



Post-OPT : Work Visas & Permanent Residence Options

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THE PRESENTERS



Prasant Desai is a shareholder at the firm and has practiced U.S. immigration law over three decades. Prasant focuses on business and family immigration matters. He represents organizations as well as entrepreneurs, scholars, physicians, scientists and families in immigration matters.



Mary Walsh is shareholder at the firm and has practiced U.S. immigration law since 2006. Mary concentrates her practice in business and family-based immigration matters, with a specialization in obtaining visas and legal permanent resident status for research scholars, scientists, artists and athletes.



Megan Parker-Johnson has practiced U.S. immigration law since 2014 and has worked in the field of U.S. immigration law in various capacities since 2008. Her practice concentrates on family-based, humanitarian, and business immigration. She holds a Bachelor's in History from Brown University and a Juris Doctor from Northeastern University School of Law.

BEFORE WE BEGIN

- The information provided in this presentation is for educational purposes only. The opinions expressed in this presentation are solely those of the presenters. No attorney-client relationship is created or intended to be created by virtue of this presentation.
- Immigration law is complex and nuanced. This presentation provides information in general terms. Please seek individualized guidance from a competent professional before taking any action.
- The information presented today is current as of March 1, 2023. However, immigration statutes, rules, policies and procedures change frequently. Accordingly, before taking any action, it is imperative to seek guidance from a licensed attorney.



AGENDA

- Overview of Categories
- Temporary Work Visas
- Green Card Pathways
- Q&A

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U.S. IMMIGRATION CATEGORIES

U.S. Citizens

At Birth (law of the soil and law of blood)

Through Naturalization

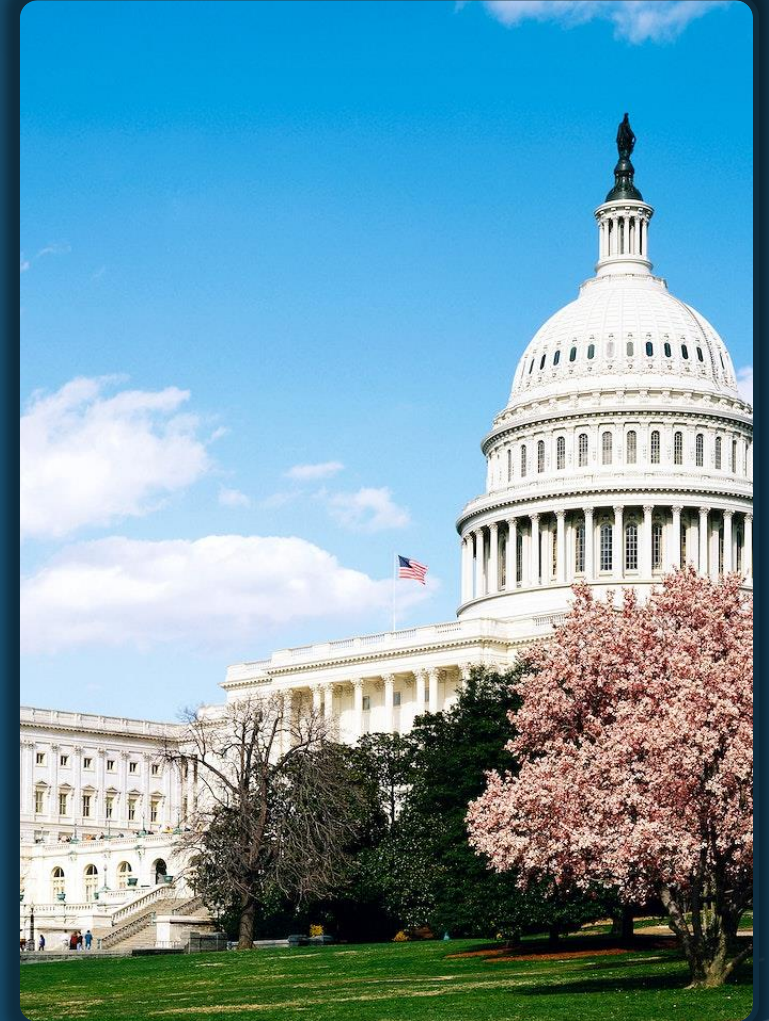
Non-Citizens

Immigrants: Lawful Permanent Residents ("green card holders")

