WHAT EVERY JOURNALIST SHOULD KNOW ABOUT IMMIGRATION LAW

Nancy B. Elkind, Esq.

Elkind Alterman Harston PC
1860 Blake Street, Suite 420
Denver, Colorado 80202
www.EAHimmigration.com

Phone: (303) 736-6650
Fax: (303) 736-6655
Email: *Nancy.Elkind@EAHimmigration.com*

- ***Please Note**: This outline is intended to give very basic information about the general tenets of immigration policies and procedures. It is by no means a complete analysis of the subject matter, and should not be relied on to make legal or procedural decisions about specific cases. This information is current to January 2011.*

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IMMIGRATION LAW BASICS

I. WHO IS AN IMMIGRANT AND WHO IS A NONIMMIGRANT?

A. An immigrant is an individual who is not a citizen of the United States, and who is coming to the United States to reside permanently. Immigrants, lawful permanent residents (or LPRs), and greencard holders are different terms for the same status.

B. The term "greencard" is a slang expression that designates the Form I-551, which is evidence of permanent residence. Greencards are generally valid for ten years, at which time they must be renewed, but the individual's status as a permanent resident does not expire.

C. There are many ways that an individual can "lose" his or her permanent residence, such as by committing certain crimes; by remaining outside the U.S. for more than one year; by becoming a public charge.

D. An immigrant can work in the U.S., can travel in and out of the country, and has most of the rights and responsibilities of a citizen. However, an immigrant cannot vote, cannot hold certain high security jobs, and is not eligible for certain public benefits.

E. An immigrant can apply for naturalization to U.S. citizenship five years after becoming a permanent resident (or three years if the permanent resident has been married to a U.S. citizen for three years). However, immigrants are not required to apply for citizenship.

F. There is a statutory presumption that all individuals seeking to enter the U.S. are immigrants. Immigration and Nationality Act (INA Section 214(b), 8 U.S.C. § 1184(b). Therefore, most individuals coming to the U.S. who are NOT immigrants must establish nonimmigrant intent to the satisfaction of either a Visa Officer at a U.S. Consulate or an Immigration Inspector at the port of entry.

G. There are only a few ways to become a permanent resident:

1. Through a relative who is a U.S. citizen or permanent resident
2. Through specific skills or employment
3. Through asylum or refugee processing
4. Through an application for cancellation of removal
5. Through an annual visa lottery

H. A nonimmigrant is someone who is coming to the United States for a limited time and a limited purpose. There are more than 25 different kinds of nonimmigrant visas (designated by letters of the alphabet), and anyone who wishes to come to the U.S. for a temporary period must qualify for one of them.

I. Some common nonimmigrant visas are:

1. B-1/B-2: Visitor for business/visitor for pleasure
2. F-1: Student in an academic program
3. H-1B: Temporary worker in a specialty occupation (usually requires a bachelor's degree)
4. H-2A & H-2B: Seasonal Workers
5. L-1: Intracompany transferee
6. TN: Canadian or Mexican professional worker
7. E-1/E-2: Treaty trader/treaty investor
8. R: Religious worker

J. Some visitors are not required to get visas to enter the U.S. under the Visa Waiver Program.

1. These visitors are from countries that have high levels of tourism and business visits to the country, and low incidence of these visitors overstaying the time they are allowed to remain in the country.

2. Persons who enter under the visa waiver program are designated as WT or WB (for tourism or business), and are allowed to remain in the U.S. for 90 days.

3. They are not permitted to extend their stay, and in almost all cases cannot change their status to another visa while they are in the U.S.

4. These individuals have many fewer rights than others who enter with a visa. Most importantly, they can be refused entry into the country or be deported without the benefit of a hearing before an Immigration Judge.

II. EMPLOYING FOREIGN WORKERS AS NONIMMIGRANTS

A. Every employer in the United States must verify that each and every employee is authorized to be employed here. (The obligations of the employer will be discussed below under "Employer Sanctions")

B. Any worker who is not a citizen or permanent resident must have a visa that allows him or her to work, or some other sort of employment authorization.

C. Some students (F-1) and exchange visitors (J-1) can get permission to work either from their school or from the U.S. Citizen and Immigration Services (USCIS, formerly INS). The work is usually not employer specific, but it is for a limited amount of time.

