
Nonimmigrant and Immigrant Visa Options for Postdoctoral Researchers

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University of California, San Francisco



AGENDA

- Nonimmigrant Visa Options
 - H-1B specialty occupation
 - J-1 and 212(e) 2-Year Foreign Residency Requirement
 - Treaty visa options (TN, E-2, E-3, H-1B1)
 - O-1 visa

- Immigrant Visa Options
 - PERM Labor Certification
 - EB-1 Extraordinary Ability
 - EB-1 Outstanding researcher/Professor
 - EB-2 National Interest Waiver
 - Family-based Adjustment of Status



NONIMMIGRANT VISA OPTIONS: H-1B

H-1B Visas for Foreign Nationals

- Available for Temporary Employees to work in "Specialty Occupations"
- Employment permitted only with petitioning employer but concurrent petitions may be filed
- Position must require at a minimum a bachelor's degree in an academic field related to the occupation
- Potential employee must possess an appropriate degree and any licenses required for position
- Potential employee may not be subject to 212(e)



Annual Numerical Limitations

- 65,000 “cap” on H-1B visas available for each fiscal year beginning October 1 and ending September 30.
- 20,000 visas available for graduates of US Master’s or higher degree programs.
- H-1B petition may be filed by employer up to 6 months in advance of visa availability. May file April 1 for visas available October 1 of next fiscal year.



Exemptions from the Numerical Cap

- College/University employees including non-faculty positions
- Employees of organizations related to or affiliated with institutions of higher education
- Employees of nonprofit research organizations or government research organizations



The LCA Wage Obligation

- The “required wage” is the higher of the “actual wage” or the “prevailing wage”
- “Actual wage” is the wage paid to “similarly situated” employees in the department or division. (Relevant if higher than prevailing wage.)
- “Prevailing Wage” is wage paid to similarly situated employees as determined by the DOL. Other reliable survey sources may be used.



Certification by H-1B Employer/Petitioners relating to Exportation of Controlled Technology or Technical Data

- New Certification required (2011)
- With respect to technology or technical data the petitioner will release or otherwise provide access to the beneficiary, the petitioner certifies that it has reviewed the Export Administration regulations “EAR” (promulgated by Dept. of Commerce) and the International Traffic in Arms regulations “ITAR” (promulgated by the Department of State) and has determined that a license is/is not required.



File H-1B Petition and supporting documents with USCIS

Forms:

1. I-129 Petition
2. I-129H Supplement
3. I-129W H-1B Data Collection Supplement
4. I-907 Request for Premium Processing

Certified Labor Condition Application

Letter from employer

Proof of employee's legal entry/maintenance of status

Proof of employee's qualifications for the position including copies of degrees, transcripts, degree evaluations



Filing Fees

- ❑ Form I-129: \$460
- ❑ Fraud Fee for first time filer with particular employer: \$500
- ❑ Training fee: \$750 if 25 or fewer employees or \$1500 if over 25 employees. Must be paid if original petition or first extension for same employer. Does not apply for second or subsequent extension or if no extension of stay requested (amended petition).
- ❑ Premium processing fee: \$1,225



Process continued

- File at USCIS Service Center having jurisdiction over area of employment
- If employee is in the U.S. maintaining legal status, Petitioner may request and USCIS may grant change of status to H-1B at the time petition is adjudicated
- Or may choose to activate H-1B status later through consular processing



Extensions of Stay

- Initial petition may be approved for up to three years at a time. Extensions of H-1B status are available for up to 6 years, regardless of changes in employers. The 6 years is cumulative.
- Periods of stay outside the USA may be recaptured.
- When a petition extending stay is timely filed, work authorization is automatically extended for 240 days.



Extensions of Stay for Applicants for Permanent Residence

- One year extensions are available if a labor certification or I-140 petition is filed prior to the end of the fifth year of H-1B employment.
- A three year extension is available if I-140 has been approved but visa number is not available.



Changing H-1B Employers

- Change of Employer may be accomplished by filing a new petition.
- Employee must be in status at the time new petition is filed, which means currently employed or within 60 days of employment termination.
- If employee entered legally and is maintaining H-1B status at the time a new petition is filed, the employee may PORT to the new employment prior to approval of a new petition.



