

the office of

General Counsel



Work Authorization for Foreign National Employees



Office of General Counsel

Michele Ballantyne, Associate General Counsel

Michele.ballantyne@legal.utah.edu

Katie Carreau, Associate General Counsel

Katie.carreau@legal.utah.edu

Kelly South, Senior Paralegal

Kelly.south@legal.utah.edu

Phone: 801/585-7002

Fax 801/585-7007



Office of General Counsel

- We facilitate obtaining work authorization for foreign nationals when departments wish to hire them.
- We help departments petition for lawful permanent residence for foreign national employees so they can remain in the U.S. and continue their important work with the University.
- We deal with workplace compliance issues related to employment of foreign nationals.



Students:

Optional Practical Training (OPT)

- OPT is a temporary employment benefit for F-1 students to gain practical experience in his or her field of study
- OPT permits employment authorization for 1 year following the completion of a degree



Permission to Extend OPT for Graduates in STEM Fields

- Graduates in certain STEM fields (Science, Technology, Engineering and Math), working in a related field are eligible to extend OPT for an additional 24 months.
- As long as student applies for STEM extension prior to expiration of OPT, they will have an additional 180 days of work authorization beyond the expiration while waiting for the approval of the extension



What are the Requirements for OPT STEM Extensions?

- F-1 student must be participating in a 12-month period of approved post-completion OPT and maintaining F-1 status.
- F-1 student must have successfully completed a degree in science, technology, engineering or mathematics (STEM) included in the DHS STEM Designated Degree Program List.
- F-1 student must be working for a U.S. employer in a job directly related to the student's major area of study.
- The employer must be enrolled in U.S. Citizenship and Immigration Services' E-Verify Program.
- Many new rules went into effect in May 2016 with additional requirements, such as Form I-983, a training plan, wage, notify your DOS of any changes, etc.




J-1 Scholars

- Visiting Professor, Research Scholar or Participating in GME
- Many J-1s are subject to Two Year Home Residency Requirement (Skills List, GME, Government Funding)
 - ✓ Must Obtain Waiver prior to petitioning for H-1B/LPR
 - ✓ Waiver Process can be lengthy
 - ✓ No Objection Letters
 - ✓ GME Waivers



J-1 vs. H-1B

- J-1 ideal in many circumstances:
 - ✓ Outside funding
 - ✓ Short-term position
 - ✓ Spouse can obtain EAD to work
- J-1 Obstacles
 - ✓ 2 year home residency requirement problematic when we wish to retain employee long term
- Fees and Wage Requirements for H-1Bs



Summary of H-1B employment authorization

- The Employer is the petitioner; an employee cannot self-petition
- Position must be classified as a “Specialty Occupation,” which generally means that the job must require Bachelor’s or higher degree
- Temporary employment authorization for up to 6 years
- Employment authorization is employer specific
- Employer pays 100% of the prevailing wage determined by the Department of Labor and be documented by survey/grant data
- USCIS approves the petition
- College and universities are NOT subject to numerical limitations or an H-1B “cap”
- May engage in academic program if it is incidental to the primary purpose of engaging in H-1B employment
- Dependents (H-4 status) are NOT permitted to work unless they qualify for their own H-1B.



Timing can be critical in filing for an H-1B within the “cap gap”

- USCIS generally reaches statutory H-1B cap of 65,000 within the first week of the filing period, which starts on April 1 each year.
- The same is true for US Master’s quota 20,000. USCIS uses a lottery to determine which cases will be adjudicated.
- No more H-1Bs without an Act of Congress.



H-1B Fiscal Year Cap Season

- On April 1 each year, USCIS will begin to accept H-1B petitions subject to the cap. Petitions subject to the cap must request a start date on or after October 1, the first day of the fiscal year.
- You may file an H-1B petition no more than 6 months in advance of the requested start date.



Employment-based nonimmigrant visa categories

- H-1B – specialty worker
- H-1B1 – available to individuals from Chile and Singapore
- E-3 - similar to the H-1B for individuals from Australia
- TN – under NAFTA for individuals from Canada or Mexico
- O-1 – extraordinary ability
- J-1 – exchange visitor
- F-1 - student



The application for H-1B employment authorization - Fees

- Base Form I-129 filing fee = \$460
- Fraud Prevention & Detection fee = \$500
 - ✓ Not required for extensions
- American Competitiveness and Workforce Improvement Act of 1998 (ACWIA fee) = \$750 for employers with 1-25 FT equivalent employees, or \$1,500 for employers with 26 or more FT equivalent employees, unless exempt
- Additional Fee Required Under Public Law 114-113 = \$4,000 if petitioner has 50 employees or more in the U.S. and more than 50% of the employees in the U.S. are in H-1B or L-1 status or has been found to be a willful violator
- Premium Processing = \$1,225
- All H-1B fees (except premium processing) must be paid for by the employer



Portability

- H-1B employees hired by another employer can “port” to a new employer or begin employment with a concurrent employer as soon as the second employer files for H-1B employment authorization with the USCIS
- Employee should be able to demonstrate he/she has been maintaining status with initial employer by submitting current pay stub
- New or concurrent employment should be in a substantially similar position that requires the same education and skills



The 240-Day Rule

- The H-1B employee can continue working while extension/change of employer petition is pending up to 240 days so long as employer has a Receipt Notice or documentation that application was sent to the USCIS
- Employee must be in the US when extension/change of employer is filed
- Employee must currently be maintaining H-1B status
- Employer must apply to extend H-1B employment authorization with the USCIS before the authorized period of stay on the I-797 expires



Changes in Employment

- Any changes in employment should be reported to OGC to evaluate if an H-1B amendment is necessary
- This includes Changes in:
 - ✓ Department
 - ✓ Wage (increase or decrease)
 - ✓ Duties
 - ✓ Title
 - ✓ FTE



Termination

- If employer terminates H-1B employee prior to the end of H-1B status:
 - ✓ Immediately ends lawful immigration status for H-1B worker



How long can a foreign national maintain H-1B status?

