

JET PROPULSION LABORATORY  
CALIFORNIA INSTITUTE *of* TECHNOLOGY

***GREEN CARD OPTIONS***  
*for*  
***SCIENTISTS AND RESEARCHERS***

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**POWERPOINT**



**HANDOUTS**





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**What we do.** Loke Walsh Immigration Law, PC focuses on obtaining a variety of visas for new graduates, professionals, artists and entertainers, professors and researchers, athletes, investors, multinational company transfers and individuals in various industries. In addition, our firm assists clients with I-9 audits, H-1B audits and corporate compliance policies.

**About us. Tien-Li (“TL”) Loke Walsh** is the Principal of Loke Walsh Immigration Law, PC. Ms. Loke Walsh has practiced exclusively in the field of immigration law since her admission to the California State Bar in 1997. Originally from Malaysia, she graduated from the University of Sydney, Australia with a B.A. in Political Science and History, and received her law degree from Boston University School of Law.

Ms. Loke Walsh has served on numerous American Immigration Lawyers Association (AILA) national committees, including the Scholars and Students Committee, the AILA/Department of State Liaison Committee and the AILA/California Service Center Liaison Committee. Ms. Loke Walsh is the recipient of a 2010 AILA President’s Commendation Award.

Ms. Loke Walsh was selected as the 2015 *Best Lawyers in America*® “Lawyer of the Year” in immigration for Los Angeles. In addition to *Best Lawyers in America*®, she is regularly selected for inclusion in *Chambers USA: America’s Leading Lawyers for Business*, *The International* and *California* editions of *Who’s Who of Business Lawyers* and in the *Southern California Super Lawyers Edition*. Ms. Loke Walsh’s authorship of several articles was commended as having drawn “a great deal of praise” and was referred to as a “[b]rilliant attorney” with a “sharp intellect” in the *California Edition of Who’s Who of Corporate Immigration Lawyers*. In that same publication, she was described as being “particularly good for state department issues” and “fabulous for visa work.” Moreover, according to *Chambers USA*, Ms. Loke Walsh’s “practice incorporates the whole gamut of immigration law” and “wins clients plaudits for her business insight,” noting that she is “terrific at boiling down information to the essentials” and applauding her “broad practice,” and “considerable expertise.”

Ms. Loke Walsh is the author or co-author of numerous articles including *Seriously, I Really am Extraordinary! ... Aren’t I? (Issues for EB-1 petitions)*; *Practice Pointers for O and P Visas*; *It’s Academic: Working with Institutions of Higher Education*; *Common Misconceptions Clients Have in Non-PERM Cases*; *Students and Recent Graduates: I’m Graduating and I Didn’t Get an H-1B! Finding Neverland*; *Schedule A under PERM: An Interesting Assortment of Immigrant Options for Nurses, Physical Therapists, Artists, Scientists and Entertainers*; *Consular Processing Enhances Electronic Security, Streamlines Visa Applications*; *The Basics of Export Control for Immigration Practitioners*; *Consular Processing Goes Green In 2008 -The Electronic Paperless Era*; *Secure*

*Borders, Open Doors: Consular Processing Issues in 2007; The Land of CLASS, TIPOFF, Mantis, Condors & Donkeys: Demystifying Security Advisory Opinions, Biometrics and Government Databases Involved in the Consular Processing Framework; The Technology Alert List and Export Control: Frequently Asked Questions; Navigating Through the Maze of Security Checks, Consular Processing – New Restrictive Security Measures Change the Playing Field; Practical Considerations for Immigration Practitioner; Consular Processing: Practice Tips for The Unwary Practitioners in the Post-IIIRAIRA Era; Practice Tips for NIV Processing at Adjacent U.S. Consular Posts in Mexico and Canada; Multinational Executives and Managers: Comparing L and E Visas and Practice Tips for NIV Processing at Adjacent U.S. Consular Posts in Mexico and Canada and the Effect of INA Section 222(g); and, Has the Pendulum Swung for the Million Dollar Investor: A review of the Immigrant Investor Program.*

Ms. Loke Walsh is a contributing author to the Lexis-Nexis *Immigration Law and Procedure* treatise. She has also spoken on a variety of topics at numerous immigration conferences including the AILA national and regional conferences, as well as at several NAFSA conferences and local bar associations.

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## Top 10 Things Every F-1 Student Should Know About Working in the United States

**By Tien-Li Loke Walsh**

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In 1993, I came to the United States on an Exchange Abroad Program (EAP) as an F-1 student from the University of Sydney, Australia. Originally from Malaysia and after ten years in Australia, I arrived in the United States to complete my senior year at the University of California, Los Angeles (UCLA) and like so many before and after me, I fell in love with America. My love affair with the United States continued with another three years as an F-1 student completing law school at the Boston University School of Law. Back then, we didn't have the resources that F-1 students have now, but after practicing immigration law for over 20 years, these are some of the things that I wish I'd known when I was an F-1 student.

### 1. You can actually work in the United States during school and after graduation!

There are several possibilities that may allow an F-1 student to work during school and after graduation – make sure you check in with your International Students and Scholars Office on campus for more information!

**Curricular Practical Training** – some students may be eligible for Curricular Practical Training (CPT) which allows them to accept internships and work during the school year, winter, spring or summer breaks.

**Optional Practical Training (OPT)** is temporary “unrestricted” employment that is directly related to an F-1 student’s major area of study. F-1 students are usually eligible for 12 months of OPT. USCIS issues an F-1 student an Employment Authorization Document (EAD) as part of OPT.

**Pre-completion OPT:** An F-1 student may be authorized to participate in pre-completion OPT after he or she has been enrolled for one full academic year. The pre-completion OPT must be directly related to the student’s major area of study. Students authorized to participate in pre-completion OPT can only work part-time while school is in session. They may work full time when school is not in session. However, any pre-completion OPT time will “eat” into an F-1 student’s post-completion OPT. F-1 students should check with their International Students and Scholars Office on campus for more information about pre-completion OPT.

**Post-completion OPT:** Most students “save” their 12 months of OPT to be used as post-completion OPT after graduation.

**STEM OPT:** F-1 students with a degree in science, technology, engineering or mathematics (STEM) who are employed by businesses enrolled in the E-Verify program may extend OPT by 24 months, for a maximum of 36 months.

## **2. Make sure you apply for Optional Practical Training (OPT)**

Even if you are planning to leave the United States after graduation, or if you have your “dream job” offer lined up in your home country or elsewhere, you should always apply for OPT in case circumstances change. In my experience, students are often offered another job opportunity or their existing job offer falls through just before leaving the United States. By applying for OPT, you keep your options open.

Did you know that a job offer is not required to apply for OPT? F-1 students simply complete the forms and submit the required documents with the government filing fee to USCIS. So, don’t miss out on that last minute opportunity by neglecting to apply for OPT. The filing fee is only \$410 – it is money well-worth spent to keep your options open.

Make sure you apply in a timely fashion: F-1 students may apply for OPT up to 90 days before their academic programs end and no later than 60 days after graduation.

Since USCIS takes about 2 to 3 months to issue the EAD, don’t leave until the last minute to apply. You cannot start working until you have the actual Employment Authorization Document (EAD) in hand.

## **3. Avoid the 90-day unemployment provision**

During OPT, F-1 status is dependent upon employment. F-1 students on regular OPT (12 months) may not accrue more than an aggregate 90 days of unemployment. F-1 students who have an approved 24-month OPT period are entitled to an additional 60 days of unemployment, for a total of 150 days over their entire OPT period. Students who exceed the period of unemployment are considered to have violated their status.

During regular post-completion OPT (i.e. first 12 months), you can avoid accruing any days towards the unemployment provision by volunteering for at least 20 hours a week in your field of study – if you do this, you never have to count any “unemployment” days. Get out there and conduct research for a professor or volunteer at a non-profit or intern at a start-up – just make sure it is for at least 20 hours per week and related to your field of study.

Unfortunately, the “volunteering” provision does not apply during STEM OPT. While on STEM OPT, a bona-fide employer-employee relationship must exist.

## **4. Use your OPT to find an Employer to Sponsor you for an H-1B or other visa**

OPT is almost like a gift to an F-1 student because it’s 12 months of unrestricted employment. It spoils you because all nonimmigrant visas are employer specific and once you transition to another visa, you will be tied to the employer that sponsors you. Once your OPT starts, make sure you use it as stepping stone to find an employer that is willing to sponsor you for an H-1B or another visa.

### **5. File an H-1B as soon as possible!**

With only 85,000 H-1B visas per fiscal year, getting an H-1B can be very competitive. All F-1 students need to be pro-active about the timing and planning their transition from OPT to the next visa. The H-1B is the most commonly used visa by F-1 students. With the limited number of visas and the strong demand for H-1Bs every year, it is not strategically wise to “hold” out for the dream job offer and H-1B sponsor. If you have a job offer and your company is willing to sponsor you for an H-1B, do it! You can even file multiple H-1Bs with different employers if you have several job offers. Filing multiple H-1Bs can increase your chances of selection. Why consider this? Once you get that first H-1B, you have been counted towards the H-1B cap. You can change jobs and transfer your H-1B as many times as you like (although it does require filing another H-1B petition with USCIS each time) without worrying about the cap again.

N.B. You cannot file multiple H-1Bs with the same employer.

### **6. Resist the temptation to cut corners!**

Every year I speak to students who feel like their backs are against the wall and feel pressured to file an H-1B and to cut corners while doing so. Employers who file H-1Bs are bound by very strict rules, such as the requirement for an employer to pay the prevailing wage for an occupation. These rules are in place to ensure that U.S. employers don't undercut U.S. wages and working conditions. Many students and employers are tempted to circumvent some of these rules by fudging job titles so that a lower prevailing wage is assigned. Another terrible idea is to state that the job is part-time when it is really a full-time job. Why is it a bad idea to fudge your hours or to call yourself something else so that you can file an H-1B application and get the job? USCIS has a fraud and investigative division, called FDNS, which conducts about 25,000 unannounced worksite visits each year to verify that the H-1B worker is indeed working in the specified position and is being paid the prevailing wage for the occupation. These unannounced site visits are random and are typically conducted once an H-1B or H-1B extension or H-1B transfer has been approved.

### **7. It's not just about the H-1B - there are other options!**

The H-1B visa may not be the right visa for you. While it is the most commonly used visa for professionals, there are plenty of other options. Investors and entrepreneurs may qualify for E-1 trade and E-2 investor visas; graphic designers, VFX artists, animators, architects, athletes, artists, entertainers, filmmakers and musicians may qualify for O-1 and P-1 visas; scientists and researchers may similarly qualify for O-1 visas; Interns and trainees may qualify for J-1 visas; multinational executives and managers may qualify for L-1 visas.

Or perhaps you are worried about the limited number of H-1Bs because of the quota? Five lucky countries have free-trade agreements with the United States that provides alternatives to the H-1B visa for professional workers. The “Lucky 5” countries are Australia, Canada, Mexico, Singapore and Chile.

Another option to consider - apply for jobs at cap-exempt organizations. Certain institutions are not subject to the H-1B quotas, so it may mean applying for a job at one of these cap-exempt organizations, which include institutions of higher education, institutions which are affiliated with institutions of higher education and non-profit research institutions. Cap-exempt organizations can file an H-1B any time of the year with no numerical limitations.

### **8. Think outside the box – network like there’s no tomorrow!**

It’s a tough job market out there. It’s challenging to find a job, let alone find an employer who is willing to sponsor you for a visa. Yes, you can and should use your school’s Career Center, on-campus job fairs and alumni connections to find a job. You should also be using networking sites such as LinkedIn. But as a foreign student, you should take advantage of your own network – call your local embassy or consulate in the city where you are studying. Many foreign embassies in the United States have all sorts of functions - cocktail parties, networking events – many of which are sponsored by the embassy itself or the local Chamber of Commerce. For example, the European Chamber of Commerce puts on many events that are comprised of members from the French, British, German, Italian, Austrian chambers of commerce. You may find a foreign owned company with a U.S. presence that may jump at the chance of hiring someone who speaks the native language but is U.S. educated!

### **9. There is a green card lottery – no kidding!**

The Diversity Lottery program, run by the State Department, issues 50,000 green cards each year. The application period typically starts in October and ends during the first week of November. The application is free and must be completed online. The minimum requirements are a high school diploma, or two years of work experience (within the past five years) in an occupation requiring at least two years of training or experience to perform. Eligibility is based on country of birth (not country of citizenship).

Individuals born in the following countries are not allowed to participate: Bangladesh, Brazil, Canada, China (mainland-born), Colombia, Dominican Republic, El Salvador, Haiti, India, Jamaica, Mexico, Nigeria, Pakistan, Peru, Philippines, South Korea, United Kingdom (except Northern Ireland) and its dependent territories, and Vietnam.

**BUT:** Persons born in Hong Kong SAR, Macau SAR and Taiwan are eligible to participate.

**WAIT!** If you are born in one of these listed countries that are not eligible to participate, but you are married and your spouse is from an eligible country, you can also participate in DV lottery by “cross-charging” to your spouse’s country of birth!

You should apply for lottery every year – you can’t rely on it, but you never know what might happen!

## 10. Use your resources

Take advantage of all of the resources that are out there. Stay in contact with your Office of International Students and Scholars – every campus has one. Attend their workshops and seminars; use their attorney networks, but here’s a few words of advice from someone who has been there and heard just about everything. Be careful – the U.S. system makes it incredibly difficult to live and work in the United States. So, anything that sounds too good to be true, is usually too good to be true. Also, here’s some advice:

- i. Be careful about calling the USCIS Customer Service Center – it’s staffed by contractors – you can call ten times and get ten different answers.
- ii. Don’t spend hours surfing the web, scouring for answers from different chat groups, etc. There is so much erroneous information out there - you will drive yourself mad from the conflicting information that is out there.
- iii. Random strangers and friends of friends love to share their experience or what they have heard from others with you. Remember – everyone’s situation is different; what may apply to one person may not apply to you; but more importantly, by the time the information is shared with you, it may have been passed down so many times that the information is not accurate.

So, what should you do? Instead of driving yourself nuts over all of the conflicting information out there, contact a reputable attorney, such as Loke Walsh Immigration Law. Most immigration attorneys don’t charge for initial consultations. A good attorney can usually answer most of your questions quickly, saving you from all of the chaos and confusion out there. Loke Walsh Immigration Law is proud to have answered questions and obtained work visas, green cards and citizenship for thousands of foreign nationals.

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*The information provided here does not constitute direct legal advice and is for informational purposes only. For further information about nonimmigrant visas, please contact us at [tl@lokewalsh.com](mailto:tl@lokewalsh.com)*



**F-1 OPT/STEM OPT  
AND  
J-1 ACADEMIC TRAINING**

## Life during OPT: Practical Tips for F-1 Students

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### *What is OPT?*

Optional Practical Training (OPT) is temporary “unrestricted” employment that is directly related to an F-1 student’s major area of study. USCIS issues an F-1 student an Employment Authorization Document (EAD) as part of OPT.

Most students “save” their 12 months of OPT to be used as post-completion OPT after graduation. In this handout, all references to OPT refer to post-completion OPT.<sup>1</sup>

### *Keep your options open: apply for OPT even if you don’t think you need it!*

Even if you are planning to leave the United States after graduation, or if you have your “dream job” offer lined up abroad, you should always apply for OPT in case circumstances change. Oftentimes, students are offered another job opportunity or their existing job offer falls through just before leaving the United States. Don’t miss out on that last minute opportunity by neglecting to apply for OPT. The filing fee is only \$410 – it is money well-worth spent to keep your options open.

### *Do I need a job offer to apply for OPT?*

No, a job offer is not required to apply for OPT. F-1 students simply complete the forms and submit the required documents with the government filing fee to USCIS.

### *When can I apply for OPT?*

F-1 students may apply for OPT up to 90 days before their academic programs end and no later than 60 days after graduation.

Since USCIS takes about 3 months to issue the EAD, don’t leave until the last minute to apply. You cannot start working until you have the Employment Authorization Document (EAD).

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<sup>1</sup> **Pre-completion OPT:** An F-1 student may be authorized to participate in pre-completion OPT after he or she has been enrolled for one full academic year. The pre-completion OPT must be directly related to the student’s major area of study. Students authorized to participate in pre-completion OPT must work part-time while school is in session. They may work full time when school is not in session. F-1 students should check with their International Students and Scholars Office on campus for more information about pre-completion OPT.

**Curricular Practical Training** – some students may be eligible for Curricular Practical Training (CPT) which allows them to accept internships and work during the school year. F-1 students should check with their International Students and Scholars Office on campus for more information about CPT.

### *Can I travel overseas during OPT?*

Very generally, an F-1 student must have the following documents to travel internationally:

- Valid passport;
- Valid F-1 visa stamp in passport;
- Valid Form I-20 endorsed for travel by the university's DSO.

An F-1 student with an expired F-1 visa stamp in his/her passport will have to apply for a new F-1 visa at a U.S. consulate or embassy abroad before returning to the United States. In some circumstances, applying for a new F-1 visa for certain applicants can be risky. These risks will vary from case to case depending on the F-1's personal situation.

Canadian F-1 students are visa-exempt, which means that a Canadian F-1 student only needs the following documents to travel internationally:

- Valid passport;
- Valid Form I-20 endorsed for travel by the university's DSO.

### *What type of employment is allowed for students on OPT?*

The employment must be in a job that is related to the student's degree program. This employment may include:

- **Paid employment** – students may work part-time (at least 20 hours per week) or full-time
  - **Multiple Employers**: students may work for more than one employer, but all employment must be related to the student's degree program
  - **Short-term multiple employers** (performing artists): students, such as musicians and other performing artists may work for multiple short-term employers (gigs). If a student has a variable schedule, it should average out to 20 hours/week within a month. The student should maintain a list of all gigs, the dates and duration.
  - **Work for hire**: commonly referred to as 1099 employment where an individual performs a service based on a contractual relationship rather than an employment relationship.
  - **Self-employed business owner**: students on OPT may start a business and be self-employed. In this situation, the student must work full-time. The student must be able to prove that s/he has the proper business license and is actively engaged in a business related to the student's degree program.
    - **Warning!** While an F-1 student can set up a business with OPT, s/he may not be able to apply for an H-1B through the business if s/he owns or has a

majority stake in the business. In some circumstances, an E investor visa may be available for entrepreneurs.

- Employment through an agency: students must be able to provide evidence showing they worked an average of at least 20 hours per week while employed by an agency.
- **Unpaid employment**: students may work as volunteers or unpaid interns, where this work does not violate labor laws. The work must be at least 20 hours per week and be related to their field of study.

### ***What if I can't find a job during my OPT?***

During OPT, F-1 status is dependent upon employment.

- F-1 students on regular OPT (12 months) may not accrue more than an aggregate 90 days of unemployment
- F-1 students who have an approved 24-month OPT period are entitled to an additional 60 days of unemployment, for a total of 150 days over their entire OPT period.
- The 90-day/150-day limitation on unemployment applies to F-1 students during the cap-gap extension.

Students who exceed the period of unemployment are considered to have violated their status.

### ***What counts as "unemployed" time?***

Each day (including weekends) during the period when OPT authorization begins and ends that the student does not have qualifying employment counts as a day of unemployment. The only exception is that periods of up to 10 days between the end of one job and the beginning of the next job will not be included in the calculation for time spent unemployed.

### ***What can I do to avoid counting any "unemployment" days?***

For regular post-completion OPT (i.e. first 12 months), you never have to count any "unemployment" days if you volunteer for at least 20 hours a week in your field of study. Get out there and conduct research for a professor or volunteer at a non-profit or intern at a start-up – just make sure it is for at least 20 hours per week and related to your field of study.

Unfortunately, the "volunteering" provision does not apply during STEM OPT. While on STEM OPT, a bona-fide employer-employee relationship must exist.

### ***How does travel outside the United States impact the period of unemployment?***

- If a student whose approved period of OPT has started, travels outside of the United States while unemployed, the time spent outside the United States will count as unemployment against the 90/150-day limits.

- If a student travels while employed (either during a period of leave authorized by an employer or as part of their employment), the time spent outside the United States will not count as unemployment.

***I have another U.S. degree and I was granted OPT based on that degree – will I qualify for another period of OPT?***

F-1 students are normally eligible for 12 months of OPT per degree level. This means that a student may not obtain a new 12 month OPT if they begin a new same-level degree program (e.g. BA in English and then a BA in sociology only yields one 12-month OPT period). However, if a student begins a new academic program at a higher level (e.g. master's after bachelor's degree or Ph.D. after master's degree), the student is eligible for an additional 12 months of OPT.

STEM students are limited to two lifetime STEM OPT extensions.

***I have heard that STEM OPT provides an F-1 student with an additional 24 months of OPT – what is it?***

F-1 students with a degree in science, technology, engineering or mathematics (STEM) who are employed by businesses enrolled in the E-Verify program may extend OPT by 24 months, for a maximum of 36 months.

***Eligibility:*** To be eligible for a STEM OPT extension, an F-1 student must:

- Currently be participating in a 12 month period of approved post-completion OPT;
- Have successfully completed a degree (bachelor's, master's or doctorate) in science, engineering, technology or mathematics (STEM) included in the DHS STEM Designated Degree Program List - The complete list is available at <http://www.ice.gov/sevis/stemlist.htm>
- Work for a U.S. employer in a job directly related to the F-1 student's major area of study
  - A bona-fide employer-employee relationship must exist to qualify for STEM OPT.
  - F-1 students may not use a volunteering opportunity as a basis for STEM OPT. Additionally, STEM OPT students may not "volunteer" to stop the clock on the 150 day unemployment provision.
- Be working for, or accepted employment with, an employer registered and in good standing with USCIS' E-Verify program. E-Verify is a free internet-based system operated in partnership with the Social Security Administration. E-Verify electronically compares information contained on the Employment Eligibility Verification Form I-9 with records contained in SSA and DHS databases to assist employers verify identity and employment eligibility of newly-hired employees; and;
- Properly maintain F-1 status.

*Caution: to qualify for STEM OPT, the employer must be an E-Verify employer!*

***What type of employment is allowed for students during OPT STEM extension?***

- Students granted an OPT STEM extension must work at least 20 hours per week for an E-Verify-enrolled employer in a position directly related to the student's STEM degree.
- STEM students may work multiple jobs related to their STEM degree, but all the employers must be enrolled in E-Verify.
- The following kinds of employment are not permitted for STEM OPT students:
  - Self-employment (e.g. starting your own business with no partners; you can only start your own business and work for it if you are an employee which usually means you have a minority interest in the business)
  - Employment as an independent contractor (1099 employment)
  - Employment through an agency
  - Employment by a consulting firm
  - Volunteering

***What is the application process for STEM OPT?***

The F-1 student must apply for the extension of OPT by filing Form I-765 with USCIS. An F-1 student who has properly filed Form I-765 prior to the expiration of OPT (at least 90 days prior to expiration) is allowed to continue working for up to 180 days while USCIS adjudicates the request for the extension.

***Which degree qualifies for STEM OPT extension?***

The F-1 student's current degree (that is the basis of the current period of OPT) qualifies a student for STEM OPT. In addition, STEM OPT may be based on a previously obtained degree. Based on these new rules, a student with an undergraduate STEM degree, but a Master's degree in a non-STEM field (e.g. English), but who will work in a STEM field related to their undergraduate degree, is now eligible for the 24-month extension. The previously obtained degree must have been conferred by a U.S. educational institution within the 10 years. Note that the STEM OPT opportunity must be directly related to the degree that qualifies the student for STEM OPT.

- If a student has a dual major and one of the majors is in a STEM field and the job is directly related to the STEM degree, the student is eligible to apply for STEM OPT extension
- A student cannot qualify for STEM OPT based on a minor in their degree.

### ***What are the reporting requirements for STEM OPT?***

As part of the STEM OPT application process, both the F-1 student and his/her employer must sign a Training Plan (Form I-983) which must identify the goals for the STEM practical training opportunity, including specific knowledge, skills or techniques that will be imparted to the student, and explain how these goals will be achieved through the work-based learning opportunity with the employer. The training plan must also describe a performance evaluation process and describe methods of oversight and supervision. The training plan must explain how the training is directly related to the student's qualifying STEM degree.

If the F-1 student is terminated, laid off or leaves the company prior to the end of the STEM OPT, the employer is required to notify the school within five business days of the termination or departure.

### ***Can I change jobs during STEM OPT?***

Yes, an F-1 student with STEM OPT may change jobs, but the employer must be an E-Verify company and comply with all reporting requirements. The student must also comply with all reporting requirements within 10 days of beginning the new opportunity (i.e. submit a new Form I-983 Training Plan and obtain school recommendation.)

### ***I have a job offer from an employer that will file an H-1B, but my OPT expires over summer – can I work during that gap?***

USCIS is authorized to extend the status of F-1 students caught in a “cap-gap” between the end of the student's OPT and the start date of an approved H-1B petition. This cap-gap extension automatically becomes effective when the H-1B cap has been reached and the student has an H-1B petition filed on his/her behalf during the acceptance period.

