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Pursuing Work Authorization and Permanent Residence After Graduation

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Immigration “Roadmap”

- H-1B status
- Other nonimmigrant visas
- Permanent residence
- Strategy issues

Common Obstacles

- Limited H-1B visa numbers/limited immigrant visa numbers
- Lack of alternatives to H-1B
- Advance Planning is Key!

Optional Practical Training

- Can work for one year
- Must apply before graduation
- Coordinate start date/end date with new visa start date
- Often essential trial period before employer makes commitment to sponsorship

Extension of OPT

New rule lets you extend OPT by 17 months if:

- Degree is in STEM field (Science, Technology, Engineering and Mathematics); and
- Employer is enrolled in E-Verify

What are the eligible STEM degrees?

- Computer Science Applications
- Actuarial Science
- Engineering
- Engineering Technologies
- Biological and Biomedical Sciences
- Mathematics and Statistics
- Military Technologies
- Physical Sciences
- Science Technologies
- Medical Scientist

What is E-Verify?

- Internet-based system operated by DHS in partnership with SSA
- Electronically compares information contained on Form I-9 with records contained in DHS and SSA databases
- Criticized for errors; often ensnares U.S. citizens

New E-Verify Requirement

Beginning in September 2009, federal contractors and sub-contractors are required to begin using E-Verify to verify their employees' eligibility to legally work in the U.S.

H-1B Visa

- 6 year visa (3 years + 3 year extension)
- Position must be in “specialty occupation” (means that job requires a degree)
- Foreign national must possess the required degree or equivalent
- An H-1B number must be available

H-1B Numerical Cap

- 65,000 new H-1B “numbers” per year
- 20,000 additional H-1B numbers for holders of U.S. Master’s degree or higher degree
- Cap not yet reached for the year!
- Normally, visas gone immediately, and lottery held for available slots.

H-1B Numerical Cap: Who is Not Subject?

- Institution of higher education
- Affiliated non-profit entity: associated with an institution of higher education, through shared ownership or control or attached as a branch, cooperative, or subsidiary
- Non-profit research organization or governmental research organization
- Individuals who previously held H-1B status for fewer than 6 years.
- Individuals currently in H-1B status

H-1B Continued...

- Dual intent-immigrant intent ok
- Exceptions to six year limit
- Must depart US and stay out for 1 year before eligible for another 6 years
- Family members-H4
- Prevailing wage must be paid

H-1B Continued...

- Position and employer specific
- Can be for part-time or concurrent employment
- Not for independent contractor
- Portability: once in H-1B status can transfer employers once petition with new employer filed and received. Do not need to wait for decision on petition (Note: if going from cap-exempt to cap-subject employer, must apply for visa number)

Change Status or Consular Processing

- **Change of status**
 - File petition with USCIS
 - Stay in US (BEWARE: departing US while petition is pending can result in denial)
 - Receive approval
 - Status change goes into effect on requested date
 - If travel abroad, must obtain visa at US Consulate
- **Consular processing**
 - File petition with USCIS
 - Receive approval
 - Depart US
 - Take original approval notice to interview at US Consulate
 - Obtain visa
 - Re-enter US

H-1B Visa: Filing Fees

REQUIRED OF ALL PETITIONS

- \$320 application fee
- \$500 USCIS anti-fraud fee

IF FEWER THAN 26 EMPLOYEES

- \$750 – ACWIA (employment and training fee)

IF 26 OR MORE EMPLOYEES

- \$1500 - ACWIA

***OPTIONAL \$1,000 PREMIUM PROCESS IN 15 DAYS**

Preparing the H-1B Petition

Determine prevailing wage or actual wage

- Prevailing wage=market wage as determined by DOL or wage source accepted by DOL
- Actual wage=the wage that is actually being paid to similarly situated workers

Must pay actual wage if more than prevailing wage

Preparing the H-1B Petition

Labor Condition Application Certified with DOL

- Employer attests that it will pay higher of the prevailing wage or the actual wage
- Employer attests that it will provide same working conditions to foreign worker as to US worker
- Employer must provide notice of the LCA to other employees
- Beware new LCA system—lots of delays

Filing the H-1B Petition

- After LCA is certified, file petition
- H-1B petition filed with the USCIS
- Regular processing 2 – 6 months
- Premium processing in 15 days by paying USCIS an additional \$1,000

H-1B Timing and Other Issues

- Employer drives the process
- Change of status before expiration of OPT
- Travel can constitute abandonment
- Cap gap relief
- Premium processing may be necessary

H-1B Hypothetical #1

OPT expires on July 15, 2009

- 60-day grace period after OPT
- Gap from Sept 15 – October 1
- Previously, consular processing required
- New rule: if you are approved for H-1B, can stay in the U.S. until Oct. 1 and work if you have otherwise maintained status.

