Immigration 101: Options After The F-1

Leonard J. D’Arrigo, Esq.
Brendan J. Venter, Esq.
Immigration Practice Group
November 6, 2019
U.S. Immigration Basic Concepts

- Non-Immigrant Visa
- Lawful Permanent Resident/Immigrant Visa (Green Card)
- Citizenship (Naturalization)
Overview of U.S. Immigration Process

Nonimmigrant Visa  
1-2 yrs.  

Immigrant Visa  
LPR / “Green Card”  
3-5 yrs.  

Citizenship

**B-1/2** Visitor for Business/Pleasure  
**E-1/2** Treaty Trader/Investor  
**E-3** Specialty worker – Austr.  
**F-1** Student - OPT  
**H-1B** Specialty worker  
**H-2** Temporary Worker  
**H-3** Trainee  
**J-1** Exchange Visitor  
**L-1** Intracompany Transferee  
**O-1** Alien of Extraordinary Ability  
**R-1/2** Religious Worker  
**TN** Trade NAFTA

**FAMILY-BASED CATEGORIES**  
**IR** Immediate relatives  
**FB-1** Unmarried sons/daughters of USC  
**FB-2** Spouses/children of LPR  
**FB-3** Married sons/daughters of USC  
**FB-4** Brothers/sisters of USC

**EMPLOYMENT-BASED CATEGORIES**  
**EB-1** Outstanding researchers  
**EB-2** Advanced degrees/NIW  
**EB-3** Professionals  
**EB-4** Special immigrants/religious  
**EB-5** Investors

3 yrs. if by marriage to U.S. citizen  
5 yrs. for everyone else
# The H-1B Visa: Professionals

## Requirements

1. Job must require BA/BS degree or equiv. as minimum entry-level requirement
2. Applicant must have degree equivalent to U.S. BA/BS, or equiv. experience
3. Employer must pay at least prevailing wage for the position in geographic area

**NO TEST OF U.S. LABOR MARKET REQUIRED; NO ADVERTISING; NO RECRUITMENT**

## Application Steps

1. Determine prevailing wage for position
2. Post Labor Condition Application (LCA) at employer’s work place
3. File LCA with U.S. Dept. of Labor; wait 7 days for certification
4. File visa petition with USCIS
5. Change of status with petition if in US consular processing overseas if out of status or overseas

## Timetable

- 3-6 months - **Variable**!
- Premium processing: decision in 15 days
- H-1B portability: May work as soon as filed if already holding H-1B visa

## Duration

- Granted for 3 years
- Renewable for 3 years
- Extend beyond 6 years if GC or PERM pending one year before H maxes out.

## Costs

- $460* USCIS filing fee
- $500 Antifraud fee
- $750 (25 or fewer EEs) or $1,500 ACWIA fee (> 25 EEs)
- - Credentials evaluation ($75-500)
- - Premium processing ($1,440)
H-1B Basics

- “Specialty Occupation” – job must require BA/BS or equivalent in a specific field for entry-level requirement
  - And employee must have a degree related to the specialty occupation
- Employer-employee relationship
  - W-2 employee
  - Employer-specific – no moonlighting, but can have concurrent H-1Bs
  - Off-site employment permitted if petitioner retains control over work, salary, etc.
- Granted for up to 3 years at a time; maximum of 6 years in H-1B status
- Employer must pay all costs/fees associated with H-1B petition process – by law, employees/beneficiaries are prohibited from paying these costs, even if they want to
H-1B Visas – The Numerical Cap

For Non-Exempt/Private Employers

H-1B Visas Currently Capped at 65,000 per year
- Cap exceptions for colleges, universities and some non-profit/government research institutions
- Fiscal Year (FY) begins in October;
- Applicants for H-1Bs can apply 6 months in advance, or by April 1

Advanced Degree Allocation
- 20,000 visas reserved for graduates of Masters or higher degree programs from U.S. colleges
The H-1B Cap

- H-1B Visas Capped at 85,000 per year
  
  FY1990  Cap set at 65,000; hit for first time in 1997  
  FY1998-01  Raised to 115,000, then to 195,000  
  FY 2004  Fell back to original level of 65,000 visas  
  FY 2005  Added 20,000 visas for graduates of U.S. graduate schools  

