



Finding the Right Path

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WARNING WARNING WARNING

- The information contained in this presentation is intended to educate members of the public generally and is not intended to provide solutions to individual problems. Readers are cautioned not to attempt to solve individual problems on the basis of information contained herein and are strongly advised to seek competent legal counsel.

2020 and what comes next?

- Separate from politics, the impact of COVID-19 on travel is ever shifting.
- The November elections – not just the presidential election – will have a big impact on immigration law and policy.
- Be careful about following the advice of a friend, cousin, internet.

Basic but important concepts

- Visa vs Status
- Non-immigrant visa/ status versus immigrant visa/status
- Removability vis Inadmissibility

Unlawful presence, overstay, and status violation

- These are three very distinct ideas/concepts within the law
- Overstay – is very simply, one who has overstayed the time given when entering the US
 - Usually – that means staying past the expiration of the I-94
 - Technically – could also mean staying past the end of a program/purpose when there is no end date on the I-94 (d/s or no I-94 given)
- Status violation
 - When one does something that violates the terms of current status like working without authorization or failing to work on OPT
- Unlawful presence
 - Accrues when one is present after the period of authorized stay. Historically, it has not accrued for students who are admitted d/s. This is under litigation and is an unpredictable issue at this time.

Overstay and Status violations

- Both overstay and status violation can trigger a ground of removability
- Both overstay and status violation can make it difficult or impossible to
 - Change non-immigrant status within the US
 - Extend non-immigrant status within the US
 - Adjust status to permanent residence within the US
- Overstay and status violation don't trigger a specific ground of inadmissibility, BUT play a lot into 214(b), 221(g) and embassy discretion
- Unlawful presence can make you inadmissible to the United States

Where can this come up?

- At a visa interview/ Embassy
- At a port of entry/ inspection for admission
- In certain applications before USCIS – especially if there has been travel in/out of the US.
- In the last few years, USCIS has been looking very closely at change of status applications from F-1/OPT to H-1B and for compliance with OPT rules.

Use OPT to your advantage!

- It allows you to “get your foot in the door” with a US employer without any paperwork on their part: vitally important.
- It allows you to try more than one job/ employer.
- When preparing for your job interview
 - Google !
 - Talk to alumni
 - Be prepared to address the immigration issues in job interviews
 - Right now I have the ability to work for any employer in any position. If you want to keep me with your company beyond my OPT, I will require sponsorship.
 - OR – I only have authorization to work in the US for a short time, so I am looking for a position that will give me as much experience/hours/work as possible.

Optional Practical Training

- Plan ahead!
 - Think carefully about graduation dates AND your start date.
 - For most, a spring graduation date will be more advantageous than a winter or summer graduation date.
 - It usually takes USCIS 90 days (or more – up to 6 months!) to process an application.
 - You do not have authorization to work until you have been issued the EAD.
- If your intent is to remain in the US, be thinking about what comes next.

Employer issues and regular OPT

- Regular OPT is broad!
- Employer has no obligations in OPT
 - No advertising
 - Hiring you for OPT does not obligate them for H1B
- Employer may be reluctant to commit to short-term employment; may need to address future H-1B/sponsorship from the beginning
- Small employer vs. large employer
 - Each has their own benefit

What comes after F-1/ OPT or J-1?

- For most individuals, H-1B status
- Different concerns and timing issues if F-1 or J-1
- J-1 may have 212(e) considerations and less flexibility with timing of applications
 - Plan ahead!
- While in some cases it may be possible to proceed directly to H1B or even permanent residence without OPT, this is usually unadvisable, as the H1B could be denied, and permanent residence almost always takes more than one year.
- Employers who have filed H-1Bs can be found on the USCIS website. Employers who have sponsored for permanent residence can be found on the Department of Labor website!

H-1B - Requirements

- Both the job and the employee must qualify for H-1B
- The Job:
 - Must require at least a bachelor's degree for entry into the profession
 - Not employer's requirements, but industry practice determines
- The employee:
 - Must, of course, qualify for the job
 - Must have at least a bachelor's in closely-related field or equivalent education and experience (3 years experience = 1 year education)
 - If diploma has not been issued, submit transcript or letter from college stating that ALL requirements for the degree have been completed (ALL means absolutely no requirements remaining unsatisfied)