- The cap-gap provision automatically extends the F-1 status and employment authorization of an F-1 student who has filed an H-1B petition that has been granted by, or remains pending with USCIS. This means that:
  - If an H-1B petition is filed and pending, the F-1 student's status and employment authorization is automatically extended while the petition is pending.
  - If the H-1B petition filed on behalf of the student is selected as a “cap case,” the F-1 student may remain in the United States and continue working until September 30<sup>th</sup> of that year with their extended OPT, and the H-1B would begin on October 1.
  - Once USCIS rejects, denies or revokes a pending H-1B petition, the automatic status and employment authorization ends. The F-1 student has the standard 60-day grace period (from notification of the denial, rejection or revocation of the petition) before he or she is required to depart the United States.

Students do not automatically receive notification when they have a cap-gap extension. Students should request an updated I-20 from their school.

***Are all F-1 students eligible for cap-gap extension?***

Unlike the extension of OPT, which is limited to F-1 students who have obtained STEM degrees, the extension of status for F-1 students in a cap-gap situation applies to all F-1 students with pending H-1B petitions.

- The “cap-gap” relief only applies to F-1 students who apply for “change-of-status” petitions and not to those who elect consular processing.

***Do I have to file an H-1B petition by a certain date to qualify for cap-gap extension?***

A student must be in valid OPT status for the cap-gap extension of status and employment authorization provision to apply.

- If the student’s OPT has already expired before the H-1B acceptance period, the student is not eligible for “cap-gap” relief. This means that an F-1’s OPT must still be valid on or after April 1. This typically has implications for F-1 students with December graduation dates, whose OPT or STEM OPT usually expires in January or February.
- A student who files a “cap-gap” H-1B petition during their 60 day grace period after the OPT expiration is only eligible for the automatic “status” extension, but is not granted continued employment authorization. This means that the F-1 student can stay in the United States while the H-1B petition is pending, but cannot work. For example, if your OPT or STEM OPT expires on February 12, you can file your H-1B on or after April 1 and remain in the US, but you do not have employment authorization to continue working.

***Can I travel during the H-1B cap-gap extension period?***

It depends. An F-1 student may generally travel abroad and seek readmission to the United States in F-1 status during a Cap-Gap period if:

1. The student’s H-1B petition and request for change of status has been approved;
2. The student seeks readmission before his or her H-1B employment begins (normally at the beginning of the fiscal year, i.e., October 1); and
3. The student is otherwise admissible.

However, if the F-1 travels and returns on the F-1 visa, s/he must be prepared to leave the United States prior to October 1 and apply for an H-1B visa at a U.S. embassy or consulate abroad. Their status will not automatically convert to an H-1B on October 1 and the only way to



“trigger” or “initiate” the H-1B is to depart the United States, apply for a visa at a U.S. embassy and then return to the United States.

Travel Tip: An H-1B professional may enter the United States up to 10 days prior to his/her H-1B start date, i.e. September 21st for an October 1 start date. Therefore, it is best to plan to travel in September, apply for an H-1B visa at a U.S. embassy or consulate, and return to the United States on or after September 21<sup>st</sup>. However, s/he cannot start H-1B employment until October 1, the first day of the H-1B.

***Is an F-1 exempt from Social Security and Medicare and other taxes?***

- *Social Security (FICA) and Medicare taxes:* in general, an F-1 student is exempt from Social Security (FICA) and Medicare taxes for the first five (5) years in the United States, as long as s/he continues to declare non-resident status for tax purposes (see Internal Revenue Service Publication 519, “U.S. Tax Guide for Aliens.”)
- *Federal, State and Local Income Taxes:* unless an F-1 student qualifies under a tax treaty between the United States and his/her home government, the earnings as an F-1 student will be subject to applicable federal, state and local income taxes, and employers are required by law to withhold those taxes from paychecks. By April 15 of each year, the F-1 student must file a federal income tax return and a “Required Statement” covering the prior calendar year to determine whether taxes are owed or if a refund is due.

Visit [www.irs.gov](http://www.irs.gov) for more information about tax liability and exemptions.

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## J-1 Students: Academic Training

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### *What is academic training for J-1 students?*

In general, J-1 students are eligible for “academic training” during the student’s studies or after graduation. Academic training is similar to OPT in the sense that allows a student to obtain practical working experience in their field of study.

### **Time Limitations:**

- **Undergraduate, Masters and pre-doctoral training:** no more than 18 months, or the duration of the program whichever is less. For example, an MBA student completing a 2 year program, would be eligible for 18 months; but an LLM student completing a 1 year program would only qualify for a 9 month period (i.e. one academic year).
- **Post-doctoral training:** up to 36 months or the duration of the student’s doctoral program, whichever is less. For example, a Ph.D. student completing the degree in 2 years would qualify for no more than 24 months.

To obtain academic training:

- J-1 students must have a written offer of employment from a company before s/he can obtain “academic training.”
- J-1 students do not need to submit an I-765 application to USCIS. Academic training is handled internally and granted by the DSO at the university or college. Once approved, the DSO issues the J-1 student with an updated DS-2019.
  - Students must apply within 30 days after completion of their program of studies to apply for and receive authorization for Academic Training
- The validity of academic training is dependent on the J-1 student’s continued employment.
- A J-1 student can have multiple employers during academic training;
- A J-1 student cannot be self-employed during academic training.
- During academic training, a J-1 can work part-time or full-time; it can be paid or unpaid.

### *Is there an unemployment provision similar to F-1s for J-1 students on academic training?*

No, but J-1s must apply for academic training within 30 days of the completion of his/her requirements for the degree. Also, J-1s must have a written offer of employment to obtain authorization from his/her university or college.

***Can the J-1 student change jobs during academic training?***

Yes, but a J-1 student must submit a new application for academic training and receive authorization from his/her university/college before making the change.

***Is a J-1 eligible for “cap-gap” protection?***

No, J-1 students with academic training are not eligible for “cap-gap” protection. Therefore, a J-1 student must time it carefully and apply for an H-1B as soon as possible.

***Is a J-1 Exempt from Social Security and Medicare and other Taxes?***

*Social Security (FICA) and Medicare taxes:* in general, a J-1 student is exempt from Social Security (F.I.C.A.) and Medicare taxes for the first five (5) years in the United States, as long as s/he continues to declare non-resident status for tax purposes (see Internal Revenue Service Publication 519, "U.S. Tax Guide for Aliens.")

*Federal, State and local income taxes:* Unless a J-1 student qualifies under a tax treaty between the United States and his/her home government, the earnings as a J-1 student will be subject to applicable federal, state and local income taxes, and employers are required by law to withhold those taxes from their paychecks. By April 15 of each year, the J-1 student must file a federal income tax return and a "Required Statement" covering the prior calendar year to determine whether taxes are owed or if a refund is due.

Visit <http://www.irs.gov/businesses/small/international/article/0,,id=129427,00.html> for more information about tax liability and exemptions.

***What visas can I qualify for if I am subject to the two-year home residency requirement?***

Section 212(e) of the immigration regulations prohibit a J-1 who is subject to the two-year home residency requirement from obtaining an H or L visa, and from adjusting status to permanent residence unless the J-1 complies with the two-year requirement or obtains a waiver. However, a J-1 who is subject to Section 212 (e) may apply for an F-1, E-1, E-2, E-3, O, P or TN visa. The J-1 would still be subject to the 212 (e) and must still either comply with the requirement or obtain a waiver. Some J-1s will slowly accumulate the two years over time and eventually comply with the requirement.

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**NONIMMIGRANT VISA  
OPTIONS  
(WORK VISA OPTIONS)**

## Nonimmigrant Visas: Working Visa Options in the United States

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Foreign nationals who wish to work in the United States must apply for a nonimmigrant visa. Most nonimmigrant visas, with some exceptions, are employer-specific, i.e. one can only work for the company that petitions or sponsors the foreign national for the job.

### H-1B Specialty Occupation Visa for Professional Workers

- Employer-specific, but concurrent employment permitted;
- Quota of 85,000 per fiscal year (65,000 for general pool of applicants; 20,000 for graduates with U.S. Master's or higher degree);
- Requires a U.S. bachelor's degree or the foreign equivalent of a U.S. bachelor's degree; may combine education and professional experience for a bachelor's degree;
- Requires a job offer in a position that normally requires a bachelor's degree to perform the job;
- An H-1B employer must make certain attestations to the government that include paying the prevailing wage for the occupation;
- Duration: an H-1B visa may be approved for up to three years; can be extended up to a maximum of six years;
- Any time spent in L-1 status counts towards the H-1B maximum period of time;
- Family: spouses and minor children (under 21 years of age) are eligible for H-4 dependent status and may attend school;
- H-4 status does not grant employment authorization.

### Free-Trade Agreement H-1B1 visas for Chile and Singapore

- Available to professionals from Chile and Singapore;
- Employer-specific, but concurrent employment permitted;
- Quota of 1,400 H-1B1 visas for Chileans and 5,400 H-1B1 visas for Singaporeans;
- Requires a U.S. bachelor's degree or the foreign equivalent of a U.S. bachelor's degree; may combine education and professional experience for a bachelor's degree;
- Duration: 18 months; renewable indefinitely but must show ties to home country;
- Family: spouses and minor children (under 21 years of age) are eligible for H-4 dependent status and may attend school;
  - H-4 status does not grant employment authorization.

### **E-3 Visa for Australian Professionals**

- Available to Australian professionals coming to the United States to perform services in a specialty occupation;
- Employer-specific, but concurrent employment permitted;
- Quota of 10,500 visas per year;
- Requires a U.S. bachelor's degree or the foreign equivalent of a U.S. bachelor's degree; may combine education and professional experience for a bachelor's degree;
- Duration: may be approved for up to two years; can be extended indefinitely;
- Family: spouses and minor children (under 21 years of age) are eligible for E-3 dependent status and may attend school;
  - E-3 spouses may apply for unrestricted employment authorization.

### **TN US-Mexico-Canada Agreement (USMCA) Visas for Canadians and Mexicans**

- Available to Canadian and Mexican professionals;
- Employer-specific, but concurrent employment permitted;
- Must be coming to work in a job that appears on the list of TN professional occupations;
- Duration: three years for Canadians; one year for Mexicans (but three-year admission on I-94 card); renewable indefinitely but no immigrant intent;
- Family: spouses and minor children (under 21 years of age) are eligible for TD dependent status and may attend school;
  - TD status does not grant employment authorization.

### **L-1 Multinational Intra-Company Transfer Visa**

- Employer-specific;
- Available to managers, executives and persons holding specialized knowledge who own or are employed by a **multinational** company abroad;
- Individual must have worked for the overseas entity for at least one of the last three years, in a managerial, executive or specialized knowledge capacity, and must be transferred to the United States in a managerial, executive or specialized knowledge position;
- Duration: up to a maximum of seven years for managers and executives (L-1A); up to five years for the specialized knowledge category (L-1B);
- Any time spent in H-1B status counts towards the L-1 maximum period of time;
- Family: spouses and minor children (under 21 years of age) are eligible for L-2 dependent status and may attend school;
  - L-2 spouses may apply for unrestricted employment authorization.

### **E-1 Treaty Trader / E-2 Treaty Investor Visa**

- Available to individuals who wish to buy a business or start-up a business, as well as employees performing in managerial, executive or essential roles for these businesses;
- A Treaty must exist between the United States and foreign country;
- The E company must be at least 50% owned by nationals of the Treaty country; for E-2 employees, s/he must hold the same nationality of the company;
- The E-1 visa is based on substantial trade (at least 50% of trade must be between the Treaty country and the U.S.);
  - Trade includes the exchange, purchase, or sale of goods or services; the transfer of technology; and binding contracts that call for the immediate exchange of items; this trade must be continuous and ongoing;
  - The following countries have E-1 treaties with the United States: Argentina, Australia, Austria, Belgium, Bolivia, Bosnia & Herzegovina, Brunei, Canada, Chile, Colombia, Costa Rica, Croatia, Denmark, Estonia, Ethiopia, Finland, France, Germany, Greece, Honduras, Iran, Ireland, Israel, Italy, Japan, Jordan, Korea (South), Latvia, Liberia, Luxembourg, Macedonia, Mexico, Netherlands, New Zealand, Norway, Oman, Pakistan, Paraguay, Philippines, Singapore, Slovenia, Spain, Suriname, Sweden, Switzerland, Taiwan, Thailand, Togo, Turkey, United Kingdom, Yugoslavia;
- The E-2 visa is based on a substantial investment;
  - No fixed amount is required and “substantial” varies depending on the nature of the business (the start-up costs of launching a business or if buying a business, the fair market value of the business);
  - The following countries have E-2 treaties with the United States: Albania, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belgium, Bolivia, Bosnia & Herzegovina, Bulgaria, Cameroon, Canada, Chile, Colombia, Congo (Brazzaville), Congo (Kinshasa), Costa Rica, Croatia, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Ethiopia, Finland, France, Georgia, Germany, Grenada, Honduras, Iran, Ireland, Italy, Jamaica, Japan, Jordan, Kazakhstan, Korea (South), Kyrgyzstan, Latvia, Liberia, Lithuania, Luxembourg, Macedonia, Mexico, Moldova, Mongolia, Morocco, Netherlands, New Zealand, Norway, Oman, Pakistan, Panama, Paraguay, Philippines, Poland, Romania, Senegal, Singapore, Slovak Republic, Slovenia, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Taiwan, Thailand, Togo, Trinidad & Tobago, Tunisia, Turkey, Ukraine, United Kingdom, Yugoslavia;
- Duration: may be extended indefinitely;
- Family: spouses and minor children (under 21 years of age) are eligible for E-1/E-2 dependent status and may attend school;
  - E-1/E-2 spouses may apply for unrestricted employment authorization.

### **O-1 Visas for Persons of Extraordinary Ability in Arts, Motion Pictures, Television, Business, Education, Science or Athletics**

- Available to individuals of extraordinary ability in the arts, motion pictures and television, business, education, science or athletics;
- Often referred to as a “genius” visa for those in science, education or business, and as an “artist” or “entertainment” visa for those in arts and entertainment;
- Employer-specific but provides more flexibility to certain professions if usually represented by an agent or manager; concurrent employment permitted;
- Must obtain appropriate union/management organization consultation letter;
- Duration: the O visa may be granted for up to three years, depending on the period of the event or project, but may be extended indefinitely;
- For artists and entertainers, any accompanying essential employees (band members, crew, managers, back-up singers, etc.) may be eligible for an O-2 visa;
- Family: spouses and minor children (under 21 years of age) are eligible for O-3 status and may attend school;
  - O-3 status does not grant employment authorization.

### **P-1 Visas for Group Entertainers and Performers**

- Available to entertainers who perform as a group;
- 75% of the group must have been together for at least one year;
- Must obtain appropriate union/management organization consultation letter;
- Duration: P visas are typically issued to performers for the duration of the “event,” up to one year; renewable indefinitely;
- Any accompanying essential employees (band members, crew, managers, back-up singers, etc.) may be eligible for a P-1S visa;
- Family: spouses and minor children (under 21 years of age) are eligible for P-4 status and may attend school;
  - P-4 status does not grant employment authorization.

### **P-1 Visas for Athletes**

- Duration: usually granted to athletes for a period of five years; can be extended indefinitely;
- Must obtain appropriate union/management organization consultation letter;
- Any accompanying essential employees (managers, coaches, trainers, etc.) may be eligible for a P-1S visa;
- Family: spouses and minor children (under 21 years of age) are eligible for P-4 status and may attend school;
  - P-4 status does not grant employment authorization.



### **P-3 Culturally Unique Performances**

- Available for performing artists who have not achieved international acclaim, but are culturally unique
- Must obtain appropriate union/management organization consultation letter;
- Duration: may be approved for up to one year; can be extended annually;
- Family: spouses and minor children (under 21 years of age) are eligible for P-4 status and may attend school;
  1. P-4 status does not grant employment authorization.

### **J-1 Exchange Visitor Program**

- Aimed at promoting cultural exchange and may be an option for students, researchers, specialists, visiting faculty, physicians, trainees, camp counselors and au pairs;
- Intern and trainee categories are most commonly used by private employers who must sponsor them for the J-1 visa;
- The Intern category is available to individuals who are currently enrolled in and pursuing studies at a degree or certificate-granting post-secondary institution outside the United States, or to those who have graduated from a foreign institution no more than twelve- months prior to the exchange-visitor program start date;
  - The intern must be participating in a structured and guided work-based internship program in his/her specific academic field;
  - The intern category is available for a one-year period;
- The Trainee category is available to individuals with either a degree or professional certificate from a foreign post-secondary academic institution and at least one year of prior related work experience abroad in his/her occupational field, or five years of work experience outside the United States in the occupational field;
  - Trainees must enter the United States to participate in a structured and guided work-based training program in the specific occupational field;
  - Best suited for certain individuals who may not have completed or received university degree;
  - Available for an eighteen-month period;
- J-1 interns and trainees are prohibited from engaging in productive employment, unless such employment is incidental and necessary to the training or internship;
- Family: spouses and minor children (under 21 years of age) are eligible for J-2 status and may attend school;
  1. J-2 spouses may apply for unrestricted employment authorization

### **Pilot J-1 Work/Travel Visas**

- Australia, New Zealand, Ireland and South Korea have pilot programs that allow certain individuals (usually students who are currently enrolled or have graduated within the past year) to come to the United States for up to twelve months to work and travel without having a job offer.

### **H-3 Trainee Visa**

- Available to interns or trainees for up to two years;
- Must participate in an established training program;
- H-3 trainees must not engage in productive employment unless it is incidental to the training;
- Trainees who complete the full two-years of training are restricted from applying for H-1B classification without returning home for six months;
- Family: spouses and minor children (under 21 years of age) are eligible for H-4 status and may attend school;
  1. H-4 status does not grant employment authorization.

### **R-1 Religious Worker Visa**

- Available to religious ministers or workers, if for the two years immediately preceding the time of the application for admission, has been a member of a religious denomination which has a bona-fide nonprofit religious organization in the United States; bona fide religious organizations must have tax-exempt status as an organization described in section 501(c)(3) of the Internal Revenue Code of 1986;
- Persons seeking R status must plan to enter the United States to solely:
  - Carry on the vocation of a minister of the religious denomination; or
  - Work in a professional capacity in a religious vocation or occupation or organization within the denomination; or
  - Work in a religious vocation or occupation for an organization within the denomination, or for a bona fide organization which is affiliated with the religious denomination;
- All organizations must undergo a government on-site visit before issuance of an R-1 visa;
- Duration: up to 30 months initially; for a total stay not to exceed five years.

## **Other Visa Options**

### **B-1 Visitor for Business**

- B-1 visitor visas may be used for the following activities:
  - Engage in commercial transactions which do not involve gainful employment in the United States;
  - Negotiation of contracts;
  - Business meetings and consultations with business associates;
  - Litigation;
  - Participation in scientific, educational, professional or business conventions, conferences, seminars;
  - Conduct independent research;
- The B-1 visitor visa may not be used for gainful employment or productive activity such as operating a business or consultancy work.

### **B-2 Visitor for Pleasure**

- B-2 visitor visas may be used to visit the United States for holidays, tourism, etc.;
- B-2 visitor visas may not be used to reside in the United States.

### **Visa Waiver Program**

- The visa waiver program permits visits for business or pleasure for 90 days without having to apply for a visa; visitors simply complete an online application, known as the Electronic System for Travel Authorization (ESTA), which is approved prior to the visitor's arrival in the United States;
- The following countries are eligible for the visa waiver program: Andorra, Australia, Austria, Belgium, Brunei, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, The Netherlands, New Zealand, Norway, Poland, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Taiwan and the United Kingdom;
- Visitors who enter on the visa waiver program may not apply for an extension of stay, and are not permitted to change status to a work visa category in the United States;
- Visitors, who ultimately receive a job offer, must apply for the visa with USCIS, leave and obtain the visa abroad.

### **F-1 Student or M-1 Vocational Student Visa**

- Full-time study required;
- Limited on-campus employment after completing the academic year; in some situations, some F-1 students may be eligible for curricular practical training (CPT) which allows students to participate in internships during the academic year;
- F-1 students are generally eligible to apply for up to one year of unrestricted employment authorization for the purpose of gaining practical training (OPT); most F-1 students use OPT to work after graduation;
  - Certain F-1 students graduating with STEM (Science, Technology, Engineering and Mathematics) degrees are entitled to an additional twenty-four months of OPT if they work for employers registered with E-Verify;
- Family: spouses and minor children (under 21 years of age) are eligible for F-2 status, which does not provide employment authorization;
  1. F-2 spouses who wish to pursue full-time studies must apply for their own F-1 visas.

### **The International Entrepreneur Parole Rule (IER)**

- Relunched in 2021 allowing DHS to exercise its discretion to grant temporary entry to foreign nationals who will provide a “significant public benefit” to the United States based their role as an entrepreneur of a recently formed start-up business.
- Entrepreneurs must own at least 10% of and maintain at least a five percent ownership in a start-up business that has done some business and was created in the five years before application or receiving the qualifying investment or funding; and must play an active role that is central to the operations of the business, applying the knowledge, skill or experience to support its growth.
- Show “significant public benefit” by meeting one of three standards:
  1. Significant capital investment of at least \$250,000 in the past 18 months from one or more US investors with an established record of successful investment. During past 5 years, each investor must have invested at least \$600,000 in start-ups, and at least two of these recipient start-ups must have created five qualifying jobs for US workers or generated \$500,000 in annual revenue with a 20% growth rate.
  2. Government funding – the start-up has received domestic, federal, state, or local government funding totaling at least \$100,000 in economic development, R & D or job creation awards or grants (excluding contractual commitments for goods/services);
  3. Partial capital investment and/or government funding and other compelling evidence – if the start-up received some but not all of the capital investment or government funding required under the above two standards, parole may be available based on other “compelling evidence” of substantial potential for rapid growth and job creation.

- Granted for up to 30 months (2.5 years) with option to renew.
- Family members (spouse and unmarried children under 21) eligible for parole. Spouses may apply for work authorization.
- Limited to three entrepreneurs per start-up.
- Maintenance of income: a parolee under the IER must maintain a household income of at least 400% above the poverty level (which currently amounts to \$51,520 for a single person).

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## The H-1B Specialty Occupation Visa

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### What is the H-1B Quota or H-1B Cap?

The fiscal year (FY) for USCIS starts on October 1st and ends on September 30<sup>th</sup> every year. There are 65,000 H-1B visas available per fiscal year. Out of the 65,000 H-1B visas, 1,400 are set aside for citizens of Chile and 5,400 are set aside for citizens of Singapore. An additional 20,000 H-1B visas are available to those who have earned Master's degrees or higher degrees from U.S. universities. This H-1B “cap” or “quota” only applies to private industry H-1Bs.

### Who is exempt from the H-1B Cap?

Cap-exempt organizations are exempt from the H-1B cap and are not subject to the quota, which means they can apply for unlimited H-1B visas any time of the year. Cap-exempt organizations include the following:

- institutions of higher education (i.e. universities and colleges);
- non-profit organizations affiliated with institutions of higher education;
- non-profit research organizations; and
- government research organizations.

A non-profit research entity is defined as:

A nonprofit research organization is an organization that is primarily engaged in basic research and/or applied research. Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest. It may include research and investigation in the sciences, social sciences, or humanities. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services. It may include research and investigation in the sciences, social sciences, or humanities.

Another way to qualify for a cap-exempt organization is if you work for a non-profit entity (including but not limited to hospitals and medical or research institutions) that meets one of the following conditions:

1. The non-profit is connected or associated with an institution of higher education through shared ownership or control by the same board or federation;

2. The non-profit is operated by an institution of higher education;
3. The non-profit is attached to an institution of higher education as a member, branch, cooperative, or subsidiary; or
4. The non-profit has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship with the institution of higher education for the purposes of research or education; and a fundamental activity of the non-profit is to directly contribute to the research or education mission of the institution of higher education.

Also, an H-1B employer/petitioner that is not itself a qualifying institution, organization or entity may claim an exemption from the cap for an H-1B nonimmigrant if: (1) the majority of the worker's duties will be performed at a qualifying institution, organization, or entity; and (2) such job duties directly and predominantly further the essential purpose, mission, objectives or functions of the qualifying institution, organization or entity (e.g. higher education, or non-profit or governmental research).

### **What fees must be paid when applying for an H-1B visa?**

The government filing fees for H-1Bs are as follows:

- \$1,500 ACWIA training fee (if company has 26 or more employees) OR \$750 training fee (if company has 25 or fewer employees);
  - the ACWIA training fee only applies to new H-1Bs, change-of-employer H-1Bs and the first extension request by the same employer;
  - the ACWIA fee is only paid by private industry H-1Bs; cap-exempt organizations are exempt from paying the ACWIA training fee;
  - the H-1B employer must pay the ACWIA fee – no exceptions.
- \$500 fraud prevention fee;
  - applies to all new H-1B petitions (both private industry and cap-exempt organizations) and change-of-employer petitions, but not to extension requests;
- \$460 regular filing fee;
- \$370 filing fee for spouse/children;
- Premium Processing: payment of an additional \$2,500 fee guarantees that USCIS will adjudicate (issue an approval or request additional evidence) an H-1B application on an expedited basis within 15 calendar days of receipt. This fee is optional.