D. **The H-1B Visa**: The H-1B visa is for professionals who are working in the U.S.

1. This is a temporary visa that may be issued initially for three years, and may be extended an additional three years. An individual usually cannot remain in the U.S. for more than six years on an H-1B. There is a statutory limit of 65,000 set for H-1B visas each fiscal year. The H-1B cap does not apply to extensions, or to applications filed by certain educational institutions or non-profit research institutions. An additional 20,000 visas were created by Congress for individuals with advanced degrees from U.S. universities.

2. The visa is applied for by the employer, and is only valid for the specific employment described in the application.

3. The employer must establish the following:

    a. That it is willing and able to pay the prevailing wage for the position described or the actual wage that it pays similarly employed individuals, whichever is higher.

    b. That it has a position available for an individual who is a professional or is in a "specialty occupation." Generally, this is a position that requires at least a bachelor's degree or the equivalent.

    c. That the employer will pay the return fare back to the individual's country of last residence in the event the individual is fired.

    d. The employer must also post a notice that the H-1B application is being filed, and that notice must be posted at the location where the individual will be working.

4. The employer does not need to prove that there is no U.S. worker who can fill the position.

5. The first step in the process is to request a prevailing wage from the state workforce agency.

6. Once the prevailing wage is determined, the employer files a Labor Condition Application with the U.S. Department of Labor, which then acknowledges that the application has been filed properly.

7. The employer next files the petition for the H-1B visa with the USCIS at one of four regional service centers around the U.S. It generally takes four to six months for adjudication. By paying an additional fee of $1225 for premium processing, the petitioner can get a decision in two weeks.

8. In addition to the regular filing fee of $325, most employers must also pay a "training fee" of $1,500 and a "fraud fee" of $500. The training fee must be paid by the employer and cannot be paid by the employee.

9. If the individual is in the U.S. legally at the time the petition for the H-1B visa is filed with the USCIS, his or her status may be changed here, and there is no need to leave the U.S. to get H-1B status.

10. If this is a new H-1B, the individual cannot begin working until the petition is actually approved. If the individual already has an H-1B for a different employer, he or she can begin working for the new employer as soon as the new H application is filed with USCIS.

11. If the individual is outside the country, he or she must take the original approval notice to a U.S. Consulate abroad and apply for the H-1B visa.

12. If the individual is in the U.S. but has remained longer than permitted by the USCIS, it is necessary for him or her to leave the U.S. and apply for a visa at the U.S. Consulate in the individual's home country. Under certain circumstances, an individual who has overstayed may be barred from returning to the U.S. for three or ten years.

13. Spouses of H-1B visa holders cannot work in the U.S., unless they qualify for work visas on their own.

E. **The L-1 Visa:** The L-1 visa permits the transfer of certain workers from companies abroad to affiliated operations in the United States -- those individuals are called intracompany transferees.

1. The L-1A is for individuals who are coming to the U.S. to work in managerial or executive positions.

2. The L-1B is for individuals who have specialized knowledge of the processes and procedures of the employer's business both abroad and in the U.S.

3. The individual must have worked for the operation abroad for one out of the last three years, as a manager, executive or individual with specialized knowledge.

4. The application must establish the "affiliation" between the company abroad and the one in the U.S. This is most commonly a parent/subsidiary relationship, but a "sister" relationship, joint venture or branch office also establishes sufficient affiliation.

5. The company abroad must continue to do business during the entire time that the beneficiary of the L visa is in the U.S., or the U.S. company must have other international operations.

6. The beneficiary of an L-1A may remain in the United States for seven years in that status, while the L-1B is limited to five years.

7. The petition for the L-1 visa is filed with the USCIS Service Center. A person who is in the U.S. legally may have his or her status changed, while someone who is out of status must proceed abroad to apply for a visa at a U.S. Consulate.

F. **The TN Visa:** Some Canadian and Mexican professionals can get TN visas, which were created under the North American Free Trade Agreement.

1. These are limited to individuals whose professions are listed on a Schedule established under the treaty.

2. The applicant merely proves that he or she has a degree in the specific field listed in the Schedule and has a job offer in the U.S.

3. The visa may be applied for and issued at any border post (land or air) between the U.S. and Canada. In Mexico, the TN is applied for at a U.S. Consulate.