Nonimmigrants: Persons Permitted in U.S. for Temporary Stay

Humanitarian Categories: Refugees; Asylees; Temporary Protected Status (TPS); Deferred Action for Childhood Arrivals (DACA); Parolees

Persons present without lawful status



IMMIGRATION TERMINOLOGY AND CONCEPTS: CONSEQUENCES OF UNAUTHORIZED EMPLOYMENT

- ✓ No concrete definition of “employment”
- ✓ Generally, DHS considers employment as encompassing any service rendered in exchange for remuneration—cash, tuition, fees, books, supplies, room, food, or any other benefit
- ✓ Bona-fide volunteer activity is not generally employment – civic/humanitarian activity in which there is no expectation of remuneration
- ✓ Some services rendered without cash payment for an activity that would normally be compensable can be construed as employment
- ✓ Most “passive investments” are permitted
- ✓ **Severe** consequences for unauthorized employment
- ✓ Loss of status and potential ineligibility for work visas and green card status



CONSEQUENCES OF UNAUTHORIZED EMPLOYMENT: BEWARE OF SIDE HUSTLES

Gig work for ride share app

Buying and Selling on online auctions and marketplaces

Open Coding

Crowdsourcing or Fundraising for your business

Campus Representative for a product, company, etc.

Blog editor

Publications / Creative Works

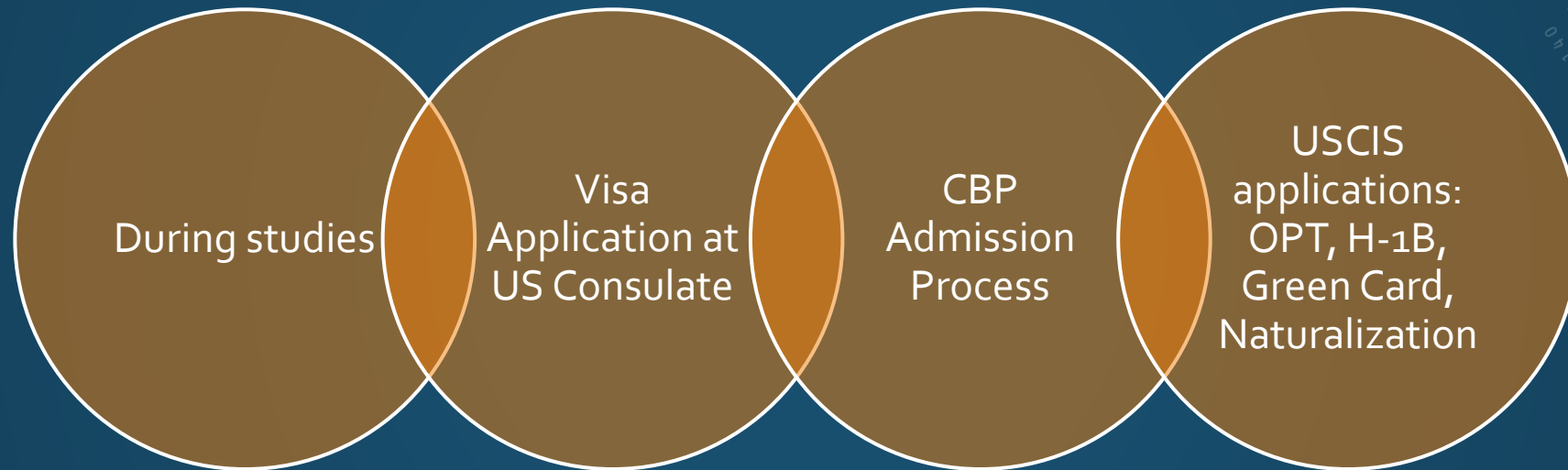
Day trading

Investing in start-ups

Investing other people's money



CONSUL AND DHS OFFICERS MAY INVESTIGATE UNAUTHORIZED EMPLOYMENT



ENTREPRENEURIAL ACTIVITY & F-1 STATUS

During school:

Limited activities possible under F-1 status—must be pre-approved and related to curriculum (CPT) or as Pre-Completion OPT

Must secure permission from school's International Office—*in advance!*

OPT:

Start-up and self-employment permitted during regular OPT

Must be directly related to degree field

Must be able to demonstrate active work on a business venture:
business license, incorporation documents, etc.

STEM OPT:

Requires a training plan outlining activities, objectives, and supervision
of student during 2-year STEM period

Available only for training with E-Verify employers

Mentorship and oversight required

Pure self-employment *not* possible



SPECIAL ISSUES UNIQUE TO J-1 EXCHANGE VISITORS

- **Home Residency Requirement applies to some J-1 visitors:**
 - Physicians in graduate medical training program
 - Program participation financed by U.S. or foreign government
 - Home country in need of J-1's skills--DOS "skills list"
- **2-year Home Residency Requirement**
 - Must return to place of last permanent residence for 2 years, in aggregate, to gain eligibility for permanent residence, H-1B, L-1, or K-1 visas
 - Waivers available
- **Waiver process can be complicated in some cases**

EMPLOYMENT RELATED NONIMMIGRANT VISA CATEGORIES

Symbol	Type of employment	Availability
H-1B	Specialty occupation	All nationalities. Cap-subject and cap-exempt. Cap subject quota: 65,000 for bachelor's, additional 20,000 for U.S. master's and above
H-1B1	Specialty occupation	Chile (1,400) & Singapore (5,400)
TN	TN specific occupations listed in treaty	Canadians & Mexicans. No quota.
E-3	Specialty occupation	Australians. 10,500
O-1	Extraordinary ability	All nationalities. No quota.
E-1/E-2	Traders/Investors	Countries w/specific U.S. treaties. No quota.
L-1	Intracompany transferee	All nationalities. No quota.
J-1	Exchange visitor	All nationalities. No quota.
F-1	Higher degree & new OPT	All nationalities. No quota.
F-1	STEM OPT extensions	All nationalities. No quota. ONLY E-verify employers

H-1B VISA PROGRAM

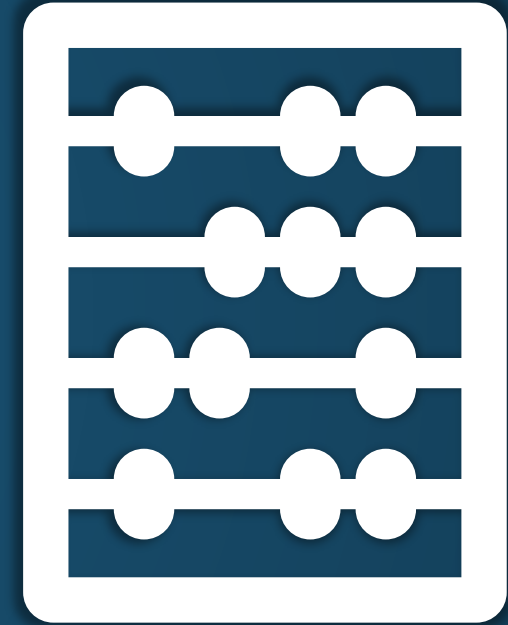
Basic Criteria

Annual Quota & Timing

Benefits and Limitations

Unique issues for entrepreneurs and start-up
companies

Alternatives to the H-1B



BASIC H-1B CRITERIA

- Sponsorship by U.S. Employer
- “Specialty Occupation” = Requires at least a Bachelor’s degree in a specific field related to job duties
- Required Wage
 - Employer must provide public notice of intent to hire H-1B worker and rate of pay
- Ability to Pay
 - Employer must show ability to pay the prevailing wage
 - Wages vary dramatically based on occupation and worksite location
- Candidate must possess required degree or equivalent at time of filing
- Licensed occupations require license before petition approval

