

POST-OPT : WORK VISAS & PERMANENT RESIDENCE OPTIONS



Presentation for Worcester Polytechnic Institute

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AGENDA

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



2/20/2024

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 February 16, 2024. However, immigration statutes, rules, policies and procedures change frequently. Accordingly, before taking any action, it is imperative to seek guidance from a licensed attorney.

U.S. IMMIGRATION CATEGORIES

U.S. Citizens

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

Through Naturalization

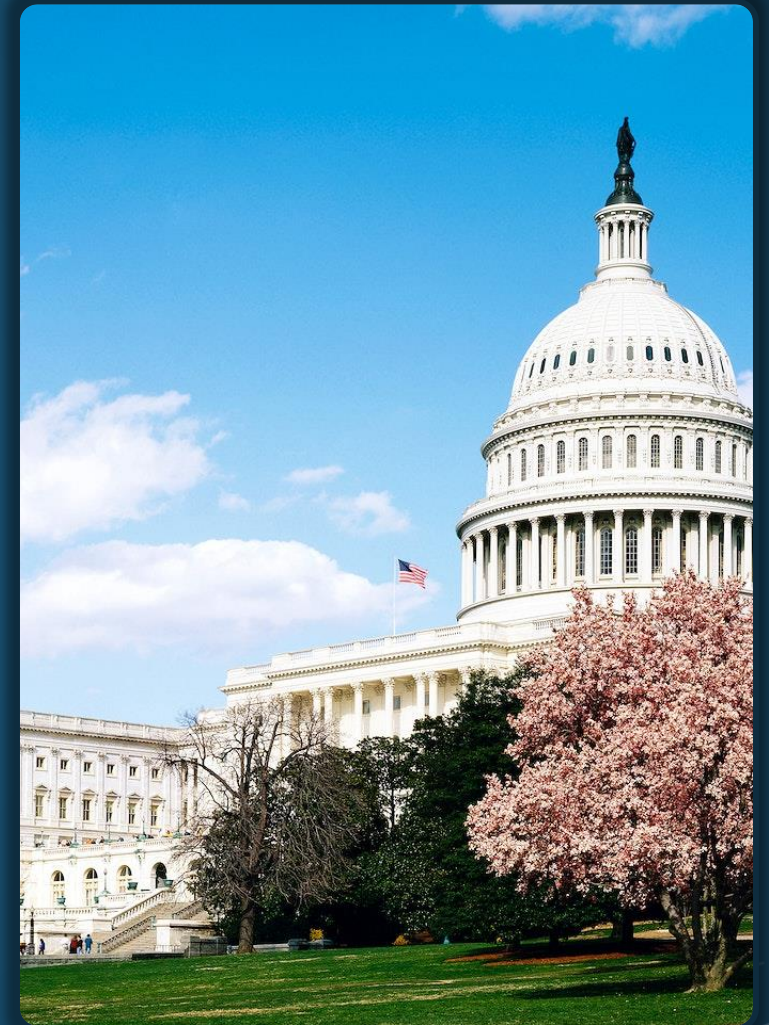
Non-Citizens

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





KEY IMMIGRATION CONCEPTS

- U.S. Department of State (DOS) issues visas
- U.S. Department of Homeland Security (DHS) controls actual admission & stay in U.S. [CBP; USCIS; ICE]
- May only be admitted to the U.S. in **one** category at a time
- Each category has benefits and restrictions
- Form I-94: created by Customs & Border Protection (CBP) at admission--notes admission date, category, and length of authorized stay
- TIP: Print I-94 from CBP website after each entry to confirm spelling of name, proper immigration category, and length of authorized stay



KEY IMMIGRATION CONCEPTS

- Change of Status: may change categories (e.g., F-1 to H-1B) within U.S. via U.S. Citizenship & Immigration Services (USCIS) if in valid status at time of application—limitations apply
- Extension of Status: may extend authorized stay within U.S. via USCIS if in valid status at time of application—limitations apply
- USCIS will create an updated I-94 once change of status or extension of status approved
- ***NOTE: international travel after approval of change or extension may require new DOS-issued visa in order to re-enter the U.S.***

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!

