankman-Fried was arrested on 12 December 2022 in The Bahamas and was extradited to the United States to face criminal charges arising out of claims that Bankman-Fried used customer money as a "personal piggy bank" and engaged in wire fraud. Other cryptocurrencies were left reeling by FTX's failure, causing drops in value in industry leaders like Bitcoin and deepening investor skepticism in the cryptocurrency industry as a whole.

***Laura M. Reich** is a commercial litigator and an arbitrator practicing at Harper Meyer LLP. In addition to representing U.S. and foreign clients in U.S. courts and in arbitration, she is also an arbitrator with the American Arbitration Association and the Court of Arbitration for Art in The Hague. A frequent author and speaker on art, arbitration, and legal practice, Ms. Reich is an adjunct professor at Florida International University Law School and Florida Atlantic University and vice treasurer of the International Law Section of The Florida Bar.*

***Clarissa A. Rodriguez** is a board certified expert in international law. She is a member of the Harper Meyer LLP dispute resolution practice and specializes in art, fashion, and entertainment law, as well as international law. With nearly two decades of experience, Ms. Rodriguez leads and serves on cross-disciplinary teams concerning disputes resolution and the arts industry. She has found a way to dovetail her passion for the arts into her legal career by representing the players in the art, fashion, and entertainment industries in their commercial endeavors and disputes.*

WESTERN EUROPE



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Germany approves emergency aid for individuals and businesses amid ongoing energy crisis in Europe.

Due to the ongoing energy crisis in Europe, the German federal government decided on emergency aid for gas and heat customers in the month of December. With the emergency aid, the federal government is implementing the first part of the recommendations of the Gas and Heat Expert Commission.

All households that use gas or district heating benefit from the emergency aid. Eligible customers of gas have no obligation to make contractually agreed advance payments or payments on account in the month of December. Also, certain small- and medium-sized companies that consume less than 1.5 million kilowatt hours of gas per year will be exempted from the down payment in December; however, the gas purchased may not be used for commercial electricity or heat generation. The federal government will then reimburse the energy and heat suppliers for the outstanding payments and will pay for this one-time relief.

Germany's parliament, the Bundestag, passed the law for the December emergency aid on 10 November. The Federal Council gave its approval during a special session on 14 November, and the law came into force on 19 November.

This (December) emergency aid is part of an up to €200 billion energy relief plan, which is set to last until 2024 and will finance energy price caps and subsidies. In order to approve this emergency relief plan, the German lawmakers have declared an emergency state and suspended the constitutional debt brake, which generally limits the federal government's structural net borrowing to 0.35% of the gross domestic product. This allows Germany to take on more new debt.

Other European Union countries and Brussels have raised concern that their biggest economy should have coordinated with other European Union countries before approving its energy relief plan and have expressed concern that it could distort the bloc's internal market by giving German businesses access to cheaper energy and push up prices in other countries.

New legislation allows consumers to bring class actions in Europe.

New laws in Europe allow EU consumers to bring class actions against traders. The law is a response to help an increasing and large group of consumers suffering harm. The new law will be implemented by 25 December 2022

and apply from June 2023. The EU’s Representative Actions Directive (EU) 2020/1828 is a major overhaul of the European class actions laws, introducing a mechanism for group litigation in all twenty-seven EU member states and a cross-border mechanism.

The new laws distinguish between domestic representative actions, which are brought in one member state, and cross-border representative actions across multiple EU member states. Qualified entities that will bring the representative actions will mostly be consumer organizations, but the rules will vary depending on the type of class action being brought.

The laws will create mechanisms to allow consumers to take collective action against traders in respect of a variety of laws such as laws concerning consumer rights, product liability and product safety, medical devices and medicinal products, and data protection.

Class actions may be funded through third-party funders with an economic interest in the outcome of the proceedings as long as there is no conflict of interest.

As is customary in Europe, the winning party in a representative action will be reimbursed by the losing party for its costs (including legal fees). The purpose of this rule is to discourage frivolous lawsuits. Individual consumers won’t be ordered to pay any costs, except in rare circumstances, if they are found to have deliberately or negligently increased costs. This means in practice that consumers will be at a very low risk of loss by participating in representative actions.

The EU did not adopt an approach comparable to the U.S. class action system, which means recovery in the EU is limited to actual loss and does not include punitive damages. The actions will mostly be brought by the respective consumer organization on an opt-in basis, but companies will be exposed to an increased risk of litigation in the EU. Particularly, the ability to collect claims across the EU and bringing large collections of smaller claims is an immense new threat for companies in the EU.

Susanne Leone is one of the founders of Leone Zhgun, based in Miami, Florida. She concentrates her practice on national and international business start-ups, enterprises, and individuals engaged in cross-border international business transactions or investments in various sectors. Ms. Leone is licensed to practice law in Germany and in Florida.

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“Farewell to Summer” Happy Hour 11 October 2022 • Miami, Florida

The Florida Bar International Law Section, The Florida Bar Young Lawyers Division, and Young MIAS hosted young professionals and law students at Ch'i on Brickell City Center for a Happy Hour to say “Farewell!” to Summer 2022. The event was sponsored by TransPerfect Legal Solutions, JAMS, and MDO Partners.



Jackie Villalba, Laura Reich, Cristina Vicens, and Ana Barton



Jennifer Mosquera with law students from the University of Miami School of Law



The “Farewell to Summer” Happy Hour offers a time to kick back and relax with colleagues.



Davide Macelloni, Omar Ibrahem, and Matt Akiba



Sherman Humphrey, Cristina Vicens, and Ana Barton



Jackie Villalba, Veronique Malebranche, Iris Elijah, and Yasemin Ding (2022 LL.M., University of Miami School of Law)

ILS Annual Orlando Luncheon 17 November 2022 • Citrus Club, Orlando

The International Law Section's Annual Orlando Luncheon is a chance for ILS members and international law practitioners in Central and North Florida to get together in their own area of the state—and it's a chance for lawyers based in South Florida to take a short trip to visit with them! Sometimes we have a speaker, but not this year. This year, after introductions from Brock McClane, Jackie Villalba, and Penelope Perez-Kelly, we went around the room and had everyone introduce themselves and talk a little bit about what they do. It was a great afternoon!



Ana Barton, Brock McClane, Laura Reich, Penelope Perez-Kelly, Richard Montes de Oca, and Deborah Kallas gather in the foyer of Brennan, Manna, & Diamond.



Networking with a great group of colleagues!



A delicious lunch and a spectacular view!



Brock McClane welcomes everyone to the Orlando luncheon.



Douglas Kelly introduces himself during the meet-and-greet after the luncheon.



ILS Chair Jacqueline Villalba



Penelope Perez-Kelly



James Lavigne greets the luncheon attendees.



Marinely Castillo, Penelope Perez-Kelly, and Donna Draves

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ILS Holiday Party

15 December 2022 • Bayshore Club, Miami

ILS members gathered at the Bayshore Club in Miami for a festive outdoor holiday party, generously sponsored by Veritext Legal Solutions. Getting together to celebrate another successful year would be reason enough, but adding to the celebration was a toy drive for Americans for Immigrant Justice. Our members had a great time ... and many underprivileged children had a great Christmas or Hanukkah.



Richard Montes de Oca, Jackie Villalba, Cristina Vicens, and Ana Barton



Bob Becerra, Ana Barton, Cristina Vicens, Jennifer Mosquera, and Richard Montes de Oca



'Tis the season for giving. The ILS holiday party goes collected toys for Americans for Immigrant Justice.



Manuel Gomez and Gary Davidson



Susanne Leone, Wai Lee, Neha Dagley, and Tiffany Comprés



Jeff Hagen, Jamie Finizio Bascombe, Chelsea Thomas-Nunez, Jennifer Mosquera, and Cristina Vicens



Richard Montes de Oca, Sabryna Raymond, Gerard Williams, and Tracey Joseph



Jeff Hagen and Cristina Vicens



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Richard Montes de Oca, Omar Ibrahem, and Davide Macelloni



Jim Meyer, Luis Molina, and Michael Cabanas

Inaugural ILS Fantasy Football League Crowns Champion After Hard-Fought (and Fun!) Season

By Jeff Hagen, Commissioner, ILS Fantasy Football League

Congratulations to Daniel Coyle of Sequor Law in Miami, Florida, for becoming the first ever champion of the ILS Fantasy Football League! Mr. Coyle is the recipient of a handsome championship trophy, which he will have the pleasure of holding for one year, until the next champion is crowned.



