



# Immigration Law Update™

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## The E-Verify Electronic Employment Verification System

**E**-Verify is a free, Internet-based system that employers use to confirm the legal status of newly hired employees, as mandated by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The system, a partnership of the U.S. Department of Homeland Security (DHS) and the Social Security Administration (SSA), verifies an employee's authorization to work, not immigration status. The system compares Social Security numbers and DHS's immigration databases with Form I-9 information. The average response time is three to five seconds.

To participate in E-Verify, an employer must register online at the DHS E-Verify page and accept the electronic Memorandum of Understanding (MOU) that details the responsibilities of the SSA, DHS and the employer. Once registered, employers submit information provided on an employee's Form I-9. The system will return one of three results:

**1. Employment authorized.** The employee is authorized to work. The

employer should then record the system-generated verification number on the Form I-9.

**2. SSA tentative nonconfirmation.**

The SSA database shows the employee's name and Social Security number do not match. The employer must promptly provide the employee with information about how to challenge the information mismatch. The employee has eight business days to resolve the issue with the SSA or DHS. The employee may continue to work while the case is being reviewed. After 10 federal government work days, the employer queries E-Verify again in order to get a confirmation or a final nonconfirmation, unless the SSA instructs otherwise. If the employee does not contest the finding, the determination is considered final and the employer may terminate the employee and resolve the case.

**3. DHS verification in process.** The DHS will respond in most cases within 24 hours with either an Employment Authorized statement or

DHS tentative nonconfirmation. If the employer receives a tentative nonconfirmation from DHS, the employer must print out the notice and provide it to the employee so the employee can decide whether or not to contest the finding. If the employer erred in the data input, the employer should attempt to refile with E-Verify.

If the employer finds a photographic nonmatch for an employee, the employer must print the photographic nonconfirmation notice and present it to the employee so the employee can decide whether to contest the finding. In the case of a photographic nonconfirmation, the employer will provide the employee with

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## U Visas for Victims of Specific Crimes

**T**he Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) created a special nonimmigrant classification designated as the U visa for victims of specific crimes. The visa offers not only protection and temporary benefits to alien victims but also bolsters law enforcement capabilities to investigate and prosecute criminal activity. On September 5, 2007, U.S. Citizenship and Immigration Services (USCIS) announced it would grant temporary immigration benefits to certain crime victims who assist government officials in investigating or prosecuting the criminal activity.



Currently, the U visa is available to those who meet four basic requirements:

**1.** The alien can show substantial suffering due to physical or mental abuse as a result of being the victim of certain criminal activity;

**2.** The alien possesses information about that criminal activity;

**3.** The alien has been, is being, will be or is likely to be helpful to federal, state or local authorities; and

**4.** The criminal activity violated U.S. law or occurred in the United States or its territories.

To apply for U status, the applicant must complete Form I-918. Application cover letters should clearly state the applicant's basis for requesting the U visa and explain why each submitted document is relevant. The application should include a declaration by the applicant describing the abuse or criminal activity suffered by the applicant relevant to the U visa eligibility.

The applicant must supply all personal information, such as personal identification, passports, birth certificates and I-94 documents for all persons applying for both the U visa and the derivative U visa. The application must also include a certification form, Form I-918 Supplement B, completed by federal, state or local law enforcement.

In cases involving substantial physical and/or mental abuse, the applicant should include a personal declaration describing the abuse, as well as any evidence of the abuse suffered by the applicant, such as

- photos,
- medical records or
- witness statements.

The application and the supporting evidence must be filed with the USCIS's Vermont Service Center. Even though the U visa is a non-immigrant status visa, an alien who has received deferred action may

**The visa offers not only protection and temporary benefits to alien victims but also bolsters law enforcement capabilities to investigate and prosecute criminal activity.**

apply for work authorization by filing Form I-765, Application for Employment Authorization. This authorization is subject to yearly review.

U status is granted for a total of up to four years and can be terminated if circumstances in the case change so that it no longer warrants deferred action. Furthermore, U status can be terminated for conduct or a condition not disclosed prior to issuance of relief. Determinations of termination of U status cannot be appealed. Termination cancels the deferred action and revokes related work authorization.

The VTVPA also allows derivative U status for applicants' spouses, children and the parents of U visa applicants younger than 21 years of age. Applicants for the derivative status must provide certification from a government official that an investigation or prosecution would be harmed without the assistance of the derivative applicant. Those family members eligible for interim relief U status who are present in the United States must also demonstrate extreme hardship if removed from the country. ■

## EB-1 Category for Outstanding Professors and Researchers

**T**he First Preference Employment-Based Immigrant (EB-1) category for Legal Permanent Residence consists of three groups:

1. Aliens of extraordinary ability;
2. Outstanding professors and researchers; and
3. Multinational managers and executives.

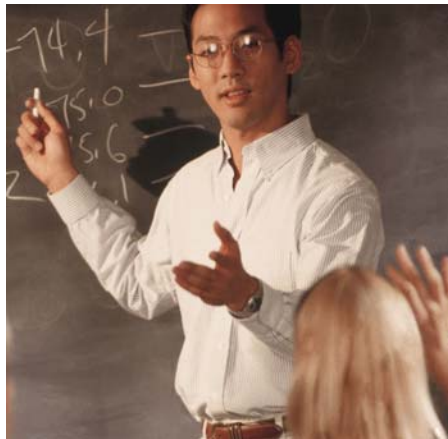
To qualify as an outstanding professor or researcher in this category, the applicant must demonstrate

- International recognition as outstanding in a specific academic field;
- At least three years of teaching or research in the field; and
- An offer of employment.

