How High is the Hurdle for an EB-1 Green Card?

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Every day, I field calls from individuals and professionals looking to come to or stay in the U.S. permanently. The volume of these inquiries has only increased as a result of the COVID-19 pandemic, as individuals were forced to choose where they prefer to live due to restrictions and constrictions to cross-border travel. Likewise, U.S. Citizenship and Immigrations Services (USCIS) has seen increased volumes of Green Card benefit applications, resulting in longer average processing times. USCIS' average processing times for regular processing of employment-based immigrant worker petitions increased by nearly 40% from 2019 to 2022.

So how high is the hurdle to obtain a first-preference (EB-1) Green Card through employment? Pretty high, considering the demand and the benefit that is being conferred. As seen in headlines across major news outlets, due to events over the last several years at the Southern U.S. border, there is no shortage of individuals who wish to immigrate to the U.S. permanently. For decades—long before the COVID-19 pandemic—demand for Green Cards has far outpaced availability. Add to that, the EB-1 first preference Green Card category does not require labor certification—meaning, employers do not need to show that there is no U.S. worker available to fill the position. As such, the process of obtaining a Green Card using the EB-1 category is generally much faster, cheaper, and more straightforward than using other preference categories (e.g., EB-2, EB-3, EB-4 or EB-5).

There are several ways to qualify for an EB-1 first preference Green Card. The first is as a multinational manager or executive. This category is rather straightforward; you either qualify, or you don't. It mirrors the requirements for the L-1A intracompany transferee nonimmigrant visa, including that the worker must have been employed outside the United States for at least one year in the three years preceding the petition (or the most recent lawful nonimmigrant admission if they are already working for the U.S. petitioning employer). The U.S. petitioner must have been doing business for at least one year, have a qualifying relationship to the entity that employed the worker outside the U.S., and intend to employ the worker in a managerial or executive capacity. It must also demonstrate the ability to pay the worker through submission of federal income tax returns, an annual report, or audited financial statements. Immigration practitioners often obtain L-1 (nonimmigrant intracompany transferee) status for their clients first, to get them into the country and vet the likelihood of success under this EB-1 category, before applying for a Green Card for a multinational manager or executive.

Certain professors and researchers who can demonstrate international recognition for their outstanding achievements in a particular academic field may also be eligible for EB-1 Green Cards. This standard is a bit higher, as it involves more of a discretionary assessment of whether the worker is "outstanding" enough for eligibility. On a basic level, the worker must have at least three years of experience in teaching or research in his or her academic area and must be entering the United States to pursue tenure or tenure track teaching, or a comparable research position at a university, institution of higher education, or with a private employer. In addition, the worker must provide an offer of employment from the prospective U.S. employer, and the U.S. employer must show documented accomplishments and that it employs at least three full-time researchers. But even where all these requirements are met, the professor or researcher must still demonstrate that they meet at least two of six criteria outlined by USCIS. These include things such as receipt of major prizes or awards for outstanding achievement; membership in associations that require outstanding achievement from their members; published material in professional publications written by others about the beneficiary's work in the academic field; participation, either on a panel or individually, as a judge of the work of others in the same or allied academic field; original scientific or scholarly research contributions in the field; or authorship of scholarly books or articles (in scholarly journals with international circulation) in the field.

The hardest category to qualify under as an EB-1 worker is as an extraordinary ability worker. This category does not require an employer to sponsor the worker; they can simply self-petition by demonstrating: (1) extraordinary ability in the sciences, arts, education, business, or athletics, which has been demonstrated by sustained national or international acclaim, and whose achievements have been recognized in the field through extensive documentation; (2) that they intend to enter the United States to continue work in the area of extraordinary ability; and (3) that their entry into the United States will substantially benefit the United States in the future. Extraordinary ability is demonstrated by either a one-time achievement (that is, a major, internationally recognized award, such as an Oscar or a Nobel Prize) or at least three of 10 enumerated regulatory criteria. These criteria are designed to demonstrate notoriety, such as a high income, published material by or about the individual, receipt of lesser-known prizes or awards, etc.

Importantly, while the first step in determining Green Card eligibility for outstanding professors and researchers or extraordinary ability workers is an assessment of whether the evidence meets the regulatory criteria to objectively meet the parameters of the regulatory criteria, there is a second step which can derail an otherwise eligible petition. USCIS also completes a "final merits determination," evaluating all the evidence together when considering the petition in its entirety, in the context of the high level of expertise required for this immigrant

classification. Essentially, you can meet the regulatory criteria and USCIS can still determine that your level of expertise is not high *enough* for a Green Card.

To learn more about whether you qualify or how to qualify for a Green Card to the U.S. via the EB-1 category, please contact a qualified U.S. immigration professional.

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