H-1B Hypothetical #2

OPT expires on January 1, 2010

- File H-1B petition on April 1, 2009, H-1B begins on Oct 1
- Lose remaining OPT time

H-1B Hypothetical #3

Masters candidate has H-1B petition on file and has valid OPT until September 2009

- Wants to travel in F-1 status in July 2009
- Must ensure H-1B change of status is approved BEFORE departing the U.S.
- USCIS views departure from U.S. prior to U.S. as abandonment of H-1B change of status--visa number will be lost!

Other Non-Immigrant Visas

Visa classification	General requirements
TN	Canadians or Mexicans are eligible for TN status for a position designated in NAFTA. Schedule 2 of NAFTA identifies the requirements for each position.
L-1A/L-1B	Intra-company transferee. (Manager or Executive) or (Specialized Knowledge). Must work abroad for one year within the last 3 years with overseas employer before transferring to U.S. Must be employed as a manager or executive. May apply for permanent residency without going through labor certification process. Limited to 7 years in L-1A status and 5 years in L-1B status.
O-1	Persons of extraordinary ability in the arts and entertainment, athletics, sciences, business and education. No numerical quota. Initial visa for 3 years and renewable annually indefinitely.

Other Non-Immigrant Visas (cont.)

Visa classification	General requirements
J-1	Cultural exchange visa. Used for trainees, research scholar, short-term scholars, or specialists. Limits vary according to type of program. Beware– some individuals will be subject to two-year return requirement.
H-3	Temporary worker invited by individual or organization for purposes of receiving instruction and training other than to receive graduate medical education or training. The training program must be one “that is not designed primarily to provide productive employment” and training can’t be available in home country.
E-3	Visa for Australian nationals. Similar to H-1B visa as position must require a Bachelor’s degree and FN must possess a Bachelor’s degree. Renewable indefinitely. Cap of 10,500 per year.

Sponsorship for Permanent Residency

Labor certification

- Employer recruits and must prove a shortage of minimally qualified American workers to fill the position
- PERM process
- File with Dept of Labor

Non-labor certification

- Outstanding Researcher
- Extraordinary Ability
- National Interest Waiver
- Multi-National Executive or Manager
- Investor

Permanent Residency Flowchart

Labor Certification (If applicable)

I-140 Immigrant Visa Petition

Adjustment of Status/ Consular Processing Application

Labor Certification: PERM

- Test the labor market to prove no qualified U.S. worker
- Recruitment for 30 – 180 day period by placing newspaper ads, internet postings, internal posting, ad with State Workforce Agency
- Online filing, audit-based (like tax return)
- Processing time in unaudited cases is 9 months on average (beware: audits are on the rise, now approximately 44% of cases)
- As of July 16, 2007, employees are NOT allowed to pay for any PERM related expenses (legal fees, cost of ads, etc.)

Immigrant Visa Petition: Form I-140

- Once PERM application approved, file immigrant visa petition
- Prove company can pay offered salary
- Prove qualifications for position
- Standard processing time approx. 6 months
- Once approved, some need to wait for visa quota availability

Visa Retrogression



- 140,000 immigrant visa numbers are available each year
- Limited numbers available for each preference category and for each country each year
- Preference category is established by the job requirements, not the applicant's qualifications in the LC context (e.g. EB-2 vs. EB-3)
- Priority date is established by date LC is filed, or if no LC required, by date I-140 is filed

Adjustment of Status: (I-485)

- Application for “green card”
- Once priority date is current (based on when PERM was filed), can file green card application
- If requirement is BS degree and less than 5 years of work experience, there is a 3 – 4 year wait
- If requirement is a MS degree or BS and 5 yrs of progressively responsible post-baccalaureate work experience, there is no quota wait unless from China, India, or the Philippines.
- Once I-485 filed, can apply for work permit and travel permit
- I-485 can be approved in 6 – 12 months if quota current
- FBI name check often delays processing but Feb 2008 USCIS memo says USCIS should now go ahead and adjudicate petition if name check still pending after 180 days.

Strategy Issues

- Research employer's policies regarding sponsorship
- Permanent residency—start planning early
- Should seek legal advice early in the process to assist planning
- Plan graduation date/OPT with H-1B in mind—should apply by April 1st for cap-subject employer if possible

Questions?

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