



PROGRAM MATERIALS

Program #3204

January 11, 2022

Immigration Options for Foreign Nationals who are Extraordinary, Outstanding and in the National Interest

Copyright ©2022 by

- **Kate Kalmykov, Esq. - Greenberg Traurig, LLP**
- **Jennifer Hermansky, Esq. - Greenberg Traurig, LLP**

**All Rights Reserved.
Licensed to Celesq®, Inc.**

Celesq® AttorneysEd Center
www.celesq.com

5255 North Federal Highway, Suite 100, Boca Raton, FL 33487
Phone 561-241-1919

Immigration Options for Foreign Nationals who are Extraordinary, Outstanding and in the National Interest

Jennifer Hermansky

Kate Kalmykov

Greenberg Traurig, LLP

Basics: Immigrant Versus Non-Immigrant Visas

- Immigrant Visa
 - Green Card/Permanent Residency
- Non-Immigrant Visa (NIV)
 - H, F, J, O, etc
 - Limited duration
 - Specific to employer/institution
 - Specific to purpose (work/study/tourism)

O-1 Visa – Nonimmigrant Visa

- O-1A: Individuals with an extraordinary ability in the sciences, education, business, or athletics (not including the arts, motion pictures or television industry);
- O-1B: Individuals with an extraordinary ability in the arts or extraordinary achievement in motion picture or television industry;
- O-2: Individuals who will accompany an O-1 artist or athlete to assist in a specific event or performance; and
- O-3: Individuals who are the spouse or children of O-1 and O-2 visa holders.

O-1 Visa – Nonimmigrant Visa

- Individuals with Extraordinary Ability/Achievement
 - In arts, sciences, education, business, or athletics, motion picture/television industry
 - Must show: sustained national or international acclaim
 - Visa for up to 3 years (determined by time necessary to accomplish event/activity; extended in 1 year increments)
 - No work authorization for spouse

O-1A Visa – Sciences, Education, Business, Athletics

- A level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor – sustained national or international acclaim
- Received a major internationally recognized award (such as the Nobel Prize) or meet three of the following criteria:
 - National or internationally recognized prizes or awards
 - 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

O-1A Visa – Sciences, Education, Business, Athletics

- Three of the following criteria continued:
 - Published material in professional or major trade publications or major media about the beneficiary
 - Evidence of the beneficiary's participation on a panel, or individually, as a judge of the work of others
 - 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

O-1A Visa – Sciences, Education, Business, Athletics

- Three of the following criteria continued:
 - Evidence that the beneficiary has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation
 - 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

O-1B Visa – Arts or Motion Picture/TV

- Sustained national or international acclaim and distinction
- O-1B (MPTV) beneficiary has a record of extraordinary achievement in the motion picture and television industry such that he or she has a very high level of accomplishment in the motion picture or television industry evidenced by a degree of skill and recognition significantly above that ordinarily encountered to the extent that the person is recognized as outstanding, notable, or leading in the field

O-1B Visa – Arts or Motion Picture/TV

- Beneficiary has received, or been nominated for, a significant national or international award in the particular field (such as an Academy Award, Emmy, Grammy, or Director's Guild Award)
- Or meet 3 of the criteria:
 - Beneficiary has performed, and will perform, services as a lead or starring participant in productions or events that have a distinguished reputation
 - Evidence that the beneficiary has achieved national or international recognition for achievements, as evidenced by critical reviews, published materials in major newspapers, trade journals, magazines, etc.
 - Major commercial or critically acclaimed success
 - significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field
 - High Salary

O-1A/B Issues

- O-1A must have a Petitioner/U.S. Employer – cannot be self-sponsored
- Agent may also file a petition when it involves workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act in its behalf.
 - Agent may act on behalf of multiple employers of the beneficiary
 - May act in place of an employer
 - May act on behalf of a foreign employer
 - Petition must include itinerary of events
 - Agent must explain the terms and conditions of employment
- Consultation Letter may be required from an appropriate labor union

Common Employment-Based Immigrant Categories

- First Preference (EB-1)
 - Extraordinary Ability (EB-1A); Outstanding Researcher (EB-1B); Multinational Executive (EB-1C)
 - Exempt from PERM Requirements
 - EB-1A can be self-sponsored – major advantage
- Second Preference (EB-2)
 - Exceptional ability: exempt from PERM *if* Nat'l Interest Waiver of the Labor Certification Requirement (NIW Petition)
 - Can also be self-sponsored
 - Otherwise, PERM required

First Preference (EB-1A) – Extraordinary Ability– Eligibility Criteria

- Evidence showing that you will be continuing to work in the area of your expertise
- No offer of employment required
- Can show evidence of a one-time achievement (i.e., Pulitzer, Oscar, Olympic Medal) OR
- **Must meet at least 3 of 6 requirements:**
- Evidence of receipt of major prizes or awards for outstanding achievement
 - School/internal company awards are not considered “major” awards.
- Evidence of membership in associations that require their members to demonstrate outstanding achievement
 - Typically requires membership in an exclusive, invite-only association, or an association with rigorous membership requirements.
- Evidence of published material in professional publications written by others about the alien's work in the field

