

Visa Options Beyond Practical Training

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GREEN
AND SPIEGEL
— AN IMMIGRATION LAW FIRM —

Disclaimer

- This presentation provides general information on immigration matters and should not be relied upon as legal advice.
- If you require legal advice, you should retain qualified legal professionals to advise you in the context of your particular circumstances.

Overview of U.S. Immigration

Government Agencies

- Department of State (DOS)
- Customs and Border Protection (CBP)
- US Citizenship and Immigration Services (USCIS)
- Department of Labor (DOL)

Key Concepts

- Immigrant vs. Nonimmigrant Visas
- Doctrine of Dual Intent
- Visa vs. Visa Status
- Change of Status, Extension of Status
- Consular Processing



Overview of U.S. Immigration

Filing of Nonimmigrant Visa Petition

- Employer Files Petition (Petitioner) with USCIS on behalf of Foreign National (Beneficiary)
- In some cases, Foreign National can file without Petitioner
- Application for visa stamp filed at U.S. consular post abroad (Canadians are visa exempt)

U.S. Department of State
NONIMMIGRANT VISA APPLICATION
PLEASE TYPE OR PRINT YOUR ANSWERS IN THE SPACE PROVIDED BELOW EACH ITEM

2. Place of Issuance:
City _____ Country _____

4. Issuance Date (dd-mm-yyyy) _____

5. Expiration Date (dd-mm-yyyy) _____

10. Date of Birth (dd-mm-yyyy) _____

12. Nationality _____

State/Province _____

Professional, Aliases _____

State/Province _____

Include as _____

DO NOT WRITE
B-1/B-2 MAX
Other _____
Mult or _____
Months _____
Issued/Refused _____
On _____
Under _____
Visa Class _____
Number of At _____

Nonimmigrant Visa Overview

Visas for Trainees

- J-1, H-3

Visas for Professional Specialty Occupations

- H-1B
- H-1B1 (Free Trade Agreements – Singapore, Chile)
- TN (NAFTA Canada, Mexico)
- E-3 (Australia)

Visas for Intercompany Transfers

- L-1A (Managers / Executives)
- L-1B (Specialized Knowledge)

Visas for Treaty Countries

- E-1 (Treaty Traders – Managers, Executives, Specialized Knowledge)
- E-2 (Treaty Investors – Managers, Executives, Specialized Knowledge)

Visas for those with Extraordinary Ability/International Recognition

- O-1

H-1B Visa – Basic Requirements

Bachelors or higher degree

- Determine U.S. equivalence of foreign degree
- Combination of education and experience

Job Offer (that will apply the academic/ specialty knowledge)

- Part-time or full-time

Specialty occupation

- Job requires bachelor's or higher degree in specific field

Prevailing Wage or Actual Wage – whichever is higher (Labor Condition Application)

Requires Employer-Employee relationship (W-2 Wages)

H-1B Cap – Institutes of higher education are exempt from the cap and the electronic registration for the lottery



H-1B Visa – Academic Qualifications

- **Must have earned a bachelor's degree or higher in a specific area of study**
- **Can be satisfied by:**
 - U.S. Bachelor's Degree
 - U.S. Master's Degree
 - Foreign education deemed equivalent to a U.S. degree;
 - Professional Experience – 3 years of progressive professional experience = 1 year of university study; or
 - A combination of the above



H-1B Visa – Specialty Occupation

- **From the Regulations:** “Will perform services in a specialty occupation which requires theoretical and practical application of a body of highly specialized knowledge and attainment of a baccalaureate or higher degree or its equivalent as a minimum requirement for entry into the occupation in the United States, and who is qualified to perform services in the specialty occupation because he or she has attained a baccalaureate or higher degree or its equivalent in the specialty occupation.” 8 CFR 214.2(h)(4)(ii)
- **In essence** – the position must be one that generally requires a bachelor’s degree in a specific specialty, and the individual must hold a bachelor’s degree in that or a closely related field



