

An overview of Green Card Employment-Based Preference Categories

The employment based (EB) category into which a green card falls is an area of great concern for many foreign national employees. In fact, the EB category will affect how quickly or slowly a foreign national might receive a green card approval, based on how far the particular EB category is backlogged or in technical terms, [retrogressed](#).

Many different factors come into play in reaching a particular EB category. The intent of this informational piece is to provide some basic guidance on the issues to consider.

A summary of the problem

Green Cards are allocated based upon a five-tiered system of preference categories (e.g. EB-1 through EB-5). The higher categories receive Green Cards first and the lower categories only after higher categories have been satisfied.

Thus foreign-born employees desire to be placed in the highest possible preference category. However, the higher categories require higher professional attainment, education, experience, and accomplishment. Since those with higher qualifications usually receive higher salaries, the Prevailing Wage requirements are greater the higher the preference category.

Thus the potential conflict: employees strive for the highest possible category even if they are only marginally qualified while employers seek the security of obtaining the Green Card in a category for which the employee is clearly qualified and has a prevailing wage consistent with the company's salary structure.

What is the EB category?

The employment based preference category system is a five tiered system (EB-1 – EB-5) into which all employment based green cards must be classified. Generally, the higher the academic credentials required for the position involved in the green card case, the higher the EB preference category into which that case might fall. The EB system is divided as follows:

- EB-1 – priority workers including: those of extraordinary ability, outstanding researchers and professors, and multinational executives and managers.
- EB-2 – members of the professions holding advanced degrees or significant work experience, individuals of exceptional ability, and workers whose occupation is in the national interest.
- EB-3 – professionals, skilled workers, and other workers.
- EB-4 – certain special immigrants including: religious workers, returning residents, and court dependents.
- EB-5 – employment creation (investors).

The majority of green card cases for foreign national employees will fall into either the EB-2 or EB-3 category. Those categories are the focus of the information below.

What determines the EB category?

The EB category is determined by the USCIS at the I-140 stage of the green card process and is based on a two pronged test:

1. whether the requirements for the job as stated on the Labor Certification Petition (LCP) meet EB-2 or EB-3 criteria
2. whether the alien meets the requirements stated on the LCP

a. Minimum job requirements

The job requirements stem from the corporate job description, which should outline the *minimum* requirements the employer has used to hire someone into that position. For example, if a job description states that the requirements for the position are a Bachelor's degree plus 3 to 5 years of experience, the minimum requirements must be a Bachelor's degree plus 3 years of experience because those are the lowest possible requirements the employer has stated will qualify someone for the position. It is important that an employer maintain consistency in its job descriptions and requirements to minimize confusion not only in the green card process, but also in its hiring structure. Maintaining such consistency may assist the employer if ever required to prove that it has not hired anyone into that position with lesser credentials.

If an employer attempts to modify a job description or its minimum job requirements for the purposes of obtaining a green card, this is a practice known as job "tailoring." If the Department of Labor (DOL) suspects that a job has been tailored to a foreign national employee for purposes of excluding potentially qualified U.S. citizens and obtaining a green card for the foreign national, it is likely to lead to a denial of the LCP and perhaps even additional penalties, depending on the severity of the employer's actions.

b. Foreign national credentials

In order for an I-140 Petition to be successful, the foreign national must also meet the minimum requirements for the position at the time of hire. If the foreign national is unable to prove his or her education and/or experience as stated on the LCP, the I-140 is likely to be denied. Further, it is generally not permitted for the foreign national to rely on experience, education, or training gained after hire by the sponsoring employer to qualify for the position on the LCP.

What is EB-2?

The EB-2 category includes: aliens who are members of the professions holding advanced degrees or their equivalent, aliens of exceptional ability in the sciences, arts, or business, and aliens who will substantially benefit the national economy, cultural, or educational interests or welfare of the United States.

The minimum requirements for EB-2 classification are either a Master's degree or a Bachelor's degree plus 5 years of post-baccalaureate progressively responsible experience.

What is EB-3?

EB-3 classification includes:

1. **Professionals** – Aliens with at least a U.S. baccalaureate degree or foreign equivalent degree (the degree must be a four year degree and experience may not be substituted for years of education); and

2. **Skilled workers** – Aliens with at least two years of experience, education, or training;
3. **Other workers** – Aliens with less than two years experience, education, or training. Note, however, that due to the long backlog, an alien could expect to wait many years before being granted a visa under this category so it is best to qualify for EB-3 under one of the top two categories if possible.