### **When can I file an H-1B visa application?**

An H-1B petition may be filed up to six months prior to an employment start date (and fiscal year), making April 1 the earliest date you can submit an H-1B petition. The registration period for the H-1B lottery is typically during the first few weeks in March, with notifications during the last week of March, allowing employers to submit the H-1B petition up to 90 days after April 1. Even if approved before October 1, an H-1B worker cannot start working until on or after October 1.

**How long is an H-1B visa valid for?**

H-1B visas are issued in three-year increments and may be extended for another three years up to a maximum of six years. Any time spent outside of the United States on holiday or for business can be recaptured back.

**Does an employer have any obligations or liabilities when filing for an H-1B visa?**

- **Attestations:** all H-1B employers are required to make certain attestations to the Department of Labor on a **Labor Condition Application (LCA)** Form ETA 9035E:
  - **Wages:** an H-1B employer must pay at least the prevailing wage or the employer's actual wage, whichever is higher, for the occupation; this must be the actual wage and cannot include discretionary bonuses, commissions, benefits, etc.;
    - An H-1B employer must pay for non-productive time and cannot "bench" an H-1B worker for lack of work or economic hardship, etc.
  - **Benefits:** an H-1B employer must make benefits available to H-1B workers on the same basis and criteria in which benefits are offered to similarly situated U.S. workers;
  - **Working Conditions:** an H-1B employer must promise to provide working conditions for nonimmigrants which will not adversely affect the working conditions of workers similarly employed;
  - **Strike, Lockout or Work Stoppage:** an H-1B employer must attest that there is no strike, lock out or work stoppage in the named occupation at the place of employment;
  - **Notice:** notice to union or to workers has been or will be provided in the named occupation at the place of employment.
- The LCA must be posted in two conspicuous locations at the worksite, for ten business days.
- A copy of the LCA must be provided to the employee before or on the first day of employment.

**Can consulting companies send their H-1B workers to work at an off-site or client location?**

An employer assigning H-1B workers at an off-site location must comply with all statutory and regulatory requirements, including the mandatory posting requirements at all off-site locations.



### **What other obligations does an H-1B employer have?**

- **ACWIA Training Fee:** depending on the size of the company, it is an employer's responsibility to pay the ACWIA training fee.
  - An employee cannot pay the ACWIA fee or reimburse the employer for this expense.
- **Payment for Nonproductive Time (Benching):** employers are prohibited from placing H-1B workers in unpaid status due to lack of assigned work, economic hardship or lack of a license. However, H-1B workers may request unpaid leave as a result of conditions unrelated to employment, such as sabbaticals or maternity or paternity leave.
  - The obligation to put an H-1B employee on payroll begins no later than 30 days after admission into the United States if entering on the approved H-1B visa, or if already in the United States and granted a change-of-status, 60 days after the date a worker becomes eligible to work for the employer.
- **Termination of Employment or Lay Off:**
  - If terminated or laid off, an employer must offer the H-1B worker "reasonable costs of return transportation" to the H-1B employee's residence abroad.
  - If an H-1B worker voluntarily resigns, an employer is not required to offer "reasonable costs of transportation" to the H-1B worker.
  - H-1B employers must also notify USCIS of the termination and withdraw the H-1B petition and the LCA.
  - If an H-1B employee voluntarily terminates employment, an employer is not required to offer "reasonable costs of return transportation" home, but must notify USCIS and DOL that the H-1B employee is no longer employed with the company and withdraw the H-1B petition and the Labor Condition Application filed.
- **H-1B Petition Expiration:** the employer is not liable for transportation costs if the H-1B employee's employment ends upon petition expiration.

### **Changes in job conditions - when is an H-1B amendment required?**

An H-1B amendment may be required in some of the following scenarios:

- Demotion or promotion or any kind of changes to an H-1B worker's job duties or job title;
- Change in physical location of an H-1B worker's worksite;
- Change in hours from full-time to part-time or from part-time to full-time;
- Merger, acquisition or any type of corporate restructuring;
- Reduction in salary.

**Does an H-1B Employer have to advertise and recruit and show that it cannot find a qualified U.S. worker?**

No, under the H-1B program, the employer is not required to advertise or show that it cannot hire a qualified U.S. worker.

**Can I use the H-1B visa to work for any employer or multiple employers?**

No, the H-1B, like virtually all nonimmigrant visas, is employer-specific, which means that one can only work for the company that sponsors/petitions for the H-1B visa.

**Does the H-1B have to be for full-time employment?**

No, an H-1B visa can be for part-time or full-time employment. There is no minimum number of hours required under the regulations to qualify for a part-time H-1B. Part-time employment is 34 hours or less. As a practical matter, an H-1B worker must make at least a living wage (i.e. can support himself/herself) or must be able to show that s/he has sufficient means to support himself/herself.

**Can I work for multiple employers?**

**Concurrent employment** allows an H-1B worker to work for multiple employers, but each employer must file a separate H-1B petition and pay all the required government filing fees. Part-time, concurrent H-1Bs are commonly used by health care professionals such as dentists, physical therapists, nurses, etc. which allows them to work for multiple employers.

**Can I set up a company and sponsor myself for an H-1B visa?**

It depends. In order to file an H-1B petition, an employer must establish that a valid employer-employee relationship exists. This is shown by the ability of the employer to hire, pay, fire, supervise or otherwise control the work of the H-1B worker. If the H-1B worker owns the company or has a majority stake in the company, the H-1B cannot be filed as there is no outside entity that can exercise control over the H-1B worker. However, if there is a valid employer-employee relationship, then the company can sponsor the H-1B worker.

Examples of successful H-1B petitions:

- An H-1B worker has a majority stake in the company, but reports to a Board of Directors which “controls” the work of the H-1B worker and has the ability to fire the H-1B worker.
- An H-1B worker has a minority stake in the company.

**How easy is it to change jobs while on an H-1B visa?**

**H-1B portability** makes it easy to transfer an H-1B from one company to another. An H-1B worker may “port” or “transfer” his/her H-1B upon filing of a new H-1B petition with USCIS. The H-1B worker does not have to wait for the approval of the new H-1B petition to commence employment for the new employer. In order to qualify for H-1B portability, the H-1B worker must have been lawfully admitted into the United States, previously been issued an H-1B visa, and must not have worked without USCIS authorization.

**If I change jobs, am I subject to the H-1B cap again?**

An H-1B worker is not subject to the H-1B cap when changing jobs if the H-1B worker has previously been “counted” towards the H-1B cap.

**What if I went to work for a cap-exempt institution and now want to transition to private industry?**

H-1B workers who are employed by cap-exempt organizations, such as universities cannot “port” to a private employer unless they have previously been “counted” towards the cap. Such H-1B workers may have to wait and file a new H-1B under the next fiscal year. In some limited situations, an H-1B worker may be able to work concurrently for the cap-exempt institution and the private industry employer.

**What if voluntarily resign from my job?**

If an H-1B employee voluntarily terminates employment, an employer is not required to offer "reasonable costs of return transportation" home, but must notify USCIS and DOL that the H-1B employee is no longer employed with the company and withdraw the H-1B petition and the Labor Condition Application filed. The H-1B employee is eligible for a grace period of up to 60 days during the period of petition validity or until the existing H-1B status ends, whichever is shorter. You cannot work during this grace period. The grace period may only apply one time per authorized nonimmigrant validity period.

You may file an H-1B transfer with a new employer during the grace period and you may start working for the new company upon filing of the petition based on the H-1B portability provision. If the new H-1B is approved, you may be eligible for an additional grace period of up to 60 days in connection with the new authorized validity period.

**Is there a grace period if I am laid off or terminated?**

Yes, H-1B workers who are laid off or terminated are eligible for a grace period of up to 60 days during the period of petition validity or until the existing H-1B status ends, whichever is shorter. You cannot work during this grace period. The grace period may only apply one time per authorized nonimmigrant validity period.

You may file an H-1B transfer with a new employer during the grace period and you may start working for the new company upon filing of the petition based on the H-1B portability provision. If the new H-1B is approved, you may be eligible for an additional grace period of up to 60 days in connection with the new authorized validity period.

**What if the H-1B quota has been reached, but I have previously held an H-1B visa?**

**Remainder Options** – if you have previously held H-1B status and did not use the full six-year period, you may apply for an H-1B for the remaining unused time from the six-year period. Individuals in this situation are not subject to the H-1B cap because they have already been “counted.” For example, someone who works for three years on an H-1B decides to go back to school as an F-1 student to obtain an MBA. After graduation, this person can apply for an H-1B for the remaining three years and is not subject to the cap and can apply at any time of the year.

If an individual on an H-1B leaves the United States and is physically abroad for at least one year, that person can either apply for a “new” cap-subject H-1B to obtain a “new” six-year period, or that person can choose to apply for the “remainder” of unused time without being subject to the H-1B cap.

There is no time limitation on recapturing the remainder of the initial 6-year period. For example, if you used three years of an H-1B in 2009, you can recapture the remaining time on an H-1B filed in 2021.

**What visa will my family receive?**

Spouses and minor children under the age of 21 years, are eligible for H-4 status. H-4 derivatives are allowed to attend school, but are generally not allowed to work. Most H-4 spouses may apply for their own work visa if they qualify under one of the other nonimmigrant visa categories.

**What is this provision that allows certain H-4 spouses to work?**

Since May 26, 2015, certain H-4 spouses of H-1B nonimmigrants who are seeking employment-based lawful permanent resident (LPR) status may apply for an H-4 Employment Authorization Document (EAD) (i.e. a work permit).

To qualify, the H-4 spouse must be married to an H-1B who:

- Is the beneficiary of an approved I-140, Immigrant Petition for Alien Worker; or
- Is the beneficiary of an approved H-1B extension petition beyond the H-1B six year limit under sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000 as amended by the 21st Century Department of Justice Appropriations Authorization Act (“AC21”). AC 21 permits H-1B nonimmigrants

seeking lawful permanent residence to work and remain in the United States beyond the six-year limit on their H-1B status, once a PERM application or I-140 petition has been filed and pending for over 365 days.

**What happens when I reach the H-1B six-year limit?**

- Recapturing time: any time spent physically abroad for vacation or business, can be recaptured towards the six-year period.
- Pending Green Card applications can help!
  - If a labor certification or I-140 has been filed and pending for at least 365 days prior to his/her 6th-year cap date, one may obtain H-1B extensions in one-year increments;
  - If an I-140 has been approved but an H-1B worker is subject to retrogression, an H-1B may be extended in three-year increments, until the green card is approved.

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## H-1B Employer Obligations

An H-1B employer has certain obligations when filing an H-1B visa petition. These include:

- **Attestations:** all H-1B employers are required to make certain attestations to the Department of Labor on a **Labor Condition Application (LCA)** Form ETA 9035E.
  - The LCA must be posted in two conspicuous locations at the worksite, for ten business days.
  - A copy of the LCA must be provided to the employee before or on the first day of employment.

The attestations are as follows:

- **Wages:** an H-1B employer must pay at least the prevailing wage or the employer's actual wage, whichever is higher, for the occupation; this must be the actual wage and cannot include discretionary bonuses, commissions, benefits, etc.;
  - An H-1B employer must pay for non-productive time and cannot "bench" an H-1B worker for lack of work or economic hardship, etc.
- **Benefits:** an H-1B employer must make benefits available to H-1B workers on the same basis and criteria in which benefits are offered to similarly situated U.S. workers;
- **Working Conditions:** an H-1B employer must promise to provide working conditions for nonimmigrants which will not adversely affect the working conditions of workers similarly employed;
- **Strike, Lockout or Work Stoppage:** an H-1B employer must attest that there is no strike, lock out or work stoppage in the named occupation at the place of employment;
- **Notice:** notice to union or to workers has been or will be provided in the named occupation at the place of employment.

An H-1B employer must maintain a public access file showing LCA compliance, and which must be readily available for public inspection or upon request by DOL. The Public Access File must be available within one business day after the LCA is filed. The Public Access File may be maintained at the employer's principal place of business or at the actual place of employment.

- **ACWIA Training Fee:** depending on the size of the company, it is an employer's responsibility to pay the ACWIA training fee.
  - An employee cannot pay the ACWIA fee or reimburse the employer for this expense.
- **Payment for Nonproductive Time (Benching):** employers are prohibited from placing H-1B workers in unpaid status due to lack of assigned work, economic hardship or lack of a

license. However, H-1B workers may request unpaid leave as a result of conditions unrelated to employment, such as sabbaticals or maternity or paternity leave.

- The obligation to put an H-1B employee on payroll begins no later than 30 days after admission into the United States if entering on the approved H-1B visa, or if already in the United States and granted a change-of-status, 60 days after the date a worker becomes eligible to work for the employer.

- **Termination of Employment or Lay Off:**

- If terminated or laid off, an employer must offer the H-1B worker “reasonable costs of return transportation” to the H-1B employee’s residence abroad.
- If an H-1B worker voluntarily resigns, an employer is not required to offer “reasonable costs of transportation” to the H-1B worker.
- H-1B employers must also notify USCIS of the termination and withdraw the H-1B petition and the LCA.
- If an H-1B employee voluntarily terminates employment, an employer is not required to offer "reasonable costs of return transportation" home, but must notify USCIS and DOL that the H-1B employee is no longer employed with the company and withdraw the H-1B petition and the Labor Condition Application filed.
- The employer is not liable for transportation costs if the H-1B employee's employment ends upon petition expiration.

- **Changes in Job Conditions May Require Filing an Amendment**

An H-1B amendment may be required in some of the following scenarios:

- Demotion or promotion or any kind of changes to an H-1B worker’s job duties or job title;
- Change in physical location of an H-1B worker’s worksite;
- Change in hours from full-time to part-time or from part-time to full-time;
- Merger, acquisition or any type of corporate restructuring;
- Reduction in salary.

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## 2022 H-1B Lottery Registration Process

For this year's H-1B cap season (known as fiscal year (FY) 2023), employers will submit an online registration to enter the H-1B cap lottery with basic information. Only those selected in the lottery will be allowed to file "complete" H-1B petitions with USCIS. As in previous years, Loke Walsh Immigration Law expects USCIS to hit the cap again in April 2022.<sup>1</sup>

The process is as follows:

- USCIS will open the initial registration period from **noon EST on March 1st through noon EST on March 18<sup>th</sup>, 2022**. All registrations must be submitted during this period.
- The registration process requires basic information about the H-1B employer and each requested H-1B worker. USCIS has stated that they will not evaluate the "quality" of the registration other than to eliminate duplicate submissions. Since some registrations will not lead to approved H-1B cap-petitions, USCIS plans to hold unselected registrations in reserve and will conduct additional selections if necessary.
- H-1B employers will be able to register multiple individuals in a single registration.
- There will be a non-refundable registration fee of **\$10** for each H-1B registration submitted by petitioning employers or their authorized representatives. This payment – which can be submitted by the employer or their attorney – can be made by credit or debit card, or from a checking or savings account. USCIS will require payment of the \$10 registration fee through the **Pay.gov** portal. Employers may submit one combined registration fee payment for multiple prospective H-1B workers at the same time.
- An H-1B employer may only submit one registration per applicant in any fiscal year. If a specific employer submits more than one registration per beneficiary in the same fiscal year ("duplicate filings"), all registrations filed by that employer relating to that applicant for that fiscal year will be considered invalid.
- Nothing prohibits a foreign national from having multiple employers (i.e. different companies) submit separate H-1B registrations for him or her.
- If a sufficient number of registrations are received, USCIS will use a computer-generated random registration selection process (lottery) to select enough registrations to meet the regular cap (65,000) and the U.S. higher-degree cap (20,000) for FY 2023. USCIS

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<sup>1</sup> In 2021, USCIS received 308,613 H-1B registrations (about 48% were higher-degree applicants); in 2020, USCIS received nearly 275,000 H-1B registrations (about 46% were higher-degree applicants); in 2019, USCIS received 201,011 H-1B petitions; in 2018, it received 190,098 H-1B petitions; in 2017, it received approximately 199,000 H-1B petitions.



conducts the lottery selection for the regular cap first, followed by the higher-degree cap. Applicants with a higher degree from a US university/college are considered in both lottery selections and therefore have “two” chances at lottery.

### **After the Lottery is Completed**

USCIS intends to notify applicants with selected registrations from the initial registration period **no later than March 31, 2022**. After the selection, employers will be notified by USCIS of the exact amount of time allowed for filing the full H-1B petition, which will in all cases be **at least 90 days (i.e. until June 30<sup>th</sup>, 2022)**. Once the H-1B petition is submitted, USCIS will then adjudicate the H-1B petition based on the merits of the case.

Employers with selected registrations will be eligible to file a cap-subject petition only for the applicant named in the registration. An employer may not substitute the applicant named in the original registration or transfer the registration to another employer.

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Please note that any applicants with non-traditional OPT expiration dates (i.e. December graduates with OPT expiration dates in January or February 2023) should apply for an H-1B in 2022. If not eligible for STEM-OPT, these applicants will have a significant gap in employment authorization the following year (2023) as they are not eligible for cap-gap extension.

Given the highly competitive nature of the H-1B lottery, we also recommend filing an H-1B petition for any “incoming” candidates (starting on OPT after graduation in May/June), as it increases the number of opportunities to apply for an H-1B visa. If unsuccessful applying in 2022, the applicant will have one more chance to file an H-1B application the following year in 2023.

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## Alternatives to the H-1B

What if you missed out on the H-1B lottery? Or, maybe the H-1B visa may not be the right visa for you?

If you missed out on the H-1B visa, what are some of your options?

- ❖ Work remotely from abroad
- ❖ Transfer to an overseas office
- ❖ Go back to school on an F-1
- ❖ Apply for a J-1 Intern/Trainee visa
- ❖ Apply for an H-3 Trainee visa
- ❖ Start a green card application if your employer is willing to do so, but you must be able to maintain status while the application is pending

If your job opportunity remains valid, you can always apply for an H-1B in the following year.

For F-1 students, consider the following:

- ❖ If you just started on OPT, you can continue to work with your OPT and file for an H-1B again next year
  - ❖ If your employer is willing to sponsor you for a green card, start a green card application!
- ❖ If you qualify for STEM OPT and work for an E-Verify employer, you can extend your OPT for another 24 months
  - ❖ If your employer is willing to sponsor you for a green card, start a green card application!

While the H-1B is the most commonly used visa for professionals, there are other options.

- ❖ Investors and entrepreneurs may qualify for E-1 trade and E-2 investor visas or the new entrepreneur parole;
- ❖ Graphic designers, VFX artists, animators, architects, athletes, artists, entertainers, filmmakers and musicians may qualify for O-1 and P-1 visas;
- ❖ Scientists and researchers may similarly qualify for J-1 or O-1 visas or apply for jobs at cap-exempt H-1Bs;
- ❖ Interns and trainees may qualify for J-1 or H-3 visas;
- ❖ Multinational executives and managers may qualify for L-1 visas;
- ❖ Managers and executives may qualify for an E-1 or E-2 employee visa if they have the same nationality as certain companies (e.g. a majority-Italian owned company in the U.S. can hire an Italian manager or executive just because they are Italian; similarly, a majority-Japanese owned company in the U.S. can hire a Japanese manager or executive just because they are Japanese).

Five lucky countries have free-trade agreements with the United States that provides alternatives to the H-1B visa for professional workers. The “Lucky 5” countries are:

- ❖ Australia (E-3 visa)
- ❖ Canada (NAFTA TN visa)
- ❖ Mexico (NAFTA TN visa)
- ❖ Singapore (H-1B1)
- ❖ Chile (H-1B1)

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## L-1 Visas: Employees of Global or Multinational Companies

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The L-1A visa enables a U.S. employer to transfer an executive or manager or an employee with specialized knowledge from one of its affiliated foreign offices to one of its offices in the United States.

To qualify for L-1 classification in this category, the employer must:

- Have a qualifying relationship with a foreign company (parent company, branch, subsidiary, or affiliate, collectively referred to as *qualifying organizations*); and
- Currently be, or will be, *doing business* as an employer in the United States and in at least one other country directly or through a qualifying organization for the duration of the beneficiary's stay in the United States as an L-1. While the business must be viable, there is no requirement that it be engaged in international trade.
  - *Doing business* means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

A *qualifying organization* is one of the following:

*Parent* means a firm, corporation, or other legal entity which has subsidiaries.

*Branch* means an operating division or office of the same organization housed in a different location.

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

*Affiliate* means:

1. One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
2. One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity, or
3. In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

For the employee to qualify for L-1 classification, the employee must:

- Generally have been working for a qualifying organization abroad for at least one of the last three years immediately preceding his or her admission to the United States in a **managerial, executive** or **specialized knowledge capacity**; and
- Be seeking to render services in an *executive* or *managerial capacity* or *specialized knowledge capacity* for a qualifying organization in the United States.

*Executive capacity* generally refers to the employee's ability to make decisions of wide latitude without much oversight. An executive must primarily

- 1) Direct the management of the organization or a major component or function of the organization;
- 2) Establish the goals and policies of the organization, component or function;
- 3) Exercise wide latitude in discretionary decision-making;
- 4) Receive only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

*Managerial capacity* generally refers to the ability of the employee to

- 1) Manage the organization, or a department, subdivision, function, or component of the organization;
- 2) Supervise and control the work of other supervisory, professional or managerial employees, or manage an essential function within the organization, or a department, or subdivision of the organization;
- 3) Have the authority to hire and fire or recommend those as well as other personnel actions (such as promotions and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- 4) Exercises discretion over day-to-day operations of the activity or function for which the employee has authority.

*Specialized knowledge (SK)* means special knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or expertise in the organization's processes and procedures. Such knowledge is beyond the ordinary and not commonplace within the industry or the petitioning organization. In other words, the employee must be more than simply skilled or familiar with the employer's interests.

The following can be useful to determine if someone has specialized knowledge:

- Possessing specialized knowledge that is "different from that generally found in the particular industry."
- Possessing knowledge that is "valuable to the employer's competitiveness in the marketplace."
- Is qualified to contribute to the U.S. employer's knowledge of foreign operating conditions as a result of specialized knowledge not generally found in the industry.

- Possessing knowledge which normally can only be gained through prior experience with that employer.
- Employment abroad in a capacity involving assignments that have significantly enhanced the employer's productivity, competitiveness, image or financial position.
- Possessing knowledge of a process or product that either is sophisticated or complex, or of a highly technical nature, although not necessarily unique to the firm.
- Possessing knowledge of a product or process which cannot be easily transferred or taught to another individual without significant economic cost or inconvenience (because, for example, such knowledge may require substantial training, work experience or education).

The common theme for SK cases is that the knowledge which the person possesses, whether it is knowledge of a process or a product, would be difficult to impart to another individual without significant economic inconvenience to the United States or foreign firm.

Executives and Managers are classified as **L-1A**, while Specialized Knowledge individuals receive **L-1B** classification.

**Offsite- Employment of L-1B Employees:** L-1B employees who are stationed primarily at the worksite of an unaffiliated employer must show that

- The employee will not be principally controlled or supervised by the unaffiliated employer; and
- The work being provided by the employee is not considered to be labor for hire for the unaffiliated employer.

**New Offices:** the L-1 visa also allows a foreign company to send an employee as a manager or executive to the United States to establish a U.S. office. To qualify, a foreign company must show that:

- Sufficient physical premises to house the new office have been secured
- The employee has been employed as an executive or manager for one continuous year in the three years preceding the filing of the petition; and
- The intended U.S. office will support an executive or managerial position within one year of the approval of the petition.

### **Blanket Petitions**

Certain organizations may establish the required intra-company relationship in advance by filing a blanket petition. In order to establish eligibility for blanket L certification, the employer

- And each of the qualifying organizations must be engaged in commercial trade or services
- Must have an office in the United States which has been doing business for one year or more
- Must have three or more domestic and foreign branches, subsidiaries, and affiliates
- Must meet one of the following criteria
  - Along with the other qualifying organizations, have obtained at least 10 L-1 approvals during the previous 12-month period; or

- Have U.S. subsidiaries or affiliates with combined annual sales of at least \$25 million; or
- Have a U.S. work force of at least 1,000 employees.

Managers, executives and specialized knowledge professionals (i.e. someone with a professional degree) may apply under the Blanket L program.

The approval of a blanket L petition provides an employer with the flexibility to transfer eligible employees to the United States quickly and on short notice without having to file an individual petition with USCIS. Based on the pre-approved Blanket L, employees apply directly at a U.S. embassy or consulate abroad. Canadian applicants have the added advantage as they can apply directly at a port-of-entry (i.e. airport or land border).

**Reassignments:** an L-1 employee admitted under a Blanket L petition may be reassigned to any organization listed in the approved Blanket L petition without filing an amended petition, as long as the L-1 employee will be performing virtually all the same job duties. If the L-1 employee will perform different job duties, an amendment must be filed.