Daniel Coyle,
League Champion

Fantasy football allows friends and colleagues an opportunity for networking and bragging rights, and the league was a resounding success. The league was formed in August, with sixteen teams hailing from both inside the state of Florida and in international destinations. Below is the full list of participants and their team names:

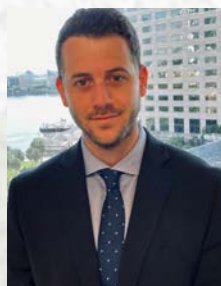
- Jacqueline Villalba (Lawyered Up)
- Richard Montes de Oca (Richard's Big Dogs)
- Ana Barton (Ana's Rookie Season)
- Cristina Vicens (DakStreet Boys)
- Laura Reich (Laura's Best Try)
- James Meyer (The Offshore Office)
- Clarissa Rodriguez (Clarissa's Crazy Team)
- Jeff Hagen (Luxury Tax Legends), League Commissioner
- Daniel Coyle (What Can Brown Do 4 U?)
- Marycarmen Soto (MC Hamler Time)
- Jorge de Hoyos Walther (Amicus Curiae)
- Mel Schwing (Battlin' Barristers)
- Omar Ibrahim (Aaron's Ayahuasca Trip)
- Sherman Humphrey (Sherman's Sunday Saints)
- Juan Carlos Freire (Juan's Sentinels)
- Juan Mendoza (Tua's Revenge)

Several big matchups turned the tide of the season for particular teams:

- **Week 3:** ILS Chair Jacqueline Villalba, a.k.a. Lawyered Up, defeated Richard's Big Dogs, a.k.a. ILS Chair-Elect Richard Montes de Oca, 112 to 81 behind quarterback Joe Burrow. Lawyered Up would end up with a bye, in part to due to this victory over her ILS successor!

- **Week 6:** Luxury Tax Legends succumbed to the superior DakStreet Boys, 107 to 101. Wide receiver Brandon Aiyuk contributed twenty-four points for DakStreet Boys, and ultimately this victory thwarted the league commissioner's chance at a bye, and he lost once again to DakStreet Boys in the playoffs!
- **Week 13:** What Can Brown Do 4 U? defeated Amicus Curiae in a high-scoring affair, 145-127 behind his two namesake wide receivers, A.J. Brown (27 points) and Amon-Ra St. Brown (29 points). This result effectively eliminated Amicus Curiae from playoff contention, despite being second in the league in points, and locked What Can Brown DO 4 U? into first place for the regular season, despite finishing with fewer points.
- **Week 16:** DakStreet Boys defeated Lawyered up 121-108, and What Can Brown Do 4 U? defeated Richard's Big Dogs 79-63, robbing us of an ILS chair versus ILS chair-elect final showdown. Cold weather played a factor in these games played during Christmas, as several game locations had wind chills in negative degrees.
- **Week 17:** What Can Brown Do 4 U? defeated DakStreet Boys, 127-72, for a resounding victory. The first place seed won the title!

Now that the first year of the ILS Fantasy Football League has concluded, it is safe to say there will be even more competitive fire among next year's participants. If you would like to join in the fun, please do not hesitate to reach out to me as we re-form the league for round two next summer. Until then, good luck with your draft prep!



Jeff Hagen (Luxury Tax Legends) is the commissioner of the ILS Fantasy Football League and is a partner at Harper Meyer LLP.

Best Practices: Why Finding Your Niche Is Key to Business Development

By Paula Black



One of the most important things that any professional or business owner can do from a marketing and business development perspective is to narrow their focus to a specific niche. Most professionals have been told that this is important. You’ve probably seen plenty of examples of others who have done this. Still, when I have this conversation with professionals—whether it’s part of a group presentation or one-to-one coaching—I get a lot of resistance.

I get it. I know that it can feel scary. But narrowing your focus into a specific niche is one of the most powerful business development strategies, so I want to give you some reassurance that choosing a niche could be very beneficial for your business and your career.

First, I want to share a quick story: One of my longtime coaching clients, Michelle Estlund, has developed a very focused niche, Interpol Defense. A few weeks back, she told me about a great new client she had just begun working with. It turns out that the client had a very specific legal need and he had sent an email blast to a listserv for a

recommendation of an attorney who could help. Every single response from the listserv told him that she was the attorney to speak with—what a powerful endorsement! Not surprisingly, my client was the only attorney he called.

How did this happen? Estlund has spent years building her reputation as the go-to authority in this specific area of law, and it’s allowed her to attract the specific types of clients she likes to work with, attract work that she enjoys doing, and build a thriving legal practice as a result. All because she focused on a niche and made herself into the biggest fish in the pond.

How can you do the same? Start by reflecting on your current clientele and ask yourself the following questions:

- Look back on your last few matters. Which ones were the most enjoyable? Why?
- What aspects of the matters really lit your fire? What, specifically, did you enjoy about the project?
- Are there certain characteristics and “types” of clients you really enjoy working with? Do you like working

Best Practices: Why Finding Your Niche Is Key to Business Development, continued

with business owners? Young parents? Career-minded professionals?

- How do your personal passions, values, and beliefs influence the type of work that you do?
- Do you see any opportunities to tie your passions into the work you do for your clients?

Once you've answered these questions, you can start to build a profile of your ideal client. It's okay if you don't have a lot of experience in your new niche—your marketing is meant to focus on what you *want* and not what you already have. Michelle Estlund built her niche around Interpol Red Notice Defense even though she only had *one* of those cases at the time.

Do your research to ensure proper fit.

You may need to develop more skills or do more research in the area you choose as your niche. You will find that this work will come easily. Why? Because it is work that you're passionate about. When you identify your niche, it becomes much easier to tell people what you do. And it becomes much easier for them to *remember* what you do. You will find that it is much easier to attract referrals when you have a focused niche.

So why doesn't everybody do this? The number-one reason that most people I speak to are reluctant to narrow their focus to a specific niche is because it's scary to think about "losing out" on everything else that doesn't fit the niche. Choosing a niche can sometimes feel like you're drastically limiting your options and limiting your growth. But here's what you need to understand: Choosing a niche doesn't mean you have to say "no" to potential clients who fall outside the niche. If a potential client comes to you and wants to engage your services, even though they're not in your niche, you can still choose to work with them. Choosing a niche is more about focusing your marketing efforts on the clients you want to attract, but that doesn't mean you can't say yes to other opportunities.

For many years, I focused my coaching practice exclusively on lawyers. All my marketing, my advertising, and my business development were focused on lawyers. And lawyers do make up much of my practice, but I still work with many other types of professionals. I work with

marketers, financial professionals, retailers, consultants, other coaches, and more. Choosing my niche did not prevent me from taking other opportunities. But it did help me laser-focus my marketing efforts and build a thriving practice working with clients I love to work with. It was one of the best career decisions I ever made, and it could be one of the best decisions you ever make, too. Don't let fear hold you back—it's time to find your niche!



Paula Black is an author, keynote speaker, and one of the world's leading business development coaches for lawyers. She teaches them how to attract more clients and grow their practices while also creating a life more fulfilling than they ever thought possible. Ms.

Black is a frequent speaker at professional conferences, seminars, and workshops. She helps her audience to dispel the myths that hold them back, find a uniquely personal path to develop business, and break free from the pressure to build a cookie-cutter life.

This article originally appeared on Forbes.com.

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Contact:

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Developments in U.S. Business and Employment-Based Immigration, continued from pg. 11

2022, the term means “a rural area or an area designated by the Secretary of Homeland Security. . . .”¹⁷

It also designated US\$800,000 as the minimum investment amount for infrastructure projects.¹⁸

Another significant change in the law is the *grandfathering* provision. When the program terminated in June 2021, investors with pending cases were left in limbo as their cases could no longer be approved due to the termination of the program. The new law prohibits denial of a petition based on the expiration of the program and directs USCIS to continue allocating immigrant visa numbers to those whose cases were filed before 30 September 2026.