- Insufficient H-1B Visas In Every Year Since 2004
  
  ▪ Some years: hit the cap AFTER the start of the FY  
  ▪ Other years: hit the cap between filing & start of the FY  
  ▪ 2014: 124,000 cases filed for 85,000 visas (68% chance)  
  ▪ 2015: 174,000 cased filed for 85,000 visas (48% chance)  
  ▪ 2016: 233,000+ cases for 85,000 (36% chance)  
  ▪ 2017: 199,000 cases for 85,000 visas (43% chance)  
  ▪ 2018: 190,098 cases for 85,000 visas (95,885 AD – 21% chance; 94,213 Bachelor’s 38%)
H-1Bs Cap Subject vs. Cap Exempt

- **Numerical cap**
  - H-1B limited to 65,000 visas per year plus 20,000 extra for those who possess Master’s degrees from U.S. institutions
  - NO numerical cap for:
    - Employees of institutions of higher education as defined by Higher Education Act of 1965
    - Organizations related to/affiliated with institutions of higher education

- **Fee Exemption**
  - H-1B government fees normally
    - $1,500 Workforce Training Fee ($750- for entities under 25 employees)
    - $500 Anti-Fraud fee
    - $460 I-129 Form fee
  - Fee exemption for institutions of higher education
    - No $1500 Workforce Training Fee
    - $500 Anti-Fraud fee still required
    - $460 I-129 Form fee still required
Changes to H-1B Selection Process for FY2020 – Merit Based

In prior years, USCIS first selected the 20,000 “Master’s Cap” petitions, and then conducted the general lottery for the remaining 65,000 visas.

This year, USCIS started to first run the lottery for 65k TOTAL visas (Master’s and Bachelor’s), then run 20k lottery for the “Master’s Cap.”

Result: 16% increase in Advanced Degree selection (5,340)
H-1B Issues for University Personnel

- **Prevailing Wage**
  - If the position is a unionized position, the prevailing wage is often governed by collective bargaining agreement
  - If not, determine prevailing wage from USDOL OES system
  - In either case, must get certified LCA

- **Transferability limitation**
  - General rule: can transfer from one H-1B employer to another upon submission of new H-1B petition
  - University personnel have limited ability to transfer to cap-subject employer if H-1B numerical cap has been reached
    - Can transfer to another cap-exempt organization
    - Cannot transfer to a non-exempt organization (cap-subject)
The Future of H-1B and STEM OPT

▪ H-1B: Most common work visa and often the only work visa for professionals
  ▪ Complaints about H-1B: fraud in program, undercuts American wages, etc.
  ▪ Visa is essential to innovation: researchers, professors, doctors, software architects, etc.
  ▪ Vehicle for foreign students: F-1 Student Visa 🡪 F-1 OPT 🡪 H-1B
  ▪ Proposed changes: double wage, limit number of H-1Bs, minimum wage of 100K or 130K
  ▪ Rescission of prior guidance affording deference to prior approvals

▪ Possible changes to OPT/STEM extension: Executive order on “Buy American/Hire American” calls for reforming practical training programs
  ▪ F-1 students entitled to 12 months of post-completion Optional Practical Training (OPT) plus STEM extension: additional 24 months
  ▪ Executive Orders indicate that STEM extension could be eliminated, along with H-4 work authorization – proposed regulations are coming
  ▪ Reports that rescission currently in the works at DHS – it’s a matter of when (affects 45,000 F-1 students)
Alternatives to the H-1B

- TN (Trade NAFTA) for Canadians and Mexicans in specified professions (including faculty members)
- Special Free Trade Hs for Chileans and Singaporeans
- E-3s for Australian professionals
- O-1s (Aliens of Extraordinary Ability)
- F-1 students (CPT and OPT)
- H-2Bs for temporary need (usually unskilled workers)
- J-1s for exchange visitors
- H-3s, Ps, Qs, etc.
J-1 Cultural Exchange Visas