### **Duration of L-1 visa**

L-1 visas are usually issued for an initial period of three years. The L-1A (Manager or Executive) may be extended up to a maximum of 7 years. The L-1B (Specialized Knowledge) may be extended up to a maximum of 5 years. L-1s admitted to establish a new office are issued a visa for one year, which can then be extended. L-1 extensions are typically granted in two-year increments, until the employee has reached the maximum limit.

### **Family of L-1 Employees**

Spouses and children (under 21 years of age) qualify for L-2 visas and may attend school. L-2 spouses may apply for unrestricted employment authorization.

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## TN Visas

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The United States-Mexico-Canada Agreement (USMCA) visa (formerly NAFTA) known as a TN, is available to Canadians and Mexicans as part of the USMCA agreement. To qualify for a TN, you must be entering the United States to perform in a job that is on the list of TN occupations. Generally, these are all professional occupation visas which typically require a BA degree to perform the job. The TN is not a general work permit that allows TNs to engage in unrestricted employment. A TN stills require a job offer (sponsorship) by an employer and it is employer-specific, which means that the TN can only work for the employer that "sponsors" him or her. There is no quota for TNs.

### Application Process

Canadians can apply for TNs at any land border crossing or airport by presenting the relevant paperwork (job offer letter, contract and educational documents). TNs are issued "on-the-spot" by the adjudicating officer. TNs for Canadians are generally issued for up to a three-year period.

Mexicans must apply for the TN at a U.S. embassy/consulate in Mexico by presenting the relevant paperwork (job offer letter, contract, educational documents, visa application forms and application fee). TN visas for Mexicans are issued in one-year increments, but are admitted for up to three years as reflected on the I-94 admission/departure card.

The main advantage of the TN is that employers bypass the USCIS mail-in application process. As such, TN visas can be obtained very quickly.

TNs can be renewed, but TN holders are not permitted to have immigrant intent. As a practical matter, this means that remaining on a TN for more than four or six years can be problematic.

### TN List of Occupations

- **Accountant**--Baccalaureate or Licenciatura Degree; or C.P.A., C.A., C.G.A., or C.M.A.
- **Architect**--Baccalaureate or Licenciatura Degree; or state/provincial license
- **Computer Systems Analyst**--Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post Secondary Certificate and three years' experience
- **Disaster relief insurance claims adjuster** (claims adjuster employed by an insurance company located in the territory of a Party, or an independent claims adjuster)--Baccalaureate or Licenciatura Degree and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims; or three years experience in claims adjustment and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims
- **Economist**--Baccalaureate or Licenciatura Degree
- **Engineer**--Baccalaureate or Licenciatura Degree; or state/provincial license
- **Forester**--Baccalaureate or Licenciatura Degree; or state/provincial license
- **Graphic Designer**--Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate and three years experience
- **Hotel Manager**--Baccalaureate or Licenciatura Degree in hotel/restaurant management; or Post-Secondary Diploma or Post-Secondary Certificate in hotel/restaurant management and three years experience in hotel/restaurant management



- **Industrial Designer**--Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience
- **Interior Designer**--Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience
- **Land Surveyor**--Baccalaureate or Licenciatura Degree or state/provincial/federal license
- **Landscape Architect**--Baccalaureate or Licenciatura Degree.
- **Lawyer (including Notary in the province of Quebec)**--L.L.B., J.D., L.L.L., B.C.L., or Licenciatura degree (five years); or membership in a state/provincial bar
- **Librarian**--M.L.S., or B.L.S. (for which another Baccalaureate or Licenciatura Degree was a prerequisite)
- **Management Consultant**--Baccalaureate or Licenciatura Degree; or equivalent professional experience as established by statement or professional credential attesting to five years experience as a management consultant, or five years experience in a field of specialty related to the consulting agreement
- **Mathematician (including Statistician)**--Baccalaureate or Licenciatura Degree
- **Range Manager/Range Conservator**--Baccalaureate or Licenciatura Degree
- **Research Assistant (working in a post-secondary educational institution)**--Baccalaureate or Licenciatura Degree
- **Scientific Technician/Technologist**--Possession of (a) theoretical knowledge of any of the following disciplines: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology, or physics; and (b) the ability to solve practical problems in any of those disciplines, or the ability to apply principles of any of those disciplines to basic or applied research
- **Social Worker**--Baccalaureate or Licenciatura Degree.
- **Sylviculturist (including Forestry Specialist)**--Baccalaureate or Licenciatura Degree
- **Technical Publications Writer**--Baccalaureate or Licenciatura Degree, or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience
- **Urban Planner (including Geographer)**--Baccalaureate or Licenciatura Degree
- **Vocational Counselor**--Baccalaureate or Licenciatura Degree.

## MEDICAL/ALLIED PROFESSIONALS

- **Dentist**--D.D.S., D.M.D., Doctor en Odontologia or Doctor en Cirugia Dental or state/provincial license
- **Dietitian**--Baccalaureate or Licenciatura Degree; or state/provincial license
- **Medical Laboratory Technologist (Canada)/Medical Technologist (Mexico and the United States)**--Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience
- **Nutritionist**--Baccalaureate or Licenciatura Degree
- **Occupational Therapist**--Baccalaureate or Licenciatura Degree; or state/provincial license
- **Pharmacist**--Baccalaureate or Licenciatura Degree; or state/provincial license
- **Physician (teaching or research only)**--M.D. Doctor Medicina; or state/provincial license
- **Physiotherapist/Physical Therapist**--Baccalaureate or Licenciatura Degree; or state/provincial license
- **Psychologist**--state/provincial license; or Licenciatura Degree
- **Recreational Therapist**--Baccalaureate or Licenciatura Degree
- **Registered Nurse**--state/provincial license or Licenciatura Degree
- **Veterinarian**--D.V.M., D.M.V., or Doctor en Veterinaria; or state/provincial license.

## SCIENTISTS

- **Agriculturist (including Agronomist)**--Baccalaureate or Licenciatura Degree
- **Animal Breeder**--Baccalaureate or Licenciatura Degree
- **Animal Scientist**--Baccalaureate or Licenciatura Degree
- **Apiculturist**--Baccalaureate or Licenciatura Degree
- **Astronomer**--Baccalaureate or Licenciatura Degree
- **Biochemist**--Baccalaureate or Licenciatura Degree
- **Biologist**--Baccalaureate or Licenciatura Degree
- **Chemist**--Baccalaureate or Licenciatura Degree
- **Dairy Scientist**--Baccalaureate or Licenciatura Degree
- **Entomologist**--Baccalaureate or Licenciatura Degree
- **Epidemiologist**--Baccalaureate or Licenciatura Degree
- **Geneticist**--Baccalaureate or Licenciatura Degree
- **Geochemist**--Baccalaureate or Licenciatura Degree
- **Geologist**--Baccalaureate or Licenciatura Degree
- **Geophysicist (including Oceanographer in Mexico and the United States)**--Baccalaureate or Licenciatura Degree
- **Horticulturist**--Baccalaureate or Licenciatura Degree
- **Meteorologist**--Baccalaureate or Licenciatura Degree
- **Pharmacologist**--Baccalaureate or Licenciatura Degree
- **Physicist (including Oceanographer in Canada)**--Baccalaureate or Licenciatura Degree
- **Plant Breeder**--Baccalaureate or Licenciatura Degree
- **Poultry Scientist**--Baccalaureate or Licenciatura Degree
- **Soil Scientist**--Baccalaureate or Licenciatura Degree
- **Zoologist**--Baccalaureate or Licenciatura Degree.

## TEACHER

- **College**--Baccalaureate or Licenciatura Degree
- **Seminary**--Baccalaureate or Licenciatura Degree
- **University**--Baccalaureate or Licenciatura Degree.

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## E-1/E-2 Investors and Traders (and Employees)

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The Treaty Trader (E-1) or Treaty Investor (E-2) visa is for citizens of a country with which the United States maintains a treaty of commerce and navigation.

- Available to individuals who wish to buy a business or start-up a business;
  - Owner/investor must be directly involved in running the investment enterprise;
  - Also available to employees performing in managerial, executive or essential roles for these businesses;
    - An employee must be a national of the Treaty Country.
- A Treaty must exist between the United States and foreign country.
- The Applicant must be a national of the Treaty Country.
- The E company must be at least 50% owned by nationals of the Treaty country.
- Duration: varies per country depending on the Treaty, but may be extended indefinitely;
- Family: spouses and minor children (under 21 years of age) are eligible for E-1/E-2 dependent status and may attend school;
  - E-1/E-2 spouses may apply for unrestricted employment authorization.

The additional requirements for the **Treaty Trader Visa (E-1)** are:

- At least 50 percent of the international trade involved must be between the U.S. and the country of the applicant's nationality.
- The international trade must be a sizable and continuing volume of trade.
- Trade includes the exchange, purchase, or sale of goods or services; the transfer of technology; and binding contracts that call for the immediate exchange of items; this trade must be continuous and ongoing; title of the trade items must pass from one party to the other.
- Trade can include services, but the provision of that service by the business must be the purpose of the business and most importantly, must itself be the saleable commodity which the business sells to clients. In these situations, trade can include international banking, insurance, transportation, tourism, communications, advertising, accounting, design and engineering and management consulting.
- E-1s are typically used by import-export type businesses, but any service item commonly traded in international commerce would qualify.
- The following countries have E-1 treaties with the United States:
  - Argentina
  - Australia
  - Austria
  - Belgium
  - Bolivia
  - Bosnia & Herzegovina
  - Brunei
  - Canada
  - Chile
  - Colombia

- Costa Rica
- Croatia
- Denmark
- Estonia
- Ethiopia
- Finland
- France
- Germany
- Greece
- Honduras
- Iran
- Ireland
- Israel
- Italy
- Japan
- Jordan
- Latvia
- Liberia
- Luxembourg
- Macedonia
- Mexico
- New Zealand
- Netherlands
- Norway
- Oman
- Pakistan
- Paraguay
- Philippines
- Singapore
- Slovenia
- South Korea
- Spain
- Suriname
- Sweden
- Switzerland
- Taiwan
- Thailand
- Togo
- Turkey
- United Kingdom
- Yugoslavia

The additional requirements for the **Treaty Investor Visa (E-2)** are:

- The investment must be substantial - it must be sufficient to ensure the successful operation of the enterprise
  - No fixed amount is required and “substantial” varies depending on the nature of the business (the start-up costs of launching a business or if buying a business, the fair market value of the business);
- The investment must be a real operating enterprise.
  - Speculative investments do not qualify.
  - Uncommitted funds in a bank account, a mere intent to invest or even prospective investment arrangements are not considered a sufficient commitment for purposes of obtaining an E visa.
- The investor must have control of the funds, and the investment must be at risk in the commercial sense
  - Loans secured with the assets of the investment enterprise are not allowed.
- The investor must be coming to the U.S. to develop and direct the enterprise.
- The investment enterprise cannot be marginal, i.e. the investment must generate significantly more income than just to provide a living to the investor and family, or it must have a significant economic impact in the United States;

- The following countries have E-2 treaties with the United States:
  - Albania
  - Argentina
  - Armenia
  - Australia
  - Austria,
  - Azerbaijan
  - Bahrain
  - Bangladesh
  - Belgium
  - Bolivia
  - Bosnia & Herzegovina
  - Bulgaria
  - Cameroon
  - Canada
  - Chile
  - Colombia
  - Congo (Brazzaville)
  - Congo (Kinshasa)
  - Costa Rica
  - Croatia
  - Czech Republic
  - Denmark
  - Ecuador
  - Egypt
  - Estonia
  - Ethiopia
  - Finland
  - France
  - Georgia
  - Germany
  - Grenada
  - Honduras
  - Iran
  - Ireland
  - Israel
  - Italy
  - Jamaica
  - Japan
  - Jordan
  - Kazakhstan
  - Kyrgyzstan
  - Latvia
  - Liberia
  - Lithuania
  - Luxembourg
  - Macedonia
  - Mexico
  - Moldova
  - Mongolia
  - Morocco
  - Netherlands
  - New Zealand
  - Norway
  - Oman
  - Pakistan
  - Panama
  - Paraguay
  - Philippines
  - Poland
  - Romania
  - Senegal
  - Singapore
  - Slovak Republic
  - Slovenia
  - South Korea
  - Spain
  - Sri Lanka
  - Suriname
  - Sweden
  - Switzerland
  - Taiwan
  - Thailand
  - Togo
  - Trinidad & Tobago
  - Tunisia
  - Turkey
  - Ukraine
  - United Kingdom
  - Yugoslavia

**Proper Use of B-1 visa or Visa Waiver for Business (WB) for Investors:** potential investors may seek out investment opportunities, survey potential sites for a business, lease premises, sign contracts and take other steps to purchase or establish a business while travelling on B-1 or WB status. However, applicants may not perform productive labor or actively participate in the management of the business prior to obtaining E-2 status. Such activity is not permissible whether or not the investor receives any payment for work. If required, you can hire U.S. workers to manage and run daily operations prior to receiving the E-1 or E-2 visa.

### **Frequently Asked Questions:**

***I own a house in the United States. Does this qualify as an investment and entitle me to an E-2 visa.***

No. Owning property in the United States does not entitle you to an E-2 visa. To qualify for an E-2 visa the investment must be a real, active and commercial or entrepreneurial undertaking, producing some service or commodity. However, owning significant properties such as an apartment complex, commercial building, multiple properties, or a hotel, etc. could qualify for an E-2 visa.

***Can I retire to the U.S. on an E visa?***

No. The E visa is a work visa, specifically intended for those who are coming to the U.S. to “solely carry on substantial trade” or “solely to develop and direct the operations of the enterprise.” This requires a “hands on” approach with involvement on a daily basis for the E visa applicant. Eligibility ceases when you no longer meet these requirements.

***Does an E visa lead to a “green card” or “citizenship”?***

No. An E visa is a non-immigrant visa and does not automatically “lead to” either a green card or citizenship. Applicants who wish to become permanent residents must qualify under the appropriate immigrant visa category.

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## **E-3 Visas for Australian Professionals**

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The E-3 is a visa category for Australians going to the United States to work temporarily in a specialty occupation, i.e. a professional occupation that usually requires a Bachelor's degree as a minimum for entry into that occupation.

### **Why are only Australians eligible for this visa?**

The legislation limited the E-3 to nationals of Australia. Permanent residents of Australia will not qualify for an E-3 visa.

### **Who qualifies for the E-3 visa?**

The E-3 visa classification currently applies only to nationals of Australia as well as their spouses and children. E-3 principal applicants must be going to the United States solely to work in a specialty occupation. The spouse and children need not be Australian citizens.

### **What is a specialty occupation?**

The definition of "specialty occupation" is one that requires:

1. A theoretical and practical application of a body of specialized knowledge, and;
2. The attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

It is not enough for an E-3 applicant to hold a bachelor's degree; the job itself must also require a bachelor-level or higher qualification. For example, someone with a degree in Business planning to work as an Administrative Assistant would not be eligible for the E-3 unless the job actually requires a bachelor's degree.

### **Do I need a license for a specialty occupation?**

An E-3 alien must meet academic and occupational requirements, including licensure where appropriate, for admission into the United States in a specialty occupation. If the job requires licensure or other official permission to perform the specialty occupation, the applicant must submit proof of the requisite license or permission before the E-3 visa may be granted. In certain cases, where such a license or other official permission is not immediately required to perform the duties described in the visa application, the alien must show that he or she will obtain such licensure within a reasonable period of time following admission to the United States.

### **I do not have a bachelor's degree but I have significant professional experience. Can I qualify for an E-3?**

An E-3 applicant may also qualify based on experience. U.S. regulations allow a certain kind and amount of experience that can be used to establish the equivalent of a bachelor's degree. The formula recognizes three years of progressive experience as equal to one year of university-level education. Therefore, someone would need 12 years of progressive experience to show the "equivalent" of a U.S. bachelor's degree.

### **Do I need a petition by my employer to the Department of Homeland Security (DHS)?**

No. The U.S.-based employer of an E-3 visa applicant is not required to submit a petition to USCIS (Immigration) as a prerequisite for visa issuance. Instead, an E-3 visa applicant can apply for the visa

directly at a U.S. embassy or consulate. As part of the application, the employer must obtain a Labor Condition Application (LCA), ETA Form 9035, from the Department of Labor and attest that it will pay the E-3 visa applicant the prevailing wage for that position. The prevailing wage will depend on the position and the location of the worksite. DOL wages can be found at <https://www.flcdatabase.com/oeswizardstart.aspx>.

**How long is the visa valid? Is it renewable?**

The E-3 visa is issued in two-year increments and may be renewed indefinitely.

**What is the fee for an E-3 visa?**

Other than the normal visa application fee of US\$205 (per person), there is no government filing fee.

**Is there a limit to the number of E-3 visas?**

Yes, there is a quota of 10,500 E-3 visas per year. Spouses and children of principal applicants do not count against the numerical limitations. However, the quota has never been reached, so E-3 visas are always available.

**Do applicants need to demonstrate a “residence abroad?”**

E-3 status provides for entry on a non-permanent basis into the United States. Similar to E-1 and E-2 visa applicants, the E-3 must satisfy the consular officer that s/he intends to depart upon termination of E-3 status.

**How do I demonstrate that I qualify for an E-3D (dependent) visa?**

You must demonstrate to the consular officer that the established family relationship exists. Therefore, only spouses and children of E-3 visa applicants will qualify for the E-3 dependent visa. A marriage or birth certificate will serve as evidence of that relationship.

**May spouses with E-3D visas work?**

Yes, E-3 spouses are entitled to work in the United States and may apply for an Employment Authorization Document (EAD) through US Citizenship and Immigration Service (USCIS) after admission to the United States in E-3D status. This EAD provides the spouse with unrestricted employment authorization. This means that a spouse may be self-employed, a freelancer/independent contractor or an employee.

**How do I apply for an E-3 visa?**

You may make your appointment for an interview at a U.S. embassy or consulate as soon as you have all the documents prepared.

**How long does it take to apply?**

Since an E-3 visa is issued at the time of the interview, it can be obtained very quickly. However, the wait times at each U.S. embassy or consulate will vary, so check with the nearest consular post to make an appointment.

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## **O-1A Extraordinary Ability in the Sciences, Business, Education and Athletics**

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**STANDARD:** Alien possesses a level of expertise indicating that he/she is one of that small percentage who has risen to the very top of the field of endeavor. Alien must show sustained national or international acclaim and that his/her achievements have been recognized in the field.

**EVIDENCE:** Evidence of a one-time achievement (that is, a major, internationally recognized award- Nobel prize etc.) **OR** at least three of the following:

- 1) Document of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor (this includes grants, scholarships as well as traditional awards);
- 2) Documentation of the alien's membership in associations in the field which outstanding achievements of their members (information on membership requirements would be most helpful);
- 3) Published materials in professional publications written by others about the alien's work in the industry, including the title, date and author of the material and complete translations;
- 4) Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied field (this could include requests to peer review journal submissions, requests to serve on a panel, etc);
- 5) Evidence of the alien's original scientific, scholarly, or business-related contributions of significance to the academic field;
- 6) Evidence of the alien's authorship of books or articles in the industry;
- 7) Evidence that the alien has held a leading or critical role for organizations establishments that have a distinguished reputation; or
- 8) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

**Note:** If the above standards do not readily apply to the beneficiary's occupation, comparable evidence may be submitted.

- ❖ Requires sponsorship from an employer.
- ❖ An O-1 visa may be issued for up to 3 years and can be renewed indefinitely in one or three-year increments as long as you continue to work in your field of endeavor.
- ❖ **O-1 Filing Process:** generally, there are two filing steps:
  1. File the O-1 petition with the U.S. Citizenship and Immigration Services (USCIS) in the United States.
  2. Consular processing – once the O-1 is approved, the applicant must obtain a visa stamp at a U.S. embassy abroad.

In some situations, an individual may be able to change-status in the United States. In these cases, obtaining the visa stamp at a U.S. embassy may not be necessary until a later date when the applicant travels internationally.

- ❖ **How long does USCIS take to make a decision?** USCIS takes approximately 2-3 months to issue a decision. The regular government filing fee is \$460. The petition can be expedited by paying \$2,500 and USCIS will adjudicate the case within 15 calendar days. Adjudication means approval, denial or a request for additional evidence. Therefore, it is important to plan as far ahead as possible to ensure the O-1 petition is approved in a timely fashion.
- ❖ **Applying for the O-1 visa at a U.S. embassy or consulate:** once the petition is approved, the O-1 applicant must make an appointment at a U.S. embassy in his/her home country to have the O-1 visa stamped into his/her passport. Appointment wait times vary with each embassy from a few days to a few weeks. The passport is typically returned within 5-10 days. Therefore, planning ahead at this stage is important too.
  - If the applicant has a criminal record, s/he must bring the official court documents that outline the offense, penalty, probation and/or other dispositions. Criminal records and prior immigration violations can significantly impact visa issuance times, and in some cases, can disqualify the applicant from entering the United States.
- ❖ **Entering the United States with an O-1 visa:** present valid passport with O-1 visa stamp and O-1 approval notice (I-797 Notice of Action) to Customs and Immigration on arrival. The Immigration Officer will generate an electronic I-94 Arrival/Departure record. You must print out the electronic record by accessing the website at to [www.cbp.gov/I94](http://www.cbp.gov/I94). Check that the expiration date on the electronic I-94 record is correct. One must never overstay the date of his/her I-94 electronic record, regardless of the length of the O-1 approval notice or O-1 visa stamp – the I-94 expiration date always governs.
  - If your passport expires before the end date of your O-1 visa, you will only be admitted until the expiration date of your passport and *not* the expiration date of your O-1. It is critical to always check the expiration date of the I-94 electronic record to ensure that you do not inadvertently overstay the visa.

- ❖ **O-1 Transfers (Changing Petitioners or Jobs):** an O-1 visa can be transferred to a new petitioner at any time. The O-1 visa holder cannot start working for the new employer until the new O-1 has been filed and approved by USCIS.
- ❖ **Concurrent O-1 visas or Multiple Employers:** one may work for multiple employers if each employer files its own concurrent O-1 visa.
- ❖ **Family members of O-1 and O-2 visa holders:** spouses and minor children under 21 years of age are eligible for O-3 visas, which allows them to attend school. O-3 status does not provide employment authorization.

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## O-1B Visa: Aliens of Extraordinary Ability in Arts, Motion Pictures and Television (Arts and Entertainment)

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- ❖ Also known as the “artist” visa or the “entertainment” visa.
- ❖ Includes but is not limited to artists, singers, actors, musicians, composers, VFX artists, graphic designers, art directors, creative directors, producers, directors, editors, stylists, writers, sound engineers, choreographers, dancers, cinematographers and models.
- ❖ To qualify for an O-1, the individual must show that s/he has received, or been nominated for, significant national or international awards or prizes in the particular field, such as an Academy Award, Emmy, Grammy or Director's Guild Award, **or** s/he must meet at least (3) three of the following:
  - Performed and will perform services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts or endorsements
  - Achieved national or international recognition for achievements, as shown by critical reviews or other published materials by or about the beneficiary in major newspapers, trade journals, magazines, or other publications
  - Performed and will perform in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation as evidenced by articles in newspapers, trade journals, publications, or testimonials.
  - A record of major commercial or critically acclaimed successes, as shown by such indicators as title, rating or standing in the field, box office receipts, motion picture or television ratings and other occupational achievements reported in trade journals, major newspapers or other publications
  - Received significant recognition for achievements from organizations, critics, government agencies or other recognized experts in the field in which the beneficiary is engaged, with the testimonials clearly indicating the author's authority, expertise and knowledge of the beneficiary's achievements
  - A high salary or other substantial remuneration for services in relation to others in the field, as shown by contracts or other reliable evidence

If the above standards do not readily apply to the beneficiary's occupation in the arts, the petitioner may submit comparable evidence in order to establish eligibility (this exception does not apply to the motion picture or television industry).

- ❖ Useful evidence includes:
  - Credits/Discography/Tear sheets (listing films, TV shows, commercials, advertising campaigns, albums, etc.);
  - Media coverage in newspapers, magazines, webzines, professional blogs, television/radio appearances featuring the applicant or the applicant's work;
  - National or international awards/nominations;
  - Testimonials/reference letters from experts in the industry;
  - Published material by the applicant (e.g. “Chat with the Expert” column or SIGGRAPH article, etc.);
  - Acting as a judge of the work of others for a festival/competition;

- Showcasing work at film festivals or art festivals or galleries, etc.
- ❖ Requires sponsorship from a petitioner. This can be an agent, manager, representative, employer, studio, record label or production company. An agent/manager must submit either a deal memorandum or contract confirming the terms of the representation.
- ❖ If the O-1 Petitioner is an agent or manager, the O-1 petition must include an itinerary of projects or tour as shown by deal memos or contracts for each project.
- ❖ An O-1 visa may be issued for up to 3 years, but USCIS has the discretion to limit the length of the visa to the duration of the project(s). For example, if the project will last for 6 months, USCIS may limit the O-1 visa to a six-month period.
- ❖ An O-1 visa is renewable indefinitely in one or three-year increments as long as you continue to work in your field of endeavor.
- ❖ An O-1 visa is granted based on extraordinary ability and achievement in the field in which the person is coming to perform. Therefore, modeling and acting are not the same field. So, if a model wants to act in film/television, s/he has to also show success as an actor. Showing extraordinary achievement in modeling will not be enough. Having an O-1 as a model will not allow s/he to take jobs as an actor.
- ❖ Prior to submitting an O-1 petition to USCIS, the relevant management organization and union or peer advisory group must provide an “advisory opinion” or “no objection” letter. For motion pictures and television cases, the relevant management organization is the Alliance of Motion Pictures and Television Producers (AMPTP) or American Federation of Television and Radio Artists (AFTRA). Unions include the Screen Actors Guild, the Directors Guild, IATSE, Visual Effects Society, the Writers Guild of America, the Producers Guild of America, the American Federation of Musicians and the Editors Guild of America. If there is no relevant organization for that industry, a peer group organization may be used. Most of these organizations and unions charge approximately \$250-\$500 to issue the advisory opinion.
- ❖ **O-1 Filing Process:** generally, there are two filing steps:
  1. File the O-1 petition with the U.S. Citizenship and Immigration Services (USCIS) in the United States.
  2. Consular processing – once the O-1 is approved, the applicant must obtain a visa stamp at a U.S. embassy abroad.