4. The TN visa is issued for one to three years at a time, but may be renewed indefinitely.

G. **The E-1 and E-2 Visas:** Citizens of certain countries can work in the U.S. if they are engaged in substantial trade between the U.S. and their home country or have made a substantial investment in a commercial enterprise in the U.S. The individuals can get either an E-1 or E-2 visa.

1. A treaty of Friendship and Commerce or a Bilateral Investment Treaty, or some similar agreement must exist between the U.S. and the person's country of nationality.

2. The E-1 visa is for the owners and employees of a company that is majority owned by nationals of the treaty country and that is engaged in substantial trade between the two countries.

3. The E-2 visa is for investors from a treaty country who have made, or are actively in the process of making, a substantial investment in a commercial enterprise in the U.S. The investment cannot be passive, such as real estate or stocks and bonds.

4. Key employees of the E-2 enterprise may also get E-2 visas.

5. E visas are usually applied for directly at the U.S. Consulate in the applicant's home country. The length of time for which the visa is issued will vary, but it is renewable indefinitely as long as the trade continues or the investment is in place. However, an individual who is in the U.S. legally may also apply for a change of status to E-1 or E-2 through the USCIS.

6. Holders of E-1s and E-2s can only work for the enterprise that qualified them for the visa.

7. The spouses of E-1 and E-2 visa holders can get authorization to work in the U.S.

H. **The H-2 Visas:** These are for workers who are coming to the U.S. temporarily to work primarily in unskilled jobs.

1. H-2A visas are for workers who are performing agricultural labor that is temporary or seasonal in nature.

2. H-2B visas are for workers performing other temporary service or labor.

3. The employer must prove, through labor certification application to the U.S. Department of Labor, that it cannot find U.S. workers to perform the work.

4. If the labor certification application is approved, the employer files a petition with USCIS.

5. If the visa petition is approved, the prospective employee must apply for a visa at a U.S. Consulate abroad.

6. For H-2A workers, employers must provide housing.

7. Employers of H-2A workers must provide employment to any qualified U.S. worker who applies until 50% of the period of work has elapsed.

8. H-2B workers have an annual cap of 66,000; half are used during the first 6 months of the fiscal year, half are used during the second 6 months.

III. OBTAINING PERMANENT RESIDENCE THROUGH A RELATIVE

A. U.S. citizens and permanent residents can sponsor certain relatives for permanent residence.

B. U.S. citizens may apply for parents, spouse, minor children (under 21), adult sons and daughters (both single and married), and brothers and sisters.

C. Permanent residents may apply for spouse, minor children, and unmarried adult sons and daughters.

D. The parents, spouse and minor children of U.S. citizens are called “immediate relatives,” and immigrant visas are always available to them.

E. All other relatives who can be sponsored are categorized as "preference immigrants" and each preference is allocated a certain number of immigrant visas a year. There are 480,000 immigrant visas each year available to these categories. In most categories there are backlogs, and for some countries the backlog is greater than for others. During the "waiting period" the foreign relative has no right to live in the U.S. unless she or he qualifies for some other visa (such as an F-1, H-1, etc.).

F. The U.S. citizen or permanent resident first files a petition with the USCIS to establish the relationship. Once the petition is approved, the foreign relative applies for permanent residence either at a USCIS office in this country or at a U.S. Consulate abroad.

IV. OBTAINING PERMANENT RESIDENCE THROUGH EMPLOYMENT

A. **Permanent Residence Through Labor Certification:** Some foreign workers will want to stay in the U.S. permanently, and therefore must apply for permanent residence. There are 140,000 employment-based visas available each year. The most common way for an employer to help an employee get permanent residence is through the **Labor Certification** process, which is now referred to as PERM.

1. The employer must show to the satisfaction that it cannot find a U.S. worker who is ready, willing and able to fill the position.

2. The employer must agree to pay the prevailing wage, and must mount a recruitment campaign that includes running two advertisements in print, posting the job announcement at the workplace, and announcing the position through the state job service center. For professional positions, three additional types of recruitment must be used.

3. If and when the labor certification is issued, it is only the first of three steps that must be taken to get the employee permanent residence.

4. The second step is the filing of a Visa Petition with USCIS, where the employer shows that it has the labor certification, that the foreign worker meets the minimum requirements, that a real job exists, and that the employer has the ability to pay the wage offered.

5. The final step is the individual's application for permanent residence, which may be done either through the USCIS, or under certain circumstances, at a U.S. Consulate abroad.