H-1B VISA BENEFITS

Preferred way to transition to a green card due to “Dual Intent”

Permits up to 6 years of work status

Full-time or part-time H-1B is allowed

Concurrent employment allowed--separate petition by each employer required

Part-time study allowed

Non-competitive: Do not have to be the best or only candidate

- Labor Certification /PERM (market test) NOT required

Dependents eligible for H-4 status

Up to a 60-day grace period available for job loss or change of employer

H-1B LIMITATIONS

H-1B stay generally may not exceed 6 years

- Extensions beyond 6 years possible
- 6-year clock rewinds if 1 year outside U.S. but must go through lottery again
- Worker can recapture all time spent outside U.S.

Working virtually from a home office is permissible

- However, if already in H-1B status, working remotely may require an H-1B amendment if the home office is outside the Metropolitan Statistical Area

H-4 spouse eligible for Employment Authorization if:

- H-1B spouse is a beneficiary of an approved I-140 or
- H-1B spouse has been granted an AC21 Extension

No self-employment or contract work

Employer must demonstrate *bona fide professional job*

- Critical issue for new employers and entrepreneurs

H-1B FOR ENTREPRENEURS

Start-ups permitted to file H-1B petition for founders

- Must prove bona-fide employer/employee relationship
 - Ability to be supervised
 - Ability to be disciplined
- Various strategies to demonstrate employer/employee relationship
 - Diversity of ownership
 - Board of Directors with Independent Members
 - Board of Advisors
 - Shareholder agreements
- USCIS closely scrutinizes petitions involving entrepreneurs and founders

ANNUAL H-1B QUOTA & TIMING

- Applies to Cap-Subject employers (i.e., private industry)
- Annual, national quota (“cap”) of 65,000 new H-1B positions
- Additional 20,000 H-1Bs for holders of a U.S. master’s degree or higher
- Visas become available October 1st each year
- ‘Cap gap’ protection for F-1 students on OPT
- Colleges, universities & affiliated non-profits, and non-profit research organizations exempt from quota

ADVANCED REGISTRATION

USCIS Advanced Online Registration

- Employers transmit sponsored worker's bio data on-line to USCIS
- Registration submission allowed only during official registration period: Noon Eastern time March 1 to noon Eastern time March 17, 2023
- USCIS will run random computer-generated lotteries and notify employers of results by the end of March 31, 2023
- USCIS runs general 65,000 lottery first then U.S. Master's degree lottery
- Order of lotteries gives U.S. Master's degree graduates greater likelihood of selection
- ***If registration is selected, Employer must submit H-1B petition to USCIS between April 1 to June 30***

H-1B LOTTERY EXEMPTIONS

- Employment by college or university
- Employment by non-profit organization CLOSELY affiliated with college or university
- Employment by non-profit or governmental research organization
- Part-time or full-time employment by university/college with concurrent employment by for-profit enterprise (each employer must file separate petition)
- Employment by for-profit enterprise where work location is “at” university/college

H-1B FEES

- Filing Fee for Form I-129 - \$460
- Anti-fraud Fee - \$500
- U.S. Worker Training Fee - \$0 or \$750 or \$1,500, some employers exempt from fee
- Premium Processing Fee - \$2,500 if available
- Additional fee for employers that employ at least 50 employees and if more than 50% are in H-1B or L-1 status
- Attorney's Fee – varies
- Who pays which Fee?