One of the most significant changes in the new law is the ability for investors who are already in the United States to concurrently file applications for adjustment of status with their I-526 petitions.¹⁹ Previously, investors had to wait for their I-526 petitions to be approved before applying for their green cards in the United States. Investing funds and filing the petition did not provide any immediate benefit for the investor or their dependent family members. Now, with the concurrent filing provision, investors and their dependent family members can remain in the United States while their petitions are pending. Additionally, they are eligible for general employment authorization as well as travel permission, which will allow them to travel internationally and return to the United States to resume the processing of their applications. Although the estimated processing time for I-526 petitions remains at over fifty-five months, this new change brings much needed stability for investors who wish to remain in the United States while their petitions are processed.²⁰

Among other changes, the new law reserves 32% of the annual EB-5 visa quota for specific types of investment projects. The reserve provision allocates 20% of the quota for foreign nationals who invest in rural areas, 10% for foreign nationals investing in high unemployment areas, and 2% for foreign nationals investing in qualifying infrastructure projects. The new law also requires greater transparency for the EB-5 process by increasing reporting and recordkeeping requirements and subjecting regional centers to regular audits. Moreover, regional centers and investors will also be required to pay additional fees that

will be allocated to the EB-5 Integrity Fund.

In conclusion, while recovery from the negative effects of the pandemic on overall U.S. immigration processing remains extremely slow, implementation of these new laws has created stability and protections for foreign nationals seeking green cards in the United States.



Jacqueline Villalba is a board certified specialist in immigration and nationality law. She is a partner at Harper Meyer LLP and leads the firm’s immigration practice. She represents clients with regard to nonimmigrant visa petitions; extraordinary ability, national interest waiver, and professional worker petitions; labor certifications; family-based immigrant visa petitions; and applications for naturalization. Ms. Villalba is chair of The Florida Bar International Law Section.

Endnotes

- 1 USCIS Stabilization Act, Public Law 116-159 (1 Oct. 2020).
- 2 Emergency Stopgap USCIS Stabilization Act, Public Law 116-159, sec. 4102 (1 Oct. 2020).
- 3 <https://www.uscis.gov/forms/all-forms/how-do-i-request-premium-processing>.
- 4 *Id.*
- 5 *Id.*
- 6 *Id.*
- 7 *Id.*
- 8 *Id.*
- 9 <https://www.govinfo.gov/content/pkg/FR-2022-03-30/xml/FR-2022-03-30.xml#seqnum18227>.
- 10 <https://www.govinfo.gov/content/pkg/FR-2022-03-30/xml/FR-2022-03-30.xml#seqnum18227>.
- 11 <https://www.uscis.gov/newsroom/news-releases/uscis-announces-new-actions-to-reduce-backlogs-expand-premium-processing-and-provide-relief-to-work>.
- 12 <https://www.uscis.gov/newsroom/alerts/uscis-to-implement-premium-processing-for-certain-previously-filed-eb-1-and-eb-2-form-i-140>.
- 13 *Id.*
- 14 <https://www.uscis.gov/newsroom/alerts/uscis-to-implement-next-phase-of-premium-processing-for-certain-previously-filed-eb-1-and-eb-2-form>.
- 15 <https://www.congress.gov/bill/117th-congress/house-bill/2471/text>.
- 16 INA 203(b)(5)(B)(ii).
- 17 INA 203(b)(5)(D)(viii).
- 18 <https://www.congress.gov/bill/117th-congress/house-bill/2471/text>.
- 19 *Id.*
- 20 <https://egov.uscis.gov/processing-times/>.

Basic Primer on Nonimmigrant and Immigrant Visas, continued from page 13

the operations of an enterprise in which the applicant has invested a substantial amount of capital (E-2), or to work in the enterprise as an executive, supervisor, or essentially skilled employee.”²⁰ Countries whose nationals may be accorded nonimmigrant classification under INA § 101(a)(15)(E) pursuant to a qualifying treaty are listed in 9 FAM 402.9-10.

In adjudicating E-1 visa applications, the consular officer must determine whether the:

1. Requisite treaty exists;
2. Individual and/or business possesses the nationality of the treaty country;
3. Activities constitute trade within the meaning of INA § 101(a)(15)(E);
4. Applicant is coming to the United States solely to engage in substantial trade;
5. Trade is principally between the United States and the treaty country of the applicant’s nationality;
6. Applicant, if an employee, is destined to an executive/supervisory position or possesses skills essential to the firm’s operations in the United States; and
7. Applicant intends to depart the United States when the E-1 status terminates.²¹

The qualifying trade for E-1 purposes must constitute a traceable exchange of qualifying commodities such as goods, monies, or services between the United States and a treaty country; the trade must be in existence at the time of the visa application; and the term “trade” includes international banking, insurance, transportation, tourism, and communications.²²

The term “substantial” is intended to describe the continuous flow of the goods or services that are being exchanged between the treaty countries and should involve numerous transactions (volume) over time.²³ Fifty percent of the total volume of the international trade conducted by the treaty trader must be between the United States and the treaty country of the applicant’s nationality.²⁴

For the adjudication of E-2 visa applications, the consular officer must determine whether the:

1. Requisite treaty exists;
2. Individual and/or business possesses the nationality of the treaty country;
3. Applicant has invested or is actively in the process of investing;
4. Enterprise is a real and operating commercial enterprise;
5. Applicant’s investment is substantial;
6. Enterprise is more than a marginal one solely for earning a living;
7. Applicant is in a position to “develop and direct” the enterprise;
8. If petitioning for an employee, the employee is destined to an executive/supervisory position or possesses skills essential to the firm’s operations in the United States; and
9. Applicant intends to depart the United States when the E-2 status terminates.²⁵

For E-2 visa purposes, the investor must establish source, possession, and control of the funds used for the investment. The source of the funds may include capital assets or funds from savings, gifts, inheritance, or contest winnings.²⁶ Investors must place the funds at risk in the hope of generating a financial return, and the investor must be close to the start of actual business operations at the time of the visa application.²⁷ The enterprise for the investment must be a real and active commercial or entrepreneurial undertaking, producing some service or commodity.²⁸ To determine if an applicant’s investment is substantial, consular officers use the proportionality test, which weighs the amount of qualifying funds invested against the cost of the business (fair market value).²⁹

Qualified treaty investors and employees will be allowed a maximum initial stay of two years.³⁰ The applicant’s spouse and minor children are admitted for the same period as the principal applicant.³¹ Requests for extension of stay in, or changes of status to, E-2 classification may be granted in increments of up to two years each.³² There is no limit to the number of extensions an E-2 nonimmigrant may be granted.³³

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Temporary Workers (H-1B)

The H-1B classification applies to an applicant who is coming temporarily to the United States to perform services for a U.S. employer in one of the categories described below:

- Applicants in specialty occupations, which require the attainment of a bachelor's or higher degree in a specific specialty for entry into the position;
- Certain fashion models: H-1B classification may be granted to an applicant who is of distinguished merit and ability (prominence) in the field of fashion modeling;
- Graduates of foreign or U.S. medical schools: A foreign "graduate of a medical school," as defined in INA 101(a)(41), may enter the United States as an H-1B nonimmigrant to perform services as a member of the medical profession; or
- A foreign physician may also be classified as an H-1B nonimmigrant if he/she is coming to the United States primarily to teach or conduct research, or both, at or for a public or nonprofit private educational or research institution or agency.³⁴

The U.S. employer must first file a Labor Condition Application (LCA) with the Department of Labor (DOL), attesting to the following:

- The employer will pay the beneficiary the higher of the wage paid to U.S. workers with similar experience and qualifications or the prevailing wage for the occupational classification in the geographic area of employment;
- The employer will provide working conditions for the applicant-beneficiary that will not adversely affect the working conditions of workers similarly employed; and
- There is no current strike or lockout because of a labor dispute in the occupational classification at the place of employment.³⁵

The employer must file a Form I-129, Petition for a Nonimmigrant Worker, with USCIS to accord status as a temporary worker.³⁶ If the petition is for an extension of stay or change of employer for a person already in H-1B classification, the petition can be filed at any time; however, due to annual cap limitations of 65,000 visas for bachelor's degree holders and an additional 20,000 for master's degree holders, USCIS accepts initial petitions for H-1B



status *only* in March of the calendar year for employment to commence on 1 October of the same year.³⁷ USCIS employs a lottery system for its H-1B random selection process, as the demand for H-1B applications greatly exceeds the annual quotas. For FY2023, USCIS received 483,927 H-1B registrations for the 85,000 available visas.³⁸