- Under current law, a foreign national can be in H-1B status for a maximum of 6 years at a time, in 3 year increments. After 6 years a foreign national must remain outside the United States for one year before another H-1B petition can be approved.
- Can “recapture” time spent outside of the U.S.
- Can have dual intent to:
 - Work temporarily as a non-immigrant; and
 - Seek lawful permanent residence (i.e., green card)
 - Not true of some other statuses (such as TN)
- If timely applied for LPR, may get H extension beyond 6 years:
 - 3 year extensions where I-140 approved and I-485 is backlogged due to over subscription from country of birth
 - 1 year extensions where labor certification or I-140 filed by end of 5th year of H-1B, but adjustment of status has not occurred



Employment-Based Green Cards

- In 1990, Congress created a priority system for granting permanent resident status to aliens based on employment skills. Annually 140,000 immigration visas are available to principal aliens who qualify under five employment-based preference categories.



Employment-Based Green Cards

- EB-1 Priority Workers (40,000 visas per year)
- EB-2 – Advanced degree Professionals of Exceptional Ability (40,000 visas per year)
- EB-3 – Skilled Workers, Professionals and other Workers (40,000 visas per year)
- EB-4 – Special Immigrants – Religious Workers (10,000 visas per year)
- EB-5 Immigrant Investors (10,000 visas per year)

Visa Bulletin

- **March 2018 Visa Bulletin** (Final Action Dates)

Employment based	All Chargeability Areas Except Those Listed	CHINA-mainland born	EL SALVADOR GUATEMALA HONDURAS	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C	C
2nd	C	08DEC13	C	15DEC08	C	C
3rd	C	15Nov14	C	01JAN07	C	01MAY16



Employment-Based Green Cards

- University-sponsored petitions
 - ✓ Outstanding Researchers and Professors (EB-1)
 - ✓ Labor Certification (EB-2/EB-3)
- Must consult with the Office of General Counsel

EB-1A

(employment-based first preference)

Self-Petition

- Extraordinary Ability employees do not need a job offer

EB-1A

(employment-based first preference)

- Must demonstrate a major achievement such as internationally recognized award or evidence establishing at least 3 of the following:
 - ✓ Lesser national or international award for excellence in the field of alien's intended U.S. employment
 - ✓ Membership in association(s) in alien's field that require members to have demonstrated outstanding achievements as judged by acknowledged experts
 - ✓ Published material about the alien in major professional/trade publications or other major media
 - ✓ Selection of alien to judge others in the same or allied field
 - ✓ Authorship of scholarly articles in professional/trade publications or other major media
 - ✓ Display of alien's work in artistic exhibitions
 - ✓ Performance of leading or critical role for distinguished organizations or institutions
 - ✓ High salary or other remuneration in relation to others in alien's field
 - ✓ Commercial success in the performing arts (box office receipts, recordings, videos, etc.)

EB-1B

(employment-based first preference)

Employer Petitions

- (90% approval rating)–Must consult with Dept & OGC
- Threshold requirements are very difficult to prove
- Does not require additional advertising or recruitment
- More work for the employee

EB-1B

(employment-based first preference)

- Evidence of international recognition in area of academic specialty demonstrated by submitting evidence of 2 of the following:
 - ✓ Receipt of major prizes/awards for outstanding achievement in the field
 - ✓ Membership in an association requiring outstanding achievement in the field
 - ✓ Published material in professional publications written by others about the applicant's work in the field
 - ✓ Participation as a judge of the work of others in the field
 - ✓ Original scientific or scholarly research
 - ✓ Authorship of scholarly articles/books in specialty area
 - ✓ Other similar evidence

- 3 years experience in teaching or research

- An offer for a tenure-track teaching or comparable research position (of unlimited duration) at an institution of higher education or private institution of demonstrated research accomplishments in the field that employs at least 3 full-time researchers.



EB-2 Labor Certification

(employment-based second preference)

- Employer Petition
- Position must require an advanced degree in the field
- University teaching positions are eligible for “Special Handling” so long as the application is filed within 18 months of the selection date
- Teaching candidates must be the most qualified candidate for the job
- Other positions must be supported by additional advertising/recruitment that demonstrates that no minimally qualified US workers (i.e., citizens or LPR) applied for or were interested in the position
- Test of Labor Market and Department of Labor approval

EB-2

National Interest Waiver (NIW) petition

- Self-Petition
- Labor Certification and Job Offer requirement waived because approval is in the national interest of the United States
- Requires “advanced degree” or “exceptional ability” in the sciences, arts or business
- You seek employment in an area that has substantial inherent value to the U.S.
- The benefit that you will provide will be national in scope
- National benefit outweighs the national interest in the labor certification process
- High burden on applicant



EB-3 Labor Certification

(employment-based third preference)

- Employer Petition
- Bachelor's degree required for the position
- Positions must be supported by additional advertising/recruitment that demonstrates that no minimally qualified US workers (i.e., citizens or LPR) applied for or were interested in the position
- See <http://travel.state.gov> for most the recent Visa Bulletin



Questions?