In some situations, an individual may be able to change-status in the United States. In these cases, obtaining the visa stamp at a U.S. embassy may not be necessary until a later date when the applicant travels internationally.

- ❖ **How long does USCIS take to make a decision?** USCIS takes approximately 2-3 months to issue a decision. The regular government filing fee is \$460. The petition can be expedited by paying \$2,500 and USCIS will adjudicate the case within 15 calendar days. Adjudication means approval, denial or a request for additional evidence. Therefore, it is important to plan as far ahead as possible to ensure the O-1 petition is approved in a timely fashion.

- ❖ **Applying for the O-1 visa at a U.S. embassy or consulate:** once the petition is approved, the O-1 applicant must make an appointment at a U.S. embassy in his/her home country to have the O-1 visa stamped into his/her passport. Appointment wait times vary with each embassy from a few days to a few weeks. The passport is typically returned within 5-10 days. Therefore, planning ahead at this stage is important too.
  - If the applicant has a criminal record, s/he must bring the official court documents that outline the offense, penalty, probation and/or other dispositions. Criminal records and prior immigration violations can significantly impact visa issuance times, and in some cases, can disqualify the applicant from entering the United States.
- ❖ **Entering the United States with an O-1 visa:** present valid passport with O-1 visa stamp and O-1 approval notice (I-797 Notice of Action) to Customs and Immigration on arrival. The Immigration Officer will generate an electronic I-94 Arrival/Departure record. You must print out the electronic record by accessing the website at to [www.cbp.gov/I94](http://www.cbp.gov/I94). Check that the expiration date on the electronic I-94 record is correct. One must never overstay the date of his/her I-94 electronic record, regardless of the length of the O-1 approval notice or O-1 visa stamp – the I-94 expiration date always governs.
  - If your passport expires before the end date of your O-1 visa, you will only be admitted until the expiration date of your passport and *not* the expiration date of your O-1. It is critical to always check the expiration date of the I-94 electronic record to ensure that you do not inadvertently overstay the visa.
- ❖ **O-1 Transfers (Changing Petitioners or Jobs):** an O-1 visa can be transferred to a new petitioner at any time. The O-1 visa holder cannot start working for the new employer until the new O-1 has been filed and approved by USCIS.
- ❖ **Concurrent O-1 visas or Multiple Employers:** one may work for multiple employers if each employer files its own concurrent O-1 visa.
- ❖ **O-2 Accompanying Support Personnel:** an O-1 visa holder may bring in any accompanying and essential support personnel (band members, back-up singers, cast and crew on a film or television project, roadies in a band, managers, choreographers, make-up artists, stylists, chefs, sound engineers, VFX artists, executive assistants, etc.) on an O-2 visa.
- ❖ **Family members of O-1 and O-2 visa holders:** spouses and minor children under 21 years of age are eligible for O-3 visas, which allows them to attend school. O-3 status does not provide employment authorization.

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## O-2 Visa: Accompanying Alien or Essential Support Personnel

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- ❖ An O-2 accompanying alien provides essential support to an O-1 individual.
- ❖ The O-2 is only available to individuals in the arts, motion pictures and television and athletics. The O-2 visa is not available to the fields of sciences, education or business.
- ❖ An O-1 visa holder may bring in any accompanying and essential support personnel (band members, back-up singers, cast and crew on a film or television project, roadies in a band, managers, choreographers, make-up artists, stylists, chefs, sound engineers, VFX artists, executive assistants, etc.) on an O-2 visa.
- ❖ The O-2 is only allowed to work with the O-1 and cannot work separately and/or apart from the O-1 to whom he or she provides support.
- ❖ **Arts and Athletics:** the O-2 must be coming to the United States to assist in the performance of the O-1, be an integral part of the actual performance, and have critical skills and experience with the O-1, which are not of a general nature and which are not possessed by a U.S. worker.
- ❖ **Motion pictures and television:** to qualify as an O-2 accompanying an O-1 individual involved in a motion picture or television production, the O-2 must have skills and experience with the O-1 which are not of a general nature and which are critical based on a pre-existing, long-standing, working relationship or, with respect to the specific production, because significant production (including pre- and post-production) will take place both inside and outside the United States and the continuing participation of the O-2 is essential to the successful completion of the production.
- ❖ Prior to submitting an O-2 petition to USCIS, the relevant management organization and union or peer advisory group must provide an “advisory opinion” or “no objection” letter. For motion pictures and television cases, the relevant management organization is the Alliance of Motion Pictures and Television Producers (AMPTP) or American Federation of Television and Radio Artists (AFTRA). Unions include but are not limited to the Screen Actors Guild, the Directors Guild, IATSE, Visual Effects Society, the Writers Guild of America, the Producers Guild of America, the American Federation of Musicians and the Editors Guild of America. If there is no relevant organization for that industry, a peer group organization may be used. Most of these organizations and unions charge approximately \$250-\$500 to issue the advisory opinion.
- ❖ **O-2 Filing Process:** the O-2 petition is filed together with the O-1 petition or after the O-1 petition is filed. Generally, there are two filing steps:
  1. File the O-2 petition with the U.S. Citizenship and Immigration Services (USCIS) in the United States.
  2. Consular processing – once the O-2 is approved, the applicant must obtain a visa stamp at a U.S. embassy abroad.

In some situations, an individual may be able to change-status in the United States. In these cases, obtaining the visa stamp at a U.S. embassy may not be necessary until a later date when the applicant travels internationally.

- ❖ **How long does USCIS take to make a decision?** USCIS takes approximately 2-3 months to issue a decision. The regular government filing fee is \$460. The petition can be expedited by paying \$2,500 and USCIS will adjudicate the case within 15 calendar days. Adjudication means approval, denial or a request for additional evidence. Therefore, it is important to plan as far ahead as possible to ensure the O-2 petition is approved in a timely fashion.
  
- ❖ **Applying for the O-2 visa at a U.S. embassy or consulate:** once the petition is approved, the O-2 applicant must make an appointment at a U.S. embassy in his/her home country to have the O-2 visa stamped into his/her passport. Appointment wait times vary with each embassy from a few days to a few weeks. The passport is typically returned within 5-10 days. Therefore, planning ahead at this stage is important too.
  - If the applicant has a criminal record, s/he must bring the official court documents that outline the offense, penalty, probation and/or other dispositions. Criminal records and prior immigration violations can significantly impact visa issuance times, and in some cases, can disqualify the applicant from entering the United States.
  
- ❖ **Entering the United States with an O-2 visa:** present valid passport with O-2 visa stamp and O-2 approval notice (I-797 Notice of Action) to Customs and Immigration on arrival. The Immigration Officer will generate an electronic I-94 Arrival/Departure record. You must print out the electronic record by accessing the website at to [www.cbp.gov/I94](http://www.cbp.gov/I94). Check that the expiration date on the electronic I-94 record is correct. One must never overstay the date of his/her I-94 electronic record, regardless of the length of the O-2 approval notice or O-2 visa stamp – the I-94 expiration date always governs.
  - If your passport expires before the end date of your O-2 visa, you will only be admitted until the expiration date of your passport and **not** the expiration date of your O-2. It is critical to always check the expiration date of the I-94 electronic record to ensure that you do not inadvertently overstay the visa.
  
- ❖ **Family members of O-2 visa holders:** spouses and minor children under 21 years of age are eligible for O-3 visas, which allow them to attend school. O-3 status does not provide employment authorization.

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## **Journalists and Members of the Media (I Visa)**

Representatives of the foreign media traveling on assignment to the United States require an “I” visa. They are not eligible to travel visa free under the Visa Waiver Program or enter the United States on B-1 business visas. Those who attempt to do so may be denied admission to the United States by immigration authorities at the port of entry.

Freelance journalists will only qualify for an “I” visa if they are under contract to a foreign media organization.

### **Who Qualifies for an “I” Visa?**

Members of the media engaged in the production or distribution of film, including employees of independent production companies, will qualify for an “I” visa only if the material being filmed will be used to disseminate information or news.

A representative of the foreign media includes, but is not limited to, members of the press, radio, or film whose activities are essential to the foreign media function, such as reporters, film crews, editors and persons in similar occupations. It is important to note that only those whose activities are generally associated with journalism qualify for the “I” visa. People involved in associated activities such as proofreaders, librarians, set designers, etc. will require O or H visas.

While certain activities clearly qualify for “I” classification visa as they are informational in content, many do not and are considered in the full context of their particular case. In making the determination as to whether or not an activity qualifies for the “I” classification visa, immigration officials focus on two issues:

1. Is the activity essentially informational? and
2. Is it generally associated with the news gathering process?

As a general rule, stories that report on events, including sports events, are essentially informational and are usually appropriate “I” classification visa activities. Stories that involve contrived and staged events, even when unscripted, such as reality television shows, and quiz shows are not primarily informational and do not generally involve journalism. Similarly documentaries involving staged recreations with actors are also not considered informational. Members of the team working on such productions will not qualify for “I” classification visas. They will require the appropriate employment-based (O or H) visas.

### **Journalists working for an American Media Organization**

Foreign journalists working for an overseas branch of a U.S. network, newspaper or other media outlet, are not precluded from applying for an “I” visa, provided they are coming to the United States solely to report on U.S. news events for a foreign audience and they will continue to be paid by the foreign based office. If the journalist is to replace or augment an American journalist reporting on events in the United States for a U.S. audience, then the appropriate employment-based (O or H) visa will be required.

### **Projects of a Commercial or Entertainment Value**

If the film project is of commercial or entertainment value, the appropriate employment-based visa such as an O or H visa is required.

## Interns and Trainees

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There are J-1 Intern and trainee visas that are used to complete internships and training programs for private employers. The Department of State has designated “sponsors,” also known as “umbrella organizations” that work with the employer and the J-1 applicant. The designated sponsor or umbrella organization ultimately issues the paperwork (DS-2019) required for the J-1. For a full list of designated sponsors, see <http://j1visa.state.gov/participants/how-to-apply/sponsor-search/>

The Intern category is available to individuals who are currently enrolled in and pursuing studies at a degree or certificate-granting post-secondary institution outside the United States, or to those who have graduated from a foreign institution no more than twelve- months prior to the exchange-visitor program start date:

- The intern must be participating in a structured and guided work-based internship program in his/her specific academic field;
- The intern category is available for a one-year period;

The Trainee category is available to individuals with either a degree or professional certificate from a foreign post-secondary academic institution and at least one year of prior related work experience abroad in his/her occupational field, or five years of work experience outside the United States in the occupational field:

- Trainees must enter the United States to participate in a structured and guided work-based training program in the specific occupational field;
- Best suited for certain individuals who may not have completed or received university degree;
- Available for an eighteen-month period;

J-1 interns and trainees are prohibited from engaging in productive employment, unless such employment is incidental and necessary to the training or internship;

Family: spouses and minor children (under 21 years of age) are eligible for J-2 status and may attend school:

- J-2 spouses may apply for unrestricted employment authorization

***If I miss out on an H-1B, can I apply for a J-1 if I already completed one year of OPT?***

The 12 month Intern J-1 and the 18 month Trainee J-1 are potential options for students who may have missed out on an H-1B visa. However, both the Intern and Trainee J-1 visas require either post-secondary education or experience from abroad.

As a practical matter, most F-1 students usually do not qualify because their post-secondary education is usually obtained in the United States. For students who may have had some post-secondary education from abroad, most J-1 umbrella organizations will require the potential J-1 applicant to return home for 2 to 3 months to establish ties to their home before allowing the J-1 to apply for the J-1 visa. The potential J-1 applicant must also be able to show that the internship or training will involve more advanced skills and training than the period of OPT.

***If I complete an Education Abroad Program or a Semester Abroad Program as an F-1 or J-1 student, can I apply for a J-1 visa?***

Many international students complete a Study Abroad Program for a semester as an F-1 student. These students are not eligible for Optional Practical Training (OPT for F-1s) or Academic Training (for J-1s) unless they complete a full academic year as an F-1 student. These students may be able to apply for a J-1 Intern visa but most J-1 umbrella organizations will require the potential J-1 applicant to return home for 2 to 3 months to establish ties to their home before allowing the J-1 to apply for the J-1 visa.

***Can I file a petition with USCIS to change status to J-1 or must I apply abroad at a U.S. embassy or consulate?***

While J-1 applicants are eligible to file a change-of-status application, most J-1 sponsors are reluctant to issue DS-2019s if they know that the person will file a change of status application. As a practical matter, most J-1 applicants also prefer the relative ease and speed with which a J-1 can be obtained overseas, versus the 3-4 month adjudications period for I-539 applications.

***Must a J-1 Intern or Trainee be paid?***

No, a J-1 Intern or Trainee does not generally have to be paid (as long as the company is still in compliance with labor laws), but the J-1 must show that s/he has a stipend or sufficient funds to support himself or herself during the stay in the United States.

***What is the J-1 pilot program for certain countries?***

Australia, New Zealand, Ireland and South Korea have pilot programs that allow certain students (usually those who are currently enrolled or have graduated within the past year) to come to the United States for up to twelve months (Australia, New Zealand and Ireland) or eighteen months (South Korea) to work and travel without having a job offer. Once in the United States, these J-1s have unrestricted employment authorization.

Note that the J-1 pilot program mentioned here is different to the Summer Work/Travel program that is typically limited to students during the summer break or a maximum of four months.

**What visas can I qualify for if I am subject to the two-year home residency requirement?**

Section 212(e) of the regulations prohibit a J-1 who is subject to the two-year home residency requirement from obtaining an H or L visa, and from adjusting status to permanent residence unless the J-1 complies with the two-year requirement or obtains a waiver. However, J-1s who are subject to Section 212 (e) may apply for an F-1, E-1, E-2, E-3, O, P or TN visa. The J-1 would still be subject to the 212 (e) and must either comply with the requirement or obtain a waiver.

Practice pointer: in order to obtain another visa, the J-1 subject alien cannot change status in the U.S. and must apply abroad at a consular post in his/her home country.

**If I came on a six-month J-1 intern or trainee visa, can I extend the J-1 for the maximum period of time (12 months for J-1 intern; 18 months for trainee)?**

Very generally, a J-1 intern or trainee may extend the J-1 up to the maximum period of time. So, if a J-1 only applies for a 6 month Intern visa, s/he could extend the J-1 up to the 12 month maximum period of time. Similarly, someone who only uses 12 months out of the 18 month Trainee J-1 visa, could extend the J-1 up to the full 18 month period.

**If I completed the full 12 months/18 months as a J-1 Intern/Trainee, can I come back on another J-1 Intern/Trainee visa?**

No, virtually all of the J-1 umbrella organizations prohibit J-1s from coming back for a “second” round or a “repeat” of J-1 interning or training immediately after completing the initial J-1. In some limited circumstances, if it involves more advanced skills or training, some may allow it, but will require the J-1 applicant to spend a significant period of time in his/her home country before allowing a second J-1.

**Under what circumstances can I change jobs and transfer the J-1 to another employer?**

Most J-1 umbrella organizations permit a J-1 to change jobs and transfer the J-1 to another employer, but the J-1 is only eligible for the remainder of time left on the J-1. However, most J-1 umbrella organizations require some sort of “reasonable” explanation before allowing a J-1 to “change” jobs during the validity of the J-1. Some examples of acceptable reasons include, but are not limited to a termination or lay off, untenable working conditions, a company closure, failure on the part of the employer to pay the J-1 or where the J-1 is not learning any skills or training is not being provided.

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## FAQ: Employment Authorization for H-4 Spouses

Since May 26, 2015, certain H-4 spouses of H-1B nonimmigrants who are seeking employment-based lawful permanent resident (LPR) status, may apply for employment authorization. Once an Employment Authorization Document (EAD) is issued by USCIS, the H-4 has unrestricted employment authorization which means that an H-4 with an EAD may work anywhere s/he wants, be self-employed and even start up his or her own business.

### Does this provision apply to all H-4 spouses?

No, this new provision does not apply to all H-4 spouses. It only applies to H-4 spouses who meet certain conditions.

### Which H-4 spouses will qualify for this new rule?

To qualify, the H-4 spouse must be married to an H-1B who:

- Is the beneficiary of an approved I-140, Immigrant Petition for Alien Worker; or
- Is the beneficiary of an approved H-1B extension petition beyond the H-1B six year limit under sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000 as amended by the 21st Century Department of Justice Appropriations Authorization Act (“AC21”). AC 21 permits H-1B nonimmigrants seeking lawful permanent residence to work and remain in the United States beyond the six-year limit on their H-1B status, once a PERM application or I-140 petition has been filed and pending for over 365 days.<sup>1</sup>

USCIS estimates that this new rule will only impact approximately 179,600 H-4 spouses in the first year, and approximately 55,000 H-4 spouses annually.

The following are some examples of H-4 spouses who will likely benefit from the new rule:

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<sup>1</sup> **Section 106(a) of AC21 allows an alien to obtain an extension of H-1B status beyond the 6-year maximum period, when:**

- A labor certification is unexpired at the time of filing of the Form I-129 H-1B extension petition; and
- The labor certification was filed with DOL or the I-140 petition was filed with USCIS at least 365 days prior to the date the alien beneficiary will have exhausted 6 years of H-1B status in the United States pursuant to 214(g)(4); and
- The extension and I-129 petition are otherwise approvable.

**USCIS will grant the extension of stay request made under section 106(a) of AC21, in one-year increments, until such time as a final decision has been made to:**

1. Deny the application for labor certification;
2. If the labor certification is approved, to revoke the approved labor certification;
3. Deny the EB immigrant petition; or
4. Grant or deny the alien’s application for an immigrant visa or for adjustment of status.

- An H-4 spouse married to an H-1B with an approved I-140 Immigrant Visa Petition filed under the EB-2 category (based on a PERM labor certification or National Interest Waiver or Schedule A, Group I (Physical Therapists or Nurses) or Schedule A, Group II Alien of Exceptional Ability) but is subject to backlogs or retrogression (and therefore unable to file an I-485 adjustment of status application).
- An H-4 spouse married to an H-1B with an approved I-140 Immigrant Visa Petition filed under the EB-3 category (based on a PERM labor certification or Schedule A, Group I (Physical Therapists or Nurses) or Schedule A, Group II Alien of Exceptional Ability) but is subject to backlogs or retrogression (and therefore unable to file an I-485 adjustment of status application).
- An H-4 spouse who is married to an H-1B who has an H-1B approved beyond the six-year limit (i.e. an H-1B in 7<sup>th</sup> year or 8<sup>th</sup> year or 9<sup>th</sup> year or more, of H-1B status) based on a PERM application or I-140 petition that has been filed and pending for over 365 days.

**My H-1B spouse has an approved PERM application under EB-2 and the priority date for this category is current. Should I apply for an EAD under this new rule?**

Since H-1Bs (and H-4 dependents) with current priority dates are eligible to file a concurrent I-485 Adjustment of Status application with the I-140 Immigrant Visa petition, it is unnecessary to file for an EAD under this new rule. The H-1B and any H-4 dependents will all receive a “combo card” (combined work permit and travel document) within 2-3 months of filing the I-485 adjustment application, so applying for a separate EAD under this rule is unnecessary.

**My H-1B spouse has an approved PERM application but the employer does not want to file the I-140 Immigrant Visa Petition until just before the 6 month expiration date. Can I apply for an EAD under this new rule?**

Some employers may not wish to file the I-140 Immigrant Visa petition immediately after the PERM approval. This could stem from ability-to-pay issues or performance issues or uncertainty related to corporate restructuring. If the H-1B has an approved H-1B beyond the six-year limit (i.e. H-1B in 7<sup>th</sup> year or 8<sup>th</sup> year or 9<sup>th</sup> year or more, of H-1B status) based on a PERM application that has been filed and pending for over 365 days, an H-4 spouse could apply for an EAD under the new rule.

**Can an H-4 dependent child apply for an EAD?**

No, the rule only covers eligible H-4 spouses. It does not allow H-4 teenage children to apply for an EAD.

**I’m not sure if I want to work. Should I apply for an EAD anyway?**

A benefit of having an EAD is that the H-4 spouse can apply for a Social Security number. Also, having the EAD in hand allows an H-4 spouse to start working at any time without delay.

### **How do I apply for an EAD under this new rule?**

Applicants should include the following with the completed Form I-765:

- Proof of eligibility – e.g. copy of I-797 Approval Notice to show I-140 approval, or H-1B I-797 Approval Notice (for H-1B extension) or proof that a PERM labor certification or I-140 petition has been pending for 365 days.
- Marriage certificate.
- Proof that the H-1B is maintaining status including status documents (I-94 electronic record, H-1B visa, as well as an employment verification letter or recent pay slips).
- 2 passport-style color photographs.
- Filing fee check in the amount of \$410.

### **How long will the EAD be valid for?**

The EAD will be valid until the H-4's expiration date as shown on their I-94 record. In some instances where any H-4 has limited validity, it may be prudent to file the H-1B/H-4 extension to maximize the duration of the EAD. USCIS has indicated that H-4s can concurrently file the I-765 application together with the I-129 (H-1B petition) and I-539 H-4 application.

### **How long will it take for USCIS to issue the EAD?**

USCIS typically adjudicates the application within 60-90 days of receipt.

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# **OPTIONS FOR ENTREPRENEURS**



# Visa Options for Entrepreneurs and Investors

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## Optional Practical Training (OPT)

Entrepreneurs may start-up companies while on OPT, but should carefully consider their long-term transition plan. Ideally, these entrepreneurs will transition to an E, H-1B or O visa if they qualify. But entrepreneurs from countries that do not have E visa treaties with the United States may not have any transition options, so starting a company while on OPT may leave you without a long-term option.

In the past, entrepreneurs with STEM OPT had additional time to build their business, but recent changes to STEM OPT prohibit self-employment on STEM OPT, thereby limiting the number of entrepreneurs who will be able to use STEM OPT to start a business. In these situations, having minority ownership and working as an employee in the start-up company may allow an entrepreneur to use STEM OPT. However, the STEM OPT entrepreneur must still ensure that they have a viable transition strategy when his or her STEM OPT expires.

## E-1 Treaty Trader and E-2 Treaty Investor Visas

The traditional option for individuals who want to start their own businesses is the E visa. There are two kinds of E visas – the E-1 Treaty Trader visa and the E-2 Treaty Investor visa.

The E-1 and E-2 visas are for citizens of a country with which the United States maintains a treaty of commerce and navigation.

- Available to individuals who wish to buy a business or start-up a business;
  - Owner/investor must be directly involved in running the investment enterprise;
- A Treaty must exist between the United States and foreign country.
- The Applicant must be a national of the Treaty Country.
- The E company must be at least 50% owned by nationals of the Treaty country.
- To maintain the E visa, the company must remain at least 50% owned by nationals of the Treaty country. If ownership drops below 50%, owners, investors and employees will no longer be eligible for the E-2 visa.
- Also available to employees performing in managerial, executive or essential roles for these businesses;
  - An employee must be a national of the Treaty Country.
- Duration: varies per country depending on the Treaty, but may be extended indefinitely;
- Family: spouses and minor children (under 21 years of age) are eligible for E-1/E-2 dependent status and may attend school;
  - E-1/E-2 spouses may apply for unrestricted employment authorization.