Once USCIS approves the petition, the case will be transferred for nonimmigrant processing abroad, if the beneficiary is outside of the United States.³⁹ If the beneficiary is in lawful immigration status, such as in valid student status, USCIS will issue the approval of the change of status petition to take effect on 1 October of the current year.⁴⁰ An H-1B petition for a beneficiary in a specialty occupation may be approved for a period of up to three years but may not exceed the validity period of the LCA.⁴¹ Generally, the maximum period of stay in H-1B status is six years.⁴²

Spouse or Fiancé(e) of U.S. Citizen (and Their Children) (K Visas)

The fiancé(e) K-1 nonimmigrant visa is for the foreign citizen fiancé(e) of a U.S. citizen.⁴³ The K-1 visa permits the

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foreign citizen fiancé(e) to travel to the United States and marry his or her U.S. citizen sponsor within ninety days of arrival.⁴⁴ Eligible children of K-1 visa applicants receive K-2 visas.⁴⁵ The K-1 visa applicant must first be the beneficiary of an approved Form I-129F, Petition for Alien Fiancé(e), approved by USCIS, for issuance of a nonimmigrant visa.⁴⁶ An approved K-1 visa petition is valid for a period of four months from the date of USCIS action.⁴⁷ With the K-1 or K-2 visa, the individual can apply for a single admission at a U.S. port-of-entry within the validity of the visa, which will be a maximum of six months from the date of issuance.⁴⁸ After marrying within ninety days of admission, the K-1 and K-2 visa holders may immediately apply to adjust their status to permanent residence.

The K-3 nonimmigrant visa is for the foreign citizen spouse of a U.S. citizen.⁴⁹ This visa category is intended to shorten the time the foreign citizen and U.S. citizen spouses must be separated by providing the option to obtain a nonimmigrant visa and enter the United States to await approval of the immigrant visa petition. Eligible children of K-3 visa applicants receive K-4 visas. K-3 visa holders are admitted for a two-year period, while K-4 visa holders are admitted for two years or the day before their twenty-first birthday, whichever is earlier.⁵⁰

Intracompany Transferees (L Visas)

L visas are issued to “intracompany transferees” who, within three years preceding the time of their application for admission into the United States, have been employed abroad continuously for one year by a firm, corporation, or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seek to enter the United States temporarily in order to render their services to a branch of the same employer or a parent, affiliate, or subsidiary thereof, in a capacity that is managerial, executive, or involves specialized knowledge.⁵¹

The following are the principal elements considered in evaluating entitlement to L-1 classification:

- The petitioner is the same firm, corporation, or other legal entity, or parent, branch, affiliate, or subsidiary thereof, for whom the beneficiary has been employed abroad;

- The beneficiary is a manager, executive, or an employee having specialized knowledge, and is destined to a managerial or executive position or a position requiring specialized knowledge;
- The petitioner and beneficiary have the requisite employer-employee relationship;
- The petitioner will continue to do business in the United States and at least one other country; and
- The beneficiary meets the requirement of having been employed abroad full-time for one continuous year within the three years preceding the petitioner’s filing of the initial L-1 petition.⁵²

An approved petition for L classification by USCIS is a prerequisite for visa issuance.⁵³ In order to be classifiable under INA § 101(a)(15)(L), the services performed by the applicant abroad, and those to be performed in the United States, must involve either “managerial capacity,” “executive capacity,” or “specialized knowledge.”⁵⁴

For consular officers, factors that will help assess whether the applicant’s position is executive or managerial in nature are the number and job duties of people that will directly or indirectly report to the applicant; whether the applicant’s supervisor is someone high within the company structure; whether the applicant’s day-to-day duties resemble a manager’s or an executive’s (e.g., overseeing the work of others, attending high-level or industry meetings on behalf of the entity, etc.); and/or whether the applicant will have the authority to make significant decisions for the company.⁵⁵

A qualifying organization under INA § 101(a)(15)(L) must, for the duration of the intracompany transferee’s stay in the United States, be doing business as an employer in the United States and in at least one other country.⁵⁶ “Doing business” means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization.⁵⁷

If the L-1 applicant is coming to join a company in the United States that has been doing business through a parent, branch, affiliate, or subsidiary for less than one year, it is considered a new office.⁵⁸ A petitioner who seeks L status for a manager or executive coming to open or be employed in a new office must submit evidence that:

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- Sufficient physical premises to house the new office have been secured;
- The beneficiary was employed for one continuous year in the three-year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involves executive or managerial authority over the new operation; and
- The intended U.S. operation, within one year of approval of the petition, will support an executive or managerial position.⁵⁹

The admission period for any applicant under INA § 101(a)(15)(L) may not exceed three years unless an extension of stay is granted.⁶⁰ For new office petitions, USCIS will approve a petition for a qualified employee of a new office for a period not to exceed one year.⁶¹ The maximum allowable period of stay for an applicant employed in a managerial or executive capacity may not exceed seven years.⁶²

The spouse and children of an L-1 nonimmigrant who are accompanying or following to join the principal applicant in the United States are entitled to L-2 classification and are subject to the same visa validity, period of admission, and limitation of stay as the L-1 applicant.⁶³ L-2 spouses are authorized employment incident to status.⁶⁴

Extraordinary Ability (O Visas)

The O-1 nonimmigrant visa is for an individual who possesses extraordinary ability in the sciences, arts, education, business, or athletics, or who has a demonstrated record of extraordinary achievement in the motion picture or television industry and has been recognized nationally or internationally for those achievements.⁶⁵ An O-1 visa applicant must be the beneficiary of a petition approved by the Department of Homeland Security (DHS) prior to visa issuance.⁶⁶

“Extraordinary ability” in science, education, business, or athletics is defined as “a level of expertise indicating that the person is one of the small percentage who has arisen to the very top of the field of endeavor.”⁶⁷ Extraordinary ability in the arts requires the petition to establish that “a person described as prominent is renowned, leading, or well-known in the field of arts.”⁶⁸ “Extraordinary achievement”

in the motion picture and television industry means a very high level of accomplishment and requires the applicant be “outstanding, notable, or leading” in the motion picture or television field.⁶⁹

The supporting documentation for an O-1 petition must include evidence that the beneficiary has received a major internationally recognized award (such as the Nobel Prize) or at least three of the following forms of evidence:

- Documentation of the beneficiary’s receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
- Documentation of the beneficiary’s membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
- Published material in professional or major trade publications or major media about the beneficiary, relating to the beneficiary’s work in the field for which classification is sought, which must include the title, date, and author of such published material, and any necessary translation;
- Evidence of the beneficiary’s participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization for which classification is sought;
- Evidence of the beneficiary’s original scientific, scholarly, or business-related contributions of major significance in the field;
- Evidence of the beneficiary’s authorship of scholarly articles in the field, in professional journals, or other major media;
- Evidence that the beneficiary has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation; or
- Evidence that the beneficiary has either commanded a high salary or will command a high salary or other remuneration for services, as evidenced by contracts or other reliable evidence.⁷⁰

The O-2 visa category applies to a noncitizen who is coming temporarily to the United States solely to assist in the artistic or athletic performance of an O-1 nonimmigrant.⁷¹ An O-2 must be petitioned for in conjunction with the

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services of the O-1 to whom the petitioner provides support and is not entitled to work separate and apart from the O-1. To qualify for O-2 status, the applicant must be an integral part of the actual performances or events and possess critical skills and experience with the O-1 that are not of a general nature, and which are not possessed by others.⁷² The O-3 category applies to the spouse and children who are accompanying or following to join a noncitizen classified as O-1 or O-2.⁷³

An approved petition for a beneficiary classified for O-1, O-2, and O-3 classification will be valid for a period determined by USCIS to be necessary to accomplish the event or activity, not to exceed three years.⁷⁴ Noncitizens in O-3 status are generally not authorized to accept employment.