- INTENDED AS A ‘CULTURAL EXCHANGE’ OPPORTUNITY
  - Administration through U.S. Dept. of State
  - Employer must be authorized by DOS to sponsor J-1 visas themselves (universities, hotel chains, medical centers) OR
  - Employer must work through approved sponsoring agencies for defined categories: J-1 Trainees, Summer Work Study, etc.
  - Approved sponsors listed on DOS website (http://j1visa.state.gov)
- MANY CATEGORIES OF J-1 VISAS:
  - Professor / Research Scholar (5 years)
  - Specialist (12 months)
  - Short-Term Scholar (6 months)
  - Trainee (18 months) / Intern (12 months)
  - Au pair (2 years) / Camp counselors (4 months)
  - Teachers – primary & secondary (3 years)
## J-1 Visas: Exchange Visitors

### REQUIREMENTS

1. Must be sponsored by organization with approved J-1 program
2. Must fall within sponsor’s defined program: e.g., research scholars, trainees, professors, specialists, etc.
3. Some participants are subject to mandatory two-year home residency requirement. Waiver of requirement can be difficult or impossible.

### APPLICATION STEPS

1. Approved J-1 sponsor organization issues DS-2019 to applicant
2. Issuance of J visa: - If in U.S., change status via USCIS - If overseas, apply for J-1 entry visa stamp at U.S. consulate overseas
3. Applicant may start work when has I-94 with J-1 stamp in hand

### TIMETABLE

<p>| | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>30 days for DS-2019</td>
<td>2 weeks - 3 mos. for consular processing OR 4-6 months for change of status</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### DURATION

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Depends on category: 1 month to six years</td>
<td>Research scholars: 3 years</td>
</tr>
<tr>
<td></td>
<td>Trainees: 18 months</td>
</tr>
<tr>
<td></td>
<td>Specialists: 1 year</td>
</tr>
</tbody>
</table>

### COSTS

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>DS-2019: depends on umbrella organization, if used</td>
<td>Visa application fees at consulate or $455 for change of status</td>
</tr>
</tbody>
</table>
J-1 Risk: Home Residency Requirement

**TWO-YEAR HOME RESIDENCY REQUIREMENT**
- Some participants in full-time programs must to home country before change to H or L visa, or ‘green card’.
- Two-year home residency requirement applies if:
  - Either U.S. or home government paid for the sojourn in the US OR
  - Country has filed Skills List with DOS designating study areas which are needed in country – no matter who paid for the study.
  - Participant has engaged in Graduate Medical Education in US
- “Home country” = country of citizenship or last residence at time of J grant

**WAIVER OF HOME RESIDENCY REQUIREMENT BY DOS POSSIBLE**
- 4 statutory grounds for waiver application; decision is ALWAYS discretionary
- Some situations where waivers are almost NEVER granted: Fulbright, AID
- Medical graduates: special alternatives, service in medically-underserved areas
TN Visas : Trade NAFTA

(United States-Mexico-Canada Agreement [USMCA]: new trade deal replacing NAFTA; not expected to have any impact on NAFTA’s immigration/visa provisions)

<table>
<thead>
<tr>
<th>REQUIREMENTS</th>
<th>APPLICATION STEPS</th>
<th>TIMETABLE</th>
<th>DURATION</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Canadian or Mexican citizen:</strong> Job on list of TN professions, e.g.: Teacher (high school &amp; univ.) Mgmt. consultants Science/engineering Systems analysts Medical professionals</td>
<td><strong>Canadians:</strong> Apply at U.S. border or airport port of entry: processed on the spot No visa petition or USCIS preprocessing required <strong>Mexicans:</strong> Apply at U.S. consulate in Mexico; fast processing</td>
<td><strong>Canadians:</strong> Almost immediate Avoid processing at high-traffic or holiday weekends <strong>Mexicans:</strong> 2-3 weeks: Must make appt. at consulate</td>
<td>May be granted up to 3 years Renewable without set limitation</td>
</tr>
<tr>
<td>Must have req’d education or training: usually BA/BS and/or license. Exceptions include: Mgmt. consultants Scientific technicians Systems analysts (2 yr. degree min.)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**COSTS**

