



US Immigration Challenges for International Students Seeking Employment at For-Profit/Industry Employers



November 30, 2023

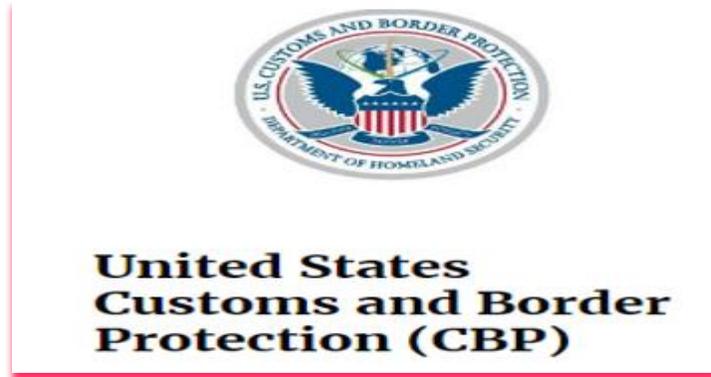
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US Immigration Law is Administered at the Federal Level





Potential Options for Employment of Foreign Nationals at Industry Employers

H-1B Specialty Occupation/H-1B1 Chile & Singapore

- // Position requires at least a Bachelor's degree
- // Candidate/employee has at least a Bachelor's degree or US equivalent

F-1 Students Curricular Practical Training "CPT"

- // Normally granted by university on a semester-to-semester basis
- // Used for internships & co-ops

Requires Employer Sponsorship

F-1 Students Optional Practical Training "OPT"

- // 12 months of authorization is granted by DSO
- // Requested 90 days in advance of graduation

F-1 Students STEM OPT Extension

- // Addition 24 months of OPT if degree was in an approved STEM field
- // STEM extension must be filed prior to OPT expiration



Potential Options for Employment of Foreign Nationals at Industry Employers

O-1 Extraordinary Ability

- // O-1A: Individuals with an extraordinary ability in the sciences, education or business
- // Certain evidence/criteria must be met in order to be approved

J-1 Exchange Visitor

- // Most common scenario is academic training after degree completion
- // Can have a two-year home residence requirement attached to it

Requires
Employer
Sponsorship

E-3 Specialty Occupation – Australian citizens

- // Position requires at least a Bachelor's degree
- // Candidate/employee has at least a Bachelor's degree or US equivalent

TN (Treaty National/Trade National)

- // Reserved only for Canadian or Mexican citizens
- // Relies on a specific list of occupations to qualify

Typical Scenarios That Companies Encounter for Work Authorized Individuals



H-4 EAD

- // Dependent of H-1B Spouse
- // Eligible for 180-day extension if certain criteria is met

L-2, E-2 & E-3 EAD

- // Dependent of L-1, E-2 or E-3 Spouse
- // Does not require separate work authorization; can either use EAD or a properly annotated I-94

Does Not
Require
Employer
Sponsorship

DACA/TPS

- // DACA “Dreamers” are eligible for work authorization if certain criteria are met
- // TPS “Temporary Protected Status” is only available to citizens of certain countries

Applicant for Adjustment of Status

- // Work authorization is based on a pending green card application; sponsorship may be required
- // Eligible for 180-day extension if certain criteria is met



Biggest Immigration Roadblock for Employers

Individuals born in India or China and who have either (1) only Master's or Bachelor's degrees and (2) no STEM degree

Master's degree or less means a harder case to prove O-1 eligibility; having an EB-2 NIW approved for someone in F-1 status born in India or China does not allow them to remain in the US and/or continue working due to visa retrogression

Without being able to access a STEM extension under OPT, someone has only one year of OPT to try and switch to another status that allows continued work authorization; this is very difficult to do

The Struggle
is Real



F-1 Students

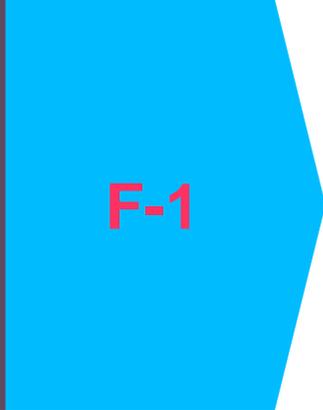
- // F-1 students are limited to on-campus employment of 20 hours per week or less
- // Under certain conditions, F-1 students can obtain employment authorization due to economic necessity

// Question: Does an F-1 student in possession of OPT/STEM OPT (or will have at the time of hire) need to indicate they need employer sponsorship at the time they apply for a role?

// Answer: YES!!!

// Why?