Waivers in Nonimmigrant Visas

For nonimmigrants subject to certain grounds of inadmissibility, there exists a nonimmigrant waiver available under section 212(d)(3)(A) of the Immigration and Nationality Act. The Department of State has exclusive jurisdiction to recommend waiver for approval to the Department of Homeland Security (DHS).⁷⁵ The waiver cannot cure ineligibility under INA § 214(b) (visa refusals as intending immigrant); ineligibility under INA §§ 212(a)(3)(A)(i)(I), INA 212(a)(3)(A)(ii), INA 212(a)(3)(A)(iii), INA § 212(a)(3)(C), INA 212(a)(3)(E)(i), or INA § 212(a)(3)(E)(ii) (security and Nazi grounds); or ineligibility under INA § 212(a)(7)(B) (documentary requirements).⁷⁶

The consular officer must consider the following factors, among others, when deciding whether to recommend a waiver:

- The recency and seriousness of the activity or condition causing the applicant's ineligibility;
- The reasons for the proposed travel to the United States;
- The positive or negative effect, if any, of the planned travel on U.S. public interests;
- Whether there is a single, isolated incident or a pattern of misconduct; and
- Evidence of reformation or rehabilitation.⁷⁷

In *Matter of Hranka*, 16 I&N Dec. 491 (BIA 1978), the Board

of Immigration Appeals detailed a list of three factors to consider when adjudicating a 212(d)(3) waiver:

1. The risk of harm to society if the applicant is admitted to the United States;
2. The seriousness of the applicant's prior immigration law or criminal law violations, if any; and
3. The nature of the applicant's reasons for wishing to enter the United States.⁷⁸

If the consular officer determines that an applicant meets the criteria for a waiver, the officer may recommend a waiver valid for multiple entries for sixty months.

II. Immigrant Visas and Adjustment of Status to Permanent Residence

An immigrant visa is issued to a foreign national who intends to live and work permanently in the United States. In most cases, a relative or an employer sponsors the individual by filing an application with U.S. Citizenship and Immigration Services (USCIS).⁷⁹ Certain applicants, such as workers with extraordinary ability, investors, and certain special immigrants, can petition on their own behalf. The application is later forwarded to the appropriate U.S. Consulate or Embassy overseas for continued processing and issuance of the immigrant visa to the intending immigrant.⁸⁰

Family-Based Immigration

To be eligible to apply for an immigrant visa based on family, a foreign citizen must be sponsored by an immediate relative who is at least twenty-one years of age and is either a U.S. citizen or U.S. lawful permanent resident. The applicant must be the beneficiary of a Department of Homeland Security-approved petition and must meet all other requirements for the issuance of an immigrant visa.⁸¹ The Immigration and Nationality Act (INA) sets an annual minimum family-sponsored preference limit of 226,000.⁸²

There are two types of family-based immigrant visas, immediate relative and family preference.

Immediate relative visas are based on a close family relationship with a U.S. citizen, such as a spouse, child, or parent.⁸³ The number of immigrants in the immediate

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relative categories is not limited each fiscal year.⁸⁴

Family preference includes four categories:

- First preference: Unmarried sons and daughters (age twenty-one or older) of U.S. citizens;
- Second preference: Spouses, unmarried children, and unmarried sons and daughters of LPRs:
 - F2A: Spouse and unmarried children of LPRs
 - F2B: Unmarried sons and daughters (age twenty-one or older) of LPRs;
- Third preference: Married sons and daughters of U.S. citizens; and
- Fourth preference: Brothers and sisters of U.S. citizens.⁸⁵

The first preference has an annual cap of 23,400 visas; second preference has an annual cap of 114,200, with the 2A category responsible for 77% of the numbers available; third preference has an annual cap of 23,400; and fourth preference has an annual cap of 65,000.⁸⁶

Upon receipt of an approved petition from USCIS granting a beneficiary immediate relative or family preference status, the National Visa Center (NVC) sends the beneficiary the “Notice of Registration as an Intending Immigrant” letter notifying the beneficiary of receipt of the petition and advising him/her what steps, if any, to take in applying for a visa.⁸⁷ The standard documents that are required for immigrant visa processing in addition to the submission of the DS-260, Online Application for Immigrant Visa and Alien Registration, are birth certificates; court and prison records (if the applicant has ever been convicted of a crime); marriage records (certificates and proof of termination); military records; proof of petitioner’s immigration status and family relationship; passport; police certificates (if the applicant is sixteen years of age or older); adoption documents (if applicable); medical examination; and affidavit of support requirements with supporting documents (if applicable).⁸⁸

After NVC reviews the documents and finds the case documentarily complete, they will schedule the immigrant visa interview when the priority date on the immigrant petition is current and there is visa availability.⁸⁹ As a general rule, an applicant in the United States should apply for a visa at the post in the consular district of the

applicant’s last foreign residence.⁹⁰ That is the only post required to accept the case for processing, although some other post might do so as a matter of discretion.⁹¹

At the immigrant visa interview, it is the consular officer’s duty to check the completeness and legibility of the applicant’s civil documents, to determine the applicant’s eligibility for the benefit sought, and to ensure that the applicant understands the contents of Form DS-260, Online Application for Immigrant Visa and Alien Registration.⁹² An immigrant visa is normally valid for a maximum of six months.⁹³ An intending immigrant must present the immigrant visa at a U.S. port-of-entry prior to the expiration of the immigrant visa.⁹⁴

Applicants whose immigrant visa applications are refused by the consular officer must be given a written explanation detailing the grounds of ineligibility.⁹⁵ If a visa is refused, and the applicant, within one year from the date of refusal, adduces further evidence tending to overcome the ground of ineligibility on which the refusal was based, the case shall be reconsidered.⁹⁶

Self-Petitioning Family-Based Immigration

The most common types of self-petitions in family-based immigration are victims of domestic violence. An applicant is eligible to file for a Violence Against Women Act (VAWA) self-petition if he/she can demonstrate the following eligibility requirements:

- He/she has a qualifying relationship as the spouse, intended spouse, or former spouse of an abusive U.S. citizen or lawful permanent resident if he/she is married to a U.S. citizen or permanent resident abuser or his/her marriage to the abuser was legally terminated by death (U.S. citizen spouses only) or a divorce (for reasons related to the abuse) within the two years prior to filing the petition;
- He/she was subjected to battery or extreme cruelty by the U.S. citizen or lawful permanent resident relative during the qualifying relationship;
- He/she is residing or has resided with the abusive U.S. citizen or lawful permanent resident relative; and
- He/she is a person of good moral character.⁹⁷

A self-petitioning spouse’s eligibility for the self-petition

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requires more than showing a legal marital relationship to a U.S. citizen or LPR. The self-petitioner must also establish that the marriage was entered into in good faith and was not entered into for the purpose of evading immigration laws.⁹⁸ To demonstrate a good faith marriage, self-petitioning spouses must show that at the time of the marriage, they intended to establish a life together with the United States citizen or LPR.

Examples of evidence to demonstrate good faith entry into the marriage may include but are not limited to joint insurance policies, joint property leases, income tax forms, or accounts (for example, bank accounts, utility statements or accounts, and credit cards accounts); birth certificates of children born to the self-petitioner and abusive spouse; police, medical, or court documents providing information about the relationship; affidavits of persons with personal knowledge of the relationship; or any other credible evidence that demonstrates the self-petitioner's intentions for entering into the marriage.⁹⁹

Examples of evidence to demonstrate battery or extreme cruelty occurred include but are not limited to reports and affidavits from police, judges, or other court officials; court records; reports and affidavits from medical personnel; medical records; reports and affidavits from social workers or other social service agency personnel; documentation showing the self-petitioner sought safe haven or services from a domestic violence shelter or other service provider; protection orders; photographs of injuries; psychological evaluations; or any other credible evidence of battery or extreme cruelty.¹⁰⁰

Employment-Based Immigration

Every fiscal year, at least 140,000 employment-based immigrant visas are made available to qualified applicants under the provisions of U.S. immigration law.¹⁰¹

Employment-based immigrant visas are divided into five preference categories.¹⁰² A petition to classify an alien under sections 203(b)(1), 203(b)(2), or 203(b)(3) of the Act must be filed on Form I-140, Petition for Immigrant Worker.¹⁰³

The statute designates the following individuals as "priority workers" who may be entitled to status as employment-

based first preference applicants (28.6% of visas):