H-1B

- H-1B maxes out at 6 years
 - Each petition can be for up to 3 years
 - Can extend past the 6th year if on the path to residence and certain things have happened
 - Start the process for permanent residence before the end of your 5th year to ensure ability to keep extending H-1B status.
- “Dual intent” permissible, so possible to pursue LPR while H-1B
- “Portability” to new employer once petition is filed by new employer
 - H-1B may continue working 240(+) days after employer files timely extension
- “Automatic visa revalidation” for short trips to Canada and Mexico (certain restrictions apply)
- H-4 status for dependents (no employment allowed)
- Those subject to 212(e)—J-1 home residence requirement—ineligible
- EMPLOYER AND POSITION SPECIFIC – but you can have more than one H-1B at a time

H-1B

- Employer (not employee) “applies” or petitions
 - Employer-specific and job-specific, so new petition for new job or employer
 - Possible to have “concurrent” employment with more than one employer
- USCIS and DOL approval required
 - Recruitment, like for employment-based “green card,” not required
- Employer must pay “prevailing wage”
 - (see <http://www.flcdatacenter.com/>)



FLC Wage Results New Quick Search New Search Wizard

You selected the All Industries database for 7/2020 - 6/2021.

Your search returned the following: [Print Format](#)

Area Code: 17780
Area Title: College Station-Bryan, TX
OES/SOC Code: 13-2011
OES/SOC Title: Accountants and Auditors
GeoLevel: 1
Level 1 Wage: \$18.56 hour - \$38,605 year
Level 2 Wage: \$23.43 hour - \$48,734 year
Level 3 Wage: \$28.30 hour - \$58,864 year
Level 4 Wage: \$33.17 hour - \$68,994 year
Mean Wage (H-2B): \$28.30 hour - \$58,864 year

This wage applies to the following O*Net occupations:

13-2011.00 Accountants and Auditors

Examine, analyze, and interpret accounting records to prepare statements, give advice, or audit and evaluate statements prep others. Install or advise on systems of recording costs or other and budgetary data.

[O*Net™ JobZone: NA](#)
Education & Training Code: No Level Set

13-2011.01 Accountants

Analyze financial information and prepare financial reports to d maintain record of assets, liabilities, profit and loss, tax liability financial activities within an organization.

[O*Net™ JobZone: 4](#)
Education & Training Code: 5-Bachelor's degree

13-2011.02 Auditors

Examine and analyze accounting records to determine financial establishment and prepare financial reports concerning operati procedures.

[O*Net™ JobZone: 4](#)
Education & Training Code: 5-Bachelor's degree

Filing Fees and Legal Fees

- Current USCIS filing fees for H-1B petitions are:
 - \$460.00 basic filing fee (for Form I-129) (as of 9/30/2020 fee increase in litigation)
 - \$500.00 “anti-fraud fee” (not for extensions)
 - Training fee (ACWIA)
 - \$750.00 (employers of fewer than 25 full-time employees) or
 - \$1500.00 (employers of 25 or more full-time employees)
 - Higher ed. institutions, primary/secondary schools, non-profit and U.S. govt. research entities are exempt from training fee
- Additional \$1,440.00 for optional “premium processing”
- PL 111-230 creates 50/50 rule – certain employees will have to pay additional \$2,000 for H-1B and \$2,500 for L-1A
- Legal fees vary greatly by market and industry.
 - Know what is included in the price!

Who pays for legal and filing fees?

- If the employee earns more than the required wage, the employee may be able to pay some or all of the legal and filing fees (excluding the training fee).
- Employee cannot pay legal/filing fees if it reduces his/her wage below the required wage.
- Having employee pay fees that he/she should not can result in fines, assessments of back pay, and disbarment from the H1B petitioning process.

The CAP!

- USCIS makes H-1Bs available October 1, the start of its fiscal year
 - 65,000 generally available
 - Additional 20,000 for graduates of US Master's degree programs
 - Higher education institutions and affiliated non-profits exempt
 - U.S. Government and non-profit research organizations exempt
- Petitions may be filed 6 months in advance, on April 1
- Lottery Process

The new way to lottery

- Employers register in USCIS online system
 - Provide basic information about employer
 - Provide basic information about the foreign national to sponsor
- Register March 1 through March 20
- \$10 registration fee per foreign national
- Lottery will run after March 20
- Those accepted will have 90 days to submit the H-1B petition
- Acceptance in the lottery does not guarantee a “win” on the merits

Cap exemptions

- Do we have to worry about the cap in April 2021?
- Cap does not apply if employed at
 - An “institution of higher education”;
 - A nonprofit entity related to or affiliated with an institution of higher education;
 - A “nonprofit research organization”; or
 - A “governmental research organization.
- Concurrent employment can solve cap issues.

