After OPT: Work Visas & Permanent Residence Options

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Immigration law is complex and nuanced. This presentation provides information in general terms. Therefore, please seek individualized guidance from a competent professional before taking any action.
AGENDA

- Immigration System

- Non-immigrant or Temporary Work Visas

- Options for a green card (employer vs. self-sponsored categories)

- Pitfalls, timing, visa retrogression, and the importance of early planning!
OVERVIEW: IMMIGRATION CATEGORIES

- **U.S. CITIZENS**
  - By Birth (law of the soil and law of blood)
  - By Naturalization

- **NON-CITIZENS**
  - **Immigrants:** Lawful Permanent Residents (“green card holders”)
  - **Nonimmigrants:** Persons Permitted in U.S. for Temporary Stay
  - **Others:** Refugees, Asylees, Temporary Protected Status (TPS), Deferred Action for Childhood Arrivals (DACA)
  - Persons present without lawful status
NONIMMIGRANT BASICS

- U.S. Department of State (DOS) issues visas; U.S. Department of Homeland Security (DHS) controls actual admission & stay in U.S.
- May only be admitted to the U.S. in one category at a time
- **Form I-94**: created by Customs & Border Protection (CBP) at admission noting 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 expiration date
  - Approval of change or extension request (below) is noted with creation of an updated I-94
- **Change of Status**: may change categories 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
- **NOTE**: international travel after approval of change or extension may require new DOS-issued visa in order to re-enter the U.S.

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What is Employment & Consequences for Unauthorized Employment?

- No concrete definition of “employment” in the Immigration & Nationality Act

- Generally, DHS considers employment as encompassing any service rendered in exchange for remuneration — cash, tuition, fees, books, supplies, room, food or any other benefit.

- What if I “volunteer”?
  - Allowable if activity is a bona-fide volunteer activity – no one would normally be paid or receive a benefit for the activity, e.g. Red Cross
  - 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, possible unlawful presence, ineligibility for future work visas / green cards
# COMMON NONIMMIGRANT WORK CATEGORIES

<table>
<thead>
<tr>
<th>Visa</th>
<th>Type of work</th>
<th>Limitations</th>
</tr>
</thead>
<tbody>
<tr>
<td>H-1B</td>
<td>Specialty occupation</td>
<td>All nationalities. Cap-subject and cap-exempt. Cap subject quota: 65,000 for bachelor’s, add. 20,000 for U.S. master’s</td>
</tr>
<tr>
<td>H-1B1</td>
<td>Specialty occupation</td>
<td>Chile (1,400) &amp; Singapore (5,400)</td>
</tr>
<tr>
<td>TN</td>
<td>TN specific professional occupations</td>
<td>Canadians &amp; Mexicans. No quota.</td>
</tr>
<tr>
<td>E-3</td>
<td>Specialty occupation</td>
<td>Australians. 10,500</td>
</tr>
<tr>
<td>O-1</td>
<td>Extraordinary ability</td>
<td>All nationalities. No quota.</td>
</tr>
<tr>
<td>E-1/E-2</td>
<td>Traders/Investors</td>
<td>Countries w/specfific U.S. treaties. No quota.</td>
</tr>
<tr>
<td>L-1</td>
<td>Intracompany transferee</td>
<td>All nationalities. No quota.</td>
</tr>
<tr>
<td>J-1</td>
<td>Exchange visitor</td>
<td>All nationalities. No quota.</td>
</tr>
<tr>
<td>F-1</td>
<td>Higher degree &amp; new OPT</td>
<td>All nationalities. No quota. E-verify NOT required</td>
</tr>
<tr>
<td>F-1</td>
<td>STEM OPT extensions</td>
<td>All nationalities. No quota. E-verify employers ONLY</td>
</tr>
</tbody>
</table>
OVERVIEW: H-1B NONIMMIGRANTS

- BASIC CRITERIA
- ANNUAL QUOTA & TIMING
- LIMITATIONS
- ALTERNATIVES TO THE H-1B

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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 usually require the license in hand for filing
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
  - NOT allowed for permanent residence sponsorship as it must be full-time
- Concurrent employment permitted *with separate petition by each employer*
- 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
- 60-day grace period after loss of job in some cases
H-1B LIMITATIONS

- H-1B period of stay generally may not exceed 6 years
  - Some 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 petition be filed with USCIS if the home office is outside the Metropolitan Statistical Area (MSA).