1. Individuals with extraordinary ability (similar evidentiary standards to the O-1 classification);
2. Outstanding professors and researchers (are recognized internationally as outstanding in a specific academic area; have three years of experience in teaching or research; and have the required offer of employment); and
3. Certain multinational executives and managers (similar evidentiary standards to the L-1A nonimmigrant executives or managers).¹⁰⁴ None of the first preference priority workers require a labor certification.¹⁰⁵

For second preference categories (28.6% of visas), a U.S. employer may file Form I-140 for classification of an alien under section 203(b)(2) of the Act as an alien who is a member of the profession holding an advanced degree or an alien of exceptional ability in the sciences, arts, or business.¹⁰⁶ "Advanced degree" means any U.S. academic or professional degree or a foreign equivalent degree above that of baccalaureate.¹⁰⁷ "Exceptional ability" in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.¹⁰⁸ Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor.¹⁰⁹ The requirement of a job offer, and thus of a labor certification, for aliens of exceptional ability in the sciences, arts, or business may be waived if the exemption would be in the national interest.¹¹⁰ To apply for the exemption, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, as well as evidence to support the claim that such exemption would be in the national interest.¹¹¹

For third preference categories (28.6% of visas), a U.S. employer may file Form I-140 for classification of an alien under section 203(b)(3) as a skilled worker, professional, or other (unskilled) worker.¹¹² The definitions are as follows:

"Other worker" is defined as a qualified alien who is capable, at the time of petitioning for this classification, of performing unskilled labor (requiring less than two years' training or experience), for which qualified workers are not

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available in the United States.

“Professional” is defined as a qualified alien who holds at least a U.S. baccalaureate degree or a foreign equivalent degree and who is a member of the profession.

“Skilled worker” is defined as an alien who is capable, at the time of petitioning for this classification, of performing skilled labor (requiring at least two years’ training or experience), for which qualified workers are not available in the United States.¹¹³

Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor.¹¹⁴

A fourth preference applicant (7.1% of the visas) must be the beneficiary of an approved Petition for Amerasian, Widow(er), or Special Immigrant, Form I-360, except for certain employees or former employees of the U.S. government abroad.¹¹⁵ A labor certification is not required for any of the certain special immigrant subgroups.

An applicant investor may qualify as an employment-creation immigrant and may be entitled to employment-based fifth preference status (7.1% of visas) if the:

1. Applicant seeks to enter the United States to create a new commercial enterprise;¹¹⁶
2. Commercial enterprise was established by the applicant;
3. Applicant made the investment after 29 November 1990;
4. Capital invested is at least US\$1.8 million for petitions filed on or after 21 November 2019 (or US\$900,000 in targeted employment areas)¹¹⁷; and
5. Enterprise benefits the U.S. economy and creates full-time employment for not fewer than ten U.S. citizens or noncitizens authorized to be employed in the United States (excluding the investor and the investor’s spouse or children).¹¹⁸

For petitions filed before 21 November 2019, the investment amounts were US\$1 million and US\$500,000 respectively.¹¹⁹ A “targeted employment area” is an area that, at the time of investment, is a rural area or is

designated as an area that has experienced unemployment of at least 150% of the national average rate.¹²⁰ Investors are not subject to the labor certification requirements of INA § 212(a)(5)(A).¹²¹

The immigrant visa process for employment-based cases is similar to the family-based visa process. The immigrant visa interview will not be scheduled until the priority date of the approved petition (I-140 or I-360) is current and there is visa availability.¹²² One distinction from the family-based immigrant process is that the affidavit of support requirement does not apply to employment-based visa cases, including special immigrant visas, other than those involving a relative who is a U.S. citizen or lawful permanent resident and has a 5% or greater ownership interest in the petitioning entity.¹²³ Another distinction is that in cases involving labor certifications, the consular officer must determine at the time of the interview that the applicant has the professional or occupational qualifications on which certification is based.¹²⁴

Adjustment of Status to Lawful Permanent Residence

Section 245(a) of the Immigration and Nationality Act states:

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.¹²⁵

Admission is defined as the “lawful entry of the alien into the United States after inspection and authorization by an Immigration Officer.”¹²⁶ For most applicants to adjust status via the filing of Form I-485, they must be lawfully in the United States at the time of filing.¹²⁷ The exceptions to this rule are immediate relatives, battered spouses and children, 245(i) applicants, certain special immigrants (religious

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workers, special immigrant juveniles, among others), and applicants for employment-based adjustment pursuant to section 245(k).¹²⁸ They can be in unlawful immigration status at the time of filing and still qualify to apply for adjustment of status in the United States.¹²⁹

An approved I-130/I-140/I-360 petition is required prior to approval of the adjustment of status application with USCIS. A visa number must also be immediately available at the time of filing.¹³⁰ To determine if a visa number is immediately available, USCIS relies on the monthly Visa Bulletin for the month in which the application is filed.¹³¹ The visa number must also be available on the date the adjustment of status application is approved.¹³²

The following categories of applicants are barred from seeking adjustment of status:

- Crewmen (the bar does not apply to VAWA-based applicants);
- Noncitizen admitted in transit without a visa;
- Visa Waiver Program entrants (the bar does not apply to those seeking to adjust status as an immediate relative of a U.S. citizen or VAWA-based applicants);
- Noncitizen admitted as an S nonimmigrant, unless the state or federal law enforcement agency requests an exception to the Department of Justice (the bar does not apply to VAWA-based applicants);
- Noncitizen removable for engagement in terrorist activity;
- Nonimmigrant admitted as the fiancé(e) of a U.S. citizen cannot adjust status except on the basis of marriage to the U.S. citizen who filed a Petition for Alien Fiancé(e); and
- Conditional permanent residents are generally ineligible to adjust status on a new basis under the provisions of INA § 245(a) unless USCIS terminates their conditional permanent resident status.¹³³

Conclusion

Evident from this article is that the practice of immigration law in the areas of nonimmigrant and immigrant visas is complex and involves knowledge of various statutes, regulations, policy manuals, case law, administrative decisions, and formal memoranda. Practitioners must be

cognizant of the legal intricacies involved in each particular client's immigration process in order to properly advise, counsel, and guide the client through the various legal pathways. The practice of immigration law requires more than just a formal understanding of the law; it also requires knowledge of current formal procedures and policy interpretations.



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Endnotes

- 1 9 FAM 401.1-2(b).
- 2 *Id.* at 401.1-3(A).
- 3 *Id.* at 401.1-2.
- 4 *Id.*
- 5 8 U.S.C. § 1182(a)(2)(A)-(H).
- 6 *Id.* at (a)(6)(A)(i).
- 7 *Id.* at (a)(6)(C).
- 8 *Id.* at (a)(9)(A).
- 9 *Id.* at § 1184(b).
- 10 9 FAM 302.1-2(B)(2).
- 11 9 FAM 402.2-2(D).
- 12 *Id.* at 402.2(B).
- 13 *Id.* at 402.2-2(C)(b).
- 14 *Id.* at 402.2-2(E)(b).
- 15 *Id.* at 402.2-5(B)(a)(1-6).
- 16 *Id.* at 402.2-4(A)(1-7).
- 17 8 C.F.R. § 214.2(b)(1).
- 18 *Id.* at (b)(2).
- 19 9 FAM 402.9-2.
- 20 *Id.*
- 21 *Id.* at 402.9-5(A)(a)(1-7).
- 22 *Id.* at 402.9-5(B).
- 23 *Id.* at (C).
- 24 *Id.* at (D).
- 25 *Id.* at 402.9-6(A)(a).
- 26 *Id.* at 402.9-6(B)(b).
- 27 *Id.* at (c) and (d).
- 28 *Id.* at (C).