H-1B Visa – Proving Specialty Occupation

- **At 8 CFR § 214.2(h)(4)(iii), the Regulations provide four methods for proving specialty occupation:**
 1. Bachelor's Degree normally the minimum requirement for entry into the particular position
 - *Occupational Outlook Handbook*
 - Industry experts
 2. Common to the industry OR is the particular position so complex or unique that it can only be performed by an individual with a degree
 - Job postings for similar positions/employers
 - Opinion from industry expert
 3. Normal requirement for the employer
 - Current/prior job postings, resumes, degrees, proof of employment
 4. Nature of the specific duties are so specialized / complex that the knowledge required to perform them can only be done by an individual with a degree
 - Expert opinion / professor letter



H-1B – Actual vs. Prevailing Wage

- An H-1B employee's guaranteed salary must meet or exceed the higher of the following:
 - **Actual Wage** – *What does someone in this position, with this experience, usually earn?*
 - Where there are other employees within the company with “substantially similar experience and qualifications in the specific employment in question”, the actual wage is the wage paid to those employees. If no such employees exist at that particular location, then the actual wage is simply the wage paid to the H-1B visa holder.
 - **Prevailing Wage** – *What do similarly qualified employees in the area earn?*
 - The prevailing wage is the wage dictated by a collective bargaining agreement if the position is unionized. If it is not, then the wage paid to all similarly situated employees in the area of intended employment is the prevailing wage. Normally, the prevailing wage is obtained through a government wage survey compiled by the Bureau of Labor Statistics.
 - Prevailing wage will depend on occupational classification, place of employment, and employer's requirements for the position



H-1B Visa - Labor Condition Application (LCA) Requirement

- The Department of Labor (DOL) plays a dual role in the H-1B process. It seeks to protect jobs of U.S. workers from undue displacement while at the same time ensures that foreign workers are not exploited by U.S. employers. To achieve this goal, the DOL requires that a Labor Condition Application or LCA, be filed with and approved by the DOL before an H-1B petition can be submitted to the USCIS.
- **A potential employer intending to petition for a foreign national must attest to the following:**
 - The wage paid to the H-1B worker will be the higher of the prevailing wage or actual wage
 - The foreign national will be working under conditions which do not adversely affect the working conditions of similarly employed workers
 - There is no current strike or lockout as a result of a labor dispute in that occupational classification and
 - The employer has provided notice of the filing of the LCA to the bargaining representative of the employer's employees in the occupation classification in which the H-1B nonimmigrant will be employed, or, if there is no bargaining representative, has posted notice of filing in the employer's location where the foreign national will be employed

H-1B Modernization Rule

- **Went into effect on January 17, 2025. The purpose was to streamline H-1B adjudications and ensure integrity in the H-1B program.**
- **Some key provisions:**
 - Codification of the “Prior Deference Rule”.
 - Clarify specialty occupation definition for H-1Bs – Petitioner/Employer may accept a range of qualifying degree fields. Each field must be directly related to the job duties.
 - Clarifying the cap-exempt non-profit research or governmental research organizations do not have to be “primarily” engaged in research activities to be cap exempt. Just have to show research is a fundamental activity of the organization.
 - H-1B Entrepreneur/Business Owners – an individual who has an ownership interest in their own company can file an H-1 with that company. Limited to 18 months.
 - Automatic extension of F-1 Status cap-gap coverage until April 1st while waiting for H-1B adjudication.