VERY LIMITED ACTIVITIES PERMITTED- Such as setting up a company

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, incorporations documents, etc.

As of now cannot sponsor self for H-1B if starts company for OPT

STEM OPT:

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

Available only for training with E-Verify employers

Pure self-employment **not** possible

ALL F-1 Employment should be discussed with International Office ALWAYS



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WHAT IS EMPLOYMENT & CONSEQUENCES IF NOT AUTHORIZED

- ✓ 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 performed in the U.S.
- ✓ **“Boots on the ground” interpretation = DHS looks to see where the employment is performed regardless of employer to determine if employment authorization is needed**
- ✓ 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



WHERE IS THE (BLURRY) LINE?

Business: When does a startup become employment?

- Developing a Business Plan = **OK**
- Interviewing individuals in the field area = **OK**
- Registering company = **OK but be careful**
- Outreach to Venture Capital / Investors / Fundraising / Crowdsourcing = **Possible Employment**
- Contractually signing with a VC Venture Capital = **Employment**
- Manufacturing beyond a prototype = **Employment**
- Cultivating suppliers or buyers = **Employment**
- Signing contracts for services or sales = **Employment**

Plan ahead before you fall into unauthorized employment!

WHAT ABOUT THE SIDE HUSTLE?



Uber / Airbnb	Income for a service that benefits others
Poshmark / eBay	Regularly done as a source of income
Landlord Rental Properties	Owning property = NOT Employment Operating / Maintaining property = Employment
Renting Properties	Subletting where student is not receiving funds beyond actual cost = NOT Employment Renting properties and is earning income = Employment
Investments	Passive = No service requirement = NOT Employment Non-Passive = If providing advice or making investments for others = Employment

WHAT ABOUT THE SIDE HUSTLE?



Open Source Coding	Paid or not? Accepting advertisements = Employment
Campus Rep for a Company	Paid or not? Providing service to an organization = Employment
Blog Editor Gigs Art Work Publications	Who benefits? Individual vs. contractor? If paid = Employment
TikTok YouTube	Paid or not? If paid = Employment
Internship Practicum	Done as authorized under F-1 CPT, OPT, SSR, J-1 AT or other

Six Questions to Ask: Is it US Employment?

A What is the AIM? Is it schoolwork, for fun, or professional?

B Who BENEFITS from the activity?

C Are you making a COMMITMENT for a future obligation?

T TIMEFRAME: When did or will this happen?

L LOCATION: Where will this activity take place? Is US or out?

C COMPENSATION: Will student receive money or other earnings?

IMPACT OF SOCIAL MEDIA & DIGITAL FOOTPRINT

Department of State reviews via a DS-160 visa question regarding applicant's Social Media accounts

- Must provide all identifiers used for all listed platforms.
- Consular officers will not request passwords.
- Not listing an account could be considered "lying to secure an immigrant benefit."

