

# AN EMPLOYER'S GUIDE TO THE IMMIGRATION PROCESS



Presented by:

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Wouldn't it be nice to recruit and retain talented, dedicated recent graduates who have a vested interest in their continued employment by your company? This is the reality of the employment-based immigration system. Many companies have utilized this fact for years to secure a stable and highly motivated work force. The information below is an outline of the major issues which should be considered in recruiting foreign students. As you can see, the commitment to your company by qualified foreign students is measured in years, almost always at least four years, with virtually no legal liability on the part of the company.

## 1. The F-1 Student and Optional Practical Training (OPT)

In most cases, the recent graduate who is an F-1 foreign student will have one year of optional practical training (OPT) available for use with any employment which is related to the degree. This employment is "open market" which means that the F-1 student is free to work for any employer during this one-year period without any further proceedings with the Immigration Service. However, it is normally limited to one year and in some cases less if the student has used any portion of the OPT previously. A 17-month extension may be available for graduates in Science, Technology, Engineering and Math.

**Advantages:** OPT is granted by the Immigration Service without any filing or involvement of the employer. The employment is authorized with a

small card called an EAD, which is normally valid for one year.

**Disadvantages:** The foreign student is allowed to use OPT with any employer without any prior approval. Therefore, this student is free to change employers at will.

## 2. What to do After OPT: The H-1 Classification

Most students are ultimately interested in obtaining permanent residence (the "green card") and will need a sponsoring employer to obtain it. However, as is discussed here, the process to obtain the green card will take many years and, in most cases, more than four years. Therefore, the H-1 classification serves as a "bridge" between the OPT and the green card. The H-1 classification is available basically for any position which requires at least a bachelor's degree in a professional or technical field and the employee has obtained that specific degree. The availability of qualified U.S. workers is irrelevant to this category. This classification is limited to a total of six years and is employment-specific. The employee must file a new H-1 petition if a substantial change is made in the employment even with the same company. Obviously, this means the employee must repeat the H-1 process if he or she changes jobs.

**Advantages:** The H-1 category is limited to a specific position with the company. Once in this category, the six-year clock begins ticking and

the employee must obtain permanent residence within that period of time (along with certain extensions which are provided as long as the employee is in the green card process). This forces the recent graduate to commit to a company for at least five years in order to complete the green card process. There is no obligation on behalf of the employer to continue the H-1 employment. Subject to other employment law requirements, the H-1 employee can be dismissed at any time as with any other employee.

**Disadvantages:** Unless the employer has in-house staff familiar with this process, outside counsel will be necessary to process the H-1. Therefore, either the employee or the employer (or both) will be responsible for attorney's fees, expenses such as filing fees and the employer is required to pay a non-reimbursable fee to CIS. The maximum time which can be requested is three years for each application with a maximum of six years for each individual regardless of the number of jobs and H-1 petitions. The employer is required to pay the "prevailing wage" for that particular position in that industry at that location. This is determined during the H-1 processing and is established before the H-1 petition and application are actually filed with the Immigration Service.

### 3. Obtaining the Green Card

As mentioned above, the employee, now an H-1 employee, is primarily interested in obtaining permanent residence. In order to obtain the

green card, the employee must have a company which is willing to sponsor him or her throughout the process, which usually takes more than four years. This process consists of three steps. The first is a limited test of the U.S. labor market in a specific geographical area referred to as a labor certification. This process is successful over 95% of the time if it is carefully processed according to the legal requirements established by the U.S. Department of Labor. Currently, labor certification applications can take one year or more to be approved. The labor certification should only be filed for positions which have specific experience requirements based on your company's products and/or services. This means the H-1 employee must gain experience with the company before the green card process can ever be initiated. This typically adds at least two years to the process. The second step is referred to as a petition and it is filed with the Immigration Service. This step in the process essentially establishes the qualifications of the H-1 employee and the employer's ability to pay the salary. This step normally takes six to twelve months and in some cases may take longer depending on backlogs at the Immigration Service. The third and final step is referred to as adjustment of status and it is this step which will provide the employee with permanent residence and the green card. Currently, adjustment of status proceedings take at least two years to complete. However, please note that "green cards" are issued pursuant to a quota system which currently has significant backlogs. Therefore, there probably will be a significant gap in time, as much as three to four years, between the second and third steps.