6. "Greencards" are given out in various categories, and there are a limited number allocated to each category. Because of these limits, there are often backlogs of several years that employers need to wait before the can get permanent residence.

B. **Other Employment-Related Routes to Permanent Residence:** Labor certification is the most common, but often the most time-consuming method for a foreign worker to get permanent residence. Under some limited circumstances, there are other possible routes to follow:

1. **Multinational Managers and Executives:** Most individuals who qualify for the L-1A visa, can also obtain permanent residence as managers or executives of an employer here that is affiliated with an employer abroad.

2. **Individuals Whose Work is in the National Interest:** An individual with an advanced degree, who can show that his or her work is in the national interest, does not need to get a labor certification.

3. **Outstanding Researchers and Professors:** A person whose research has been recognized internationally as outstanding may be granted permanent residence.

4. **Individuals of Extraordinary Ability**: An individual who can demonstrate extraordinary ability in science, the arts, business or athletics, may be granted permanent residence.

5. **Nurses and Physical Therapists:** There are special rules for Registered Nurses and licensed Physical Therapists that allow them to obtain permanent residence more easily than others.

6. **Ministers and Other Religious Workers:** Ministers of religion, religious professionals and other religious workers can get permanent residence through their work if they are supported by a bona fide religious organization.

7. **Investors:** Investors who are investing $1 million ($500,000 in certain high unemployment areas) in a new enterprise, and creating at least ten new jobs, may be granted permanent residence. Also as part of this EB-5 program, an investment of $500,000 in a Regional Center can lead to a green card.

V. EMPLOYER SANCTIONS

A. Every employer has an obligation to confirm that every employee is authorized to be employed in the U.S.

1. Every employee -- whether U.S. citizen or foreign worker -- must complete a form I-9 within three days of being hired.

2. On the I-9, the employee attests that he or she is authorized to work in the U.S., and the employer verifies that it has seen documents establishing the employee’s work permission.

3. Under the Federal law, the employer is not required to copy documents. However, Colorado law requires an employer to keep copies of I-9 documents.

B. Employer sanctions are now enforced by the U.S. Immigration Control and Enforcement (ICE) within the Department of Homeland Security. ICE can audit I-9s at anytime – with three days notice.

C. Employers that do not complete I-9s, or that complete them incorrectly, or that knowingly hire undocumented workers are subject to fines.

D. The I-9 Inspection process.

1. ICE usually undertakes an inspection of an employer's I-9s either because it is focusing on a particular industry, or because it has received information that undocumented workers are employed.

2. The process can begin by ICE showing up with a notice of inspection at the place of employment, by a full-blown raid, or by written notice being sent to the employer that the inspection will take place on a specific date.

3. The employer is required to bring in I-9s, and a list of past and present employees with Social Security numbers, and hire/termination dates.

VI. UNLAWFUL PRESENCE

A. Any alien who enters the U.S. illegally or who overstays after a legal entry starts to accumulate "unlawful presence."

B. Once a person has 180 days of unlawful presence and leaves the U.S., he or she cannot return legally for three years.

C. Once a person has one year of unlawful presence and leaves the U.S., he or she cannot return legally for 10 years.

D. In most cases, a person who overstays or who entered illegally must depart the U.S. and apply for a visa abroad in order to achieve legal status in the U.S.

E. There is a waiver available for someone who is subject to the three and ten year bar.

1. An application for the waiver must establish that the applicant has a U.S. citizen or permanent resident spouse or parent who would suffer "extreme hardship" if the applicant is not permitted to return to the U.S.

2. Hardship to U.S. citizen children is not a consideration in granting or denying a waiver.

3. On the I-9, the employee attests that he or she is authorized to work in the U.S., and the employer verifies that it has seen documents establishing the employee's work permission.

4. Under the Federal law, the employer is not required to copy documents. However, Colorado law requires an employer to keep copies of I-9 documents.

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VII. ASYLUM AND CANCELLATION OF REMOVAL

A. Asylees and Refugees

1. A refugee is someone who is outside the United States and outside his or her country of nationality who is unwilling or unable to return to his or her home country because of a fear of persecution. A limited number of refugees are allowed to enter the U.S. each year, with the numbers set by the President and Congress.

2. An asylee is in the U.S. and meets the definition of refugee. Asylum may not be granted to an individual who has been "firmly resettled" in a third country.