Cap Gap

- “Cap Gap” is the gap between the end of OPT and the start of H-1B that many students face because they start OPT in June and H-1Bs usually unavailable until October 1
- 2008 Regulations
 - If employer files an H-1B petition requesting change of status for you before your OPT expires, then your OPT work authorization and “D/S” (F-1 status) are extended until 10/1
- The approval notice will indicate grant of a change of status effective October 1
- If there’s a lottery, and your employer’s petition is not “selected,” when OPT ends you have a 60-day “grace period” to remain in the U.S. (can’t work during grace period)

H-1B Process (an overview)

- Analyze whether H-1B status is proper for the position and the employee
- Determine “prevailing wage” for job
- File Labor Condition Application with DOL
- File H-1B petition with USCIS
- If employee is in the U.S., USCIS can change status to H-1B (no need to leave U.S. usually)
- Obtain proper status (H-4) for dependents
- Extensions, if necessary
- Change of Employer (“transfer”), if necessary

Planning for H-1B Status

- Apply for OPT (and strategic) manner
- Talk to your employer early
 - “H-1B cap” problems make this essential
 - How you handle the discussion depends on the situation
- Issues to settle
 - Who will handle the petition process
 - Remember, it is the employer who files the petition
 - Some employers use a specific attorney, some have in-house experts, some will allow you to hire the attorney, others have no idea about any of this
 - Do not let your petition be your company’s first self-filed H-1B petition
 - Who will pay the legal fees and filing fees?
 - Do you need an attorney for lottery registration?
- If your employer’s petition is not selected, what will you do?

Recent Issues in H1B

- Buy American, Hire American
 - issues with level 1 wages/entry level jobs
 - issues with computer programmer positions
 - increased scrutiny and delays
 - Across the board great increase in requests for evidence, great increase in scrutinizing “specialty occupation”
- Focus on employer/employee relationship
- 3rd party worksites
- Rise in requests for evidence that foreign national has maintained student status/ OPT

Good links! And Good Luck!

- Wage information

<https://www.flcdatcenter.com/OESWizardStart.aspx>

- Job duties and descriptions

<https://www.onetonline.org/find/>

- H-1B employers <https://www.uscis.gov/h-1b-data-hub>

Other Non-Immigrant Options

- Country Specific Options: TN (Mexico and Canada), E-3 (Australia), H-1B1 (Chile and Singapore)
- Treaty Investor or Treaty Trader – E-1 and/or E-2
- Multinational executive/manager or specialized knowledge – L-1A/L-1B
- Religious Worker – R-1
- Extraordinary Ability or Artists – O-1
- H-3 trainee
- H-2B seasonal
- J-1 options? – beware 212(e)
- B-1 – VERY VERY LIMITED
- I for media/ journalists

O-1A and O-1B

- Alien must be “one of the small percentage who have arisen to the very top of the field of endeavor.”
- Position must require utilization of extraordinary ability
- Must have a petitioner
 - Employment limited to petitioning employer in O-1A
 - For O-1B:
 - Room for creativity about who can be a petitioner and underlying relationships
 - Ways to self-petition
 - set up the petition for a much broader scope of employment
- For O-1B artists – think creatively
 - standard is different/lesser
 - What is art? Who is an artist?
 - Avoiding film classifications

Art is everywhere

- The art of ??????
 - Hair stylist
 - Bodyguard
 - Ferrier
 - Venetian plasterer
 - Motorcycle maintenance
 - Quilting
 - Burlesque dancing
 - Cosmetics
 - Graphic design
 - Video games

TN Visa

- Available to citizens of Mexico and Canada
- Occupation must appear on NAFTA list
- Given in one-year or three-year increments
- Canadians need only present job offer/ credentials at border or airport for admission
- Mexicans must follow procedures at US Embassy
- Extensions may be done within US

E Visa: Treaty/Trader Visas

- This can be a self-petition
- You must have nationality of a treaty country
- E-1 Import/Export
 - Can be goods OR SERVICES
 - SERVICES can be knowledge
 - U.S. company must have nationality of a treaty country
- E-2 Investing in a business in the US
 - must be engaged in managerial duties or have essential skills
 - Must be 50% owner
 - Must have a substantial investment
- Sometimes, can have employees from home country on an E with the business.
- E visas granted for an initial period of up to 5 years and subsequent extensions are available (Petitions granted 2 years)
- Spouses eligible to apply for employment authorization

Thinking outside the box

- Educate yourself and your employer about back up plans
- Can your employer partner with a University in such a way to create concurrent employment?
- Are you eligible for TPS? (Yemen, Nepal, etc.)
- Are there options for your spouse that lead to work authorization for you? (i.e. can your spouse obtain an investor visa which allows for work authorization for spouse?)
- Can you work abroad for the employer until an H or PR can be secured?
- Back to school and CPT?
- Jump ahead to permanent residence?