CBP can also look up your social media presence

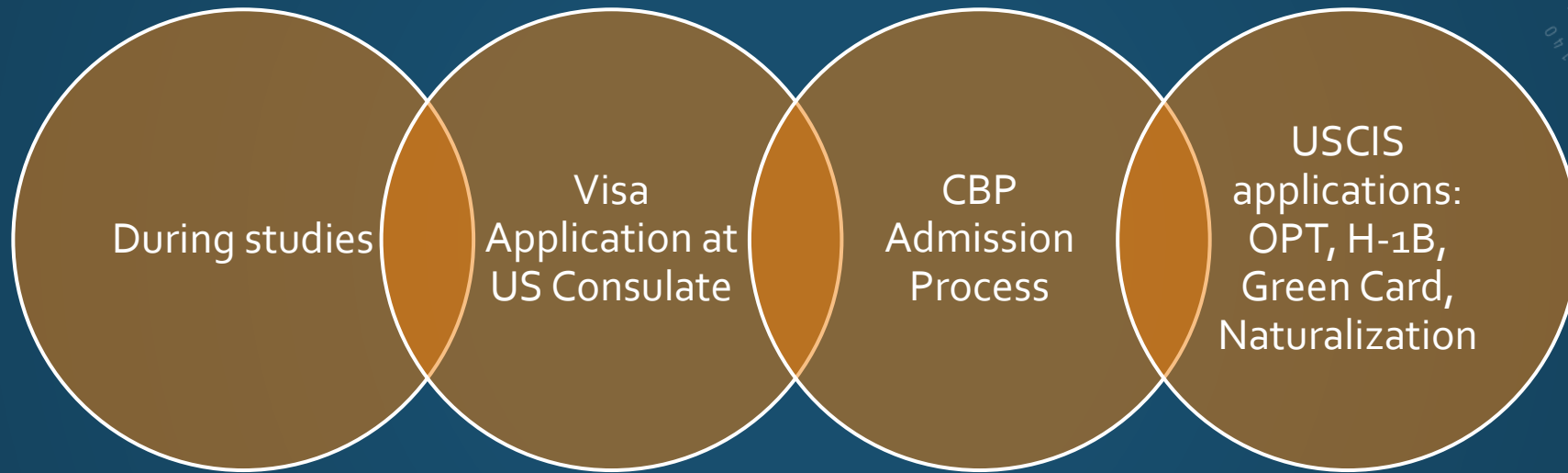


CONSEQUENCES OF VIOLATION OF FEDERAL CONTROLLED SUBSTANCE REGULATIONS/OTHER ISSUES

- ✓ Controlled Substances Regulations at State and Federal Level are different
- ✓ Activities that are lawful at State level can be unlawful under Federal law
- ✓ Federal Immigration Rules generally bar admission of non-citizens who are convicted of OR admit to acts in violation of any drug law whether state, federal, or foreign
- ✓ Cannabis use, possession, or trafficking by non-citizen can lead to loss of status, deportation, and ineligibility to naturalization
- ✓ **Work in cannabis industry** by non-citizen can lead to loss of status, deportation, and ineligibility to naturalization
- ✓ Other: DUIs (automatic cancellation of visa) – If you face any arrest, you must obtain criminal defense counsel versed in “crimmigration law”/or also consult with an immigration attorney



CONSUL AND DHS OFFICERS MAY INVESTIGATE UNAUTHORIZED EMPLOYMENT



EMPLOYMENT RELATED 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, add. 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

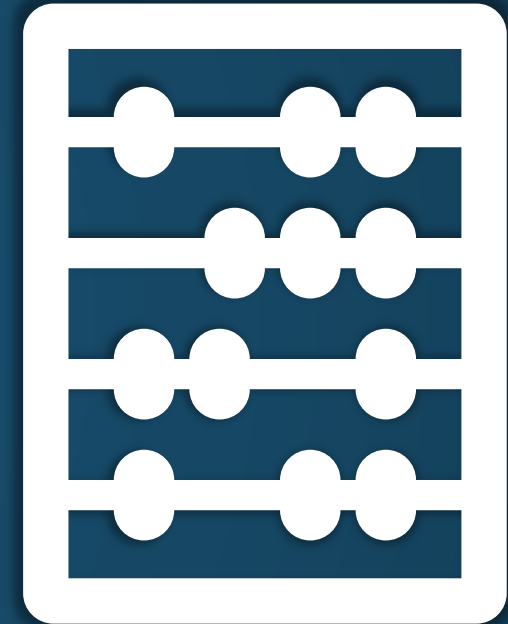
Basic Criteria

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 (change in lottery process helps)
- 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.

