

Immigration Options for Foreign Students



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TERMINOLOGY

- Nonimmigrant
- Immigrant
- Visa
- Visa Status
- I-94 Electronic Record

AGENCY OVERVIEW



- Adjudicates employment petitions (temporary and permanent)
- Adjudicates visa applications through Embassies/Consulates (temporary and permanent) and recommends J-1 waivers
- Discretion to admit or deny admission to foreign nationals traveling to the United States and processes certain petitions and waiver.
- Adjudicates Labor Condition Applications (for temporary H-1B petitions), Labor Certification Applications (for permanent petitions), and Prevailing Wage Requests

Nonimmigrant (Temporary) Options

Overview

- F-1 Students/Curricular and Optional Practical Training
- J Visas and J Waivers
- H-1B visas (specialty workers)
- L-1 visa (intracompany transferees)
- O-1 visas (aliens of extraordinary ability)
- Country specific options/treaty agreements:
 - Mexico / Canada - TN
 - Australia - E-3
 - H-1B1 - Chile and Singapore

F-1 Students (Optional Practical Training)

- During degree program, can apply for CPT
- After completing degree, can apply OPT
- 12 months per academic level
- Work must be related to field of study
- Additional 24 months extension for STEM degrees
 - Employer enrolled in E-verify
 - Evaluation and reporting requirements for students and employer
 - Formal training plan (including employer attestation of resources for training and will not replace US worker)
 - EAD automatically extends for 180 days
- OPT extension to SEP 30 if selected for H-1B
- Student applies for OPT through DSO and USCIS

J Visas

- Two Year home residence requirement
 - No H visa or permanent residence
 - Must be met in home country
 - Subject if:
 - Government funding (US or foreign)
 - Skills List
 - Foreign Medical Graduates / medical training
- Waivers sometimes available
 - Persecution
 - Hardship to U.S. Citizen/LPR spouse or child
 - No Objection Letter
 - State health department request
 - U.S. federal agency request
- Apply for waiver with the Department of State

Accrual of Unlawful Presence for Students and Exchange Visitors

- May 2018: Memo substantially changes rules pertaining to unlawful presence for foreign students/exchange visitors as of August 8, 2018
- Status violation v. Unlawful presence:
 - Status violation = no bar
 - Unlawful presence = 3/10 year bar
- **Old rule:** ULP starts only upon formal finding by immigration judge or an immigration official.
- **New rule:** ULP starts day after no longer pursuing a course of study; day after engaging in unauthorized activity; day after completing course of study (including grace periods); day after being order removed.

H-1B Visas

- Temporary employment in *specialty occupation*
- Requires employer-employee relationship
- Degree in a related field of study
- Paid higher of actual or prevailing wage
- Six year limit w/limited exceptions
 - Extensions beyond 6 years if 365 days have passed since filing first step of permanent residence process
 - Extensions beyond 6 years if an immigrant visa petition has been approved, but foreign national cannot become green card holder because an immigrant visa not available
- Dual intent allowed

H-1B Annual Cap

- 65,000 “new” H-1Bs under current law
 - US advanced degree = 20,000 exemption
 - Chile & Singapore Free Trade Acts
- File up to 180 days in advance (April 1)
- Fiscal year runs from OCT 1 to SEPT 30
- No new H-1B’s until October 1, 2019 unless employer or beneficiary is cap-exempt

H-1B Cap Exemptions

EMPLOYER/PETITIONER:

- Colleges and universities
- Non-profit research institutions
- Government research institutions
- Non-profits affiliated with colleges or universities

BENEFICIARY:

- Previously counted toward the cap
- Beneficiary is employed by cap-subject employer and based *at* a cap-exempt employer
- J-1 physician with state health office-based waiver