The employee must remain with the company throughout the process and generally must remain in the same position.

**Advantages:** By far the most important advantage of this process is the fact that the employee must be retained for a particular position with one company and must remain with the company in most cases for more than four years. On the other hand, the employer has no legal responsibility or obligation to continue the processing and may discontinue the case and/or terminate the employment relationship at any time.

**Disadvantages:** The permanent residence process is very complicated and an experienced immigration practitioner will be required to pursue this type of case. Therefore, there will be attorney's fees as well as other expenses such as advertising costs and filing fees. The employer is required to pay a portion of these fees. The process requires the employer to provide at least basic information about the company and the position to a qualified attorney. The employer will be required to create an account with the Department of Labor's on-line system so that the attorney can file of all the necessary documents. The employer's participation also involves reviewing documents which have been prepared, signing documents and in some cases telephone interviews with job applicants. All of these steps can be minimized from the employer's perspective by the use of experienced immigration counsel.

## **Conclusion**

Based on the foregoing it is clear that recruiting and retaining foreign nationals carries very little liability and creates a tremendous opportunity for a long-term employment relationship with a highly motivated employee. Many of the problems which arise with some foreign nationals can be traced to a lack of experience or knowledge on behalf of the employer or even the attorney representing the company and its employees. It is imperative that the process be handled by an experienced immigration attorney and the risks and rewards of each case carefully outlined in the beginning.

# APPLYING FOR A JOB

## (Ideas, Tricks and Suggestions)

### NUMBER ONE

#### RESEARCH!

- Find out about the company. Find out about the job.
- Target the company and the job you want.
- Don't send 500 resumes to random companies.



### NUMBER TWO

- Find the right person!
- Try to find the manager for the job you want in the company.
- Follow the company's instructions for applications but don't stop there!
- Send ten resumes to one company you have RESEARCHED, not one resume to 100 companies you know nothing about.

### NUMBER THREE

#### SEND A COVER LETTER!

- Always send a cover letter with your resume. This is where you show off your research.
- Explain in the cover letter why the company should hire you – tie your skills, interests, talent into the company's products and services.
- Sell YOU to the company!

### NUMBER FOUR

#### FOLLOW UP!

- Sending a cover letter and resume to several people in a company is usually not enough.
- Follow up the cover letter/resume with another type of contact: email, phone call, etc. or try several other people in the company with a cover letter/resume.

### NUMBER FIVE

Always use a personal note as a follow-up contact. A personal, well-written card/note is the best way to get attention and show your interest.



## EMPLOYMENT LAW GUIDELINES FOR UNPAID VOLUNTEER OR TRAINEE WORK

It is often asked when an employer can lawfully accept the work of a volunteer or a trainee without having an obligation to pay at least the applicable minimum wage. This memorandum provides a short overview of the answer to this question.

**THE GENERAL RULE** is that all persons who work to the benefit of an employer must be paid at least the minimum wage as set by the Fair Labor Standards Act (FLSA)<sup>1</sup> unless a specific exception or exemption applies. Two Common exceptions allowing for unpaid work involve volunteers and trainees, if the criterion for each exception is fully satisfied in all respects.

**VOLUNTEERS** can donate services without pay for nonprofit entities and, in most cases, to *public sector employers* (e.g., governmental agencies), but not for private, for-profit employers. Such service is typically expected to be part time and must be performed for community service, religious or humanitarian objectives without any expectation of pay.

**TRAINEES or INTERNS** can be unpaid when they perform work which is for their own benefit. Workers who receive work-based training are not considered employees for purposes of the FLSA. The specific facts and circumstances of the worker's activities must be analyzed to determine if the worker is either a bona fide "trainee" who is not subject to the FLSA and thus need not be paid, or instead is actually an "employee" who may be subject to the FLSA and entitled to at least the minimum wage.