H-1B Visa – Additional Issues

- **Cap subject employers must complete electronic registration during March for selections in H-1B lottery**
 - If selected, H-1 petition must be filed within 90 days
 - 65,000 general cap; additional 20,000 for those beneficiaries with U.S. masters' or higher degrees
- **Cap exempt employers**
 - For institutions of higher education, nonprofit research organizations, and government research organizations
 - If employer has affiliation with an institute of higher education, nonprofit research organization, or government research organization, they can also qualify for cap exempt status
- **3 year initial period, 3 year extension = 6 year maximum** □ Exceptions
- **Loss of Employment** □ Grace Period (lesser of 60-days or remaining portion of H-1B)
- **Change of Employer** □ H-1B Portability
- **Amended Petitions** □ material change to previously approved employment
- **Concurrent employers** □ part-time work for several employers
- **Extensions** □ timely filed, automatic 240 days of employment authorization while pending; must be in the U.S.
- **Cap-Gap with OPT**
- **H-4 dependents cannot (usually) work** □ Exceptions

E-3 Visas – For Citizens of Australia

- **Similar Requirements to H-1B (and H-1B1)**
 - Bona-fide employer-employee relationship
 - Must meet prevailing/actual wage □ Labor Condition Application w/DOL
 - Specialty occupation
- **Key Differences**
 - Can apply directly at U.S. Consulate abroad
 - Visa valid in 2-year increments
 - 100% nonimmigrant intent, but renewable indefinitely
 - Spouses can apply for Employment Authorization
 - Yearly limit of visas never met



H-1B1 Visas – Citizens of Chile & Singapore

- **Similar Requirements to H-1B**

- Bona-fide employer-employee relationship
- Must meet prevailing/actual wage □ Labor Condition Application w/DOL
- Specialty occupation

- **Key Differences**

- Can apply directly at U.S. Consulate abroad
- Visa valid in 18-month increments, admission for 1-year at a time
- 100% nonimmigrant intent, but renewable indefinitely
- Yearly limit of visas never met

TN Visas – Citizens of Canada and Mexico

- **Common Features**

- Require nonimmigrant intent
- Authorize up-to-three years of stay
- Position/qualifications must appear on professions list – see 8 CFR 214.6
- No strict prevailing wage requirement
- Spouses / Children = TD

- **Differences Depending on Citizenship**

- *For Mexican Citizens* – must apply for Visa at U.S. Consulate abroad, TN visa itself only valid for one-year increments
- *For Canadian Citizens* – may apply at the U.S. Border, Visa Exempt (but if spouse/children non-Canadian citizens, must apply for visa)

O-1 Visa: Individuals with Extraordinary Ability or Achievement

- O-1A: Extraordinary Ability in the sciences, education, business, or athletics
- O-1B: Extraordinary Ability in the arts or Extraordinary Achievement in motion picture or television industry
- Peer consultation / advisory opinion required
- Length of Stay- 3 year initial, with 1 year extensions; can extend indefinitely
- O-3: Dependents of O-1s (spouses, unmarried children under 21)
 - No work authorization



O-1A Visa

- Evidence needed:
 - Receipt of major national or international award such as a Nobel Prize;
- OR 3 of the following (paraphrasing):
 - Significant and original contributions
 - Authorship of scholarly articles in journals
 - Media attention (Press)
 - Membership in Associations which require outstanding achievements
 - High Salary
 - Recognition from Experts
 - Judging the work of others
 - Employment in critical role for distinguished organizations
 - Other comparable evidence



EMPLOYMENT BASED IMMIGRANT VISA CATEGORIES (I-140 PETITION)

First Preference (EB-1) Exempt from PERM Labor Certification

- EB1A Extraordinary Ability (Self Petition)
- EB1B Outstanding Researcher/Professor

Second Preference (EB-2)

- EB2 (advanced degree or Bachelors plus 5 years exp) and EB3 with PERM Labor Certification
- Special Handling PERM Labor Certification
- Pre-certified Occupations—RN and Physical Therapist
- EB2 NIW (Self Petition) PERM Labor Certification not needed



FILING FOR PERMANENT RESIDENCE (IMMIGRANT VISA/GREEN CARD)

- Immigrant Visa Must be Available (Visa Bulletin)
- Long Wait Time for Applicants born in India and China
- Adjustment of Status filed with USCIS (Form I-485)
 - Can obtain employment authorization (EAD) while I-485 is pending
- Concurrent Filing of I-140/I-485
- Portability with Approved I-140 and I-485 unadjudicated after 180 days



For Further Information



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