Border fees: $56+$6 per I-94
Free Trade Visas: H-1B1 and E-3

H-1B1 VISAS FOR CHILE AND SINGAPORE (6,800 cap never met)
- 1,400 for nationals of Chile; 5,400 for nationals of Singapore
- H-1B1 can be granted for up to 18 months; renewable.
- No visa petition required if processed directly at consulate overseas

E-3 VISAS: AUSTRALIAN PROFESSIONALS (10,500 cap never met)
- Substantially equivalent to H-1B
- Specialty workers for jobs requiring BA degree
- PW determination/LCA required, but no public access file
- E-3 can be granted for up to two years; renewable
- Processed directly at a US Consulate in Australia: no petition required
- Can also be processed by COS in the US – regulations notwithstanding
O-1A Visas

Individuals with Extraordinary Ability or Achievement

- Science, Education, Business or Athletics
- National or International Acclaim
  - Letters of support
  - Publication
  - High salary
  - Media, citations, press
  - Judge work
  - Awards, critical acclaim
  - Selective professional memberships

- Available to J-1 holders who are subject to home residence requirement
Overview: Green Card Process

Most Employment Based (EB) start here → All Family-Based (FB), some EB start here

PERM LABOR CERTIFICATION Form ETA 9089
6+ months

VISA PETITION Form I-130 / I-140
5-14 months

ADJUSTMENT OF STATUS Form I-485
5 - 12+ months
Filed w/ visa petition if visa number current

CONSULAR PROCESSING
If visa number not current wait may be months & in some cases up to a decade.

GC ISSUED Form I-551
Quotas and Priority Dates

LIMITS ON NUMBER OF GREEN CARDS PER YEAR
- Each type of green card (preference category) have numerical limits: numbers vary by year and by usage
- Approximately 140,000 EB-based GCs in all categories
- Approximately 226,000 FB-based GCs in all categories
- Each country is also limited to a ceiling number of visas, regardless of demand
- When either preference group or country quotas are met, waiting lists build

PRIORITY DATE DETERMINES PLACE ON WAITING LIST
- When waiting lists build, cases are processed in priority date order
- Priority date established at the first official filing date of the paperwork (USCIS, DOL)

GLOBAL VS. COUNTRY WAITING LISTS
- Country which hits country ceiling taken out of the worldwide visa pool and given its own separate pool of visas (approximately 7% of total available)
- Ensures even distribution of visas across all GC categories.
- Leads to longer waits in many categories.
- The Visa Bulletin (www.travel.state.gov): priority dates for each month.
Visa Bulletin: Employment

- **VISA BULLETIN**  November 2019  
  [www.travel.state.gov](http://www.travel.state.gov)
- Annual employment-based immigration: 140,000
- Employment-based immigrant visa cases with priority dates *before* the stated dates are eligible for final action:

<table>
<thead>
<tr>
<th>Employment Categories</th>
<th>World-wide</th>
<th>China</th>
<th>El Salvador Guatemala. Honduras</th>
<th>India</th>
<th>Mexico</th>
<th>Philippines</th>
</tr>
</thead>
<tbody>
<tr>
<td>EB-1</td>
<td>01JUN18</td>
<td>01FEB17</td>
<td>01JUN18</td>
<td>01JAN15</td>
<td>01JUN18</td>
<td>01JUN18</td>
</tr>
<tr>
<td>EB-2</td>
<td>C</td>
<td>15MAR15</td>
<td>C</td>
<td>13MAY09</td>
<td>C</td>
<td>C</td>
</tr>
<tr>
<td>EB-3 -BA</td>
<td>C</td>
<td>01NOV15</td>
<td>C</td>
<td>01JAN09</td>
<td>C</td>
<td>01FEB18</td>
</tr>
<tr>
<td>EB-3 - other</td>
<td>C</td>
<td>01FEB08</td>
<td>C</td>
<td>01JAN09</td>
<td>C</td>
<td>01FEB18</td>
</tr>
<tr>
<td>EB-4</td>
<td>C</td>
<td>C</td>
<td>01JUL16</td>
<td>C</td>
<td>22JUL17</td>
<td>C</td>
</tr>
<tr>
<td>Relig. Workers</td>
<td>C</td>
<td>C</td>
<td>01JUL16</td>
<td>C</td>
<td>22JUL17</td>
<td>C</td>
</tr>
<tr>
<td>EB-5</td>
<td>C</td>
<td>01NOV14</td>
<td>C</td>
<td>08DEC17</td>
<td>C</td>
<td>C</td>
</tr>
</tbody>
</table>
Why are waiting lists a problem?