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—Proposed Rule Pending to change the definition of “employer” to make it more flexible for entrepreneurs

H-1B FOR ENTREPRENEURS

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

- Must prove bona-fide employer/employer relationship
 - Ability to be supervised
 - Ability to be disciplined
- Various strategies to demonstrate employer/employer relationship
 - Diversity of ownership
 - Board of Directors with Independent Members
 - Board of Advisors
 - Shareholder agreements
- USCIS closely scrutinizes petitions involving entrepreneurs and founders
- USCIS proposing changes which MAY help- still pending for now

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

ADVANCED REGISTRATION

- USCIS announced that Organizational (Employer) and attorney accounts will open 2/28/24
- Employers (Registrants) transmit sponsored worker's (Beneficiary) bio data on-line to USCIS, passport or travel document number
- Registration submission allowed only during official registration period will open **noon, 3/6/24** and close **noon, 3/22/24**
- USCIS will run random computer-generated lotteries based upon Beneficiary (the non-citizen) identified by passport number
- USCIS runs general 65,000 lottery first then U.S. Master's 20,000 degree lottery
- ***If registration is selected, Employer must submit H-1B petition to USCIS between April 1 to June 30 (**allows soon-to-be graduates to register)***

H-1B LOTTERY EXEMPTIONS

- Employment by college or university
- Employment by non-profit organization CLOSELY affiliated with college or university (NOT ALL Non-Profits qualify)
- Employment by non-profit or governmental research organization
- Employment by for-profit enterprise where work location is “at” university/college
- Part-time or full-time employment by university/college with concurrent employment by for-profit enterprise (each employer must file separate petition)
- There are incubator programs at universities/Cap-Exempt organizations that help start ups to leverage the Cap-exempt H-1B

ALTERNATIVES TO H-1B

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

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.

L-1 INTRA-COMPANY TRANSFEREES

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

O-1 Person of Extraordinary Ability

Must prove sustained national or international acclaim

Receipt of major, internationally recognized award such as Nobel 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.

PATHWAYS TO LAWFUL PERMANENT RESIDENCE

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



EMPLOYMENT-BASED GREEN CARD CATEGORIES

- Requires a FULL-TIME job offer from a U.S. Employer
- Must be in legal nonimmigrant status on the day you file green card in the U.S. (no violation of status***)
- Ideally, you also have an underlying status while waiting for green card approval
- Must File “Immigrant Petition” as foundation to apply for Green Card

TRANSITION TO GREEN CARD FROM NONIMMIGRANT VISA

Maintain Nonimmigrant Status

Examples:

- * H-1B (Ideal)
- * F-1
- * J-1
- * Etc.

Immigrant Petition Filed with USCIS

Different Employment-based categories (NOT A VISA):

- EB1
- EB2
- EB3

File Green Card

May file Green Card application with immigrant petition, or after immigrant petition approved-- strategies involved.

CATEGORY & COUNTRY QUOTA BACKLOGS

- Annual Quota of 144,000 green card numbers is divided by Preference Categories (EB-1, EB-2, EB-3) and Nationality (country of **birth** not citizenship)
- Backlogs can occur in both **category** and **country** queues
- Significant backlogs in some categories and for some countries
- A monthly report is issued by the US Department of State entitled, the “Visa Bulletin” that reports green card usage by category and country
 - Dual Charts – Dates for Filing and Final Action
- The date the first step toward your green card is filed establishes your **priority date** and potentially your place in the queue, if there is one.

VISA BULLETIN MARCH 2024

FINAL ACTION DATES

EMPLOYMENT BASED CATEGORIES	ALL OTHER	CHINA	INDIA	PHILIPPINES	MEXICO
EB-1	Current	15 Jul 22	01 Oct 2020	Current	Current
EB-2	22 Nov 22	01 Jan 20	01 Mar 12	22 Nov 22	22 Nov 22
EB-3	08 Sep 22	1 Sep 20	01 Jul 12	08 Sep 22	08 Sep 22

EMPLOYMENT-BASED GREEN CARD CATEGORIES

EB-1:

- EB-1A Persons of Extraordinary Ability
- EB-1B Outstanding Professors & Researchers
- EB-1C Multinational Managers & Executives

EB-2: Masters Degree or equivalent

- National Interest Waiver (NIW)
- PERM (Labor Certification) – Majority Fall Into this Category

EB-3: Bachelors Degree/Skilled Workers

- PERM (Labor Certification) – Majority Fall Into this Category

TYPICAL EMPLOYMENT-BASED PROCESS FLOW

Step 1: PERM Labor Certification

Request prevailing wage determination from DOL (8-12+ months)

Test local labor market through advertisements and postings (90-120 days)

File application with DOL (min 6-month review)

Step 2: Immigrant Visa Petition

Prove Ability to Pay Offered Wage

Demonstrate candidate fully qualifies for PERM or where PERM not involved fully qualifies for immigrant category

Step 3: Candidate's Application for Adjustment of Status

Review of Immigration History including past statements on visa applications and criminal history databases

May file applications for interim employment and travel authorization

Spouse and minor unmarried children may file applications at same time as principal applicant.