The additional requirements for the **Treaty Trader Visa (E-1)** are:

- At least 50 percent of the international trade involved must be between the U.S. and the Treaty country.
- The international trade must be a sizable and continuing volume of trade.
- Trade includes the exchange, purchase, or sale of goods or services; the transfer of technology; and binding contracts that call for the immediate exchange of items; this trade must be continuous and ongoing; title of the trade items must pass from one party to the other.
  - E-1s are typically used by import-export type businesses.
  - Trade in a service is permissible if the provision of that service by a company is the purpose of that business, and must itself be the saleable commodity which the company sells to clients. Examples of services that qualify as “trade” for E-1 purposes include international banking, insurance, transportation, tourism, advertising, accounting, design and engineering, management consulting and communications.
- The following countries have E-1 treaties with the United States:
  - Argentina
  - Australia
  - Austria
  - Belgium
  - Bolivia
  - Bosnia & Herzegovina
  - Brunei
  - Canada
  - Chile
  - Colombia
  - Costa Rica
  - Croatia
  - Denmark
  - Estonia
  - Ethiopia
  - Finland
  - France
  - Germany
  - Greece
  - Honduras
  - Iran
  - Ireland
  - Israel
  - Italy
  - Japan
  - Jordan
  - Latvia
  - Liberia
  - Luxembourg
  - Macedonia
  - Mexico
  - Netherlands
  - New Zealand
  - Norway
  - Oman
  - Pakistan
  - Paraguay
  - Philippines
  - Singapore
  - Slovenia
  - South Korea
  - Spain
  - Suriname
  - Sweden
  - Switzerland
  - Taiwan

- Thailand
- Togo
- Turkey
- United Kingdom
- Yugoslavia

The additional requirements for the **Treaty Investor Visa (E-2)** are:

- The investment must be substantial - it must be sufficient to ensure the successful operation of the enterprise.
  - No fixed amount is required and “substantial” varies depending on the nature of the business (the start-up costs of launching a business or if buying a business, the fair market value of the business);
- The investment must be a real operating enterprise.
  - Speculative or passive investments do not qualify.
  - Uncommitted funds in a bank account, a mere intent to invest or even prospective investment arrangements are not considered a sufficient commitment for purposes of obtaining an E visa.
- The investor must have possession and control of the funds, and the investment must be **personally** at risk for the investor.
  - The investor can receive the funds by legitimate means, e.g. savings, gift, inheritance, contest, etc. Investment funds do not need to come from outside of the United States.
  - Loans secured with the assets of the business are not allowed.
  - Rights to intangible or intellectual property may be considered capital assets to the extent to which their value can reasonably be determined.
- The investor must be coming to the U.S. to develop and direct the enterprise.
- The investment enterprise cannot be marginal, i.e. the investment must generate significantly more income than just to provide a living to the investor and family, or it must have a present or future capacity to make a significant economic contribution in the United States. The projected future capacity should generally be realizable within 5 years from the date the investor commences normal business activity.
- The following countries have E-2 treaties with the United States:
  - Albania
  - Argentina
  - Armenia
  - Australia
  - Austria,
  - Azerbaijan

- Bahrain
- Bangladesh
- Belgium
- Bolivia
- Bosnia & Herzegovina
- Bulgaria
- Cameroon
- Canada
- Chile
- Colombia
- Congo (Brazzaville)
- Congo (Kinshasa)
- Costa Rica
- Croatia
- Czech Republic
- Denmark
- Ecuador
- Egypt
- Estonia
- Ethiopia
- Finland
- France
- Georgia
- Germany
- Grenada
- Honduras
- Iran
- Ireland
- Israel
- Italy
- Jamaica
- Japan
- Jordan
- Kazakhstan
- Kyrgyzstan
- Latvia
- Liberia
- Lithuania
- Luxembourg
- Macedonia
- Mexico
- Moldova
- Mongolia
- Morocco
- Netherlands
- New Zealand
- Norway
- Oman
- Pakistan
- Panama
- Paraguay
- Philippines
- Poland
- Romania
- Senegal
- Singapore
- Slovak Republic
- Slovenia
- South Korea
- Spain
- Sri Lanka
- Suriname
- Sweden
- Switzerland
- Taiwan
- Thailand
- Togo
- Trinidad & Tobago
- Tunisia
- Turkey
- Ukraine
- United Kingdom
- Yugoslavia

**Proper Use of B-1 visa or Visa Waiver for Business (WB) for Investors:** potential investors may seek out investment opportunities, survey potential sites for a business, lease premises, sign contracts and take other steps to purchase or establish a business while travelling on B-1 or WB status. However, applicants may not perform productive labor or actively participate in the management of the business prior to obtaining E-2 status. Such activity is not permissible whether or not the investor receives any payment for work. If required, you can hire U.S. workers to manage and run daily operations prior to receiving the E-1 or E-2 visa.

## **E Visa Frequently Asked Questions**

***I own a house in the United States. Does this qualify as an investment and entitle me to an E-2 visa.***

No. Owning property in the United States does not entitle you to an E-2 visa. To qualify for an E-2 visa the investment must be a real, active and commercial or entrepreneurial undertaking, producing some service or commodity. However, owning significant properties such as an apartment complex, commercial building, multiple properties, or a hotel, etc. could qualify for an E-2 visa.

***Can I retire to the U.S. on an E visa?***

No. The E visa is a work visa, specifically intended for those who are coming to the U.S. to “solely carry on substantial trade” or “solely to develop and direct the operations of the enterprise.” This requires a “hands on” approach with significant involvement by the investor.

***Does an E visa lead to a “green card” or “citizenship”?***

No. An E visa is a non-immigrant visa and does not automatically “lead to” either a green card or citizenship. Applicants who wish to become permanent residents must qualify under the appropriate immigrant visa category.

## **H-1B Professional Occupation Visas**

Entrepreneurs may also consider an H-1B when starting up the business. However, there are some practical challenges for an H-1B application to be successful. First, in order to file an H-1B petition, the company must establish that a valid employer-employee relationship exists. This is shown by the ability of the employer to hire, pay, fire, supervise or otherwise control the work of the H-1B worker. If the H-1B worker owns the company or has a majority stake in the company, there is no “employer-employee” relationship if no one exercises control over the H-1B worker.

However, in some circumstances, an H-1B visa may be viable. Examples of successful H-1B petitions include:

- An H-1B worker has a majority stake in the company, but reports to a Board of Directors which “controls” the work of the H-1B worker and has the ability to fire the H-1B worker.
- An H-1B worker has a minority stake in the company.

As a practical matter, there are some other logistical challenges with using the H-1B visa for start-ups. These include:

- Showing financial viability of the company;

- The prevailing wage for a founding member of the company can be quite high since the position is usually at the management level.
  - This can put unnecessary pressure on the company's bottom line if the founder must be paid the prevailing wage
  - Having to pay the prevailing wage to a founding member may act as a deterrent to investors who prefer to see their investment funds used to develop the business and not to pay a management level salary to a founder.
  - The H-1B lottery makes filing an H-1B a total crapshoot – the founding member may not even be selected for an H-1B visa from the lottery.

For more information about the H-1B visa, please see our H-1B visa Info Sheet.

### **O-1 Alien of Extraordinary Ability**

Some entrepreneurs, typically those with a Ph.D. or a history of national or international success, or even artists and entertainers, may also qualify for an O-1 visa. In this situation, an O-1 can start up a company and then use that company to sponsor him/herself for an O-1 visa. While the O-1 may be more difficult to qualify for because of the higher standard of “extraordinary ability,” it is not subject to the same limitations as an H-1B. There is no O-1 quota and the O-1 visa does not require payment of a prevailing wage.

For more information about the O-1 visa, whether in the arts, sciences, business or education, please see our O-1 visa Info Sheets.

### **National Interest Waiver**

This EB-2 (second preference) category is for aliens with advanced degrees whose employment is in the national interest.

To establish eligibility for a National Interest Waiver (NIW) case, one must meet the *Matter of Dhanasar* test by showing:

#### **1. The Applicant's proposed endeavor has both substantial merit and national importance**

- a. To show substantial merit:
  - The Applicant's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education.
  - Evidence that the endeavor has the potential to create a significant economic impact may be favorable but is not required as an endeavor's merit may be established without immediate or quantifiable economic impact.
  - For example, endeavors related to pure science and the furtherance of human knowledge may qualify, whether or not the potential accomplishments in these fields are likely to translate into economic benefits for the United States.

- b. To show national importance:
    - USCIS considers its potential prospective impact.
    - An undertaking may have national importance because it has national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances. Even undertakings that have as their focus one geographic area of the United States may be considered to have national importance.
    - Test is now “national importance” and not “national in scope,” thus avoiding overemphasis on the geographic breadth of the endeavor.
    - An endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area may have national importance.
- 2. The Applicant is well positioned to advance the proposed endeavor, and**
- a. USCIS considers the individual’s education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.
  - b. Not required to show that the endeavor is more likely than not to succeed.
- 3. On balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.**
- a. USCIS may evaluate factors such as whether, in light of the Applicant’s qualifications or proposed endeavor, it would be impractical either for the Applicant to secure a job offer or for the Petitioner to obtain a labor certification.
  - b. This prong does not require a showing of harm to the national interest or a comparison against U.S. workers in the Petitioner’s field.
  - c. This is a more flexible test which allows entrepreneurs and self-employed applicants to qualify.

For more information about the NIW, please see our NIW Info Sheet.

### **The International Entrepreneur Parole**

The International Entrepreneur Parole is designed to improve the ability of certain promising start-up founders to begin growing their companies within the United States and help improve the economy through increased capital spending, innovation and job creation.

#### ***Validity Period of the Entrepreneur Parole***

Eligible entrepreneurs may be granted a stay of up to 30 months, with the possibility to extend the period by up to 30 additional months if they meet certain criteria, in the discretion of DHS.

An entrepreneur may not exceed the maximum period of five years on a parole based on the same start-up entity.

The Entrepreneur Parole may be granted to up to three (3) entrepreneurs per start-up entity.

### ***How to Qualify for the Entrepreneur Parole***

To qualify, an entrepreneur must demonstrate that he or she meets the following criteria:

- The entrepreneur possesses a **substantial ownership interest** in a start-up entity created within the past five years in the United States that has substantial potential for rapid growth and job creation.
  - An entrepreneur must possess at least a 10 percent ownership interest in the start-up entity at the time of adjudication of the initial parole; and
  - During the initial parole, the entrepreneur may continue to reduce ownership interest, but must at all times during the initial parole period, maintain at least a 5 percent ownership interest in the entity.
  - During the re-parole period, the entrepreneur may continue to reduce the ownership interest, but must, at all times maintain an ownership interest in the entity.
- The entrepreneur has a **central and active role** in the start-up entity such that the applicant is well-positioned to substantially assist with the growth and success of the business.
- The entrepreneur can prove that his or her stay will provide a **significant public benefit** to the United States based on his or her role as an entrepreneur of the start-up entity by:
  - Showing that the start-up entity has received a **significant investment** of capital from certain **qualified U.S. investors** with established records of successful investments;
  - Showing that the start-up entity has received significant awards or grants for economic development, research and development, or job creation (or other types of grants or awards typically given to start-up entities) from federal, state or local government entities that regularly provide such awards or grants to start-up entities; or
  - Alternative criteria: showing that they partially meet either or both of the previous two requirements and providing additional reliable and compelling evidence of the start-up entity's substantial potential for rapid growth and job creation.

### ***Definitions***

***Qualified investment:*** means an investment made in good faith that is not an attempt to circumvent any limitations imposed on investments, of lawfully derived capital in a start-up entity that is a purchase from such entity of its equity, convertible debt, or other security convertible into its equity commonly used in financing transactions within such entity's industry. A qualified investment cannot come, whether directly or indirectly, from the entrepreneur; the parents, spouse, brother, sister, son or daughter of such an entrepreneur; or any corporation,



limited liability company, partnership, or other entity in which such entrepreneur or the parents, spouse, brother, sister, son or daughter of such entrepreneur directly or indirectly has any ownership interest.

***Qualified investor:*** a qualified investor is an individual who is a U.S. citizen or lawful permanent resident (i.e. green card) of the United States, or an organization that is located in the United States and operates through a legal entity organized under the laws of the United States or any state, that is majority owned and controlled, directly and indirectly, by U.S. citizens or lawful permanent residents of the United States. The “investor” must be an individual or organization that regularly makes substantial investments in start-up entities that subsequently exhibit substantial growth in terms of revenue generation and job creation.

A qualified investor must have in the preceding five years:

- i. Made investments in start-up entities in exchange for equity, convertible debt or other security convertible into equity commonly used in financing transactions within their respective industries, comprising a total in such 5-year period of no less than \$633,952; and
- ii. Subsequent to such investment, at least 2 such entities each created at least 5 qualified jobs or generated at least \$528,293 in revenue with average annualized revenue growth of at least 20 percent.

#### ***Applying for Initial Parole***

1. The start-up entity must have received, within 18 months prior to filing the application for parole, a qualified investment of at least \$264,147 from one or more qualified investors; or
2. The start-up entity must have received within 18 months prior to filing the application for parole, an amount of at least \$105,659 through one or more qualified government awards or grants.
3. The entrepreneur must apply for the Parole at a US embassy or consulate abroad. One cannot change-status from another nonimmigrant visa category to a Parole.

#### ***Applying for Re-Parole***

To qualify for a re-parole for an additional 30 months, the entrepreneur must demonstrate that:

- The entrepreneur possesses at least a 5 percent ownership interest in the start-up entity at the time of adjudication of the re-parole.

The business has:

- Received at least \$528,293 in qualifying investments, qualified government awards or grants, or a combination of such funding during the initial parole period; or

- Created at least 5 qualified jobs with the start-up entity during the initial parole period; or
- Reached at least \$528,293 in annual revenue in the United States and averaged 20 percent in annual revenue growth during the initial parole period.

Alternatively, an entrepreneur who partially meets one or more of the above criteria may provide other reliable and compelling evidence of the start-up entity's substantial potential for rapid growth and job creation.

***Qualified job:*** means full-time employment (35 hours per week) located in the United States that has been filled for at least 1 year by one or more qualifying employees. Combinations of part-time positions (even if when combined, such positions meet the hourly requirement per week) do not meet this definition of a "qualified job."

***Qualifying employee:*** means a U.S. citizen, a lawful permanent resident, or other immigrant lawfully authorized to be employed in the United States, who is not an entrepreneur of the relevant start-up entity or the parent, spouse, brother, sister, son, or daughter of such an entrepreneur. Independent contractors do not count as a qualified employee.

### ***Employment Authorization***

An entrepreneur who is paroled into the United States is authorized for employment with the start-up entity immediately upon entry or approval.

However, the spouse of an entrepreneur must apply for employment authorization with USCIS which issues an Employment Authorization Document (EAD). Children are not eligible for employment authorization.

### ***Maintaining the Entrepreneurial Parole***

As a condition of parole, an entrepreneur must maintain household income that is greater than 400% of the federal poverty line for his or her household size as defined by the Department of Health and Human Services.

An entrepreneur granted a parole must report any material change(s) to USCIS. Material changes include but are not limited to the following: a significant change with respect to ownership and control of the start-up entity; a cessation of the entrepreneur's qualifying ownership interest in the start-up entity or the entrepreneur's central and active role in the operations of the start-up entity; a sale or other disposition of all or substantially all of the start-up entity's assets; the liquidation, dissolution or cessation of operations of the start-up entity; the voluntary or involuntary filing of a bankruptcy petition by or against the start-up entity; any criminal charge, conviction, plea of no contest, or other judicial determination in a criminal case concerning the entrepreneur or start-up entity; any complaint, settlement, judgment, or other judicial or administrative determination concerning the entrepreneur or start-up entity in a legal or administrative proceeding brought by a government entity; any settlement, judgment or other

legal determination concerning the entrepreneur or start-up entity in a legal proceeding brought by a private individual or organization other than proceedings primarily involving claims for damages not exceeding 10 percent of the current assets of the entrepreneur or start-up entity.

At the time of the final rule in 2017, DHS estimated that 2,940 entrepreneurs would be eligible under this rule annually.

### **Employment Authorization Document (EAD)**

Certain visa categories allow spouses to apply for Employment Authorization Documents (EAD). E-1, E-2, E-3, J-2 and L-2 spouses may apply for an EAD and start up a business.

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## **The International Entrepreneur Visa (“Parole”) is Back !**

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As way of background, on January 17, 2017, the Department of Homeland Security (DHS) published a final rule (“The International Entrepreneur Rule”) to improve the ability of certain promising start-up founders to begin growing their companies within the United States and help improve the economy through increased capital spending, innovation and job creation. DHS published this final rule just 3 days before the Trump administration took office. It was scheduled to take effect on July 17, 2017. However, prior to the effective date, DHS published a final rule to delay its implementation with the intent to rescind the rule altogether.

On May 12, 2021, USCIS announced the withdrawal of the notice of proposed rulemaking that proposed to remove the International Entrepreneur program from DHS regulations. This announcement is consistent with President Biden’s [Executive Order 14012](#): “Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans.” The executive order requires the secretary of homeland security to “identify any agency actions that fail to promote access to the legal immigration system.”

“Immigrants in the United States have a long history of entrepreneurship, hard work, and creativity, and their contributions to this nation are incredibly valuable,” said Acting USCIS Director Tracy Renaud. “The International Entrepreneur parole program goes hand-in-hand with our nation’s spirit of welcoming entrepreneurship and USCIS encourages those who are eligible.

The May 12, 2021 announcement is a game changer for many international entrepreneurs looking to start up businesses in the United States. A summary of the Entrepreneur Parole follows:

### **Validity Period of the Entrepreneur Parole**

Eligible entrepreneurs may be granted a stay of up to 30 months, with the possibility to extend the period by up to 30 additional months if they meet certain criteria, in the discretion of DHS. An entrepreneur may not exceed the maximum period of five years on a parole based on the same start-up entity.

The Entrepreneur Parole may be granted to up to three (3) entrepreneurs per start-up entity.

By regulation, the investment amounts will be automatically adjusted every three years by the Consumer Price Index for All Urban Consumers (CPI-U) and posted on the USCIS website. The investment numbers listed below were adjusted on October 1, 2021.

## How to Qualify for the Entrepreneur Parole

To qualify, an entrepreneur must demonstrate that he or she meets the following criteria:

- The entrepreneur possesses a **substantial ownership interest** in a start-up entity created within the past five years in the United States that has substantial potential for rapid growth and job creation.
  - An entrepreneur must possess at least a 10 percent ownership interest in the start-up entity at the time of adjudication of the initial parole; and
  - During the initial parole, the entrepreneur may continue to reduce ownership interest, but must at all times during the initial parole period, maintain at least a 5 percent ownership interest in the entity.
  - During the re-parole period, the entrepreneur may continue to reduce the ownership interest, but must, at all times maintain an ownership interest in the entity.
- The entrepreneur has a **central and active role** in the start-up entity such that the applicant is well-positioned to substantially assist with the growth and success of the business.
- The entrepreneur can prove that his or her stay will provide a **significant public benefit** to the United States based on his or her role as an entrepreneur of the start-up entity by:
  - Showing that the start-up entity has received a **significant investment** of capital from certain **qualified U.S. investors** with established records of successful investments;
  - Showing that the start-up entity has received significant awards or grants for economic development, research and development, or job creation (or other types of grants or awards typically given to start-up entities) from federal, state or local government entities that regularly provide such awards or grants to start-up entities; or
  - Alternative criteria: showing that they partially meet either or both of the previous two requirements and providing additional reliable and compelling evidence of the start-up entity's substantial potential for rapid growth and job creation.

## Definitions

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**Qualified investor:** a qualified investor is an individual who is a U.S. citizen or lawful permanent resident (i.e. green card) of the United States, or an organization that is located in the United States and operates through a legal entity organized under the laws of the United States or any state, that is majority owned and controlled, directly and indirectly, by U.S. citizens or lawful permanent residents of the United States. The “investor” must be an individual or organization that regularly makes substantial investments in start-up entities that subsequently exhibit substantial growth in terms of revenue generation and job creation.

A qualified investor must have in the preceding five years:

- i. Made investments in start-up entities in exchange for equity, convertible debt or other security convertible into equity commonly used in financing transactions within their respective industries, comprising a total in such 5-year period of no less than \$633,952 (previously \$600,000); and
- ii. Subsequent to such investment, at least 2 such entities each created at least 5 qualified jobs or generated at least \$528,293 (previously \$500,000) in revenue with average annualized revenue growth of at least 20 percent.

### **Applying for Initial Parole**

1. The start-up entity must have received, within 18 months prior to filing the application for parole, a qualified investment of at least \$264,147 (previously \$250,000) from one or more qualified investors; or
2. The start-up entity must have received within 18 months prior to filing the application for parole, an amount of at least \$105,659 (previously \$100,000) through one or more qualified government awards or grants.

### **Applying for Re-Parole**

To qualify for a re-parole for an additional 30 months, the entrepreneur must demonstrate that:

- The entrepreneur possesses at least a 5 percent ownership interest in the start-up entity at the time of adjudication of the re-parole.

The business has:

- Received at least \$528,293 (previously \$500,000) in qualifying investments, qualified government awards or grants, or a combination of such funding during the initial parole period; or
- Created at least 5 qualified jobs with the start-up entity during the initial parole period; or
- Reached at least \$528,293 (previously \$500,000) in annual revenue in the United States and averaged 20 percent in annual revenue growth during the initial parole period.

Alternatively, an entrepreneur who partially meets one or more of the above criteria may provide other reliable and compelling evidence of the start-up entity's substantial potential for rapid growth and job creation.

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### **Employment Authorization**

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As a condition of parole, an entrepreneur must maintain household income that is greater than 400% of the federal poverty line for his or her household size as defined by the Department of Health and Human Services.

An entrepreneur granted a parole must report any material change(s) to USCIS. Material changes include but are not limited to the following: a significant change with respect to ownership and control of the start-up entity; a cessation of the entrepreneur's qualifying ownership interest in the start-up entity or the entrepreneur's central and active role in the operations of the start-up entity; a sale or other disposition of all or substantially all of the start-up entity's assets; the liquidation, dissolution or cessation of operations of the start-up entity; the voluntary or involuntary filing of a bankruptcy petition by or against the start-up entity; any criminal charge, conviction, plea of no contest, or other judicial determination in a criminal case concerning the entrepreneur or start-up entity; any complaint, settlement, judgment, or other judicial or administrative determination concerning the entrepreneur or start-up entity in a legal or administrative proceeding brought by a government entity; any settlement, judgment or other legal determination concerning the entrepreneur or start-up entity in a legal proceeding brought by a private individual or organization other than proceedings primarily involving claims for damages not exceeding 10 percent of the current assets of the entrepreneur or start-up entity.

At the time of the final rule in 2017, DHS estimated that 2,940 entrepreneurs would be eligible under this rule annually.

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**IMMIGRANT VISA  
OPTIONS  
(GREEN CARD)**

# Immigrant (“Green Card”) Visa Options

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## Family-Sponsored Immigrants

### Immediate Relatives

- Immediate relatives include spouses and minor children of U.S. citizens and parents of U.S. citizens who are over 21 years of age;
- Immediate relatives of U.S. citizens are exempt from visa quotas and can generally process their applications quickly within 8-12 months;
- Spouses of U.S. citizens are granted a two-year conditional green card, unless the marriage has been in existence for at least two years at the time the applicant is admitted as a permanent resident; these spouses receive the “regular” ten-year green card;
- Conditional permanent residents must apply to remove the conditional nature of the green card during the 90-day window prior to the expiration of the conditional green card.

There are four family-sponsored preference categories – these are subject to numerical limits, which often have long backlogs or waiting lines, known as retrogression. Applicants born in India, China, Mexico, and the Philippines will experience even longer backlogs.

- **First preference (F-1)** is for unmarried sons and daughters of U.S. citizens regardless of age. There is generally a waiting line of approximately eight to ten years for first preference immigrants;
- **Second preference** includes two sub-categories:
  1. **F-2A** is for spouses and minor children of permanent residents; the waiting line in this category is usually three to four years, but it has been current in the past few years;
  2. **F-2B** is for unmarried adult sons and daughters of permanent residents; the waiting line in this category is approximately six to eight years;
- There are no benefits such as employment authorization or travel authorization for applicants who are subject to retrogression. If an applicant wishes to remain in the United States during this time, they must maintain an underlying nonimmigrant status;
- **Third preference (F-3)** is for married sons and daughters of U.S. citizens; the waiting line is approximately twelve to fifteen years;

- **Fourth preference (F-4)** is for brothers and sisters of U.S. citizens who are 21 years of age or over; applicants wait for at least fifteen years for this category to become current.

## **Employment/Investment-Based Immigrants**

There are five employment-based categories (EB-1 through EB-5).

