Immigration Options for Foreign Students

John Medeiros
Attorney

Myers Thompson PA
400 1st Avenue North, Suite 520
Minneapolis, MN 55401
(612) 349-3062
jmedeiros@myersthompson.com

TERMINOLOGY
• Nonimmigrant
• Immigrant
• Visa
• Visa Status
• I-94 Electronic Record
• I-9, Employment Eligibility Verification Form

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 degree 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

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, 2018 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 and has not used up full 6 years of H-1B time
- Previously counted toward the cap and eligible for extensions beyond 6 year limit
- J-1 physician who received 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
  - Publication of scholarly books/articles
  - Critical employment with prestigious organizations
  - Publications about work
  - High salary relative to others
  - Other comparable evidence
- Distinct requirements for individuals applying to work in arts, TV/Motion Pictures
- Apply through USCIS.
### 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

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

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

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)

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

**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

**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

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

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 (March 2018)

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