L-1 Visas

- Intracompany Transferee
- Qualifying relationship between U.S. company and company abroad
 - Parent, subsidiary, affiliate, branch
- 1 year of employment abroad (in last three years) in specialized knowledge, managerial or executive position and coming to U.S. to work in a specialized knowledge, managerial or executive position
- U.S. position:
 - L-1A (managers/execs) = 7 years (3, 2, 2)
 - L-1B (specialized knowledge) = 5 years (3, 2)

O-1 Visas

- “Extraordinary ability” (having risen to top of field)
- To qualify as extraordinary in science, education, business, or athletics
 - Prizes/Awards
 - Judging work of others
 - Selective professional memberships
 - Original contributions of major significance in field
 - Publication of scholarly books/articles
 - Critical employment with prestigious organizations
 - Publications about the beneficiary and his/her work
 - High salary relative to others
 - Other comparable evidence
- Distinct requirements for individuals applying to work in arts, TV/Motion Pictures

Country Specific: TN Visas

- Under North American Free Trade Agreement (NAFTA)
- Canadian and Mexican citizens only
- Valid up to three years
- Role must fall within list of professional occupations
- Does not allow for dual intent

Country Specific: E-3 Visas

- Australian citizens only
- Same eligibility and labor condition (wage) requirements as H-1B
- 10,500 annual cap
- No max limitation - eligible for indefinite extensions
- Does not allow for dual intent
- Apply at US consulate with LCA and Job Offer or with USCIS

Country Specific: H-1B1 Visas

- Citizens of Singapore (5,400) or Chile (1,400)
- Same eligibility and labor condition (wage) requirements as H-1B
- No max limitation - eligible for indefinite extensions but H-1B1 time counts toward H-1B durational limit
- Does not allow for dual intent
- Apply directly at Embassy or through USCIS

Immigrant (Permanent) Options

What is Permanent Residence?

- Legal ability to permanently live in United States
- Employment in the occupation of your choice without prior approval from USCIS or the DOL
- Travel that does not require a visa to return
- Ability to obtain U.S. citizenship
- Quotas:
 - Family: 480,000 (at least 226,000)
 - Employment: 140,000

Three-Step Employment-Based Immigration Process

- **STEP ONE: Labor Certification**
 - U.S. Department of Labor
 - Employer must test U.S. job market to show it cannot find a qualified, willing, able or available U.S. worker
- **STEP TWO: Immigrant Visa Petition**
 - U.S. Citizenship and Immigration Services
 - Establishes basis for permanent residence
 - Classifies beneficiary in employment-based category
- **STEP THREE: Adjustment of Status/CP**
 - U.S. Citizenship and Immigration Services (AOS) OR
 - U.S. Department of State (consular processing)

Employment-Based Immigration

Group 1: Priority Workers with Extraordinary Ability

- Aliens with extraordinary ability in sciences, arts, education, business or athletics demonstrated by sustained national or international acclaim.
- Evidence of a major, one-time achievement (i.e., Nobel Prize),

OR

Employment-Based Immigration

At least THREE of the following:

- Lesser awards/prizes with national/ international recognition
- Membership in organization based on achievement
- Published material *about* alien in professional publications
- Serving as judge for work of others in field
- Original scholarly contributions of major significance
- Authorship of scholarly articles in field
- High salary compared to others in field
- Comparable evidence if relevant

Employment-Based Immigration

Group 1: Outstanding Professors & Researchers

- Recognized internationally as “outstanding” in a particular field
- Three years teaching or research experience
- Requires tenured-track or comparable research position at university or private employer that employs at least three (3) persons in full-time research activities

Employment-Based Immigration

At least TWO of the following:

- Major prizes or awards in the field
- Membership in organization based on achievement
- Published material *about* alien in professional publications
- Serving as judge for work of others in field
- Original scholarly contributions of major significance
- Authorship of scholarly articles in field

Employment-Based Immigration

Problems/Pitfalls:

- One piece of evidence in multiple categories
- USCIS emphasis on post-degree achievements
- Recommendation letters that diminish applicant
- Letters of support that are not objective
- Graduate assistantship is not a major prize
- Membership requires more than paying dues
- USCIS places a different standard on this definition than it places on the O-1 classification
- Two-step analysis (*quantitative & qualitative*)

Employment-Based Immigration

Group 1: Multinational Managers & Executives

- Employed abroad at least 1 year (in last 3 years) in a managerial/executive position by qualifying entity related to US company.
- Seeks to enter US to render services for US company that are managerial/ executive in nature.
- Manages/Directs organization, people and/or critical function in company

Employment-Based Immigration

Group 2: Professionals with Advanced Degrees

- Advanced degree is anything above Bachelor's degree (Master's, Ph.D., MD, etc.)
- Foreign equivalents must be a SINGLE degree (not a combination of education, training or experience)
- Advanced degree is also a Bachelor's degree + five years of progressively responsible post-baccalaureate experience

Employment-Based Immigration

Group 2: Aliens of Exceptional Ability

- A degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business
- Factors (at least three of the following):
 - Degree relating to area of exceptional ability
 - At least ten (10) years of experience
 - License to practice profession
 - Commandment of high salary or remuneration
 - Membership in professional association
 - Recognition for achievements and significant contributions to the industry or field by peers, government entities or prof/business organizations

Employment-Based Immigration

National Interest Waiver

(for professionals with advanced degrees or aliens of exceptional ability)

- Criteria:
 - Work in the field is of “substantial intrinsic merit”
 - Benefit of the proposed activity will be national in scope
 - National interest supersedes the national interest of the labor certification process (which is to protect the U.S. worker)
- Sciences, arts, professions or business fields
- Waives labor certification requirement & job offer

Employment-Based Immigration

Group 3: Professionals, Skilled Workers,
Other Workers

- Professional = Bachelor's degree (or foreign equivalent degree or combination of education, training and/or experience)
- Skilled Worker = Full-time permanent job requiring *at least* two years training *or* work experience.
- Other Workers = Those with less than two years of training and/or work experience

Three Steps to Permanent Residence

Step One: Labor Certification (PERM)

- Process designed to protect the U.S. worker
- Employer must show it is unable to find a qualified, willing and able U.S. worker (definition changes for universities, where they must show that the alien is the best suited candidate for the position)
- Group 1 exempt from this process, as well as Group 2 National Interest
- Requires the employer to undergo extensive recruitment for professional positions
- 1 year H-1B extension if 365 days have passed since filing of LC

Three Steps to Permanent Residence

Step Two: Immigrant Visa Petition (I-140)

- Employer must be petitioner (*except* EB-1 extraordinary ability petition and EB-2 NIW)
- Stage where employer shows alien qualifies for the certified position
- Does NOT grant status to the alien; simply classifies the alien in a qualifying category
- Category is determined by what the *position requires*, not the alien's qualifications
- 1 year H-1B EOS if 365 days pass since filing of I-140
- 3 years H-1B EOS if I-140 is approved & visa backlogged
- Approved I-140 = H-4 spouse can request work permit

Three Steps to Permanent Residence

Step Three: Adjustment of Status (USCIS) or Consular Processing (DOS)

- Requires that an immigrant visa is available
- Availability of visas updated each month by DOS and printed in the Visa Bulletin
(<http://travel.state.gov/content/visas/en/law-and-policy/bulletin.html>)
- Currently, 2nd preference backlogs for India and China, and 3rd preference backlogs for India, China, and the Philippines
- Adjustment of status allows family members to apply for work and travel authorization

Visa Bulletin (February 2019)

Employment-Based	ALL (except those listed to right)	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	01DEC17	08FEB17	08FEB17	01DEC17	01DEC17
2nd	C	01OCT15	06APR09	C	C
3rd	C	01JUL15	22APR09	C	01AUG17
Other Workers	C	01AUG07	22APR09	C	01AUG17

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