

Topic: Work Authorization for Foreign National Employees

Date: April 16th, 2018

Invited Speakers: From the Office of General Counsel, University of Utah:

- **Katie Carreau**, *Associate General Counsel*
- **Kelly South**, *Senior Paralegal*

Summary:

We had a comprehensive overview of visa options available for postdocs given by Katie Carreau, representing the Office of General Counsel from the University of Utah. Foreign nationals who wish to enter the United States must first obtain either a nonimmigrant visa for temporary stay, or an immigrant visa for permanent residence. F-1 Optional Practical Training (OPT), Exchange visitor (J-1) and Temporary Worker Visas (H-1B) are examples of nonimmigrant visas compatible with postdoctoral positions. Employer-sponsored immigrant visas (green cards) are not compatible with a postdoctoral position, since this position is not permanent in nature. However, some self-petition options that are not tied to specific employment are options for postdocs. Other employer-sponsored options exist for permanent positions.

The information provided on this summary is intended for informational purposes only and does not constitute legal advice. Please be aware that immigration is a constantly evolving area of law and that you should consult with a lawyer to discuss your particular situation. This summary was revised in May 2018.

Highlights from the discussion are provided below:

1. **Optional Practical Training (OPT)** is a benefit of the F-1 visa. After completion of a degree, it permits temporary employment for 12 months or up to three years for graduates in STEM fields (<https://www.ice.gov/sites/default/files/documents/Document/2016/stem-list.pdf>).
2. **Exchange Visitor (J-1)** are nonimmigrant visas for individuals approved to participate in exchange visitor programs in the United States. Since these are employer-sponsored visas, your sponsor needs to provide you with a DS-2019 form. When you agree to participate in an Exchange Visitor program you may be subject to the two-year home-country physical presence (foreign residence) requirement. This means you will be required to return to your home country for two years at the end of your J1 before you can obtain H-1B status or lawful permanent residency. Some people are eligible for a waiver of this requirement, which must be approved by the Department of State and the Department of Homeland Security. You should contact your International Advising Office (such as ISSS at the U of U <https://internationalcenter.utah.edu>) to determine how this affects you. You should not extend your DS-2019 after obtaining a waiver, so plan ahead. Dependents can obtain work authorization under a J2 visa and they are also permitted to study without a student visa. The J-1 provides a 30 day grace period once your visa expires to leave the country.

1. **Temporary Worker Visas (TN, O-1, E-3, H-1B)** are employer-specific temporary working authorizations. This means that they are an employer petition, not an employee petition. While there are several categories the most common is the H-1B category (Person in Specialty Occupation).
 - H-1Bs are limited to 65,000 per year. An additional 20,000 are available for persons with U.S. master's degree or higher. If USCIS receives more petitions than the cap during the first five business days starting April 1st, they will use a random selection process (commonly known as a "lottery") to select the sufficient number of petitions. Universities are not subject to this cap.
 - H-1B visas are issued for up to 3 years, and can be extended up to 6 years. Further extension is possible under certain circumstances related to green card processing. You can "recapture" time spent outside the U.S. so it is helpful to keep travel records including passport stamps and airline tickets.
 - H-1B visas have "portability". This means that an H-1B holder can change their employer and start to work for a new employer on the date that the USCIS receives the H-1B transfer petition submitted by the new employer. You may not transfer from a cap-exempt employer to a cap subject employer without being awarded an H-1B during the April lottery process.
 - If you change your employment, even within the University, you (or your department) need to inform the Office of General Counsel so they can determine if an amendment is needed.
 - The H-1B allows study as long as your primary purpose is the H-1B employment.
 - Immediate family members can be issued a H-4 visa. H-4 holders cannot work in the U.S., unless the H-1B holder has an approved I-140 (Immigrant Petition for Alien Worker). You are required to prove that you can support your family during the stay.
 - There is no mandatory waiting time after a H-1B is issued to start a green card application.
 - There is no grace period to leave the country if employment is terminated, however in certain cases you may stay up to 60 days to find another employer but you will be without any immigration status.

1. **Employment-based immigrant visas (green cards).** Every year 140,000 employment-based immigrant visas are made available to qualified applicants. Only 7% can go to any given country.
 - The process to obtain a green card typically takes 18 months if there is no backlog. Information on backlogs for specific countries based on green card preference category is available each month in the Department of State's visa bulletin: (<https://travel.state.gov/content/visas/en/law-and-policy/bulletin.html>).
 - EB-1 Outstanding Researcher and EB-2 or EB-3 Labor Certification processes are University sponsored petitions. Before applying in these categories you need to determine if your PI and department can sponsor you and then contact the Office of General Counsel.
 - Self-petitions that you can file without employer-sponsorship are the EB-1 Extraordinary Ability petition and EB-2 National Interest Waiver (NIW).

- Unless you are from China or India EB-2/EB-3 processes are generally preferred (China and India have backlogs in this category). In these categories, with the Labor Certification process, the employer needs to prove that there are no U.S. workers willing and qualified to do the job (except for teaching positions where you only need to be the most qualified person for the job). The job must be permanent in nature, such as a tenure-track faculty position or a Research Associate position. Postdoc positions do not qualify.
- The self-petition NIW process also falls into the EB-2 category. For the NIW you need to prove your work is of substantial intrinsic merit and national in scope.
- For the EB-1 category, the University's Outstanding Researcher petition also requires a permanent position and evidence that your work is outstanding and has been internationally recognized (through research achievements, publications, peer-reviewing, etc.). The EB-1 Extraordinary Ability Self-petition requires evidence similar to the Outstanding Researcher petition, but does not require a specific employment opportunity and is not the employer's petition.