3. An individual who is in the U.S. (or is attempting to enter the U.S.) and who can establish a well-founded fear of persecution in his or her home country can apply for asylum in the U.S. Except under unusual circumstances, the application must be filed within one year of entry to the U.S.

4. The persecution that is feared must be based on one of five factors:

    a. Race
    b. Religion
    c. Ethnic Group
    d. Social Group
    e. Political Opinion

5. The asylum applicant may apply affirmatively to the USCIS. The application is sent to one of several asylum offices around the country. An interview is then held with a specially trained asylum officer.

6. If the application is granted, the individual is considered an asylee.

    a. Asylees can work in the U.S., and may travel out of the country with a Refugee Travel Document.

    b. Asylees may bring certain relatives to the U.S.: spouses and children, but only where the relationship existed before the asylum was granted.

7. Asylees and refugees can apply for permanent residence one year after that status is granted.

8. If the asylum application is not granted, the case is usually referred to the Immigration Court, and the application can be renewed in Removal Proceedings.

B. **Cancellation of Removal**

1. Certain individuals who are in removal proceedings (formerly known as deportation proceedings) may apply for cancellation of removal before an Immigration Judge. If granted, this process results in the alien obtaining permanent residence in the United States. The applicant must prove:

a. That he or she has been in the U.S. for at least ten years, with only brief absences permitted;

b. That he or she is a person of good moral character, and has been during at least the previous ten years;

c. That he or she has a spouse, child or parent who is a U.S. citizen or permanent resident who would suffer "exceptional and extremely unusual hardship" if the applicant were deported.

VIII. OTHER ROUTES TO PERMANENT RESIDENCE

A. **Registry:** Anyone who has been in the U.S. since 1972 can apply for creation of a record of permanent residence, and thus be granted an immigrant visa.

B. **Battered Spouses and Children:** Under the Violence Against Women Act (VAWA), the spouse and children of U.S. citizens and permanent residents who can establish that they have been emotionally or physically abused, may apply for permanent residence. The Act also has provisions for applying for cancellation of removal after three years instead of ten years.

C. **Diversity Lottery:** Fifty-five thousand immigrant visas are available each year to the winners of a lottery. The lottery is limited to certain countries from which we have had relatively low immigration during the previous five years. Winners must show that they will not become public charges, and that they have at least a high school education or work in a job that requires at least two years of training.

IX. REMOVAL OF IMMIGRANTS

A. An Alien may be removed from the United States, through a removal proceeding, for a broad range of reasons. Removal proceedings replace what were previously known a deportation and exclusion proceedings.

B. An alien is removable for entering the U.S. without inspection or for not maintaining nonimmigrant status.

1. Any alien who remains in the U.S. after the expiration of his or her permission to be here for more than 180 days after April 1, 1997, and then departs the U.S., must remain outside the country for three years.

2. The bar to re-entry increases to ten years if the person remains illegally for one year after April 1, 1997.

C. An alien is removable for becoming a public charge.

D. The most common and most complicated grounds for removal are those based on a criminal conviction, which may make an alien inadmissible and/or removable.

1. Any alien convicted of, or who admits having committed, a crime of moral turpitude is inadmissible.

2. Any alien convicted of a violation of any state, U.S., or foreign regulation of controlled substances, is a trafficker in a controlled substance, is inadmissible.

3. Any alien convicted of two or more offenses for which the aggregate sentence actually imposed is five years or more, is inadmissible.

4. Any alien who has engaged in prostitution or commercialized vice, is inadmissible.

5. Any alien who is convicted of a domestic violence crime is removable.

6. Any alien who was convicted of an “aggravated felony” anytime after admission to the U.S. may be removed.

a. In immigration law, the terms “misdemeanor” and “felony” as they are commonly used have no meaning.

b. Many types of criminal offenses have been labeled aggravated felonies, including: murder, rape, sexual abuse of a minor; illicit trafficking in controlled substance; firearms/explosive violations; money laundering; any domestic violence charge; most crimes of violence; theft or burglary; child pornography; RICO and gambling offenses; fraud; alien smuggling; counterfeiting; failure to appear for sentencing; bribery; obstruction of justice; high speed flight from an immigration checkpoint; drug abusers or addicts; false claims to U.S. citizenship; security and related grounds.

c. A conviction of any of these and several other offenses may bar a person from the U.S., even if he or she has U.S. citizen spouse and children.