- H-4 spouses may apply for Employment Authorization (EAD) only 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
  - Issues with small & new employers
H-1B ENTREPRENEURIAL ISSUES

- Start-ups/self-employment and supporting activities permitted during Optional Practical Training
- Start-up activities possible during F-1 status if part of approved full-time curriculum. Must report to school’s International Office to secure permission
- Passive investments permitted
- Start-ups permitted to file H-1B petition with foreign national in executive position even if original founding member, but most show bona-fide employer/employer relationship (i.e., ability to be fired)
- DHS gives more scrutiny during adjudication to small businesses and start-ups
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 Online Registration

- Employers transmit certain details of sponsored worker to USCIS via on-line system and create a registration, available February 21, 2022, noon (EST)
- Employers may submit a registration starting—noon (EST), March 1, 2022, to noon (EST), March 18, USCIS will then run random computer-generated lotteries and notify employers by the end of March 31, 2022.
- If registration is selected, Employer allowed to submit I-129 petition to USCIS between April 1st to June 30th
- USCIS used to run the general 65,000 Bachelor’s lottery first and then U.S. Master’s degree lottery second
- This order gives U.S. Master’s degree graduates greater likelihood of selection
H-1B CAP EXEMPTIONS

Not Subject to Annual Quota

- Employment by college or university
- Employment by non-profit organization affiliated with college or university
- Employment by non-profit research organization or a governmental research organization
- Part-time or full-time employment by university/college with subsequent concurrent employment by for-profit enterprise
- Employment by for-profit enterprise “at” university/college
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 listed
  - Application Process:
    - Canadians may apply at the border
    - Mexicans must obtain a visa at U.S. Consulate

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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
  - 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
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 ≥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](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

- **L-1A:**
  - 7 years max
  - Executive or Manager of Professionals or Essential Function

- **L-1B:**
  - 5 years max
  - Person with “specialized knowledge”
O-1: EXTRAORDINARY ABILITY

- Persons of extraordinary ability
  - Sciences, Education, Business, Athletics
  - Arts (fine arts, visual arts, culinary, performing arts)
- Must be sponsored by a U.S. employer for an “event”
  - An "event" includes, but is not limited to, scientific projects, academic years, lecture series, conferences, business projects, or tours
- Available for initial period of 3 years
  - Renewals in 1-year increments
- May be option to postpone (not satisfy) the J-1 two-year home residency requirement.
  - Note: NOT available for change of status. Must apply for visa at U.S. Embassy or Consulate abroad.
O-1A (Sciences, Education, Business or Athletics)

Requires: Sustained national or international acclaim, person is one of the small percentage who have risen to the very top of their field of endeavor.

**Step 1:** Evidence of receipt of major, internationally recognized award, such as the Nobel Prize; OR at least 3 of the following:

1. **Receipt of nationally or internationally recognized prizes or awards** for excellence in the field of endeavor;
2. **Membership in** associations that demand outstanding achievement of members
3. **Published material** about the scholar in professional publications
4. **Judged the work of others**, either individually or on a panel
5. Original scientific, scholarly, artistic, athletic, or business-related **contributions of major significance** to the field
6. **Authorship of scholarly articles** in professional or major trade publications or other major media
7. Performance of a **leading or critical role** in distinguished organizations.
8. 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.
9. **Comparable Evidence:** If a particular criterion is not readily applicable to the beneficiary’s occupation, comparable evidence may be submitted.
**New O-1 Clarifying Guidance**

**Step 2:** Review of the Totality of the Evidence

Provides specific examples:

- Articles in particularly highly-ranked journals relative to other journals in the field, e.g. impact factor
- Published work is high relative to others in the field, or the beneficiary has a high h-index for the field
- The Beneficiary’s employment or research experience is with leading institutions in the field, such as U.S. universities, or foreign universities with comparably high research activity, or highly regarded
- The record establishes that the beneficiary has received 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
- Diversity Lottery
- Investment
- Asylum/Refugee
- Others: Violence Against Women Act (VAWA) etc.
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)

- **EB-3:** Bachelors Degree/Skilled Workers
  - PERM (Labor Certification)

- Employer must sponsor foreign worker
  - **Exception:** EB-1A Extraordinary Ability and EB-2 NIW cases, you may self-sponsor.

- Employer must show via a Labor Certification (PERM) market test 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
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
- Significant backlogs in some categories and for some countries
- Planning the entire process early while maintaining legal nonimmigrant status is critical
- Must be “current” at time of filing and at time of ultimate green card approval
  - Dual Charts – Dates for Filing and Final Action
# Visa Bulletin February 2022

## Chart A – Final Action Dates

https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html

<table>
<thead>
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<th>EMPLOYMENT BASED CATEGORIES</th>
<th>ALL OTHER</th>
<th>CHINA</th>
<th>INDIA</th>
<th>PHILIPPINES</th>
<th>MEXICO</th>
</tr>
</thead>
<tbody>
<tr>
<td>EB-1</td>
<td>Current</td>
<td>Current</td>
<td>Current</td>
<td>Current</td>
<td>Current</td>
</tr>
<tr>
<td>EB-2</td>
<td>Current</td>
<td>1 MAR 19</td>
<td>1 Jan 13</td>
<td>Current</td>
<td>Current</td>
</tr>
<tr>
<td>EB-3</td>
<td>Current</td>
<td>22 MAR 18</td>
<td>15 Jan 12</td>
<td>Current</td>
<td>Current</td>
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</tbody>
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Employment-Based Green Card Flowchart

