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The Compass[®]

The Law Firm of Tidwell, Swaim & Associates, P.C.

Specializing in U.S. Immigration and Nationality Law Since 1978

Ask David

Dear David:

I just graduated as a nurse and several of my friends told me that it is now possible to apply for permanent residence if I have an employer willing to sponsor me. I am very confused as I thought nurses could not get H-1 status and couldn't get green cards?

*Gina R.
Denton, Texas*

Dear Gina,

Last August things changed dramatically for nurses and other people who qualify for a green card in the 3rd Preference and "other workers" categories. It is now possible to get a green card through this type of work (any job which requires two years of experience or an Associate's Degree for example) but the timing is critical and the case must be started immediately. Following is an article about this situation which we recently published in *Texas Lawyer*. Either Erick Espinoza or I may be contacted if you have any questions about this important issue.

A Short-Term Fix for Non-Professional Employees

Immigration law is a fast-growing, complex, and oftentimes difficult to navigate patchwork of federal statutory and administrative law. There are essentially two avenues that an immigrant can take to obtain permanent residency in the United States: those based on a qualifying family petitioner or those



**David Swaim
Managing Partner**

based on an employment relationship. Employment immigration has five separate categories, called preferences, based on the employer's requirements for skills, knowledge, and education and some categories have more stringent and rigorous standards than others.

The EB-3 visa is one of five immigrant visa preference categories for United States employment-based permanent residency. INA § 203(b). The requirements for an EB-3 visa are less rigorous than some of the other categories, and unlike the other categories, EB-3 applicants require a sponsoring employer. While in the past, the wait was much longer than other preferences, especially for residents of India, China, and the Philippines, now the wait has been reduced significantly. On average the "priority date" of an EB-3 visa is taking a few months to become "current." The Department of State issues a Visa Bulletin every month that discloses the "priority date" for applicants. However, for residents of India, China, and the Philippines it is still a lengthy wait because the pool of candidates is greater and each country is only allocated a certain percentage of the visas. This issue is detailed below.

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A Short-Term Fix (continued from page 1)

Congress sets a quota for immigrant visa preference categories for United States employment-based permanent residency. The current limit for the worldwide employment-based preference is 140,000. INA § 201(d). The EB-3 category is limited to 28.6 percent of the worldwide level, plus any spillover (visas not used by the first two categories). INA § 203(b)(3)(A).

The employment-based third preference permanent residency process starts with obtaining a labor certification from the U.S. Department of Labor. The applicant is inadmissible, unless the Secretary of Labor certifies to the Secretary of State and the Attorney General that there are insufficient workers who are able, willing, qualified, and available at the time of application for a visa, and the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed. INA §212(a)(5)(A)(i).

The details in the labor certification, dependent on the job requirements, will determine what preference category to give the applicant. The applicant does not need to be employed when the labor certification is filed; however, a permanent, full-time job offer is required. The second part of the process is the filing of the Petition for Alien Worker (form I-140) with United States Citizenship and Immigration Services (USCIS).

The EB-3 category has three subcategories, including: 1. professionals; 2. skilled workers; and 3. other workers. INA § 203(b)(3)(A)(i)-(iii). USCIS requires professionals to possess a U.S. baccalaureate degree or foreign degree equivalent, and the ability to demonstrate that the baccalaureate degree is the normal requirement for entry into the occupation.

In this subcategory, the applicant may not substitute education and experience for a baccalaureate degree. In the second subcategory, USCIS requires a skilled worker to demonstrate at least two years of job experience or training. Lastly, other workers require applicants to be capable, at the time the petition is filed by the sponsoring employer, of performing unskilled labor (requiring less than two years training or experience), that is not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The last step in the permanent residency process depends on whether the applicant is filing for adjustment of status or going through consular processing. The AOS is done while

the applicant is in the U.S. by filing the Application to Register Permanent Residence or Adjust Status, (form I-485). The CP process involves processing at a U.S. consulate and then entering the United States. Those individuals living abroad that will not enter the United States before the completion of permanent residency must use CP. This step, whether AOS or CP, cannot be initiated until the applicant's "priority date" is "current" under the quota system for third preference.