FREE TRADE AGREEMENT PROFESSIONALS

- TN: Mexico & Canada
 - Basics:
 - No quota
 - Valid for 3 years at a time
 - Requires employment by U.S. employer.
 - Offered job must be one that is identified by the treaty, approximately 63 occupations identified
 - Application Process:
 - Canadians may apply at the border
 - Mexicans must obtain a visa at U.S. Consulate
 - ***Up to a 60-day grace period available for job loss or change of employer***

OTHER FREE TRADE AGREEMENT PROFESSIONALS



- **H-1B1: Singapore and Chile**
 - Similar to H-1B
 - High quota, low usage
- **E-3: Australia**
 - Similar to H-1B
 - Employer required to make wage attestations
 - High quota, low usage
 - *E-3 Spouse eligible for employment authorization*
- **Application Process for H-1B1 and E-3:**
 - No USCIS pre-approval required
 - Worker may apply for visa directly at US Consulate
- ***Up to a 60-day grace period available for job loss or change of employer***

E-1 TRADERS & E-2 INVESTORS

- Available to a citizen of a country that has a treaty of commerce and navigation (trade) with the U.S.
- U.S. employer must then also be owned $\geq 50\%$ by nationals of the same treaty country
 - Over 80 countries have either E-1 or E-2 or both types of treaties with U.S.:
<https://travel.state.gov/content/visas/en/fees/treaty.html>
- **E-1 Treaty Trader:** Engaged in substantial trade with treaty country and U.S.
- **E-2 Treaty Investor:** Substantial investment in the U.S.
- Typically, process is completed at a U.S. Embassy or Consulate but can also elect change of status without leaving the U.S.
- *Up to a 60-day grace period available for job loss*

L-1 INTRA-COMPANY TRANSFERREES

Requires sponsorship by U.S. employer

- Employee must have worked abroad for one complete year in the last three years
- Qualifying employment must be with the Parent, Branch, Subsidiary or Affiliate of the U.S. employer
 - Managers/Executives:
 - ✓ 7 years max
 - Specialized Knowledge Employees:
 - ✓ 5 years max
- *Up to a 60-day grace period available for job loss*

O-1 Person of Extraordinary Ability

Must prove sustained national or international acclaim

Receipt of major, internationally recognized award such as Noble Prize

OR

Three of the following:

- Receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor
- Membership in associations that demand outstanding achievement of members
- Published material about the scholar in professional publications
- Judged the work of others, either individually or on a panel
- Original scientific, scholarly, artistic, athletic, or business-related contributions of major significance to the field
- Authorship of scholarly articles in professional or major trade publications or other major media
- Performance of a leading or critical role in distinguished organizations
- Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence
- Comparable Evidence: If a particular criterion is not readily applicable to the beneficiary's occupation, comparable evidence may be submitted

O-1 TOTALITY OF THE EVIDENCE STANDARD

- Articles in particularly highly-ranked journals relative to other journals in the field, e.g. impact factor
- Published work is highly cited relative to others in the field
- High h-index-for the field
- Employment or research experience with leading institutions in the field, such as U.S. universities, or foreign universities with comparably high research activity, or highly regarded
- Receipt of unsolicited invitations to speak or present research at nationally or internationally recognized conferences in the field.
- O-1 Petition can be approved for up to 3 years
- ***Up to a 60-day grace period available for job loss or change of employer***

PATHWAYS TO LAWFUL PERMANENT RESIDENCE

- Employment Based
- Family Based
- Diversity Lottery
- Investment
- Asylum/Refugee
- Others: Registry, Cuban Adjustment Act, other special statutes



CATEGORY & COUNTRY QUOTA BACKLOGS

- Annual Quota is divided by Category (EB-1, EB-2, EB-3...) and Nationality (country of birth not citizenship)
- Backlogs can occur in both **category** and **country** queues, some very severe
- Place in queue (“priority date”) determined by filing date of PERM or Immigrant Visa Petition, whichever is earlier
- Planning the entire process early while maintaining legal nonimmigrant status is critical
- Priority date must be “current” at time of filing immigrant visa or adjustment of status application **and** at time of ultimate green card approval
 - Dual Charts – Dates for Filing and Final Action

VISA BULLETIN MARCH 2023

FINAL ACTION DATES

EMPLOYMENT BASED CATEGORIES	ALL OTHER	CHINA	INDIA	PHILIPPINES	MEXICO
EB-1	Current	1 Feb 22	1 Feb 22	Current	Current
EB-2	1 Nov 22	8 Jun 19	08 Oct 11	1 Nov 22	1 Nov 22
EB-3	Current	1 Aug 18	15 Jun 12	Current	Current