1. Prevailing Wage Determination
2. Conduct Recruitment
3. File PERM Application

Stage 1
PERM Labor Certification

Stage 2
I-140 Immigration Petition

Stage 3
I-485 Adjustment of Status or Consulate Processing

Receive Green Card

Work Permit (I-485 only)
Advanced Parole (I-485 only)
3-STEP LABOR CERTIFICATION (PERM)-BASED GREEN CARD

- Requires employer sponsorship

**Step 1: Labor Certification (PERM)**
- DOL certification to DHS that employer’s sponsorship of foreign national will **not take** away job opportunity from qualified US worker
- If job market test shows no qualified, willing, and able U.S. worker was available, Employer files a labor certification application with DOL
  - Some occupations are pre-certified: nurses, physical therapists
  - “Special Handling” process for college/university professors

**Step 2: Immigrant Petition (Form I-140)**
- Once labor certification application is approved, the Employer may then file an immigrant visa petition for non-citizen with DHS.

**Step 3: Adjustment of Status (Form I-485)**
- If no backlog in visa queue, non-citizen and dependents may apply for adjustment of status (green card) simultaneously with immigrant visa petition or when “current.”
EMPLOYMENT BASED APPLICATIONS WITHOUT LABOR CERTIFICATION

If Labor Certification is not required, Employment Based Green Card Applications consist of two basic steps/components:

- **Step 1: I-140, Immigrant Petition for Alien Worker**
  - Petitioner’s request to USCIS that a named foreign national physician or researcher meets the requirements of the EB-1(A), EB-1(B) or EB-2 category
  - Petitioner may file multiple I-140’s
    - Must meet requirement of each category applied for as of time of filing

- **Step 2: I-485, Application to Apply to Adjust Status to Permanent Resident**
  - Individual application by foreign national and spouse and each minor unmarried child under 21 years of age which demonstrates that applicant is admissible to U.S. and should be granted residency
  - Approval of I-485 results in “green card” status for applicant
  - I-485 may only be filed if an immigrant visa number is immediately available
EB-1(A): PERSONS OF EXTRAORDINARY ABILITY

- Persons of extraordinary ability in the sciences, arts, education, business or athletics.
  - May self-sponsor. Labor Certification (PERM) NOT required
- Must present evidence of either:
  - Receipt of a "major, internationally recognized award, such as the Nobel Prize"; 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 alien in major media
- Judging the work of others
- Original scientific, scholarly, artistic, athletic, or business-related contributions of major significance
- Authorship of scholarly articles in professional or major trade publications or other major media
- Work has been displayed at artistic exhibitions or showcases
- Performance of a leading or critical role in distinguished organizations
- Having commanded a high salary or other remuneration in comparison 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.
  - May NOT self-sponsor. Labor Certification (PERM) NOT required.

- Must present evidence of the following:
  1. An offer of employment by either:
     - U.S. university or college offering a tenure or tenure-track position or permanent research position; OR
     - Organization which employs at least 3 full-time researchers offering a permanent research position
  2. At least 3 years of teaching and/or research in academic field post advanced degree; 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):

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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:

- 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 (NIW)

- Must have a Masters degree (or equivalent) or higher
- USCIS may grant a national interest waiver if the Petitioner demonstrates:
  I. That the foreign national’s proposed endeavor has both substantial merit and national importance
  II. That he or she is well positioned to advance the proposed endeavor; and
  III. That on balance, it would be beneficial to waive the job offer and labor certification requirements.

- Examples of work deemed to be in the “National Interest” of the U.S. are pursuits that:
  - Promote economic development
  - Improve wages and working conditions
  - Improve education and training programs for children and under-qualified workers
  - Improve health care, or
  - Provide more affordable housing for the young and/or old and poor
New Policy Guidance – NIW STEM Ph.D.'s and Entrepreneurs

• **Factors:** the person will be engaged in work furthering a critical and emerging technology or other STEM area important to U.S. competitiveness; and

• The person is well positioned to advance the proposed STEM endeavor of national importance.

• The potential to support U.S. national security or enhance U.S. economic competitiveness, or when the petition is supported by letters from interested U.S. government agencies
FAMILY-BASED IMMIGRANT CATEGORIES

- **Sponsored by U.S. Citizen:**
  - Parent*
  - Spouse*
  - Unmarried minor child*
  - Son or Daughter – married or unmarried
  - Sister or Brother

- **Sponsored by Lawful Permanent Resident**
  - Spouse
  - Unmarried son or daughter

- ***Immediate Relatives:** not subject to a quota & often can adjust status to permanent residence inside the U.S.
  - ‘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.

- **Other Family-Based Categories:** subject to category & country quotas backlogs — See Visa Bulletin
“But my friend’s case…”

- USCIS adjudication backlogs
- Rescission of certain guidance of prior administration
- Use of expedite requests
- Update on visa bulletin
- Congressional Support
- Other
STAY INFORMED ON LATEST DEVELOPMENTS...

QUESTIONS?

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