Therefore, the minimum requirements for either a Professional or Skilled Worker EB-3 category are a Bachelor's degree (or its equivalent) or two years of experience, education, or training.

Does the USCIS accept foreign degrees?

The USCIS does accept foreign degree equivalents with certain limitations. The USCIS takes the view that in order to meet the Bachelor's degree requirement on an LCP, the degree must be equivalent to a U.S. Bachelor's degree. The USCIS defines a U.S. equivalent degree as a **single source**, four year degree program.

The single source rule is very important to foreign educational equivalencies. Despite the fact the USCIS will accept foreign equivalent degrees, it is important to note that it will **not** necessarily accept any combination of foreign equivalent education as being equivalent to a U.S. degree. When a Bachelor's degree is required for a position, a foreign national must possess a single source, four year degree in order to meet the job qualification. If a foreign national possesses anything less than a four year degree such as a three year degree that must be combined with prior diplomas or coursework to equate to a Bachelor's degree, the USCIS will generally take the position that this does not meet EB-2 or EB-3 Professional criteria. Such credentials are likely to fulfill the EB-3 Skilled Worker category; however, careful drafting must occur during the LCP process to allow for such equivalencies.

Therefore, in order to meet the Bachelor's degree requirement for EB-2 classification or EB-3 Professional classification, the degree must be a single source, four year degree program. For example, if the LCP requires a Bachelor's degree followed by five or more years of experience and the beneficiary holds a three year Bachelor's degree from India, then the beneficiary will not qualify for EB-2 because he cannot meet the second prong of the two part test and the very stringent definition of a U.S. equivalent degree.

In addition, the USCIS has created an ad-hoc rule as it relates to equivalent Master's degree education, called the six year rule. If a foreign national has completed six years of education culminating in the award of a Master's degree, such education is likely to be deemed equivalent to a U.S. Master's degree. However, if a beneficiary possesses only a three year foreign Bachelor's degree followed by a two year foreign Master's degree, this is unlikely to meet a Master's degree job requirement as it only equates to five years of education. Also keep in mind that the higher the job requirements listed on the LCP, the greater likelihood an LCP might be audited by the DOL for excessive requirements. If the job requirements exceed what the DOL considers to be normal for a particular occupation, the employer may have to demonstrate the reasons for such excessive requirements stemming from a business necessity. When a case is audited by the DOL it is likely to lengthen the overall processing time of the green card, as the LCP will often be delayed for many months.

How does the EB category affect the timing of the green card approval?

The timing of the green card approval is dependent on not only the EB category but also the country of birth of the foreign national. Generally, since the requirements for the EB-3 category are lower, more people fall into that category causing a higher demand for EB-3 green cards. The higher the demand for green cards the longer the wait for an approval. This often leads to the trend known as "EB envy" in

which foreign nationals want their case filed as EB-2 in the hopes of getting a faster green card approval. Because a foreign national is not able to elect to be in the EB-2 category, as that determination is based on other factors often beyond their control (e.g. the minimum requirements for the job), it can sometimes create a conflict between employers and foreign national employees. It is important to remember that a green card is an employer sponsored case and the employer is responsible for not only determining the job requirements and but also for proving it has not hired anyone into that position with lesser credentials.

Also keep in mind that the higher the job requirements listed on the LCP, the greater likelihood an LCP might be audited by the DOL for excessive requirements. If the job requirements exceed what the DOL considers to be normal for a particular occupation, the employer may have to demonstrate the reasons for such excessive requirements stemming from a business necessity. When a case is audited by the DOL it is likely to lengthen the overall processing time of the green card, as the LCP will often be delayed for many months.

How does the EB category affect the prevailing wage?

Many factors come into play when the prevailing wage is determined, however, generally the higher the job requirements that are necessary to perform the job the higher the prevailing wage is going to be for the position. While the prevailing wage may not have to be paid to the foreign national until the green card is approved, employers must keep in mind that during the I-140 stage it must be able to demonstrate that it at least has the ability to pay the prevailing wage, even if it is not yet paying such wage.

If you have further questions, please contact us.