EMPLOYMENT-BASED GREEN CARD CATEGORIES

EB-1: Priority Workers

EB-1A Persons of Extraordinary Ability

EB-1B Outstanding Professors & Researchers

EB-1C Multinational Managers & Executives

EB-2: Professionals with Advanced Degrees or Exceptional Ability

National Interest Waiver (NIW) or PERM (Labor Certification)

EB-3: Professionals/Skilled Workers

PERM (Labor Certification)

Employer sponsorship required for all categories

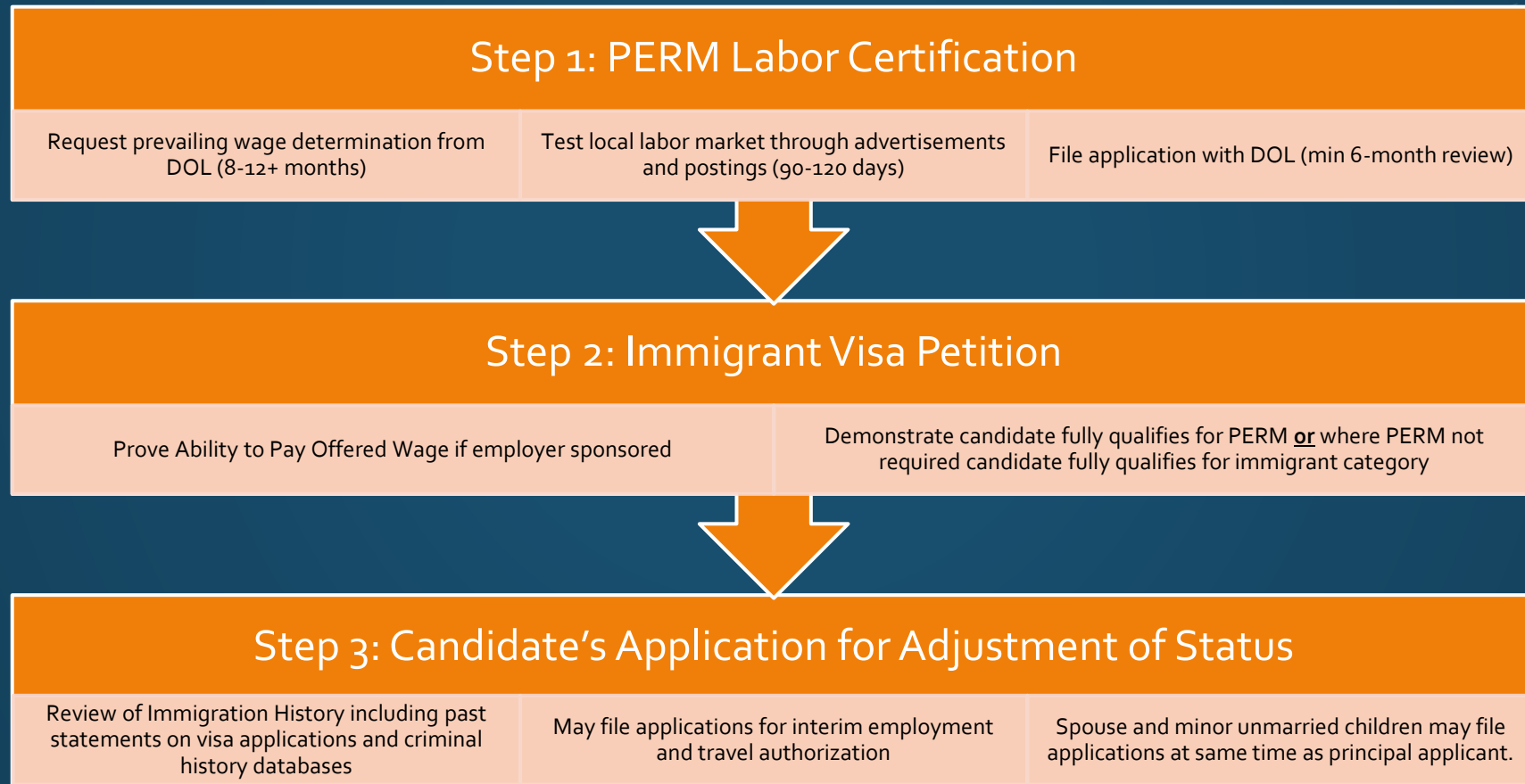
Exception: EB-1A Extraordinary Ability and EB-2 NIW can be self-sponsored