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- 29 *Id.* at 402.9-6(D)(c).
 30 8 C.F.R. § 214.2(e)(19)(i).
 31 *Id.* at (19)(ii).
 32 *Id.* at (20).
 33 *Id.*
 34 9 FAM 402.10-4(B).
 35 20 C.F.R. §§ 655.700(b)(1); (d)(4).
 36 8 C.F.R. § 214.2(h)(2)(i)(A).
 37 9 FAM 402.10(7)(B).
 38 U.S. Citizenship and Immigration Services, “H-1B Electronic Registration Process” <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process> (last updated 25 Apr. 2022).
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 57 *Id.* at (b).
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 98 *See* INA § 204(a)(1)(A)(iii)(I).
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 117 *Id.* at 6(f).
 118 *Id.* at (g)(1).
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 129 *Id.*
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Options for Processing Employment-Based Immigrant Visas, continued from page 15

If the Visa Bulletin shows that a prospective immigrant’s priority date is current and there is an immediately available immigrant visa available, the prospective immigrant may then apply for an immigrant visa through consular processing or adjust their status with USCIS. Priority dates are current when the dates for filing employment-based visa applications published in the DOS’s monthly Visa Bulletin (Table 2) are earlier than the final action dates (often referred to as cutoff dates) published in the DOS’s monthly Visa Bulletin (Table 1).¹²

Table 1. Final Action Dates for Employment-Based Preference Cases

Employment-based	All Chargeability Areas Except Those Listed	CHINA-mainland born	EL SALVADOR GUATEMALA HONDURAS	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C	C
2nd	C	08JUN19	C	01APR12	C	C
3rd	C	15JUN18	C	01APR12	C	C
Other Workers	01JUN20	01DEC12	01JUN20	01APR12	01JUN20	01JUN20
4th	C	C	15MAR18	C	15SEP20	C
Certain Religious Workers	C	C	15MAR18	C	15SEP20	C
5th Unreserved (including C5, T5, I5, R5)	C	22MAR15	C	08NOV19	C	C
5th Set Aside: Rural (20%)	C	C	C	C	C	C
5th Set Aside: High Unemployment (10%)	C	C	C	C	C	C
5th Set Aside: Infrastructure (2%)	C	C	C	C	C	C

Table 2. Dates for Filing of Employment-Based Visa Applications

Employment-based	All Chargeability Areas Except Those Listed	CHINA-mainland born	EL SALVADOR GUATEMALA HONDURAS	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C	C
2nd	C	08JUN19	C	01APR12	C	C
3rd	C	15JUN18	C	01APR12	C	C
Other Workers	01JUN20	01DEC12	01JUN20	01APR12	01JUN20	01JUN20
4th	C	C	15MAR18	C	15SEP20	C
Certain Religious Workers	C	C	15MAR18	C	15SEP20	C
5th Unreserved (including C5, T5, I5, R5)	C	22MAR15	C	08NOV19	C	C
5th Set Aside: Rural (20%)	C	C	C	C	C	C
5th Set Aside: High Unemployment (10%)	C	C	C	C	C	C
5th Set Aside: Infrastructure (2%)	C	C	C	C	C	C

Please note that these charts are for illustrative purposes only. Any questions regarding a final action date for a specific month should be confirmed by consulting an official copy of the Visa Bulletin published by the DOS.

Electing Adjustment of Status Over Consular Processing

Choosing between consular processing and adjustment of status is not a “one size fits all” approach. In addition to the immediate availability of a visa number, there are many factors that prospective immigrants should consider before making their decision to pursue LPR status either with USCIS through adjustment of status or at a consulate abroad through consular processing. If eligible, electing adjustment of status over consular processing may present the following benefits for prospective immigrants and/or their employers:

- Concurrent filing:** In addition to allowing the principal applicant to file Stage 1 and Stage 2 while remaining in the United States, this filing provides the applicant with the added benefit of being able to apply for employment authorization and advance parole earlier than if the applicant waited for the approval of Stage 1 before filing Stage 2. Consequentially, for an applicant whose priority date is current but who may be subject to visa retrogression, concurrent filing may allow the applicant to legally remain and work in the United States, and to freely travel in and out.
- Employment authorization:** Principal applicants (and dependent family members) applying to adjust may apply for an employment authorization (EAD) based on the pending adjustment of status application. An EAD is generally issued in one-year increments, and USCIS can, in its discretion, extended if necessary. An approved EAD authorizes the applicant (and their dependent family members) to work for *any* employer. There is no employment authorization through consular processing, and therefore an employer would have to wait for the applicant’s green card approval abroad.
- Advance parole:** Principal applicants (and dependent family members) applying to adjust status may apply for advance parole, a travel document that does not require an underlying visa. Advance parole is issued in one-year increments.
- Status violation forgiveness through INA Section 245(k):** Because consular processing requires leaving and reentering the United States, it can raise issues of admissibility. If the applicant has overstayed the authorized period of admission as reflected on the

Options for Processing Employment-Based Immigrant Visas, continued



applicant's Form I-94, this may bar the applicant from entering the United States for three or ten years. Through adjustment of status, however, since the applicant does not need to depart and reenter the United States, adjusting status within the United States may help avoid certain admissibility issues through INA Section 245(k). The exceptions in INA Section 245(k) permit EB-1, EB-2, and EB-3 applicants (as well as their dependent family members) to obtain approval of the adjustment of status to permanent residence, even if the applicant has been out of status, worked without authorization, or otherwise violated the terms and conditions of the admission if the aggregate period of such violations does not exceed 180 days.

- **Interview waiver:** In recent efforts to reduce the visa backlog, USCIS has waived and continues to waive the requirement for an interview in the clear majority of employment-based adjustment applications. Consular processing, however, always requires an interview by a consular officer with no exceptions. Interviews are set at the consulate's discretion, and as the consular processing backlog shows, it could be several months before the department schedules an interview.
- **Right to counsel:** If USCIS schedules an adjustment of status interview, an applicant has the right to bring immigration counsel to the interview. This is not the case under consular processing, as many consulates do not allow counsel to be present at the interview.
- **Portability:** Adjustment of status applicants whose applications have been pending for 180 days or more can change employers, as long as the new job is in the "same

or similar occupational classification" as reflected in the original labor certification and/or on the applicant's Form I-140. This advantage is not available through consular processing and if the applicant has changed employers by the time the DOS schedules the interview, the DOS will deny the application.

Solving the Consular Conundrum

For U.S. employers and foreign nationals, recent trends in immigrant visa processing show that the decision of how to proceed with Stage 2, with either USCIS through adjustment of status or the Department of State through consular processing, will impact the speed at which a foreign worker can begin working in the United States. USCIS and the DOS Bureau of Consular Affairs immigrant visa processing trends should be a primary consideration for U.S. employers seeking to employ foreign nationals with minimal delay to entry and work authorization. Simply by reviewing the advantages of adjustment of status described in the bullet points above in conjunction with the significant immigrant visa backlog facing prospective immigrants and USCIS's pro-employment-based visa processing policies, it is abundantly clear that processing through adjustment of status best serves employers, if such processing is available to the foreign national. While in the past, both adjustment of status and consular processing have generally been viable pathways to the approval of employment-based immigrant visas, based on the above, the perceived "conundrum" is not really one at all when adjustment of status is an option.

Options for Processing Employment-Based Immigrant Visas, continued



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Please note that the opinions of the authors in this article are based on their experience in practice, but every client's situation is different. Therefore, these suggestions should not be taken as official legal advice; rather, should you or

your client have questions pertaining to consular processing and adjustment of status, please reach out directly to the authors for official clarification.

Endnotes

- 1 <https://travel.state.gov/content/travel/en/News/visas-news/update-on-worldwide-visa-operations.html>.
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While it may be true that nothing is entirely unhackable, a decent VPN connection is about as secure as it gets.⁸ Also, giving workers remote access through a VPN allows the company to maintain data on its U.S.-based server, either on site or in a cloud.

The ability to centralize and control company data is one reason many businesses already use VPN connections even for their U.S. employees. Just be aware that certain countries may prohibit or restrict the use of VPNs,⁹ including China, Russia, Belarus, United Arab Emirates, North Korea, Iraq, and other authoritarian regimes.¹⁰ Russia and Belarus are particularly noteworthy since both are offshoring hotspots for software programmers and developers.¹¹

According to a report prepared for Congress, experts are at odds as to how offshoring might impact national security and consumer privacy.¹² Most likely, the risk analysis should be done on a country-by-country and industry-by-industry

basis. Legislators are constantly considering bills for new laws and regulations, and we may see new legislation as the picture becomes clearer . . . or we may not.^{13 14}

While it may seem intuitively correct that crossing borders with sensitive information would increase the threat of security breaches, that threat always exists anyway. In response, ICTs are constantly developing new security measures, such as two-step verification and biometric authentication. Ultimately, ICT developers are in the best position to combat the quickly evolving security risks, and they have a clear business interest in doing so. Even the White House, through the Executive Order on Improving the Nation's Cybersecurity, has recognized the important role of the private sector in "the prevention, detection, assessment, and remediation of cyber incidents."¹⁵

Post pandemic. Some of the traditional challenges of offshoring services have been addressed through ICTs, as well as changing mindsets, due in large part to the

Offshoring U.S. Services After the Pandemic, continued

pandemic.¹⁶ As a result, U.S. businesses that were forced to gear up and accept the idea of employees working from home may now find themselves in a position to take the next logical step, which is to consider offshoring. Certainly, the incentive to do so is palpable.