- **EB-1 First preference** immigrant category is the fast track green card and includes the following:
  1. Persons with extraordinary abilities in the sciences, art, education, business or athletics;
    - No job offer required; can self-petition;
    - Available to that small percentage who have reached the top of their field.
  2. Outstanding professors and researchers;
    - Job offer required;
    - Must have three years of teaching or research experience if sponsored by an institute of higher education; if using experience during higher degree, must show that this experience is outstanding;
    - Must have at least three full-time researchers if sponsored by company in private industry.
  3. Multinational executives or managers;
    - Must be employed by the overseas company for at least one of the three years immediately preceding their transfer to the United States, in a managerial or executive capacity.
- **EB-2 Second preference** immigrant category is for professionals holding an advanced degree (at least a Master's degree or a Bachelor's degree plus five years of progressively senior work experience);
  - The job that the foreign national is being sponsored for must require such qualifications;
  - Includes:
    - PERM Labor Certifications;
    - Special Handling PERM applications for university and college teachers;
    - Schedule A, Group I Physical Therapists and Nurses (requiring a higher degree or BA plus 5 years of experience);
    - Schedule A, Group II Aliens of Exceptional Ability in the Arts and Sciences and Aliens of Exceptional Ability in the Performing Arts;

- National Interest Waivers (NIW) where the labor certification is waived if it can be shown that the employment of the applicant will be in the “national interest,” a broadly defined term; NIWs are the only other category where a foreign national can self-petition;
- **EB-3 Third preference** immigrant visa category usually requires a labor certification except for registered nurses and physical therapists applications. EB-3 is divided into three categories:
  1. Professionals with Bachelor’s degrees;
  2. Individuals performing a job that requires at least two years of education, experience or training; and
  3. Other workers, including individuals performing jobs which require less than two years of education, training or experience.
- **EB-4 Fourth preference** category includes the religious worker category.
- **EB-5 Fifth preference investor** category (EB-5) is for immigrants who make large investments. There are 10,000 visas for individuals who invest \$1.8 million and create at least ten new jobs. Under the EB-5 program, the amount can be reduced to \$900,000 if the business is located in a rural area, or in an urban area with high unemployment. The most common issue with these cases is showing the creation of ten full-time jobs, which may not include independent contractors and immediate family members.
  - The popular **Immigrant Investor Pilot Program** allows individuals to make a \$900,000 investment in “pre-approved” designated regional centers. The Pilot Program does not require the investor to directly hire ten qualified workers, but allows the calculation of employees to include individuals who provide services or a job that has been created indirectly by the investment in the new commercial enterprise.
  - EB-5 immigrant investors receive a conditional green card. In the 90 days before the expiration of the conditional green card, a final petition must be filed to remove the “conditional” nature of the green card.

## **Diversity Visas (DV) Lottery**

The Diversity Lottery program, run by the State Department, issues 50,000 green cards each year. The application period typically starts in October and ends during the first week of November. The application is free and must be completed online. The minimum requirements are a high school diploma, or two years of work experience (within the past five years) in an occupation requiring at least two years of training or experience to perform. Eligibility is based on country of birth.

- Individuals born in the following countries are not allowed to participate: Bangladesh, Brazil, Canada, China (mainland-born and Hong Kong SAR), Colombia, Dominican Republic, El Salvador, Haiti, Honduras, India, Jamaica, Mexico, Nigeria, Pakistan, Philippines, South Korea, United Kingdom (except Northern Ireland) and its dependent territories, Venezuela, and Vietnam
- Persons born in Macau SAR and Taiwan are eligible to participate.

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## EB-1A Alien of Extraordinary Ability

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- Aliens of extraordinary ability in the sciences, arts, education, business or athletics.
- Extraordinary ability is defined as:

a level of expertise indicating that the individual is *one of that small percentage who have risen to the very top of the field of endeavor*. In order to qualify, the alien must show *sustained national or international acclaim* and that his or her achievements have been recognized in the field of expertise.

- May self-petition -- does not require a job offer or sponsorship by an employer.
- Must show that s/he is coming to the United States to continue work in the area of expertise.

To qualify as an alien of extraordinary ability, must show:

- evidence of a **one-time achievement** (that is, a major, international recognized award), or at least three of the following:
  1. Receipt of lesser or internationally recognized prizes or awards for excellence in the field of endeavor;
  2. Membership in associations in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their fields;
  3. Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field.
  4. Participation, individually or on a panel, as a judge of the work of others in your field;
  5. Original scientific, scholarly, artistic, athletic or business-related contributions of major significance in the field;
  6. Authorship of scholarly articles or books in your field published in professional or major trade publications or other major media;
  7. Display of your work at artistic showcases or exhibitions
  8. Performance in a leading or critical role for organizations or establishments that have a distinguished reputation;
  9. Receipt of a high salary or other significantly high remuneration for services in relation to others in the field; and
  10. Commercial successes in the performing arts, as shown by box office receipts or records, or sales, etc.

One may also use comparable evidence to meet the regulatory criteria.

### Immigrant Visa Application (Form I-140)

- The applicant or an employer files an I-140 Immigrant Visa petition evidencing the individual's extraordinary ability with USCIS.

- Can file the I-140 under the Premium Processing Service program. For a \$2,500 processing fee, USCIS guarantees that it will issue either an approval, or a request for evidence within 15 calendar days of receipt.

### **Adjustment of Status in the United States (Form I-485)**

- An I-485 application adjusts the status of the foreign national and any eligible family members (spouse and minor children under the age of 21) from non-immigrant status (e.g., H-1B) to permanent resident status.
- An I-485 application is filed by the principal applicant and any family members (spouse and minor children under 21 years of age).
- May file I-140 and I-485 concurrently.
  - Advantages of a concurrent filing: spouses may apply for an Employment Authorization Document (EAD) which allows unrestricted employment; family members can obtain Social Security numbers.
  - Disadvantage of a concurrent filing: if the I-140 is denied, the I-485 will also be denied. Some applicants prefer to file the I-140 first and then only file the I-485 application once the I-140 is approved.
- An Employment Authorization Document (EAD) and Advance Parole travel document (combo card) is issued to all family members and can be renewed. The combo EAD/AP allows unrestricted employment and travel.
- Once the I-485 application is filed, travel is not permitted outside of the United States, unless the applicant has a valid H-1B, H-4, L-1 or L-2 visa. A departure without the appropriate travel document will result in the abandonment of the I-485 application. The combo card is usually issued within 60-90 days of filing of the I-485 application.

### **Immigrant Visa Processing at a U.S. Embassy Overseas**

Instead of filing an I-485 adjustment of status application, an applicant may also choose to attend a green card interview at the U.S. embassy in their home country. This is called consular processing.

- Once the I-140 is approved, USCIS forwards the file to the National Visa Center (NVC). NVC coordinates the collection of documents and schedules an in-person interview at the U.S. embassy.
- Prior to the interview, the employee and family members must continue to maintain their non-immigrant status (e.g., H-1B/H-4 or O-1/O-3 or F-1/F-2) during their stay in the United States.
- Interviews are generally scheduled approximately 4-6 months after the I-140 approval.

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## EB-1B Outstanding Professors and/or Researchers

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This EB-1 category is for professors and/or researchers who are recognized internationally as outstanding in a particular academic field.

- Must have offer of permanent employment – i.e. either tenured, tenure-track or for a term of indefinite or unlimited duration, and in which an employee would ordinarily have an expectation of continued employment unless there is good cause for termination.

To qualify based on sponsorship by an institute of higher education such as a university or college:

- Must have at least three years of experience in teaching or research in the academic area; and
- Offered a tenured position, tenure-track position or comparable position within a university or institution of higher education.
  - Experience in teaching or research while working on an advanced degree will only be acceptable if the alien has acquired the degree, and if the teaching duties were such that he or she had full responsibility for the class taught *or* if the research conducted toward the degree has been recognized within the academic field as outstanding.

To qualify based on sponsorship by a private employer, the department, division or company must:

- show that it employs at least 3 persons full-time in research positions; and
- have achieved documented accomplishments in an academic field.

In order to qualify as an outstanding professor and/or researcher, evidence of at least two of the following must be provided:

1. Major prizes or awards for outstanding achievement in the academic field;
2. Published material in professional publications written by others about your work in the academic field;
3. Participation as a judge of the work of others in your field or an allied field;
4. Authorship of scholarly articles or books in your field published in scholarly journals with international circulation;
5. Membership in associations in the academic field which require outstanding achievements of their members; or
6. Original scientific or scholarly research contributions to the academic field.



### **Immigrant Visa Application (Form I-140)**

- The employer files an I-140 Immigrant Visa petition evidencing the individual's outstanding achievements with USCIS.
- Can file the I-140 under the Premium Processing Service program. For a \$2,500 processing fee, USCIS guarantees that it will issue either an approval, or a request for evidence within 15 calendar days of receipt.

### **Adjustment of Status in the United States (Form I-485)**

- An I-485 application adjusts the status of the foreign national and any eligible family members (spouse and minor children under the age of 21) from non-immigrant status (e.g., H-1B) to permanent resident status.
- An I-485 application is filed by the principal applicant and any family members (spouse and minor children under 21 years of age).
- May file I-140 and I-485 concurrently.
  - Advantages of a concurrent filing: spouses may apply for an Employment Authorization Document (EAD) which allows unrestricted employment; family members can obtain Social Security numbers.
  - Disadvantage of a concurrent filing: if the I-140 is denied, the I-485 will also be denied. Some applicants prefer to file the I-140 first and then only file the I-485 application once the I-140 is approved.
- An Employment Authorization Document (EAD) and Advance Parole travel document (combo card) is issued to all family members and can be renewed. The combo EAD/AP allows unrestricted employment and travel.
- Once the I-485 application is filed, travel is not permitted outside of the United States, unless the applicant has a valid H-1B, H-4, L-1 or L-2 visa. A departure without the appropriate travel document will result in the abandonment of the I-485 application. The combo card is usually issued within 60-90 days of filing of the I-485 application.

### **Immigrant Visa Processing at a U.S. Embassy Overseas**

Instead of filing an I-485 adjustment of status application, an applicant may also choose to attend a green card interview at the U.S. embassy in their home country. This is called consular processing.

- Once the I-140 is approved, USCIS forwards the file to the National Visa Center (NVC). NVC coordinates the collection of documents and schedules an in-person interview at the U.S. embassy.
- Prior to the interview, the employee and family members must continue to maintain their non-immigrant status (e.g., H-1B/H-4 or O-1/O-3 or F-1/F-2) during their stay in the United States.
- Interviews are generally scheduled approximately 4-6 months after the I-140 approval.

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## EB-1C Green Card Options for Executives and Managers of Global or Multinational Companies

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The EB-13 category (the green card version of the L-1A) enables a U.S. employer to transfer an **executive** or **manager** from one of its affiliated foreign offices to one of its offices in the United States.

To qualify for EB-13 classification, the U.S. employer must:

- Have a qualifying relationship with a foreign company (parent company, branch, subsidiary, or affiliate, collectively referred to as *qualifying organizations*); and
- Currently be *doing business* in the United States and in at least one other country.
  - *Doing business* means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.
- The U.S. employer must have been in business for at least one year.

For the employee to qualify for EB-13 classification:

- If the employee is outside of the United States, in the three years immediately preceding the filing of the petition, the employee has been employed outside of the United States for at least one year in a managerial or executive capacity by a firm or corporation or other legal entity or by an affiliate or subsidiary of such a firm or corporation or other legal entity.
- If the employee is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity, in the three years preceding entry as a nonimmigrant (e.g. H-1B or L-1A or E visa), the employee was employed by the entity abroad for at least one year in a managerial or executive capacity.
- The employee must be seeking to render services in an *executive* or *managerial capacity* for a qualifying organization in the United States.

*Executive capacity* generally refers to the employee's ability to make decisions of wide latitude without much oversight. An executive must primarily

- 1) Direct the management of the organization or a major component or function of the organization;
- 2) Establish the goals and policies of the organization, component or function;
- 3) Exercise wide latitude in discretionary decision-making;
- 4) Receive only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

*Managerial capacity* generally means an assignment within an organization in which the employee primarily:

- 1) Manages the organization, or a department, subdivision, function, or component of the organization;
- 2) Supervises and controls the work of other supervisory, professional or managerial employees, or manage an essential function within the organization, or a department, or subdivision of the organization;
- 3) Has the authority to hire and fire or recommend other personnel actions (such as promotions and leave authorization) related to another employee or other employees that are directly supervised; or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- 4) Exercises discretion over day-to-day operations of the activity or function for which the employee has authority.

#### **The Process: Phase 1: Immigrant Visa Application (Form I-140)**

- The employer files an I-140 Immigrant Visa petition under the Multinational Executive/Manager category.
- Premium Processing is not available for the EB-13 category.

#### **The Process: Phase 2: Adjustment of Status to Permanent Resident Status or Immigrant Visa Processing at a U.S. embassy abroad**

##### ➤ **Adjustment of Status in the United States (Form I-485)**

- An I-485 application adjusts the status of the foreign national and any eligible family members (spouse and minor children under the age of 21) from non-immigrant status (e.g., H-1B) to permanent resident status.
- Concurrent I-140/I-485 filing is only available to applicants whose priority date is current.
  - Visa retrogression: if the applicant is subject to visa retrogression and there are no immigrant visas available, the applicant must wait until the priority date is current before s/he can file the I-485 application.
  - Visa priority dates are released by the Department of State (DOS) in its Visa Bulletin ([http://travel.state.gov/visa/bulletin/bulletin\\_1360.html](http://travel.state.gov/visa/bulletin/bulletin_1360.html)) on a monthly basis).
- A combo card (combined Employment Authorization Document (EAD) and Advance Parole travel document) is issued to all family members in one-year increments. Combo cards can be renewed on a yearly basis. The combo card allows unrestricted employment and travel.
  - It also allows dependents to apply for a Social Security number (if they do not already have one).

- Once the I-485 application is filed, travel is not permitted outside of the United States, unless the applicant has a valid H-1B, H-4, L-1 or L-2 visa. A departure without the appropriate travel document will result in the abandonment of the I-485 application. The combo card is usually issued within 2-5 months of filing of the I-485 application.

➤ **Immigrant Visa Processing at a U.S. Embassy Overseas**

Instead of filing an I-485 adjustment of status application in the United States, an applicant may instead choose to attend a green card interview at the U.S. embassy in their home country. This is called consular processing.

- Once the I-140 is approved, USCIS forwards the file to the National Visa Center (NVC). NVC coordinates the collection of documents and schedules an in-person interview at the U.S. embassy.
- Prior to the interview, the employee and family members must continue to maintain their non-immigrant status (e.g., H-1B/H-4 or O-1/O-3 or F-1/F-2) during their stay in the United States.
- Please note that the U.S. embassy or consulate will not schedule the interview until an immigrant number is available.
- If an immigrant visa is available, interviews are generally scheduled approximately 4-6 months after the I-140 approval. If the alien is affected by visa retrogression and there are no immigrant visas available, then, the consular post will not schedule the interview until the priority date is current.

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### **Green Card Portability**

A foreign national may leave the sponsoring employer and still adjust to permanent resident status (i.e. keep the green card) if the following conditions are met:

- 1) The I-140 has been approved; and
- 2) The I-485 adjustment of status application has been pending for at least 180 days; and
- 3) The new job is in the same or similar occupational classification as the job for which the certification or approval was initially made.

If the I-485 adjustment of status application has been pending for less than 180 days, USCIS has discretion to either approve or deny the application. USCIS will generally look to see if there was a bona fide job offer and intent to remain in the offered job.

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## EB-2 National Interest Waiver Category

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The EB-2 (second preference) category is for aliens with advanced degrees whose employment is in the national interest.

### Immigrant Visa Application (Form I-140)

- Alien may self-petition or employer may also sponsor.
- May file I-140 and I-485 concurrently.
- No premium processing.
- Must have substantial documentation evidencing that the applicant's work is in the national interest, i.e. it is in the national interest for U.S. Citizenship and Immigration Services (USCIS) to waive the requirement of a job offer from a sponsoring employer who has advertised and recruited for minimally qualified American workers through the lengthy PERM labor-certification process.

To establish eligibility for a National Interest Waiver (NIW) case, one must meet the *Matter of Dhanasar* test by showing:

1. **The Applicant's proposed endeavor has both substantial merit and national importance;**
  - To show substantial merit:
    - The Applicant's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education.
    - Evidence that the endeavor has the potential to create a significant economic impact may be favorable but is not required as an endeavor's merit may be established without immediate or quantifiable economic impact.
    - For example, endeavors related to pure science and the furtherance of human knowledge may qualify, whether or not the potential accomplishments in these fields are likely to translate into economic benefits for the United States.
  - To show national importance:
    - USCIS considers its potential prospective impact.
    - An undertaking may have national importance because it has national or even global implications within a particular field, such as those resulting from certain improved manufacturing processes or medical advances. Even undertakings that have as their focus one geographic area of the United States may be considered to have national importance.
    - Test is now "national importance" and not "national in scope," thus avoiding overemphasis on the geographic breadth of the endeavor.
    - An endeavor that has significant potential to employ U.S. workers or has other substantial positive economic effects, particularly in an economically depressed area may have national importance.
2. **The Applicant is well positioned to advance the proposed endeavor; and**
  - USCIS considers the individual's education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.
  - Not required to show that the endeavor is more likely than not to succeed.

3. **On balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.**
- USCIS may evaluate factors such as whether, in light of the Applicant's qualifications or proposed endeavor, it would be impractical either for the Applicant to secure a job offer or for the Petitioner to obtain a labor certification.
  - This prong does not require a showing of harm to the national interest or a comparison against U.S. workers in the Petitioner's field.
  - This is a more flexible test which allows entrepreneurs and self-employed applicants to qualify.

Any of the following is useful in NIW cases:

- Publication of scholarly articles in highly ranked, peer-reviewed journals. The number of articles published is not necessarily the key factor. Rather, it is most important to establish the impact of the research discussed in the published papers. Citation records can be used to reflect this.
- Acting as a reviewer for a prominent journal, committee member for meetings and conferences of national organizations or societies, and/or reviewer of grant proposals submitted to national organizations or societies.
- Occupying a lead or critical role in scientific or research studies funded by a federal government agency and/or national organizations or societies. Simply participating in a well-known or highly regarded study will not necessarily convince USCIS that you have benefited the national interest.
- Presenting your work at prestigious national or international forums in your field.
- Receiving awards or other recognition for research accomplishments. Awards received in the academic context from institutions at which you are training or conducting research are generally not considered very persuasive by USCIS.
- Obtaining testimonials showing the originality and/or critical nature of your work.

### **Adjustment of Status to Permanent Residence – Form I-485**

- Concurrent I-140/I-485 filing is only available to applicants whose priority date is current.
  - Advantages of a concurrent filing: spouses may apply for an Employment Authorization Document (EAD) which allows unrestricted employment; family members can obtain Social Security numbers.
  - Disadvantage of a concurrent filing: if the I-140 is denied, the I-485 will also be denied. Some applicants prefer to file the I-140 first and then only file the I-485 application once the I-140 is approved.
- **Visa retrogression:** if the applicant is subject to visa retrogression and there are no immigrant visas available, the applicant must wait until the priority date is current before s/he can file the I-485 application.
- An I-485 application is filed by the principal applicant and any family members (spouse and minor children under 21 years of age).
- An Employment Authorization Document (EAD) and Advance Parole travel document (combo card) is issued to all family members and can be renewed. The combo EAD/AP allows unrestricted employment and travel.
- Once the I-485 application is filed, travel is not permitted outside of the United States, unless the applicant has a valid H-1B, H-4, L-1 or L-2 visa. A departure without the appropriate travel document will result in the abandonment of the I-485 application. The combo card is usually issued within 60-90 days of filing of the I-485 application.

### **Immigrant Visa Processing at a U.S. Embassy Overseas**

Instead of filing an I-485 adjustment of status application in the United States, an applicant may choose to attend a green card interview at the U.S. embassy in their home country. This is called consular processing.

- Once the I-140 is approved, USCIS forwards the file to the National Visa Center (NVC). NVC coordinates the collection of documents and schedules an in-person interview at the U.S. embassy.
- Prior to the interview, the employee and family members must continue to maintain their non-immigrant status (e.g., H-1B/H-4 or O-1/O-3 or F-1/F-2) during their stay in the United States.
- Please note that the U.S. embassy or consulate will not schedule the interview until an immigrant number is available.
- If an immigrant visa is available, interviews are generally scheduled approximately 4-6 months after the I-140 approval. If the alien is affected by visa retrogression and there are no immigrant visas available, then, the consular post will not schedule the interview until the priority date is current.

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## PERM Labor Certification

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- A sponsoring employer must test the US job market to demonstrate there are no minimally qualified US applicants willing to accept the position.
- A sponsoring employer must conduct a good faith recruitment effort prior to filing a PERM Labor Certification with the U.S. Department of Labor (“DOL”).
- All legal fees and any associated costs related to a PERM labor certification must be paid by the sponsoring employer. However, a foreign national can cover the costs of the I-140 and I-485 applications.
- PERM Labor Certifications may be filed under the EB-2 second-preference or EB-3 third-preference categories:
  - **EB-2** is for professionals holding an advanced degree (at least a Master’s degree or a Bachelor’s degree plus five years of progressively senior work experience);
  - **EB-3** divided into three categories:
    - Professionals with Bachelor’s degrees;
    - Individuals performing a job that requires at least two years of education, experience or training; and
    - Other workers, including individuals performing jobs which require less than two years of education, training or experience.
  - Determining whether the PERM application is filed under EB-2 or EB-3 depends on the minimum job requirements for the position that the foreign national is being sponsored for.

PERM Labor Certification applications have several phases:

### Phase 1. PERM Labor Certification

- The PERM program is an attestation and audit process requiring employers to conduct advertising and recruitment before filing the labor certification application;
- Employers must demonstrate that there are no able, willing, qualified and available U.S. workers to perform the job, and that the employment of the alien will have no adverse effects on the wages and working conditions of similarly-employed U.S. workers.
- Employers must place:
  - Two (2) Sunday advertisements (which may be consecutive) in the newspaper of general circulation in the area of intended employment; and
  - A job order with the appropriate State Workforce Agency (SWA) for 30 days.
  - For professional occupations, employers must take three (3) additional recruitment steps from the following alternatives:
    - job fairs;
    - employer’s website;
    - job search website other than the employer’s;
    - on-campus recruiting;
    - trade or professional organizations;
    - private employment firms;
    - employee referral program with incentives;
    - campus placement offices;



- Local and ethnic newspapers; and
- radio and television advertising.
- If the job requires experience and an advanced degree, and a professional journal would normally be used to advertise the job opportunity, the employer may, in lieu of one of the Sunday ads, place an advertisement in the professional journal.
- Employers must post a notice of the job opportunity at the work-site for ten (10) consecutive business days or provide such notice to a certified collective bargaining unit representative, if any, in the location of intended employment.
  - The notice must also be published in any and all in-house media in accordance with the normal procedures used for the recruitment of other similar positions.
- The company must maintain copies of all resumes received. All applicants that appear to meet the minimum qualifications must be contacted. The employer should make detailed notes about attempts to contact applicants and results.
- All documents pertaining to the recruitment process, including resumes and interview notes, must be kept for five years after the filing of the labor certification.

If the DOL is satisfied that the employer has made good faith recruitment efforts, it will certify the Labor Certification. Once the Labor Certification is certified, the employer must file Form I-140 Immigrant Visa Petition, with USCIS within 6 months.

## **Phase 2. Immigrant Visa Petition (Form I-140)**

- The employer must provide evidence of financial viability to compensate the employee at the prevailing wage rate. For companies with less than 100 employees, evidence of financial ability includes a current corporate tax return or audited financial statement.
- The alien worker for whom the I-140 is being filed must provide evidence (academic credentials/employment verification, etc.) that s/he meets all the minimum requirements (as stated on the labor certification application) at the time of hire by the sponsoring employer.
- If there is a termination of the employment relationship during Phase 1 or 2, the alien worker may not be allowed to apply for permanent resident status on the basis of the labor certification application.
- You may file the I-140 under the Premium Processing Service program. For a \$2,500 processing fee, USCIS guarantees that it will issue either an approval, or where appropriate, a request for further evidence within 15 calendar days of receipt.

## **Phase 3. Adjustment of Status to Permanent Resident Status or Immigrant Visa Processing at a U.S. embassy abroad**

### **➤ Adjustment of Status in the United States (Form I-485)**

- An I-485 application adjusts the status of the foreign national and any eligible family members (spouse and minor children under the age of 21) from non-immigrant status (e.g., H-1B) to permanent resident status.
- Concurrent I-140/I-485 filing is only available to applicants whose priority date is current.
  - Visa retrogression: if the applicant is subject to visa retrogression and there are no immigrant visas available, the applicant must wait until the priority date is current before s/he can file the I-485 application.

- Visa priority dates are released by the Department of State (DOS) in its Visa Bulletin ([http://travel.state.gov/visa/bulletin/bulletin\\_1360.html](http://travel.state.gov/visa/bulletin/bulletin_1360.html)) on a monthly basis).
- A combo card (combined Employment Authorization Document (EAD) and Advance Parole travel document) is issued to all family members in one-year increments. Combo cards can be renewed on a yearly basis. The combo card allows unrestricted employment and travel.
  - It also allows dependents to apply for a Social Security number (if they do not already have one).
- Once the I-485 application is filed, travel is not permitted outside of the United States, unless the applicant has a valid H-1B, H-4, L-1 or L-2 visa. A departure without the appropriate travel document will result in the abandonment of the I-485 application. The combo card is usually issued within 2-5 months of filing of the I-485 application.

➤ **Immigrant Visa Processing at a U.S. Embassy Overseas**

Instead of filing an I-485 adjustment of status application in the United States, an applicant may instead choose to attend a green card interview at the U.S. embassy in their home country. This is called consular processing.