Core Issue: Cannot file adjustment of status until priority date is current
- Labor certification and I-140 can be filed without regard to priority date
- Cannot file adjustment of status or consular process an immigrant visa unless a priority date is current.

Deprives applicants of AOS-related benefits
- 2003: USCIS began to allow concurrent filing of I-140 and AOS
- Allowed dependents to obtain EADs earlier in process
- Eliminated need for H-1B visa renewals; visa stamp processing, etc.
- Minor children can “age out”, i.e., turn 21 & fall off parents’ applications
Perm Labor Certification

MOST COMMON EMPLOYMENT-BASED GREEN CARD PROCESS:

- Application by employer to USDOL to certify individual and position after statutorily mandated recruitment campaign

- Nearly all positions qualify, but substantial waiting periods for non-professional positions/short or no waiting for positions with higher requirements (Master’s or Bachelor’s degree plus five years experience is EB-2)

- Process requires significant employer involvement, including payment of legal fees and all associated costs
Perm Labor Certification (cont.)

PROCEDURES/ADVERTISING:

- Define job and skills on DOL forms in compliance with DOL requirements
- Obtain DOL prevailing wage determination
- Advertise two Sundays in paper of general circulation
- Professional positions: 3 additional recruitment steps (job fairs, web ads, etc.)
- Interview and evaluate applicants; prepare recruitment report
- Submit ETA 9089 to DOL with recruitment results
- DOL reviews and approves or audits
- Possible audits in 50% of cases

Requirements simplified for university faculty under “Special Handling”
- Only 1 national journal advertisement required
- “Most qualified” standard as opposed to minimally qualified
Other Employment Based Green Card Options

- Extraordinary Ability Alien (EB-1A)
- Outstanding Researcher (EB-1B)
- Multinational Manager (EB-1C)
- National Interest Wavier (EB-2)

*All of the above are exempt from the labor certification requirement*
Outstanding Researcher or Professor

Intended to accommodate prospective immigrants who are recognized nationally or internationally for their outstanding achievement in their field. An employer must submit this petition on behalf of a prospective permanent resident.

USCIS regulations provide that applicant must demonstrate international recognition for outstanding achievements in a particular academic field, as well as at least 3 years’ experience in teaching or research in that academic area.

Applicant must be entering the United States in order to pursue tenure or tenure track teaching or comparable research position at a university or other institution of higher education.
Or Evidence Requirements

Documentary Evidence must include at least 2 of the following:

- Evidence of receipt of major prizes or awards for outstanding achievement
- Evidence of membership in associations that require their members to demonstrate outstanding achievement
- Evidence of published material in professional publications written by others about the alien's work in the academic field
- Evidence of participation, either on a panel or individually, as a judge of the work of others in the same or allied academic field
- Evidence of original scientific or scholarly research contributions in the field
- Evidence of authorship of scholarly books or articles (in scholarly journals with international circulation) in the field
Useful Resources

- Immigration and Customs Enforcement (www.ice.gov)

- NAFSA: Association of International Educators (www.nafsa.org)

- U.S. Citizenship and Immigration Services (www.uscis.gov)

- Immigration Attorney
Contact Information

Leonard J. D’Arrigo, Esq.
518-701-2770
LDarrigo@harrisbeach.com

Brendan Venter
518-701-2773
BVenter@harrisbeach.com

The information in this presentation is intended as general background information on immigration law and employment eligibility issues. It is not to be considered as legal advice with regard to any specific immigration issue. Immigration law changes often and information becomes rapidly outdated. Please consult your immigration counsel before taking action on immigration matters.