Concurrent Employment

- An H-1B employee may have more than one employer
- A new petition must be filed for each new employer and or new and different position
- There is no minimum number of hours an H-1B employee must work – employee may have three or four concurrent positions as long as the big picture is reasonable.
- An H-1B employee who is the beneficiary of an exempt petition and is maintaining status may also accept concurrent non-exempt employment.



NONIMMIGRANT VISA OPTIONS: J-1 RESIDENCY REQUIREMENT AND WAIVERS

J-1: Section 212(e) Two-Year Home Country Residence Requirement

- Who is subject?
 - ❑ Graduates of Foreign Medical Schools coming to U.S. for Advanced Medical Training (Researchers exempted.)
 - ❑ Individuals who have received funds from any government source (U.S. or home country)
 - ❑ Skills List: individuals receiving training in shortage occupations (listed on U.S. Dept. of State website)



J-1: Section 212(e) Requirement

- Must reside and be physically present in home country for aggregate of two years before eligible for certain immigration benefits
- Cannot apply for H-1B visas, L visas, K visas, or lawful permanent residence
- Cannot change status to most other nonimmigrant visa categories, but remain eligible for O-1, TN, F-1, B-1, B-2 visas through consular processing



J-1: Section 212(e) Waivers

- **No Objection Statement** – home country govt. issues no objection statement (to skills list and home country govt. funding)
- **Exceptional Hardship** – to U.S. citizen or permanent resident spouse or child if required to return to home country
- **Persecution** – on account of race, religion or political opinion if required to return to home country
- **Interested U.S. Government Agency** – will be engaged in program for U.S. govt. agency, who supports waiver
- **Conrad Waivers for Medical Doctors** – foreign medical graduate to practice medicine for 3 yrs in area designated as having shortage of health care professionals



J-2 Spouses and Dependents

- Status is dependent on J-1 Spouse
- If 212(e) applies to principal J-1, it also applies to dependents and waiver must be obtained if requirement not fulfilled
- J-2 Spouses may apply for employment authorization for up to four years.



Treaty Visa Options: E-3,
H-1B1, and TN

E-3 Specialty Occupation Visas for Australians

- 10,500 visas per year issued – usually not filled as quickly as H-1B quota
- Requirements:
 - Must be citizen of Australia
 - Must have an offer of employment for a specialty occupation (same definition as H-1B)
 - Must have requisite degree/credentials/license for the position
 - Requires nonimmigrant intent to remain in the U.S. temporarily
 - Like H-1B, requires LCA filed by employer
- Duration:
 - Initial visa for 2 years, can apply for 2-year extensions as long as can show nonimmigrant intent
- Dependents:
 - E-3 spouse and children can accompany, need not be Australian citizens
 - Spouses can obtain work authorization



H-1B1 specialty occupation visas for nationals of Singapore and Chile

- Of the 65,000 visas allocated to the capped H-1B visa program, a total of 6,800 are reserved for use for the H-1B1: 1,400 for Chile and 5,400 for Singapore
- Requirements:
 - Must be citizen of Singapore or Chile
 - Must have an offer of employment for a specialty occupation (same definition as H-1B)
 - Must have requisite degree/credentials/license for the position
 - Requires nonimmigrant intent to remain in the U.S. temporarily
 - Like H-1B, requires LCA filed by employer
- Duration:
 - Initial visa for 2 years, can apply for 2-year extensions as long as can show nonimmigrant intent
- Dependents:
 - H-1B1 spouse and children can accompany, need not be Singapore/Chile citizens



E-2 Treaty Investor Visa

- Requirements:
 - Foreign national must be a citizen of a “treaty” country
 - Company must be majority owned by citizens of treaty country
 - Must be a substantial investment that is put at risk, funds irrevocable committed
 - Company must be a real operating enterprise that is not marginal
 - Foreign national must be directing/developing the investment (50% ownership or executive/managerial role), or have essential skills necessary for operation of the business
- Duration:
 - Initial stay of 2 years granted, can apply 2-year extensions as long as can show nonimmigrant intent
- Dependents:
 - E-2 spouse and children can accompany, need not be treaty country citizens
 - Spouses may obtain employment authorization



NONIMMIGRANT VISA OPTIONS: TN VISAS

- Limited to Mexican and Canadian citizens
- Occupation must be listed in the NAFTA Appendix 1603.D.1 (professionals)
- Nonimmigrant intent must be maintained
- Employment must remain temporary, but no overall time limit
- Can apply from within the US (change of status petition) or at port of entry
- Mexican citizens need a TN visa for entry
- Canadian citizens do not need a visa



