

# **AFTER OPT: WORK VISAS & PERMANENT RESIDENCE OPTIONS**

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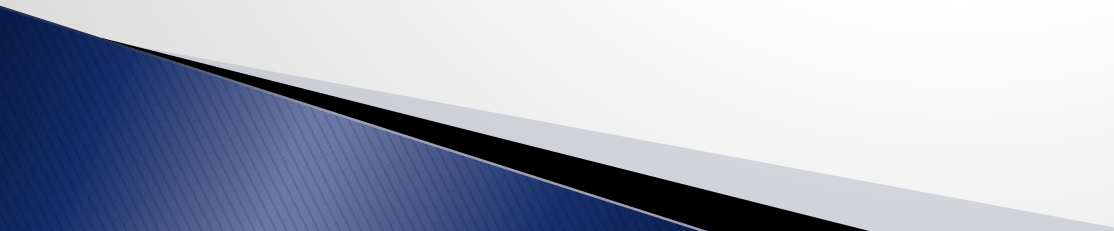
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Immigration law is complex and nuanced. This presentation provides information in general terms. Therefore, please seek individualized guidance from a competent professional before taking any action.



# 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.

# 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

Visa	Type of work	Limitations
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
H-1B1	Specialty occupation	Chile (1,400) & Singapore (5,400)
TN	TN specific professional occupations	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. E-verify NOT required
F-1	STEM OPT extensions	All nationalities. No quota. E-verify employers ONLY

# OVERVIEW: H-1B NONIMMIGRANTS

- ▶ BASIC CRITERIA
- ▶ ANNUAL QUOTA & TIMING
- ▶ LIMITATIONS
- ▶ 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 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 must show bona-fide employer/employer relationship (i.e., ability to be fired)
- ▶ DHS gives more scrutiny during adjudication to small businesses and start-ups

# 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 1<sup>st</sup> 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 FY2023

## ► 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 1<sup>st</sup> to June 30<sup>th</sup>
- USCIS used to run the general 65,000 Bachelor's lottery first and then 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

# 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  $\geq 50\%$  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
- ▶ 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

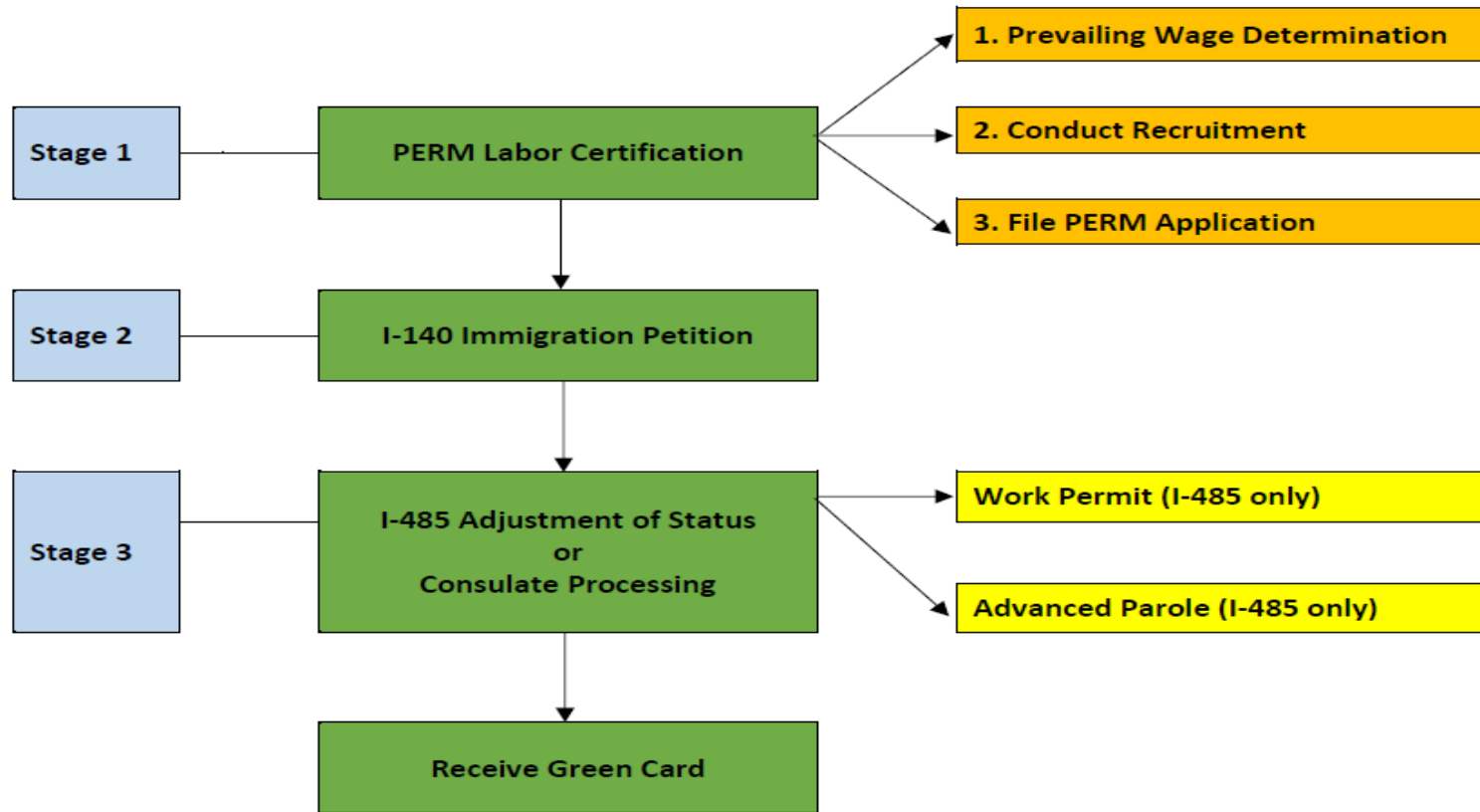
## Chart A – Final Action Dates

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

<b>EMPLOYMENT BASED CATEGORIES</b>	<b>ALL OTHER</b>	<b>CHINA</b>	<b>INDIA</b>	<b>PHILIPPINES</b>	<b>MEXICO</b>
<b>EB-1</b>	Current	Current	Current	Current	Current
<b>EB-2</b>	Current	1 MAR 19	1 Jan 13	Current	Current
<b>EB-3</b>	Current	22 MAR 18	15 Jan 12	Current	Current



# Employment-Based Green Card Flowchart



# 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):



# EB-1(B) ELIGIBILITY CRITERIA

- ▶ 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

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# QUESTIONS?



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