EB-1(A): PERSONS OF EXTRAORDINARY ABILITY

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

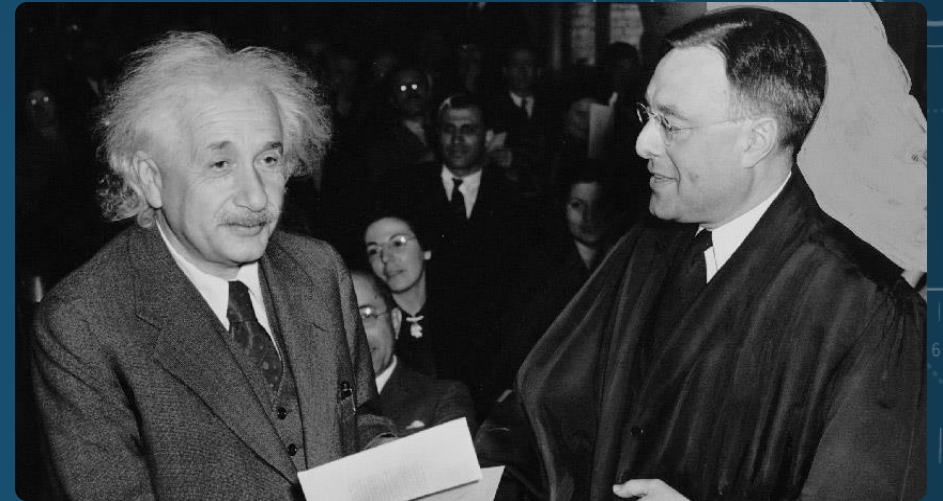
- May self-sponsor. Labor Certification **NOT APPLICABLE**

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 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 as post-doc; **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

Must establish scholar/researcher is recognized internationally as **outstanding in academic field**

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-1(C) INTRACOMPANY MANAGER/EXECUTIVE

- Similar to the L-1A Category
- Allows Manager/Executive to skip the labor certification process
- Must prove was a manager/executive at a related company abroad for at least one year in the prior three years before coming to the U.S. (typically in L-1A status)
- Employer sponsorship required
- Related company – parent, subsidiary, or affiliate

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EB-2: NATIONAL INTEREST WAIVER (SELF-SPONSORSHIP ALLOWED)

Must have a Masters degree (or equivalent) or higher

USCIS may grant a national interest waiver if the Petitioner 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

USCIS 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



IMPORTANT: PLAN EARLY...

Employment Based Summary of most common scenarios:

EB-1 – No Labor Certification Required; EB-1A Self-Petition

EB-2 -- NIW self-petition

EB-2 -- Master's degree, Requires Labor Certification

EB-3 -- Bachelor's degree, Requires Labor Certification

Must Maintain Legal Status to Bridge to Green Card

TRANSITIONING TO GREEN CARD FROM NONIMMIGRANT VISA

Maintain Nonimmigrant Status

Examples:

- * H-1B (Ideal)
- * F-1
- * J-1
- * Etc.

Immigrant Petition Filed with USCIS

Different Employment-based categories (NOT A VISA):

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File Green Card

May file Green Card application with immigrant petition, or after immigrant petition approved-- strategies involved.

FAMILY-BASED IMMIGRANT CATEGORIES

Sponsored by U.S. Citizen:

- Parent – no quota
- Spouse – no quota
- Unmarried minor children – no quota
- Son or Daughter – married or unmarried
- Sister or Brother

Sponsored by Lawful Permanent Resident

- Spouse
- Unmarried son or daughter

'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 backlogs — See *Visa Bulletin*

2/20/2024



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