Employer must show via PERM (Labor Certification) that no qualified U.S. worker was available for job

Exception: all EB-1 cases and EB-2 NIW

ALL CATEGORIES SUBJECT TO STRICT ANNUAL QUOTA —See *Visa Bulletin* for backlogs

TYPICAL EMPLOYMENT-BASED PROCESS FLOW



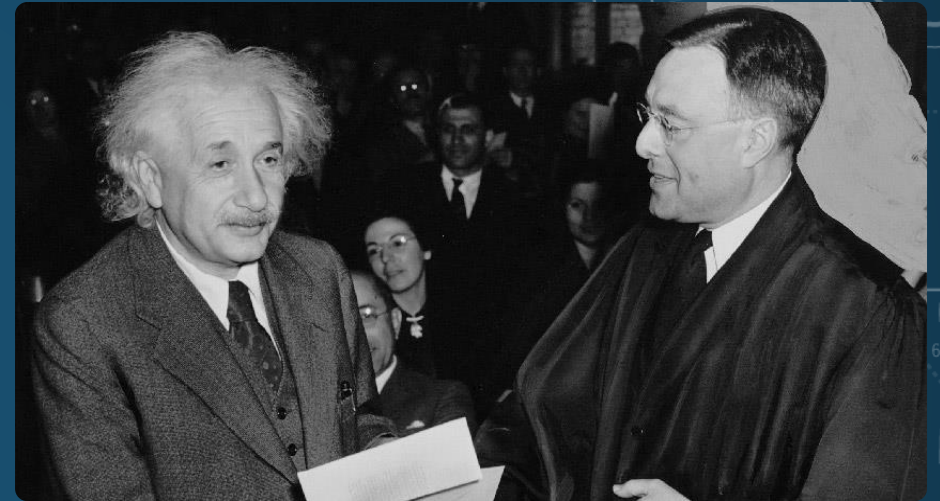
EB-1(A): PERSONS OF EXTRAORDINARY ABILITY

Persons of extraordinary ability in the sciences, arts, education, business or athletics

- May self-sponsor. Labor Certification **NOT APPLICABLE**

Must present evidence of either:

- Receipt of a major, internationally recognized award
- OR**
- Documentation of at least **3** of the following (next slide):



EB-1(A): PERSONS OF EXTRAORDINARY ABILITY

- ✓ Lesser nationally or internationally recognized prizes
- ✓ Membership in associations which demand outstanding achievement of their members
- ✓ Published material about the candidate in major media
- ✓ Judge of the work of others in the same or allied field
- ✓ Original contributions of major significance
- ✓ Authorship of scholarly articles in professional or major trade publications or other major media
- ✓ Display of work at artistic exhibitions or showcases
- ✓ Performance of a leading or critical role in distinguished organizations
- ✓ Command of a high salary or other remuneration compared to others in the field
- ✓ Evidence of commercial success in the performing arts
- ✓ Miscellaneous: If listed criteria do not readily apply, comparable evidence of eligibility may be submitted (i.e., patent or grant funding).

EB-1(B): OUTSTANDING PROFESSORS & RESEARCHERS

Outstanding professors & researchers.

