H-1B and U.S. Permanent Resident Petitions: What You Need To Know

February 4, 2016
Iowa State University
Types of Status

- **Nonimmigrant**
  A person who can establish that he or she has a residence abroad that he or she has no intention of abandoning, who is coming to the United States for a temporary period, and who fits into a specifically defined category under INA §101(a)(15). Nonimmigrant categories include students, tourists, treaty investors, short term workers such as H-1B, and foreign government officials.

- **Immigrant – Permanent Resident**
  Not U.S. citizenship. A lawful permanent resident of the United States. Permanent residents are allowed to live and work in the U.S. indefinitely unless they lose their residency by (1) abandonment or (2) commission of immigration or criminal violations resulting in removal (deportation) in immigration court. A permanent resident may apply for U.S. citizenship upon meeting eligibility requirements. Sometimes called a “green card.”
Path For Student to Employment

● While in school, on campus employment or off campus Curriculum Practical Training

● After graduation, Optional Practical Training

● Prior to completion of Optional Practical Training, H-1B nonimmigrant worker

● During 4th year of H-1B work, Labor Certification should be started and filed so it or the next stage the I-140 petition is pending 365 days or more

● H-1B extended while, I-140 petition approved and priority date current on Visa Bulletin
  *(This is when H-4 spouses may apply for work authorization, effective 05/26/2015)*

● Once Visa Bulletin priority date current, I-485 residency application filed and residency cards mailed to the residence
Optional Practical Training (OPT)

- Employment authorized after graduation
- Non-STEM = 12 months employment authorization
- STEM 12 + 17 = 29 months employment authorization
- **For details and full information meet with the International Student & Scholars Office**
Unlawful Presence Accrual: Avoid Illegal Work

- Most common trigger of unlawful presence: F-1 or J-1 engaging in unauthorized off-campus employment working in a restaurant, retail store, construction, etc. or self-employed providing services or goods.

- Cannot change status to H-1B or family/employment preference permanent residency without leaving the U.S.

- However, leaving the U.S. after 180 or 365 days unlawful presence accrual triggers the 3 and 10 year bar to returning.

- Waiver forgiving the 3 or 10 year bar are only available through a qualifying U.S. or LPR spouse or parent.
H-1B Specialty Occupation Work

- Must be for a specialty occupation that requires:
  (A) theoretical and practical application of a body of highly specialized knowledge, and
  (B) bachelor’s or higher degree (or its equivalent) in the specific specialty is a minimum for entry into the occupation in the United States.
TOP OCCUPATIONS

- Computer Systems Analysts
- Software Developers, Applications
- Computer Programmers
- Computer Occupations, All Other
- Software Developers, Systems Software
- Management Analysts
- Accountants and Auditors
- Financial Analysts
- Computer and Information Systems, Managers
- Network and Computer Systems Administrators
H-1B Nonimmigrant Visas: Program Details

● Employee tied to the employer, NO self-employment

● Employee may attend school, NO “moonlighting” such as other self-employment or work for another employer without another H-1B petition approved

● Employer must pay the required wage in the application

● Employer cannot move the employee to another job or location without filing an amended application

Matter of Simeio Solutions

● If J-1 student has 2 year home residency requirement cannot switch to H-1B status unless waiver granted or complied with 2 year requirement
Length of H-1B Work Time

- Initial grant up to 3 years, 1st extension up to 3 years = Total 6 years

- After 6 years, leave U.S. for 1 year, then employer may file for new initial H-1B

- Additional extensions allowed beyond 6 years:
  - Recapture time outside of the U.S. while in H-1B status (keep records)
  - Prior to 6th year, employer sponsored permanent residency pending more than 365 days (American Competitiveness in the Twenty-First Century Act (AC21))
## H-1B Nonimmigrant Visas: Limits

<table>
<thead>
<tr>
<th>Cap exempt employer or employee</th>
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<th>Cap subject employee and employer</th>
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</thead>
<tbody>
<tr>
<td>NO yearly quota, may apply any time</td>
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<td>85,000 yearly quota</td>
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<tr>
<td>- Public university or college employers</td>
<td>- First time application for the employee</td>
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<td>- Government research organizations</td>
<td>- Not subject to cap once counted the first time</td>
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<td>- Described in 8 CFR 214.2(h)(19)(iii)</td>
<td>- 20,000 carved out for U.S. Master’s or Ph.d graduates)</td>
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<td>- 6,800 carved out for Chile &amp; Singapore</td>
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Timing of Cap Subject Applications

- Applications accepted beginning April 1 – April 5 lottery (172,000 - 2014) (233,000 – 2015)

- As of April filing, employee must meet full qualifications of job, i.e. B.S. diploma

- Approved employees first possible day of work the following October 1
Cap Subject Process: Part 1

- Employer confirms Dun & Bradstreet database is correct
- Employer submits Internal Revenue Service Employer Identification Number to the Department of Labor
- Prevailing wage is determined either using the Department of Labor wage found at http://icert.doleta.gov/index.cfm?event=ehGeneral.dsplogin&Logout=1&lob=1 or private wage survey
- Employer submits the Labor Condition Application form ETA-9035 through iCERT Visa Portal System
- Employer signs and posts the certified Labor Condition Application at the place of employment for 10 business days
Employer files H-1B application with U.S Citizenship and Immigration Services, April 1

After application selected in lottery and approved:
- Employee in U.S. on F-1/J-1 may start work Oct 1
- Employee outside U.S. may apply for visa approval as of October 1, after entry start work

If not selected application and fees returned

Attorney or employer creates and maintains records public inspection files in case of Site Visit
Government Filing Fees for Private Employers

- The Department of Labor requires employers to pay the government filing fees because it is considered an unlawful reduction in payment of the prevailing wage if the employee pays the fees. This may make it difficult to convince employers unfamiliar with the H-1B program or the employee to file.