Other Alternatives – Permanent Residence

- Employment
 - Through an employer
 - Self petition
- Close Family – Spouse, Parent, Child over 21, sibling (very long wait)
- Asylum
- Diversity Visa Lottery – if possible, have both you and spouse apply and increase your chances
- Money
- Removal Proceedings

Immigration through Employment

- First Preference: Extraordinary ability or achievement in sciences, arts, education, business, or athletics; Outstanding professor/ researcher; Certain multinational executives/ managers
- Second Preference: Professionals with advanced degree; Aliens of exceptional ability; National interest waiver of job offer and labor certification for professional with advanced degree or alien of exceptional ability

Immigration through Employment

- Third Preference:

- Skilled workers - Members of the professions holding minimum of Bachelor's degree or where job requires at least two years education, training or experience
- Other workers (where job requires less than two years education, training, or experience).
- Generally requires PERM except nurses and physical therapists

Immigration through Employment - the very simple version-

- Step 1
 - The employer demonstrate to the DOL that there are no qualified US workers (called PERM)
 - For certain jobs/positions/aliens this step can be skipped.
- Step 2
 - Petition filed with USCIS (the I-140)
 - In most cases, filed by the employer. Sometimes, the alien can self-petition.
- Step 3
 - The application for permanent residence
 - There has to be a “spot” available

Who Pays?

- ALL PERM costs must be borne by Employer
- Includes atty's fees and costs
- Includes advertising costs
- Employer cannot require employee to pay back

Representation Issues

- Alien can have separate attorney
- Attorney who assists employer is deemed the Employer's attorney
- Alien CAN pay fees and costs for Post PERM (Labor Certification)

How long does it all take?

- Process to permanent residence can be lengthy (years), not because the processing with the government is lengthy but because the demand for immigrant visas exceeds the supply.
- The higher in preference, the shorter the line.

for issuance only for applicants whose priority date is **earlier** than the final action date listed below.)

| Employment-based | All Chargeability Areas Except Those Listed | CHINA-mainland born | EL SALVADOR GUATEMALA HONDURAS | INDIA | MEXICO | PHILIPPINES | VIETNAM |
|-------------------------------------|--|----------------------------|---|--------------|---------------|--------------------|----------------|
| 1st | C | 01JUN18 | C | 01JUN18 | C | C | C |
| 2nd | C | 01MAR16 | C | 01SEP09 | C | C | C |
| 3rd | C | 01JUL17 | C | 15JAN10 | C | C | C |
| Other Workers | C | 01DEC08 | C | 15JAN10 | C | C | C |
| 4th | C | C | 01AUG17 | C | 01SEP18 | C | C |
| Certain Religious Workers | U | U | U | U | U | U | U |
| 5th Non-Regional Center (C5 and T5) | C | 15AUG15 | C | C | C | C | 01AUG17 |
| 5th Regional Center (I5 and R5) | U | U | U | U | U | U | U |

Skipping H and Jumping to PR while on OPT

- Timing is a big issue
- Employer must be willing to bear cost, etc
 - Difficult for recent hires
 - May be an option in a high demand field
- Unlikely that the process will get you to a work card during 1 year OPT, definitely a possibility if you are STEM and start at the beginning of your time in OPT (unless from India and China)
- Must understand preference and visa bulletin

What about self-petition?

- First-preference : (Eb-1-1 or EB-1A) have to show alien of extraordinary ability = international acclaim
- Second-preference: (NIW or Dhanasar) have to show advanced degree and national interest
 - Publications, citations to work, reliance on work.

Talking to your employer about immigration

- Understand the process and deadlines
- Employer may be reluctant to pay legal fees/ filing fees
- Understand the difference between H-1B requirements and Permanent Residence requirements
- Be prepared to be persuasive and how to negotiate

What if it doesn't work

- Go back to school
- Go back home and gain experience, education, skills
- Work abroad for a company with US ties with a long term goal of being transferred back
- Look at possibilities in Australia and Canada (and others)

Potential changes?

- Congress –
 - More number to India and China
 - Small changes to existing law
 - Perhaps DACA legislation
- Judiciary
 - Potential to limit some of the executive policies/ changes
- Executive
 - Changing when an I-485 can be filed in employment cases
 - Limiting work cards
 - Changes to OPT
 - Changes to H1B



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