**SIX-FACTOR TEST:** The US Department of Labor's Wage and Hour Division (WHD) has a six-factor test based on US Supreme Court decisions to evaluate whether a worker is a trainee or an employee for purposes of the FLSA:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to what would be given in a vocational school or academic educational instruction;
2. The training is for the benefit of the trainees;
3. The trainees do not displace regular employees, but work under close observation;
4. The trainees are not necessarily entitled to a job at the end of a training period;
5. The employer providing the training derives no immediate advantage from the activities of the trainee, and on occasion the employer's operations may actually be impeded; and
6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.

<sup>1</sup> The FLSA regulates higher wages in all states for most employees and employers. Some states also have laws that apply higher or additional standards than the FLSA, but this varies. This short paper addresses only federal law on this issue.

## UNPAID VOLUNTEER OR TRAINEE WORK

**FLSA VIOLATIONS:** If all of the factors listed above are met, then the worker is a “trainee.” An employment relationship does not exist under the FLSA, and the FLSA’s minimum wage and overtime provisions do not apply to the worker. Because the FLSA’s definition of “employee” is broad, the excluded category of “trainee” is necessarily quite narrow. The burden is on the employer to prove that the worker satisfies all of the factors and to be sure that any intended volunteer or training relationship is administered in a way that complies with the guidelines. Moreover, the fact that an employer labels a worker as a “trainee” (and the worker’s activities are “training”) does not make the worker a trainee for purposes of the FLSA unless the six factors are actually met. If a volunteer or training relationship turns out to fail under the relevant WHD test, the volunteer or trainee will not be in violation of the law, but the employer can be liable for back pay, liquidated “double” damages and attorney fees and fines.

**PROPER DOCUMENTATION:** We recommend that before a work-based training or volunteer relationship begins, both the employer and the worker agree in writing to the key aspects of the arrangement so that there are no misunderstandings. Such a document would make clear that the activity is unpaid, that the worker is not an employee or contractor, that the schedule is part-time, and that the worker is not entitled to the job at the conclusion of the training or volunteer period, among other things. The mere fact that the employer might later actually hire the worker as an employee does not mean the prior arrangement was employment that should have been compensated. However, if an employer frequently hires trainees or volunteers, then the unpaid service may not be considered by the WHD to be a true “nonwork” arrangement.

There are other training programs and exceptions and exemptions that may apply to certain situations, but it is not possible to detail them all in the confines of this short overview. This is not intended as legal advice but as general information only. This is current as of 2010, but please keep in mind that employment law frequently changes. Because the determination mentioned above are necessarily made on a case-by-case basis after considering all of the relevant facts and applying applicable federal, state and local law, you should seek counsel of a qualified legal professional familiar with laws in your area before making any conclusions about the FLSA or other labor and employment law compliance.