TN for Canadians and Mexicans cont'd

■ Duration

- ❑ Initial admission for up to 3 years
- ❑ 3-year extensions possible after, as long as nonimmigrant intent maintained

■ Dependents

- ❑ TD spouses and children can accompany
- ❑ Not work authorized, but may attend school



NONIMMIGRANT VISA OPTIONS: O-1 VISAS

O-1 Visa for Extraordinary Aliens

- O-1A: Individuals with extraordinary ability in education, sciences, business, or athletics
- Requirements: (at least 3 of following):
 - National/international prizes/awards for excellence
 - Membership in associations requiring outstanding achievements
 - Authorship of scholarly publications
 - Media published about the individual
 - Original contributions of major significance
 - High salary/remuneration
 - Participation as a judge of work of others
 - Employment in critical/essential role for distinguished organization



O-1 Visa for Extraordinary Aliens

- O-1B: Individuals with extraordinary ability in the arts or extraordinary achievement in motion picture or television industry
- Requirements: (at least 3 of following):
 - Lead/starring participant in distinguished productions/events
 - National/international recognitions through reviews/published material
 - Performance in lead/critical role for distinguished organization
 - Major commercial/critically acclaimed successes
 - Significant recognition from recognized experts
 - High salary/remuneration



O-1 Visa for Extraordinary Aliens

- Duration:
 - Initial petition for 3 years,
 - Extensions in 1 year increments
- Dependents:
 - O-3 spouses and children can accompany (not work eligible)



O-1 Visa for Extraordinary Aliens

- Advantages of O-1 vs. H-1B:
 - No overall time limit
 - No yearly cap – can apply at any time during the year
 - Remain eligible for consular processing visa even if subject to J-1 212(e) requirement
- Possible to hold concurrent O-1 visas or have multiple employers if agent is petitioner
- Limited dual intent visa: travel in O-1 status while pursuing immigrant visa may raise non-immigrant intent issues



Options for Applying for Permanent Residence

Affirmative Permanent Residence Application Tracks

- Sponsorship by US citizen or permanent resident family member (226,000 per year)
- Diversity Visa Lottery (50,000)
- Asylum or Refugee application
- Employment-based preference immigrants (140,000)
 - EB-1: Extraordinary Ability, Multinational Managers/Execs, Outstanding Researchers/Professors (40,040)
 - EB-2: Advanced Degree Professionals (40,040)
 - EB-3: Professionals and Skilled Workers (40,040)
 - EB-4: Religious Workers (9,940)
 - EB-5: \$1 Million Investors (9,940)



EB-2/EB-3:

3 Steps to Permanent Residence

- Step 1: PERM Labor Certification Application filed with DOL. Employer must test the labor market and confirm that no qualified U.S. workers applied for the position. Must engage in recruitment pursuant to DOL guidelines.
- Step 2: I-140 Immigrant Petition for Alien Worker filed with USCIS.
- Step 3: I-485 Application to Adjust Status to Permanent Residence (in U.S.) or Application for Immigrant Visa (consular processing abroad)



PERM Labor Certification Application

- Requires a permanent full time job offer.
- NOTE: It is usually difficult for post-docs working on temporary grants to benefit from PERM applications because employer cannot attest to permanent job offer
- Process takes about 8 – 12 months
- Employer must identify minimum education and experience requirements for position consistent with hiring practices
- Employee must document experience gained prior to hire date
- Experience gained at sponsoring employer not counted unless experience was in position at least 50% different from current position
- Request Prevailing Wage Determination from DOL (currently taking 4 months)



PERM Labor Certification Cont'd

- Test labor market through recruitment advertising (minimum 30 days + 30 day wait period)
- File electronic application with DOL
- Approximately 15 – 20% of applications subject to audit
- Must maintain audit records for 5 years
- Lay offs within 180 days inhibit PERM filing



College and University Professors

- University and college teachers/researchers may benefit if employer files a “Special Handling” PERM within 18 months of receiving offer of employment from an institution of higher education.
- Must be offered a “tenure track” position
- Employer must have engaged in national competitive recruitment process.