  - $325 Form I-129 Fee
  - $1,500 Data Collection ACWIA Fee
    ($750 Small Employers)
  - $500 Anti-Fraud Fee
  - **$2,325 Total Fees**
    ($1,575 Small Employers)

$1,225 Form I-907 Premium Processing Fee (Optional)
$4,000 Public Law 111-230 Fee (if Applicable)
H-1B Portability

Employee previously issued an H-1B visa or status may begin work for a new employer as soon as the new H-1B employer files a “non-frivolous” H-1B petition, if:

- (a) the nonimmigrant was lawfully admitted to the United States;
- (b) the non-frivolous petition for new employment was filed before the end of their period of authorized stay; and
- (c) the nonimmigrant has not been employed without authorization since his lawful admission to the United States, and before the filing of the non-frivolous petition.
Termination of Employment

- Once a H or L nonimmigrant’s services for a U.S. employer is terminated, the employee is no longer in valid nonimmigrant status.
- Employer obligated to pay for plane ticket back to home country.
- Employee should attempt to negotiate with employer to allow to change into F-1 student status or transfer to new employer before final termination.
- Employer obligation to pay wage until termination may cause some employers not to agree.
H-4 Spouse and Children

- May attend school on H-4 status
- Children allowed status if unmarried & under age 21
- Children may not work or be self-employed
- Spouse may not work or be self-employed unless meets new criteria
- Spouse may change from H-1B to H-4 and vice versa, subject to own time limits in H-1B status
- Need to change status from F-2 to H-4
Permanent Residency Employment: EB-1

- EB-1 – 3 Types
  - Possess Extraordinary Ability in the Sciences, Arts, Education, Business or Athletics, or
  - Are Outstanding Professors or Researchers, or
  - Managers and Executives of multinational business entities who are on international transfer
Permanent Residency
Employment: EB-2

- EB-2 – 3 Types
  - Advanced Degree – job requires minimum of Masters or B.S. plus 5 years progressive work experience (LABOR CERTIFICATION REQUIRED), or
  - Exceptional Ability employee in the sciences, arts, or business; a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business (LABOR CERTIFICATION REQUIRED), or
  - National Interest Waiver (Self-Petitioning)
Permanent Residency

Employment: EB-3

- EB-3 – 2 Types
  - Professional B.S. job (LABOR CERTIFICATION REQUIRED), or
  - Skilled Workers, job requires 2 years experience (LABOR CERTIFICATION REQUIRED)
Criteria for EB-2 National Interest Waiver

- You must show that you plan on working in the United States in an area of substantial intrinsic merit.
- You must show that the proposed impact of your work is national in scope.
- You must show waiving the labor certification requirement would benefit the national interests of the United States.
Steps for Employment Residency

- Labor Certification or Waived
- I-140 Petition
- Priority Date Current
- I-485 Adjustment or Immigrant Visa
Steps Labor Certification / PERM

- Obtain wage from U.S. Department of Labor [https://icert.doleta.gov/](https://icert.doleta.gov/) 60 days minimum
- Advertise the job and conduct recruitment (more than 30 days and less than 180 days before filing)
- Prepare PERM recruitment report
What is your **Priority Date**?

- For employment-based cases the date of the filing of the labor certification application, or if no labor certification is required, the date the I-140 petition is filed.
Visa Bulletin

http://travel.state.gov/content/visas/english/law-and-policy/bulletin.html

New Change: Now there are two charts, the earlier chart for which priority dates may file, the later chart for which will be approved.
<table>
<thead>
<tr>
<th>Employment-Based</th>
<th>All Chargeability Areas Except Those Listed</th>
<th>CHINA - mainland born</th>
<th>INDIA</th>
<th>MEXICO</th>
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## FILING DATES NEW CHART

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Change of Employment

- Change of Employment Permitted in Cases of Lengthy Adjustment Adjudication
  - Form I-140 Petition Must be Approved Prior to a Favorable Determination of a §106(c) AC21 portability request.
  - Form 1-485, Application to Adjust Status, on the basis of the EB immigrant petition has been filed and remained un-adjudicated for 180 days or more; and
  - the new job is in the same or similar occupational classification.
Permanent Residency Programs

Sponsored
- Employment
- U.S. or Permanent Resident Family Members

Self-Petitioning
- Employment National Interest Waiver
- Asylum or Refugees
- Diversity Lottery
- U Victims of U.S. Crimes
- T Trafficking Victims
- VAWA Abused Spouses or Children of U.S. Citizens/Residents
- Special Immigration Juvenile Status
- Amerasian
- Registry