This offer of employment can take three forms:

1. A tenured or tenure-track teaching position or a comparable research position;
2. A research position with no fixed term, in which the employee would generally have the expectation of permanent employment; or
3. A research position with a private company if the employer has at least

three full-time researchers and has documented research accomplishments in the field.



Unlike aliens in the extraordinary ability subcategory, aliens in the outstanding professor or researcher subcategory must have a job offer. However, as with all first preference employment petitions, no labor certification is required.

Aliens demonstrate that their work has been recognized as outstanding in the international arena by presenting evidence similar to that required to show extraordinary ability. Two of

the following types of evidence are required:

- Receipt of a major international prize or award for outstanding achievement in the academic field;
- Membership in associations that require outstanding achievements of their members;
- Material in professional publications written by others about the alien's work;
- Participation as a judge of the work of others in the field;
- Original contributions in the field; or
- Authorship of scholarly books or articles in journals with international circulation.

Strong evidence includes peer-reviewed publications and participation as a peer-reviewer. As always, one of the strongest types of evidence is the submission of letters from academic peers.

Along with the petition, the potential employer must submit a letter outlining the employment offer. The letter must include basic terms of employment, including salary. ■

## E-3 Visa for Australians

**T**he E-3 visa was created in 2005 to allow for the admission of nationals of the Commonwealth of Australia who will perform services in a "specialty occupation." The E-3 visa contains components of both the H-1B visa and the E treaty visa and can be viewed as a hybrid useful to Australian nationals seeking work in the United States.

The term "specialty occupation" means the occupation requires theo-

retical and practical application of a body of highly specialized knowledge and attainment of a bachelor's degree or higher in the specialty (or its equivalent). This definition is the same as for an H-1B.

Like the H-1B, the petitioning employer must file a Labor Condition Application with the U.S. Secretary of Labor and make the same attestations including those regarding paying the prevailing and

actual wages, not breaking up strikes, maintaining public access files, etc.

The number of E-3 visas is limited to 10,500 per fiscal year. This cap applies to all initial E-3 applications made abroad at a U.S. consulate and to all applications for a change of status to E-3 made through U.S. Citizenship and Immigration Services. The cap does not apply to

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## E-3 Visa for Australians

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E-3 extensions if the E-3 alien continues to be employed by the same employer named in the original E-3 application. If an E-3 alien seeks to change employers, the E-3 alien will again be counted against the cap.

E-3 status may be obtained by applying for the visa at a U.S. consulate or, in the case of an alien already in the United States, by applying to the Vermont Service Center for a change of status on Form I-129. The following supporting documents must also be submitted with the application:

- Proof the alien is a national of the Commonwealth of Australia;
- Letter from the U.S. employer describing the specialty occupation,

the anticipated length of stay and the arrangements for remuneration;

- Evidence the alien has a U.S. bachelor's degree or higher (or its foreign equivalent) in the specific specialty;
- Evidence the alien meets any other licensure or occupational requirements; and
- A U.S. Department of Labor-issued certified labor condition application.

E-3 visa holders are admitted into the United States for up to two years, like E-1 and E-2 visa holders, and the status can be extended indefinitely in two-year increments.

The E-3 visa is not a dual intent visa like the H-1B and L-1, but it does not have a foreign residence requirement. While applicants need to attest that they intend to depart the United States when their status terminates, they do not need to show



they are maintaining a residence in their home country.

The spouse and children of an E-3 visa holder are allowed derivative E-3 nonimmigrant status irrespective of their nationality. Such spouses and children do not count against the 10,500 cap. Also, spouses and children of E-3 visa holders are entitled to work authorization by applying on Form I-765. ■

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a referral letter to DHS. DHS will provide the results within 10 days of the referral unless it determines it needs more time.

In photographic nonconfirmation cases, the employer sends a copy of the employee's Form I-551 permanent residency card or I-766 employment authorization document to DHS by scanning and uploading the document or mailing a photocopy via express mail. When an employer cannot determine if the photograph matches, the employer should forward the document to DHS for a decision.

Employers using E-Verify are required to post in an area visible to prospective employees an antidiscrimination notice and a notice that

the company is an E-Verify participant. Effective January 2009, certain employers doing business with the federal government are required to use E-Verify for new and certain existing employees as a condition of their contracts.

An employer can complete E-Verify after an offer of employment is accepted and a Form I-9 is completed. This can be before the start date (as long as an employer is not prescreening applicants), but no later than three business days after the start date. This does not apply in cases where there is no Social Security number, in which case the employer should wait until the number is available. Employers must be consistent in the timing of a query to avoid discrimination.

Employers using the E-Verify system must verify all newly hired em-

ployees, including citizens and non-citizens. Employers may not pick and choose which employees are submitted into the system. E-Verify may not be used to go back and check employees hired before the company signed the MOU or reverify employees who have temporary work cards.

Employers who use E-Verify are presumed not to have violated employer sanctions rules with respect to hiring if they obtain confirmation of the identity and employment eligibility. Note, however, that DHS does not consider that using E-Verify provides a "safe harbor." ■

*Do you or your staff have any questions or comments about Immigration Law Update? Please call or write our office. We would be happy to hear from you.*

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