- Once the I-140 is approved, USCIS forwards the file to the National Visa Center (NVC). NVC coordinates the collection of documents and schedules an in-person interview at the U.S. embassy.
- Prior to the interview, the employee and family members must continue to maintain their non-immigrant status (e.g., H-1B/H-4 or O-1/O-3 or F-1/F-2) during their stay in the United States.
- Please note that the U.S. embassy or consulate will not schedule the interview until an immigrant number is available.
- If an immigrant visa is available, interviews are generally scheduled approximately 4-6 months after the I-140 approval. If the alien is affected by visa retrogression and there are no immigrant visas available, then, the consular post will not schedule the interview until the priority date is current.

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**Reaching the H-1B Six-Year Limit**

- Any time spent physically abroad for vacation or business, can be recaptured towards the six-year period.
- Pending Green Card applications can help!
  - If a labor certification or I-140 has been filed and pending for at least 365 days prior to his/her 6th-year cap date, one may obtain H-1B extensions in one-year increments;
  - If an I-140 has been approved but an H-1B worker is subject to retrogression, an H-1B may be extended in three-year increments, until the green card is approved.

### **Green Card Portability**

A foreign national may leave the sponsoring employer and still adjust to permanent resident status (i.e. keep the green card) if the following conditions are met:

- 1) The I-140 has been approved; and
- 2) The I-485 adjustment of status application has been pending for at least 180 days; and
- 3) The new job is in the same or similar occupational classification as the job for which the certification or approval was initially made.

If the I-485 adjustment of status application has been pending for less than 180 days, USCIS has discretion to either approve or deny the application. USCIS will generally look to see if there was a bona fide job offer and intent to remain in the offered job.

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**RETROGRESSION**  
**(BACKLOGS)**  
**FAQ**

## Basics About Visa Quota Backlogs aka Retrogression

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### Priority Dates and Visa Quota Backlogs (aka Retrogression)

The Immigration and Nationality Act sets limits on how many green card visas may be issued each Fiscal Year (October 1 through September 30) in all visa categories. For employment based cases, nationals of each country may obtain immigrant visas (i.e., a green card), in different preference categories (i.e., EB-1, EB-2, EB-3). For each category, the law restricts the number of green cards such that no one country may have more than a specific percentage of the total number of visas available per year. There is a similar per-country limit for family-based immigrant visas. Once a per-country limit is reached in a particular category, a waiting list is created and applicants are placed on the list based on the date their application was filed. This filing date is called a "Priority Date."

Visa availability or visa "chargeability" per country is based on the individual's country of birth and not country of citizenship.

### The Importance of a Priority Date

In order for USCIS to approve an immigrant visa, your priority date must be "current." A priority date is current if there is no backlog in the category, or if the priority date is on or before the date listed as current in the State Department's monthly Visa Bulletin. This Bulletin is accessible at <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html> and is usually released around the 15<sup>th</sup> of each month. The priority dates in each category and for each country can change each month moving backwards and forward, but can also remain the same. The dates can also move very slowly (or not at all) or move forward by months or years. It is virtually impossible to predict what a priority date will be in a future month or when a category will become current.

### The Difference between "U" (unavailable) and a Specific Date (MM/DD/YY) and "C" (Current)

"U" means "Unavailable" which means that there are no more visas available for the month shown. If the Visa Bulletin lists a specific date (i.e. 11/23/08), it is considered to be the cut-off date, and that means that there is a "quota backlog". Only applicants with a priority date earlier than the cut-off date may move forward with the process, usually the I-485 adjustment of status application or the immigrant visa application. For example, if the Visa Bulletin lists 11/23/08, an applicant with a priority date of 11/23/08 or earlier can move forward with their green card process. But, an applicant with a priority date of 11/24/08 or later must wait.

"Current" means that there is no quota backlog in this category and all applicants can move forward with the process, usually the I-485 application or the immigrant visa application.

## *Frequently Asked Questions*

### **If I have obtained citizenship in a country that is not where I was born, will this help me?**

Unfortunately, it will not help you. Visa availability or visa “chargeability” per country is based on the individual’s country of birth and not country of citizenship. So, if you were born in China but have Canadian citizenship, you will still be considered “Chinese” for visa chargeability purposes.

### **If my spouse has a different country of birth, can this help me?**

If you are married, your spouse’s country of birth may also be used to determine visa chargeability. For example, if you were born in China, but your spouse was born in Australia and there is a quota backlog for China but no quota backlog for Australia in your preference category, you and your spouse may move forward with your I-485 application or immigrant visa application based on your spouse’s country of birth.

### **I have an approved I-140 petition with a prior employer and my current employer is sponsoring me for permanent residence. Can I keep the earlier priority date?**

Yes, you may use the priority date from the earlier approved I-140 petition.

### **Which immigration applications require a current priority date to file?**

An applicant must have a current priority date to file an I-485 adjustment of status application or complete immigrant visa processing at a U.S. consular post abroad. An I-140 immigrant visa petition (based on an approved PERM Labor Certification) can still be filed and adjudicated if the priority date is not current, as the I-140 is not impacted by quota backlogs.

### **I filed my I-485 application previously but my priority date has retrogressed and is no longer current.**

Unfortunately, USCIS will not adjudicate your case until your priority date becomes current again. In the meantime, you may continue to renew your “combo” card for continued employment and travel authorization.

### Can I file an I-485 adjustment of status application before my priority date is current?

It depends. As of October 2015, the Visa Bulletin will include two separate charts in both the family and employment based categories. The first chart, the “*Application Final Action Dates*” chart will list the priority dates that are current. The second, new chart is the “*Dates for Filing Application*” chart, which indicates the date when a green card applicant can submit an I-485 adjustment of status application. If the date on the chart is current (“C”) or your priority date is earlier than the date on this chart, you may file your I-485 adjustment of status application with USCIS.

If it all sounds like mumbo jumbo and you are more of a visual person, here’s an example of how to read the charts. Let’s use the following hypothetical. Pretend that Donald is an Indian national, married to the lovely Hillary. Donald filed under the EB-2 category and has a priority date of June 14, 2011. The October 2015 Visa Bulletin’s “Application Final Action Dates” chart (Chart 1) shown below, lists EB-2 India as May 1, 2005. This means that an immigrant visa (i.e. green card) can only be issued (i.e. I-485 adjustment of status application approved) to an Indian national with a priority date on or before May 1, 2005. Donald’s priority date is not yet current. Is Donald out of luck?

#### Application Final Action Dates for Employment-Based Preference Cases (CHART 1)

Employment-Based	All Chargeability Areas Except Those Listed	CHINA – mainland born	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C
2nd	C	01JAN12	01MAY05	C	C
3rd	15AUG15	15OCT11	08MAR04	15AUG15	01JAN07
Other Workers	15AUG15	01JAN06	08MAR04	15AUG15	01JAN07
4th	C	C	C	C	C
Certain Religious Workers	U	U	U	U	U
5th	C	08OCT13	C	C	C

Targeted Employment Areas/ Regional Centers					
5th Pilot Programs	U	U	U	U	U

Maybe not! Donald and the lovely Hillary may qualify under this new provision and be able to submit their I-485 adjustment of status applications now. This is where the “Dates for Filing Employment-Based Visa Applications” chart (Chart 2) below, must be consulted. To find out if Donald qualifies now, he has to find his visa type in the first column (EB-2 or 2nd) of the Chart 2. He has to stay in the row and move directly to the right to find the corresponding date for India. Chart 2 lists July 1, 2011 for EB-2 India. In order for Donald and Hillary to file their I-485 applications, their priority date must be earlier than July 1, 2011. Since Donald’s priority date is June 14, 2011, he and Hillary, along with any non-U.S. citizen children, may apply for their I-485 adjustment of status applications.

### Dates for Filing of Employment-Based Visa Applications (CHART 2)

Employment-Based	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C
2nd	C	01MAY14	01JUL11	C	C
3rd	01SEP15	01OCT13	01JUL05	01SEP15	01JAN15
Other Workers	01SEP15	01JAN07	01JUL05	01SEP15	01JAN15
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th Targeted	C	01MAY15	C	C	C



Employment Areas/Regional Centers and Pilot Programs					
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But, imagine – what if Donald filed an EB-3 case instead of an EB-2? He and the lovely Hillary, would be out of luck. Chart 2 lists July 1, 2005 for EB-2 India. In this second hypothetical, Donald and Hillary would not be able to file their I-485 adjustment applications just yet. But, Donald would be able to extend his H-1B in three-year increments and Hillary could apply for the [H-4 EAD](#). So, not all is lost!

**My I-485 adjustment of status application is pending and I recently married. Can my spouse file his/her I-485 even if my priority date is not current?**

It depends. New changes implemented in October 2015 allow certain applicants to file an I-485 adjustment of status application even if the principal applicant’s priority date is not current. In order to be eligible, the principal applicant’s priority date must be current or earlier than the date listed on the “Dates for Filing Employment-Based Visa Applications” chart in the current Visa Bulletin. If the principal applicant’s priority is later than the date listed in the Visa Bulletin, the spouse must wait for the appropriate date before filing an I-485 adjustment of status application.

**My I-485 adjustment application has been approved, but my dependent’s application is still pending and the priority date is no longer current.**

USCIS cannot approve your dependent’s I-485 application until the priority date is current.

**If my I-485 application has been pending because of retrogression or quota backlogs, will USCIS request any updated information or documents?**

At the time the I-485 application is adjudicated, USCIS may ask for updated employment verification letter.

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*The information provided here does not constitute direct legal advice and is for informational purposes only. For further information about nonimmigrant visas, please contact us at [tl@lokewalsh.com](mailto:tl@lokewalsh.com).*

# **TRAVEL FAQ**

# Frequently Asked Questions About Entering the United States with a Nonimmigrant Visa

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## Travel FAQ for F-1 Students

### Can I travel overseas during OPT?

Yes. Very generally, an F-1 student must have the following documents to travel internationally:

- Valid passport;
- Valid F-1 visa stamp in passport;
- Valid Form I-20 endorsed for travel by the university's DSO.

An F-1 student with an expired F-1 visa stamp in his/her passport will have to apply for a new F-1 visa at a U.S. consulate or embassy abroad before returning to the United States. In some circumstances, applying for a new F-1 visa for certain applicants can be risky. These risks will vary from case to case depending on the F-1's personal situation.

N.B. Canadian F-1 students are visa-exempt, which means that a Canadian F-1 student only needs the following documents to travel internationally:

- Valid passport;
- Valid Form I-20 endorsed for travel by the university's DSO.

### How does travel outside the United States impact the period of OPT unemployment?

If a student whose approved period of OPT has started, travels outside of the United States while unemployed, the time spent outside the United States will count as unemployment against the 90/120-day limits.

If a student travels while employed (either during a period of leave authorized by an employer or as part of their employment), the time spent outside the United States will not count as unemployment.

### Can I re-enter the United States if my request for OPT is still pending?

Yes. In addition to having a valid passport, F-1 visa and I-20 (endorsed for travel), F-1s should also carry the I-765 receipt notice. However, if USCIS approves your OPT application while abroad, you should have the EAD in hand when returning to the United States.

**Can I travel during the H-1B cap-gap extension period?**

It depends. An F-1 student may generally travel abroad and seek readmission to the United States in F-1 status during a Cap-Gap period if:

1. The student's H-1B petition and request for change of status has been approved;
2. The student seeks readmission before his or her H-1B employment begins (normally at the beginning of the fiscal year, i.e., October 1); and
3. The student is otherwise admissible.

However, if the F-1 travels and returns on the F-1 visa, s/he must be prepared to leave the United States prior to October 1 and apply for an H-1B visa at a U.S. embassy or consulate abroad. Their status will not automatically convert to an H-1B on October 1 and the only way to "trigger" or "initiate" the H-1B is to depart the United States, apply for a visa at a U.S. embassy and then return to the United States.

Travel Tip: An H-1B professional may enter the United States up to 10 days prior to his/her H-1B start date, i.e. September 21st for an October 1 start date. Therefore, it is best to plan to travel in September, apply for an H-1B visa at a U.S. embassy or consulate, and return to the United States on or after September 21<sup>st</sup>. However, s/he cannot start H-1B employment until October 1, the first day of the H-1B.

**General Travel FAQ**

**I am traveling to Mexico or Canada, what is the "automatic revalidation rule?"**

There is a special provision called "automatic revalidation" that allows certain foreign nationals with nonimmigrant visa status to visit a "contiguous territory" (Canada and Mexico) for less than 30 days and return to the U.S. without a valid visa stamp in the passport. In these situations, the validity of an expired nonimmigrant visa may be considered to be automatically extended to the date of application for readmission at ports of entry. This includes cases where someone has changed their status from another status (e.g. F-1 to H-1B).

For Fs and Js, this special "automatic revalidation" also applies to travel for less than 30 days to "adjacent islands" (Saint Pierre, Miquelon, Cuba, The Dominican Republic, Haiti, Bermuda, The Bahamas, Barbados, Jamaica, The Windward and Leeward Islands, Trinidad, Martinique, other British, French, and Netherlands territory or possessions in or bordering on the Caribbean Sea).

Automatic revalidation applies in two ways.

1. If you have a visa stamp in your passport that matches your current status, but has expired, that visa stamp is considered to be automatically revalidated to a current date for your return to the U.S. even though it has expired.
2. If you have changed status while in the U.S., and you have a visa stamp that matches your old status (either expired or unexpired), that visa stamp is considered to be automatically changed to a stamp matching the new status and revalidated to a current date for your return to the U.S. even though it is not the same as your current status and has, perhaps, expired.

Fs and Js must have the following documents:

- Valid I-94 record showing an unexpired period of initial admission or extension of stay
- I-20 or DS-2019
- Valid passport

All other nonimmigrants (E-3, H, I, L, O, P):

- Valid I-94 record showing an unexpired period of initial admission or extension of stay
- Valid passport

The provisions of the automatic revalidation of visas do not apply to citizens of countries identified as state sponsors of terrorism. These are Iran, Syria, Sudan and Cuba.

However, if you meet any one of following criteria, you will not be able to automatically revalidate your visa.

- You applied for a new visa at a U.S. embassy or consulate and your visa has not yet been issued it to you
- You applied for a new visa and the U.S. embassy or consulate denied the application
- You have a terminated SEVIS record indicating that you are out of status
- You have been out the United States for more than thirty days

***Is it safe to travel if your passport expires before the end date of your I-797 Approval Notice?***

The CBP rule is that it will only admit you to the United States (as reflected on your I-94 record) until the expiration date of your passport. So, if you travel internationally and if your passport expires before the expiration date of your I-797 Approval Notice, you will most likely be admitted to the U.S. only until the expiration date of your passport, instead of the expiration date

of the approval notice. The same is true for your family members with dependent visas. If this happens, you should renew your passport and travel internationally before the expiration date of your I-94 record. USCIS views the expiration date on your I-94 record as the true expiration date of your status. If you do not leave on or before the expiration date of your “short-changed” I-94 admission record, then, you will begin to accrue unlawful presence. If you accrue more than 180 days of unlawful presence, you will be subject to a three-year bar when you leave the United States. If you accrue more than 365 days of unlawful presence, you will be subject to a ten-year bar when you leave the United States.

**What if I have an expired passport or one that will expire in less than six months?**

In most cases, to enter the United States, you must have a passport that is valid for at least six months after the date you enter or reenter. However, the countries listed below have an agreement with the United States that allows you to enter on a current passport up to the actual date of expiration.

Try to keep your passport current at all times. You need to determine your country’s requirements and timelines for renewing passports. Many countries will allow you to renew your passport while in the United States. The other alternative is to renew your passport when you return home for a visit.

In some cases, you may want to delay leaving the United States until you have renewed your passport. You will not be able to reenter the United States without a valid passport. If your expired passport has a valid visa, you can still use that visa if you kept the old passport. Present the old passport, along with the new passport when you reenter the country.

The countries that have an agreement with the United States (known as the Six-Month Club) allowing entry with a passport until the date of expiration are as follows:

- Algeria
- Antigua and Barbuda
- Argentina
- Australia
- Austria
- Bahamas
- Bangladesh
- Barbados
- Belgium
- Bolivia
- Bosnia-Herzegovina
- Brazil
- Canada
- Chile
- Colombia
- Costa Rica
- Cote D’Ivoire
- Cuba
- Cyprus
- Czech Republic
- Denmark
- Dominica
- Dominican Republic
- Ecuador
- Egypt
- El Salvador
- Ethiopia
- Finland

- France
- Germany
- Greece
- Grenada
- Guatemala
- Guinea
- Guyana
- Hong Kong (certificates of identity and passports)
- Hungary
- Iceland
- India
- Ireland
- Israel
- Italy
- Jamaica
- Japan
- Jordan
- Korea
- Kuwait
- Laos
- Latvia
- Lebanon
- Liechtenstein
- Luxembourg
- Madagascar
- Malaysia
- Malta
- Mauritius
- Mexico
- Monaco
- Netherlands
- New Zealand
- Nicaragua
- Nigeria
- Norway
- Oman
- Pakistan
- Panama
- Paraguay
- Peru

Note: U.S. Customs and Border Protection (CBP) updates the six month club list on a regular basis. Check their website ([www.cbp.gov](http://www.cbp.gov)) for the latest version before making travel arrangements.

**My visa is in my old passport, can I still use it?**

Yes. If your nonimmigrant visa is still valid and in your old passport, carry your old passport with your new passport. CBP will notate your passport with “VIOPP” which stands for “visa in old passport.”

**I have changed jobs and my visa has the name of my old employer. Can I still use it?**

Yes, as long as you are still in the same nonimmigrant visa classification and the visa is valid. So, if you have an H-1B or O-1 visa and you transferred it to another company, you may continue to use the existing visa stamp for re-entry to the United States, even if it has the name of your old company. U.S. embassies don’t want to issue new visas every time someone changes jobs, so this rule exists to reduce the administrative burden and to facilitate travel. However, if the visa has expired, you will need to apply for a new visa.

**Can I travel internationally while my green card application is pending?**

It depends. If you or a family member have filed an I-485 adjustment of status application, you may continue to travel if you have a valid H-1B, H-4, L-1 or L-2 visa. If you are in H or L status but do not have a valid visa stamp, you must either wait for the combo card (combined travel and employment authorization document) or Advance Parole Travel Document or apply for an H or L visa while abroad. If you are in any other status (e.g. B, E, F, I, J, M, O, P, R), you cannot travel abroad until USCIS has issued a combo card or an Advance Parole document. If you travel abroad before receiving the combo card, your I-485 application is considered abandoned.

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# **LAYOFF/TERMINATION FAQ**

## **Employees That are Laid Off or Terminated After a Merger, Acquisition or Restructuring**

When companies undergo changes that arise from mergers, acquisitions, consolidations, spin-offs or any type of corporate restructuring, there are potential immigration consequences for their foreign-national workforce. The following are general guidelines on how these changes impact employees that are laid off or terminated.

### **Impact on Nonimmigrant Visa Employees That are Laid Off or Terminated**

#### **➤ *Grace Periods***

Individuals on E-1, E-2, E-3, H-1B, H-1B1, L, O or TN visas who are laid off or terminated are eligible for a grace period of up to 60 days during the period of petition validity or until the existing visa status (i.e. I-94 expiration date) ends, whichever is shorter. You cannot work during this grace period. The grace period may only apply one time per authorized nonimmigrant validity period. However, if the individual's status expires before the end of the 60 days, then the grace period is only until the expiration date of their status. For example, if an H-1B has valid status until April 30, 2021 but is laid off on March 30, 2021 the H-1B's grace period is only until April 30, 2021 instead of May 29, 2021.

For H-1B visa holders, you may file an H-1B transfer with a new employer during the grace period and you may start working for the new company upon filing of the petition based on the H-1B portability provision. If the new H-1B is approved, you may be eligible for an additional grace period of up to 60 days in connection with the new authorized validity period.

Other visa holders may use this grace period to find another employer to transfer the visa to, or to settle affairs or change to another visa category (assuming they qualify). For other visa holders filing a transfer to another employer, you must wait for the approval before you can start working for the new company. If the new visa is approved, you may be eligible for an additional grace period of up to 60 days in connection with the new authorized validity period.

#### **▪ *Employer Obligations When H-1B Workers are Laid Off or Terminated***

If H-1B employees are laid off or terminated, the original company is required to do the following:

- Offer the H-1B worker "reasonable costs of return transportation" to the H-1B employee's residence abroad.
- Notify USCIS of the termination and withdraw the H-1B petition and the LCA.
- The original employer is not liable for transportation costs if the H-1B employee's employment ends upon petition expiration.

If E-3 or H-1B1 employees are laid off or terminated, the original company should withdraw the LCA.

### **Impact on Green Cards/Immigrant Visas When Employees are Laid off or Terminated**

#### **➤ AC 21 Green Card Portability for Employees with Approved I-140 and Pending I-485 petitions**

The best scenario is where the foreign national has an approved I-140 and an I-485 is pending. In some situations, an employee may be able to benefit from “green card portability,” which allows an individual to move to a new company and keep the green card. In order to qualify for “green card portability,” the following conditions must be met:

1. The I-140 Immigrant Visa petition must be approved;
2. The I-485 Adjustment of Status application must be pending for 180 days; and
3. The new job must be in the same or similar occupational classification to that in the original PERM application filed by the original employer.

If the employee does not meet all of these conditions, s/he will have to start a new PERM application or another type of green card application (if they qualify) with a new employer.

#### **➤ What Happens to a Pending PERM Labor Certification When an Employee is Laid Off?**

If a PERM LC is pending with DOL when the employee is laid off, the employee will not be able to pursue a green card application through the original employer. The employee would have to start a new green card application with a new employer.

#### **➤ What Happens if an Employee’s PERM and I-140 Have Been Approved?**

If a PERM LC and the I-140 Immigrant Visa petition have been approved (but no I-485 has been filed), the employee will not be able to pursue a green card application through the original employer. However, s/he may retain his or her priority date for future applications with another employer. This is usually a common fact pattern for Chinese and Indian nationals who are subject to retrogression. For most other nationals who have reached this stage in the process, they will usually have filed a concurrent I-485 and may be able to benefit from AC 21 green card portability.

#### **➤ Maintaining a Priority Date When Laid Off or Terminated**

If the employee’s PERM LC and I-140 have been approved, the employee may retain his or her priority date for future applications with another employer. This is especially important for Chinese and Indian nationals who are subject to retrogression.

➤ **Layoffs/Terminations of H-1B Employees Reaching Their Six Year Cap**

If an H-1B employee is laid off or terminated and does not qualify for green card portability, they may still be able to extend their H-1B beyond six years with another employer, if they meet certain conditions.

1. H-1Bs with an approved I-140 who are subject to retrogression (and cannot file an I-485 application), may use the approved I-140 to extend their H-1B in three-year increments until they get a green card. So, an H-1B could go to a 9<sup>th</sup> year, 12<sup>th</sup> year, 15<sup>th</sup> year and so on. However, if the original employer withdraws the I-140 before 180 days have passed, the H-1B employee is no longer eligible to renew in three-year increments. Note that employers do not usually withdraw an I-140 immigrant visa petition because it is not required by USCIS.

N.B. H-1Bs may apply for a H-1B with a new company using an approved I-140 (for the original employer) to transfer and extend their H-1B beyond the 6 years. For example, an H-1B has an approved PERM and I-140 from the original employer and has already used six years of H-1B time. The H-1B can use the approved I-140 from the original employer to file an H-1B with a new company and also request a three-year period. The approved I-140 does not have to be for the company filing the new H-1B.

N.B. If the original employer that sponsored the employee will cease operations and close down, this will not impact employees as long as the business termination occurs 180 days or more after the I-140 approval. If the business terminates before 180 days has passed, this will impact employees as they will no longer have an “approved” I-140 petition, which impacts their ability to renew an H-1B in three-year increments (if they have reached the six-year cap).

2. H-1Bs whose green card applications (PERM or I-140) have been pending for 365 days (regardless of the employer) may extend their H-1B in one-year increments until they get a green card. However, if the employer withdraws the PERM or I-140 petition, the H-1B may no longer rely on this provision to extend the H-1B beyond the six-year period.

➤ **Foreign Nationals With Pending EB-1A (EB-11) Petitions (Alien of Extraordinary Ability)**

Since EB-1A petitions do not require a job offer, laid off or terminated employees with pending EB-1As are not impacted. However, the employee must show that s/he will continue to work in their field of expertise.

➤ **Foreign Nationals With Pending EB-13 (EB-13) Petitions (Multinational Managers and Executives)**

If an EB-13 I-140 petition is pending when the employee is laid off or terminated, the employee will not be able to pursue a green card application through the original employer. The employee would have to start a new green card application with a new employer.

➤ **Foreign Nationals With Approved I-140 Petitions Filed Under the EB-13 (EB-13) Category (Multinational Managers and Executives)**

Some multinational managers and executives may be eligible for AC 21 green card portability even if they are laid off or terminated, as long as they meet the following conditions:

1. The I-140 Immigrant Visa petition must be approved;
2. The I-485 Adjustment of Status application must be pending for 180 days; and
3. The new job must be as a manager or executive with job duties that are similar or the same as in the original I-140 petition filed by the original employer.

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