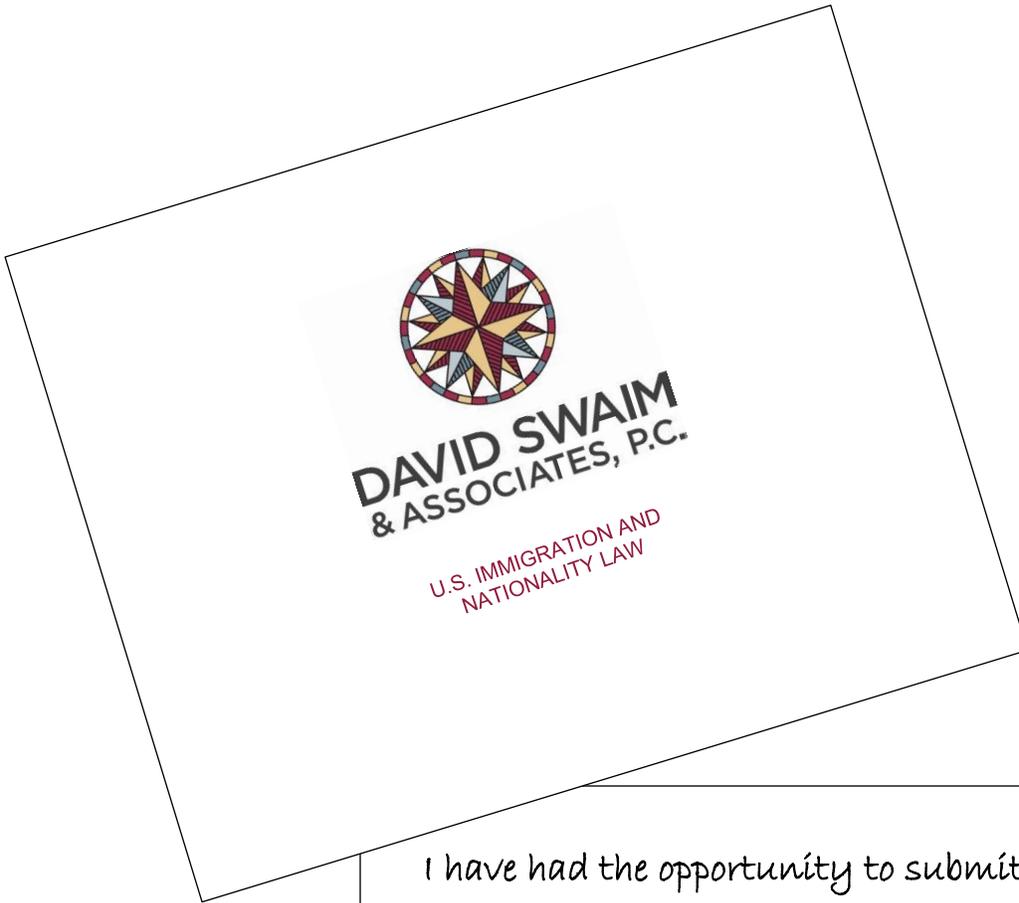
**ABOUT THE AUTHOR: SCOTT AGTHE** is board certified in labor and employment law by the Texas Board of Legal Specialization and has practiced in state and federal court and before agencies and arbitrators for more than 28 years. He has the highest Martindale-Hubble peer review rating (AV Preeminent) and is a fellow of the Texas Bar Foundation (the highest honor from the State Bar of Texas). He helps clients with labor and employment law needs throughout Texas, providing practical legal advice and representation to all kinds of businesses, from publicly-traded and Fortune 500 companies to small and medium-sized businesses and non-profit entities. His firm’s clients include entrepreneurs, professionals, executives and individuals. Services include the negotiation of employment agreements and severance packages, representation in discrimination and wage disputes and advice with regard to regulatory compliance, labor union matters and the development of workplace policies, procedures and benefit plans. For more information, please visit the FisherBroyles website at [www.fisherbroyles.com](http://www.fisherbroyles.com).

# VISA AVAILABILITY BULLETIN

November 2020

Family Preferences	All Chargeability Areas Except those listed	China Mainland Born	El Salvador Guatemala Honduras	India	Mexico	Philippines	
F1	07-22-15	07-22-15		07-22-15	02-22-00	10-08-12	
F2A	C	C		C	C	C	
F2B	05-01-16	05-01-16		05-01-16	12-01-99	04-01-12	
F3	06-01-09	06-01-09		06-01-09	08-15-00	12-22-02	
F4	09-15-07	09-15-07		11-22-05	04-22-99	09-01-02	
<b>Employment Preferences</b>							
1 <sup>st</sup>	C	09-01-20	C	09-01-20	C	C	
2 <sup>nd</sup>	C	10-01-16	C	05-15-11	C	C	
3 <sup>rd</sup>	C	06-01-18	C	01-01-15	C	C	
Other Workers	C	05-01-09	C	01-01-15	C	C	
4 <sup>th</sup>	C	C	02-01-18	C	C	C	
Certain Religious Workers	C	C	02-01-18	C	C	C	
5 <sup>th</sup> Non-Regional Center	C	12-15-15	C	C	C	C	
5 <sup>th</sup> Regional Center	C	12-15-15	C	C	C	C	

# A Sample Note/Card



I have had the opportunity to submit my resume to your company on several occasions. Because my research shows that I can contribute to your company's success, I would very much appreciate an interview to discuss this.

Thank you again,

David Swaim

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