Historically, the third preference/other worker quota has been delayed anywhere from two to ten years. For professional workers, the H-1 non-immigrant status is available to allow the foreign national to work while waiting for the quota to become "current." However, non-professional workers such as skilled and semi-skilled workers do not have the H-1 option so in almost all cases the employer refuses to initiate the process since the actual employment of the foreign national cannot start for at least three years and in most cases much longer. Also, with the possible exception where the worker has a permanent resident/U.S. citizen parent or spouse, the foreign national cannot even obtain permanent residence this way unless he/she stays out of the country for at least ten years.

Despite all of these hurdles, there are at least two areas which may be helpful to employers seeking to hire skilled, non-professional/non-degreed employees. In one example, a foreign nursing student who has graduated will be given one year of work authorization called OPT. During this time, it is conceivable that all three steps of the permanent residence process can be filed during the one year of OPT. This is important because most employers in Texas will accept an associate's degree for an RN which precludes the nurse from getting H-1 non-immigrant status. However, because it appears the third preference quota will only be one or two months behind until at least the spring of 2016, RNs in OPT may have just enough window to squeeze through to permanent residence.

The second example is when an employer has located a potential employee out of the U.S. and wants to bring them in to the country but no non-immigrant visa exists for that type of work. This applies to almost all non-professional, skilled workers such as those in manufacturing, construction, ranching/farming, as well as occupations such as truck driving and auto/truck mechanics. If third preference remains only one or two months delayed in the quota, employers can anticipate a 12-18 month process to bring the employee into the U.S. Although this may

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Jeng Chi

Restaurant and Bakery

By: Erica Gomez



Dallas/Fort Worth has a multitude of vibrant, unique Chinese communities instead of only one single, consolidated China Town. But probably the most recognized China Town in the Dallas/Fort Worth metroplex is located in Richardson in the telecom corridor. This is a great destination for a variety of Asian cuisine including Chinese, Japanese, Korean, Taiwanese, and Vietnamese food. One such restaurant that caught our attention is Jeng Chi.

Jeng Chi, an authentic family-owned restaurant serving Taiwanese and Chinese dishes, first opened in Richardson in 1991. It began as a modest 3,000 square foot establishment but, thanks to robust business, has nearly tripled in size. The owner, Wuan Hai Teng, was unable to meet us because, as his daughter-in-law put it, he was "busy in the kitchen

covered head to toe in flour."

Today, Jeng Chi serves many authentic dishes from Taiwan and mainland China. The restaurant offers items such as shareable hot pots, seafood plates, and over-rice dishes in an open, bustling, and modern ambiance. Jeng Chi is renowned for its dumplings which are made entirely from scratch and served by the dozen in bamboo baskets and filled not just with pork, but also beef, chicken, shrimp, and vegetables. Patrons can watch as these dumplings are filled and folded behind glass walls. On our visit to Jeng Chi we ordered Chicken with Vegetables, Orange Chicken and of course the famous Pork Dumplings. All were amazing! And if you are in the mood for something sweet you have come to the right place! Pastry chefs at Jeng Chi create delicious and beautiful European-style cakes and desserts that can be made to order for special events.

Jeng Chi Restaurant and Bakery
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**TSA Welcomes Two New Members
of the Family!**

Congratulations Kathryn and Cory on the birth of your two precious babies, Camryn Layla and Koby Jeremiah . The twins were born on December 2, 2015. Kathryn says that sleep is overrated!

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seem like a long time, it may not be that long to an employer unable to find any qualified and available workers in the U.S. Also, since the foreign national will enter the U.S. with a "green card" and can work for any related employer immediately, there are contractual restrictions (called a "liquidated damage clause"), which can be used to restrict the employment to the sponsoring employer, at least for a few years.



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