X. NATURALIZATION

A. Certain permanent residents may apply for U.S. citizenship. The basic requirements are:

1. Permanent resident for five years, or three years if the applicant is married to a U.S. citizen;

2. Physically present in the U.S. for at least half of the five years or three years, respectively, with no absences of more than twelve months. Absences of six months or more may raise a rebuttable presumption that the individual has lost permanent residence.

3. Good moral character for at least the five years prior to application (three years for spouses of U.S. citizens).

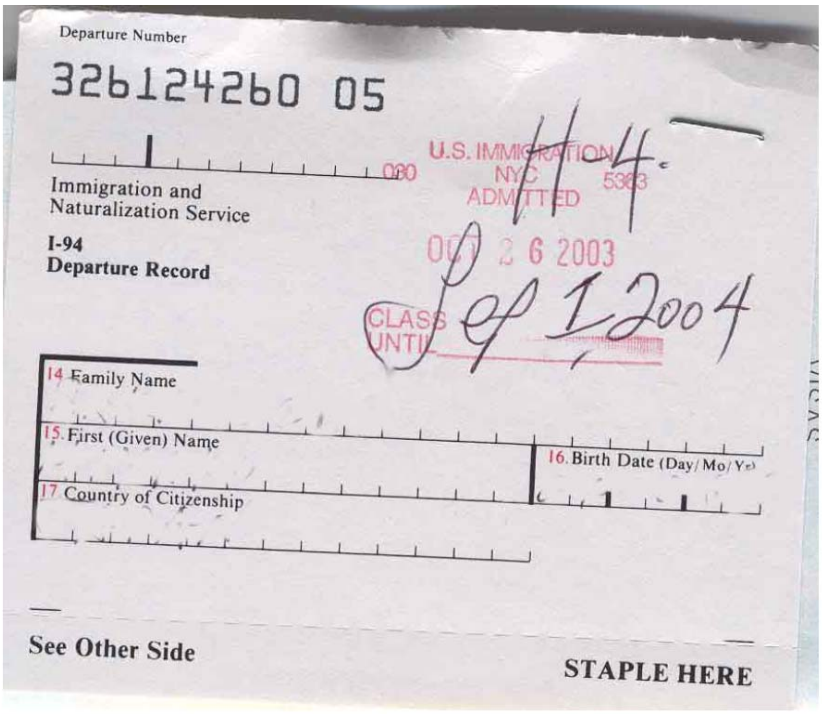
4. Able to read, write and speak English.

5. Knowledge of basic information about U.S. history and government.

B. There are a few waivers available to the English and history parts of the application process for individuals who are physically unable to comply, or who have been permanent residents for a long time and are elderly.

C. Naturalized U.S. citizens have all of the protections, rights and responsibilities of citizens born in the U.S.--except that they cannot become President of the United States.

Sample I-94



Sample Visa

February 2011 – Visa Bulletin - Family-Based Preference Categories

Family	All Chargeability Areas Except Those Listed	CHINA-mainland born	DOMINICAN REPUBLIC	INDIA	MEXICO	PHILIPPINES
1st	01JAN05	01JAN05	01JAN05	01JAN05	22JAN93	01AUG94
2A	01JAN08	01JAN08	01JAN08	01JAN08	01APR05	01JAN08
2B	15APR03	15APR03	01JAN97	15APR03	01JUL92	01JUN99
3rd	01JAN01	01JAN01	01JAN01	01JAN01	22NOV92	22OCT91
4th	01JAN00	01JAN00	01JAN00	01JAN00	01JAN96	15JAN88

February 2011 – Visa Bulletin - Employment-Based Preference Categories

Employment - Based	All Chargeability Areas Except Those Listed	CHINA-mainland born	DOMINICAN REPUBLIC	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C	C
2nd	C	01JUL06	C	08MAY06	C	C
3rd	01APR05	01JAN04	01APR05	22FEB02	08JUL03	01APR05
Other Workers	01MAY03	22APR03	01MAY03	22FEB02	01MAY03	01MAY03
4th	C	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C	C
5th	C	C	C	C	C	C
Targeted Employment Areas/ Regional Centers	C	C	C	C	C	C
5th Pilot Programs	C	C	C	C	C	C