- Requires employer sponsorship. Labor Certification **NOT APPLICABLE**

Must present evidence of the following:

1. An **offer of employment** by either:
 - U.S. university or college offering a tenure or tenure-track or permanent research position; **OR**
 - Organization which employs at least 3 full-time researchers
2. At least **3 years of teaching and/or research** in academic field; **AND**
3. Evidence that scholar/researcher is recognized internationally as **outstanding in academic field**. This evidence must consist of at least two of the following eligibility criteria (next slide):

EB-1(B) ELIGIBILITY CRITERIA

To establish international recognition evidence must consist of **at least two** of the following:

- ✓ Receipt of major prizes or awards for outstanding achievement
- ✓ Membership in associations which demand outstanding achievement of their members
- ✓ Published material about the alien in major media
- ✓ Judging the work of others
- ✓ Original scientific, scholarly contributions to the field
- ✓ Authorship of scholarly articles in professional or major trade publications or other major media

EB-2: NATIONAL INTEREST WAIVER

May Self-Sponsor – no employer required

Must have a Masters degree (or equivalent) or higher. Labor Certification NOT APPLICABLE

USCIS may grant a national interest waiver if the Applicant demonstrates:

- I. Proposed endeavor has both substantial merit and **national** importance
- II. Applicant is well positioned to advance the proposed endeavor
- III. On balance, beneficial to waive the job offer and labor certification requirements

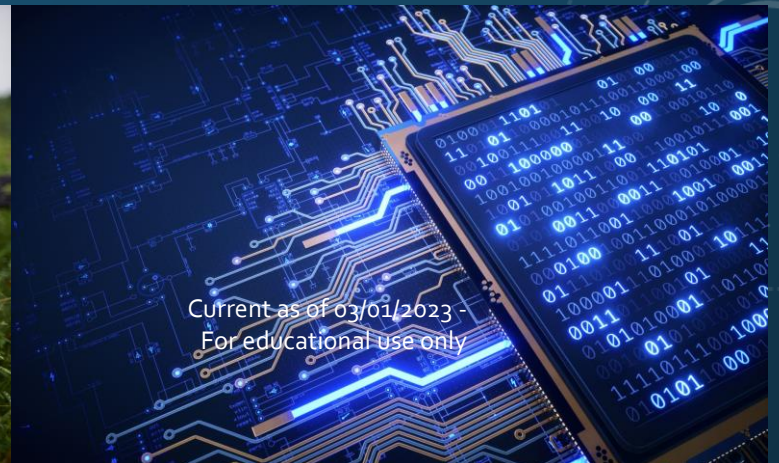
Examples of work deemed to be in the “National Interest”

- Improve wages and working conditions
- Improve education and training programs for children and under-qualified workers
- Improve health care
- Provide more affordable housing for the young and/or old and poor

NEW POLICY GUIDANCE FAVORABLE FOR STEM PH.D.'S AND ENTREPRENEURS

In balancing potential benefits or applicant versus protection of US worker opportunities favorable factors include:

- Work furthering a critical and emerging technology
- Work furthering other STEM area important to U.S. competitiveness
- Work that has potential to support U.S. national security
- Work that will enhance U.S. economic competitiveness
- Petition is supported by letters from interested U.S. government agencies



EB-2 & EB-3 LABOR CERTIFICATION

Requires offer of full-time year-round employment

Employer must demonstrate lack of qualified US applicant despite

- Good faith effort – print and on-line ads and postings
- At the **minimum** education, skills and training necessary to do the job
- At the required wage

Process currently takes 18 to 24 months

FAMILY-BASED IMMIGRANT CATEGORIES

Sponsored by U.S. Citizen:

- Parent – *no quota*
- Spouse – *no quota*
- Unmarried minor children – *no quota*
- Fiancé/Fiancée (if abroad) – *no quota*
- Son or Daughter – married or unmarried – *quota*
- Sister or Brother – *quota*

Sponsored by Lawful Permanent Resident

- Spouse – *quota*
- Unmarried son or daughter – *quota*

“Spouse” includes same-sex married persons & trans persons of both the same and opposite sex

“Child” includes children adopted before 16 years of age and step-children where the step-relationship was created before 18 years of age

Family-Based Categories: subject to category & country quotas and backlogs — See Visa Bulletin

Current as of 03/01/2023 -
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SUBMIT



QUESTIONS?



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