Foreign skilled labor is available for a fraction of the cost of hiring comparable U.S. workers. And since many countries have higher rates of unemployment than that generally enjoyed by the United States,¹⁷ there is a large pool of well-educated foreign workers anxiously awaiting a chance to ply their trades. That availability of talent gives employers the flexibility to scale up or down as desired. Moreover, since many foreign workers are unaccustomed to such opportunities, they may value the job and demonstrate a high level of commitment. If nothing else, having the company's talent offshore would seem to make it harder for competitors to poach.

Immigration Implications

Intuitively, there should be an inverse relationship between offshoring services and business immigration. The more U.S. employers hire skilled workers to provide services remotely, the less the need for employment-based visas.

As of 2020, when the pandemic hit the U.S. market, immigrants accounted for a sizable portion of the skilled workforce: 29% of STEM workers and 52% of doctorate holders.¹⁸ As a practical matter, it may be all but impossible to determine with any accuracy the impact of offshoring on U.S. immigration due to the number of complex factors involved. For example, some of the more popular visa categories, such as the H-1B and EB-2, are subject to quotas. So, as long as the quota is met, there will be no change in the number of visas issued—at least no change directly attributable to offshoring.

That said, it would make sense to see an increase in the number of B-1 visa applications since that is the type of visa that would allow foreign workers to travel to the United States to attend meetings and receive training. At the moment, however, all immigration numbers are skewed by the backlog that U.S. Citizenship and Immigration Services is under following the pandemic. It may well take years for the data to normalize and become meaningful.

Undoubtedly, the American lifestyle, as well as the prestige of our universities, will continue to draw foreign talent. Still, it does stand to reason that some percentage of foreign skilled workers, given the option, will elect to provide their services remotely rather than emigrate to the United States.

Impact on the U.S. Economy

Experts generally agree that offshoring has a “net zero” effect on U.S. jobs, or even leads to increased employment of U.S. workers.¹⁹ While there is no question U.S. manufacturing jobs have declined, studies demonstrate little or no dip in overall U.S. employment rates.²⁰ One theory behind these findings is that the cost savings obtained through offshoring results in expansion of operations and thereby creates new demand for U.S. workers.²¹ So, while U.S. workers may lose their manufacturing jobs, they tend to be rehired to work in different capacities. Could the same be true for services jobs sent offshore?

On the one hand, it seems somehow understandable that a displaced U.S. worker might be hired to supervise low-skilled workers in a manufacturing or agricultural context. It may not stand to reason that the same would be true for skilled service providers. After all, foreign workers may well be better educated and more qualified than displaced U.S. workers. That is a good problem to have from a business point of view, but might there be a negative effect on the overall U.S. job market?

The prevailing opinion is that, while the concern is certainly valid, the overall benefits gained from offshoring more than compensate for the loss of relatively low-level jobs.²² For one thing, offloading lower-value tasks can lead to greater efficiency and allow company management to focus on core functions. The increased profit and productivity, in turn, tend to create demand for additional supervisory personnel. And previously displaced U.S. workers would seem to be likely candidates for such new, better-compensated positions.

If this model holds, then job opportunities within the United States are not so much “lost” as they are “reallocated.” Without downplaying the anxiety and disappointment felt by displaced U.S. workers, viewed

Offshoring U.S. Services After the Pandemic, continued

from a macro perspective, the practice of offshoring could ultimately be for the betterment of all concerned.

Conclusion

At least for the foreseeable future, there will always be certain limits on a company's ability to offshore services. Professional licenses must be obtained within the jurisdiction where the practice is located. Certain governmental restrictions, such those imposed by Medicare, expressly restrict certain offshore operations.²³ Financial institutions and governmental agencies are similarly restricted by federal regulations. So, the United States is not likely to see an exodus of white-collar jobs anytime soon.

That said, there is good reason to believe we may see an increase in offshoring of support functions in service industries. In this post-pandemic environment, where the use of ICTs has become much more ubiquitous, offshoring services may no longer be limited to call centers, IT development, customer support, and the like. Rather, the next wave may well be for other service-based companies, even professional services, to take advantage of the new paradigm.



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5 12 CFR Part 1016 (Privacy of Consumer Financial Information – Reg. P).

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22 See note 10.

23 See note 2.

U.S. Immigration Laws and the Peril of International Arbitration, continued from page 19

involved in international arbitration proceedings, parties involved in these proceedings seated in the United States should be wary of potential violations of U.S. immigration laws due to unauthorized employment. For now, it is a question for U.S. courts to decide if an international arbitration award may be voidable if someone directly involved in the proceeding was not authorized to work in the United States.



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Endnotes

1 See 9 U.S.C. §§ 1-16; 9 U.S.C. §§ 201-208; 9 U.S.C. §§ 301-307; the Federal Arbitration Act enacted in 1925 provides the basic legal principles applicable to arbitration in the United States; it also encompasses the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, from 1958, and the 1975 Inter-American Convention on International Commercial Arbitration, also known as the Panama Convention.

2 See United Nations Commission on International Trade Law (UNCITRAL), *UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*. As of January 2019, 80 countries including 111 jurisdictions have adopted the UNCITRAL Model Law on International Commercial Arbitration. As explained by the UNCITRAL, the UNCITRAL Model Law "[c]overs all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world."

3 See the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Article V, Section 1 (d) and Section 2 (b).

4 U.S. immigration policy is governed largely by the Immigration and Nationality Act (INA), which was first codified in 1952 and has been amended significantly several times since.

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7 See Immigration and Nationality Act (INA) Section 101(a)(15) (B).



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Obtaining a U.S. Investor Visa With Crypto, continued from page 21

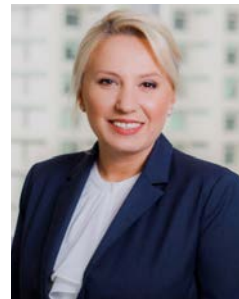
be able to provide evidence that the crypto was initially purchased with money from their personal account, thus proving their ownership of the cryptocurrency, and then document subsequent transactions to transfer the cryptocurrency or other digital assets to the U.S. business.

To satisfy the requirement that funds were not derived from illicit activities and were legally obtained, E-2 applicants and their immigration attorneys must be able to provide evidence that the crypto transaction is legal in the jurisdiction where it was purchased, that the applicant complied with the laws, including the tax code, in the country where the income was derived, and that cryptocurrency is legally considered a capital asset in the United States.

For example, a consular officer might take issue with an E-2 applicant who never declared or paid tax on cryptocurrency gains in their home country, despite being required to do so. To avoid problems and to ensure a client's compliance with home country laws, an immigration practitioner can work with the client to engage the services of a legal professional in the home country of the E-2 applicant.

The United States has not yet developed a clear regulatory framework for cryptocurrency as an asset class; however, the Internal Revenue Services (IRS) classifies digital assets, including cryptocurrency, as property for federal tax purposes and treats cryptocurrency transactions as taxable just like transactions in any other property and capital assets. According to the IRS, digital assets include but are not limited to convertible virtual currency and cryptocurrency, stablecoins, and non-fungible tokens (NFTs).⁴

U.S. immigration laws and regulations do not provide guidance on the legitimacy of cryptocurrency transactions when it comes to applying for U.S. Treaty Investor visas; however, experience shows that persuasive arguments, convincing documentation, and detailed explanation of the underlying transactions can convince the U.S. Consulates that investments of cryptocurrencies in a U.S. business are permitted under the E-2 visa regulations.



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Endnotes

- 1 9 FAM 402.9-6(A).
- 2 9 FAM 402.9-6(B)(b); 8 CFR §214.2(e)(12) (emphasis added).
- 3 *Id.*
- 4 <https://www.irs.gov/businesses/small-businesses-self-employed/virtual-currencies>.



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