IMMIGRANT VISA
OPTIONS: EB-1 and
EB-2 National Interest Waiver

Employment-Based Permanent Residence

I-140 Immigrant Visa Petition may be filed without PERM Labor Certification if Foreign National qualifies in EB-1 or EB-2 categories as an:

- ❑ Extraordinary Alien EB-1
- ❑ Outstanding Professor or Researcher EB-1
- ❑ International Executive or Manager EB-1
- ❑ Foreign National who is a member of the professions holding an advanced degree or has exceptional ability whose immigration is in the National Interest EB-2



EB-1 Extraordinary Ability Petition

Individuals with extraordinary ability in the sciences, arts, education, business or athletics:

- Must demonstrate sustained national or international acclaim
- Must meet at least three of the listed criteria at a minimum (see following slide)
- Based on recent case law, also must demonstrate fall within a small percentage of individuals at the top of their field
- Does not require offer of employment, but individual must present clear evidence of intent to continue work in the field of extraordinary ability.



EB-1 Extraordinary Ability Petition

- Applicant must meet 3 criteria at a minimum:
 - Lesser nationally/internationally recognized prizes
 - Membership in associations requiring outstanding achievements
 - Published material about you in major media
 - Judge of the work of others (e.g., reviews for journals)
 - Authorship of scholarly articles (and citations)
 - Original contributions of major significance to the field
 - Performance in leading/critical role for distinguished organization
 - High salary/remuneration in relation to others in the field
 - Commercial success in performing arts
 - Display of artwork at exhibitions/showcases



EB-1 Outstanding Researcher/Professor

- Must demonstrate international recognition as outstanding in the academic field
- Must meet at least two of the listed criteria at a minimum (see following slide)
- Must have a permanent or tenure track offer of employment
- Employee must have three years of experience as professor or researcher, *preferably* post-PhD.



EB-1: Outstanding Researcher/Professor

- List of Relevant Criteria (must meet 2 criteria at a minimum)
 - Prizes or awards for outstanding achievement
 - Membership in associations requiring outstanding achievement
 - Published material about your work
 - Judge of others' work in the academic field, including reviews for academic journals
 - Original scientific or scholarly research contributions to the academic field
 - Authorship of scholarly books or articles



EB-2 National Interest Waiver

- Must demonstrate will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the U.S.
- Must demonstrate an exemption from the labor certification requirement will benefit the national interest (3-part standard, see following slide)
- Still EB-2 preference category, but waives labor certification requirement
- Does not require job offer by an employer



EB-2: National Interest Waiver

- 3-part Standard (established by case law):
 - Proposed endeavor has both substantial merit and national importance
 - Applicant is well-positioned to advance proposed endeavor
 - The national interest would be adversely affected if a labor certification were required. Stated differently, must establish that applicant will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications required for the position.



Immigrant Visas: Priority Dates

Priority Date for Visa Eligibility

- Established on the date the labor certification is filed with the DOL
- OR, on the date the immigrant visa petition (I-140) is filed with USCIS.
- Availability of employment based visas varies for different employment based categories
- World wide quotas determine availability of visas
- Visa availability may also be affected by nationality which is the place of birth, not citizenship.



Visa Bulletin: Employment-Based Preferences January 2018

Employment Based	All Chargeability Areas Except Those Listed	China-Mainland Born	India	Mexico	Philippines
1 st	C	C	C	C	C
2 nd	C	08 May 13	22 NOV 08	C	C
3 rd	C	15 APR 14	01 NOV 06	C	15 FEB 16
Other Workers	C	22 DEC 06	01 NOV 06	C	15 FEB 16
4 th	C	C	C	01JUN 16	C
Certain Religious Workers	U	U	U	U	U
5 th	C	22 JUL 14	C	C	C



Family-Based Adjustment of Status

- Immediate relative petitions: Spouse, child (under 21) or parent of U.S. citizen
 - Process:
 - U.S. citizen petitioner files I-130 petition
 - May file for I-485 adjustment of status concurrently, without waiting for a priority date to become current
 - Requires lawful entry, but beneficiary need not be in status at time I-485 is filed
- All other family-based petitions: adult children and siblings of U.S. citizens; spouses, children and unmarried adult children of LPRs
 - Process:
 - U.S. citizen or LPR petitioner files I-130 petition
 - Foreign national must wait for current priority date before filing I-485
 - Requires both lawful entry and maintenance of status at the time the I-485 is filed