First Preference (EB-1A) – Extraordinary Ability– Eligibility Criteria

Must meet at least 3 of 6 requirements (Continued):

- Evidence of participation, either on a panel or individually, as a judge of the work of others in the same or allied academic field
 - Peer-review work for journals, or conference committee work.
- Evidence of original scientific or scholarly research contributions in the field
 - Major accomplishments in their field (patents, significant contributions to commercialized technologies, etc.)
- Evidence of authorship of scholarly books or articles (in scholarly journals with international circulation) in the field
 - Peer-reviewed journal/conference publications
 - Citations are important! USCIS has demanded more and more citations

First Preference (EB-1) – Eligibility Criteria

- Step 2: USCIS Final Merits Analysis
 - In addition to at least 3 of the 6 eligibility criteria listed above, USCIS also conducts a secondary analysis to determine whether the evidence submitted is sufficient to demonstrate that the foreign national meets the required high level of expertise for the extraordinary ability/outstanding researcher immigrant classification during a final merits determination.
 - This is an extremely subjective standard, and USCIS receives wide deference to determine whether a foreign national's accomplishments and achievements are sufficient to demonstrate his/her high level of expertise.

First Preference (EB-1B) – Outstanding Researcher

- International recognition for outstanding achievements in a particular academic field
- Must have at least 3 years experience in teaching or research in that academic area
- Must be entering the United States in order to pursue tenure or tenure track teaching or a comparable research position at a university, institution of higher education, or private employer
- Must provide an offer of employment from the prospective U.S. employer. The private employer must show documented accomplishments and that it employs at least 3 full-time researchers.
- Beneficiary must meet at least 2 of the 6 requirements discussed above.
- Step 2 “Final Merits Analysis” still applies to OR Petitions.

First Preference (EB-1A/B) – Things to Remember

- EB-1A/B petitions are exempt from the PERM labor certification requirements
- Indian and Chinese-born foreign nationals do *not* have any wait times for EB-1 green cards.
- USCIS strictly scrutinizes EB-1A and EB-1B Petitions
- Meeting the bare minimum eligibility requirements is unlikely to lead to an approval – Final Merits Analysis

Second Preference (EB-2) –Advanced Degree or Exceptional Ability

- Exceptional Ability - 8 CFR 204.5(k)(2) defines exceptional ability in the sciences, arts, or business as having a degree of expertise significantly above that ordinarily encountered
- Eligibility criteria includes:
 - Relevant degree
 - Min. 10 years of full-time experience in the field
 - Professional license
 - Evidence of high salary
 - Membership in professional associations
 - Recognition for achievements to the industry by peers in the field, government leaders, and/or professional organizations
- The Exceptional Ability category requires an approved labor certification unless the petitioner demonstrates eligibility for a national interest waiver (the foreign national's talents are so important to the country that waiving the PERM labor certification requirement is warranted).

EB-2 National Interest Waiver (NIW) Petition

- Foreign national may self-petition
- Labor certification (ETA-750B) filed directly with USCIS along with their Form I-140, Petition for Alien Worker
- Evidence of an advanced degree or exceptional ability
- Employment in the United States would greatly benefit the nation – not specifically defined by statute or regulation
- Meet the 3 National Interest Waiver criteria in order to demonstrate that it is in the national interest that USCIS waive the requirement of a job offer, and thus the labor certification:
 - The proposed endeavor has both substantial merit and national importance.
 - Well positioned to advance the proposed endeavor.
 - It would be beneficial to the United States to waive the requirements of a job offer, and thus the labor certification.



Kate Kalmykov

NEW JERSEY +1 973.443.3276

NEW YORK +1 212.801.2287

kalmykovk@gtlaw.com | [Detailed Biography](#)

Kate Kalmykov focuses her practice on business immigration and compliance. She represents clients in a wide-range of employment based immigrant and non-immigrant visa matters including students, trainees, professionals, managers and executives, artists and entertainers, treaty investors and traders, persons of extraordinary ability and immigrant investors.

Kate has deep experience working on EB-5 immigrant investor matters. She regularly works with developers across a variety of industries, as well as private equity funds on developing new projects that qualify for EB-5 investments. This includes creation of new Regional Centers, having projects adopted by existing Regional Centers or through pooled individual EB-5 petitions. For existing Regional Centers, Kate regularly helps to prepare amendment filings, file exemplar petitions, address removal of conditions issues and ensure that they develop an internal program for ongoing compliance with applicable immigration regulations and guidance. She also counsels foreign nationals on obtaining greencards through either individual or Regional Center EB-5 investments, as well as issues related to I-829 Removal of Conditions.



Jennifer Hermansky

PHILADELPHIA +1 215.988.7817

hermanskyj@gtlaw.com | [Detailed Biography](#)

Jennifer Hermansky focuses her immigration practice on employment-based immigration. Jennifer has experience serving health care, pharmaceutical and real estate industries, as well as entrepreneurs, scientists and researchers in scientific communities for a wide range of temporary visa options and permanent residence solutions.

Questions?