- // Many times employer sponsorship is needed in the future but technically not at the time when someone joins using OPT
- // Individuals tasked with being in charge of immigration status at your company need to know about you ahead of time so your status can be managed appropriately
- // Depending on when you are hired, the company will want to make sure they submit your name in the H-1B lottery
- // An individual who needs a STEM extension has to (1) have an employer willing to sign and provide an I-983 Training Plan and (2) participate in E-verify



F-1



F-1 Students & Practical Training

Day 1 CPT “Curricular Practical Training”

- // If you have 12 months or more of full-time CPT, you are ineligible for OPT, but part-time CPT is fine and will not stop you from doing OPT
- // Students won't have the same ability to take online classes starting in the fall 2023 semester since Covid-19 flexibilities will no longer be in place.
- // The government has cracked down on CPT fraud in recent years. It is critical that students meet all eligibility requirements to be able to pursue this option to avoid creating potential status issues down the line

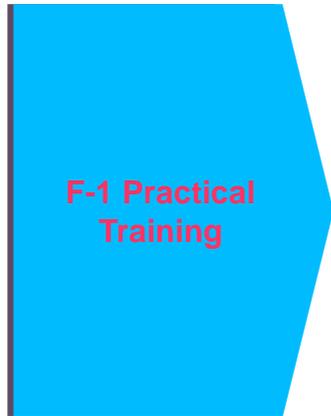
OPT “Optional Practical Training”

- // OPT must relate to your major or course of study
- // You can apply for 12 months of OPT at each education level, (i.e., you may have 12 months of OPT at the bachelor's level and another 12 months of OPT at the master's level)

STEM OPT Extension

- // STEM OPT granted once per degree level (i.e., bachelor's, master's or doctorate). A student may participate twice in the STEM OPT extension over the course of their academic career
- // To participate twice in the STEM OPT extension, a student must earn a second qualifying degree at a higher education level and must be participating in an initial period of OPT at the time they apply to USCIS for their second STEM OPT extension
- // F-1 students cannot qualify for STEM OPT extensions unless they will be bona fide employees of the employer signing the Form I-983 because F-1 students may not provide employer attestations on their own behalf. However, STEM OPT applicants can participate in a start-up or small business so long as all regulatory requirements are met. The employer that signs the Training Plan must be the same entity that employs the student and provides the practical training experience.

<https://studyinthestates.dhs.gov/stem-opt-hub/additional-resources/stem-opt-extension-overview>





F-1 Students & Day 1 CPT

Considering Day 1 CPT if not picked in the H-1B Lottery? Be prepared to be able to document EVERYTHING.

- // Official copies of the student's current transcript;
- // Copies of degrees and/or certificates issued to the student showing course completion;
- // Receipts for tuition payments, books, parking passes, and school supplies;
- // Student's school ID;
- // Course syllabi or outlines for the student's current program;
- // Documentary evidence to show that the student was physically attending the courses in which s/he was enrolled (e.g. transportation receipts, confirmed transportation reservations, attendance records, etc.);
- // Utility bills/rental contracts or other receipts documenting the student's current residence;
- // Confirmation as to the number of online/distance education class credits the student was/is enrolled in for the duration of his/her studies;
- // A letter from the school, that establishes that the student has been engaged in a full course of study and is working towards program completion; and
- // A letter from the school or the employer explaining how CPT is directly related to the academic program and how it will form an integral part of that program.

F-1 Day 1 CPT



H-1B Lottery & Other Considerations

For-profit/industry employers are subject to a numerical limitation of 85,000 H-1B visas each federal fiscal year. Individuals who hold H-1B status at a cap-exempt employer CANNOT transfer H-1B status to a cap-subject employer

Registration period runs usually between March 1 and March 17. If an individual's name is not submitted during this timeframe, they will not be entered in the lottery for that year and will have to wait until the following March to have a registration submitted

Once the H-1B is approved, it is not effective until October 1 of that calendar year

Position being offered to individual must require a Bachelor's degree as the minimum requirement

If you hold a different status but previously held J-1 status and are still subject to the two-year home residence requirement, you must have the J-1 waived in order to be able to obtain an H-1B visa at a US Consulate

**H-1B
Lottery**



H-1B Lottery Woes



This chart shows registration and selection numbers for fiscal years 2021-2024 (as of July 31, 2023).

Cap Fiscal Year	Total Registrations	Eligible Registrations*	Eligible Registrations for Beneficiaries with No Other Eligible Registrations	Eligible Registrations for Beneficiaries with Multiple Eligible Registrations	Selections**
2021	274,237	269,424	241,299	28,125	124,415
2022	308,613	301,447	211,304	90,143	131,924
2023	483,927	474,421	309,241	165,180	127,600
2024	780,884	758,994	350,103	408,891	188,400

*The count of eligible registrations excludes duplicate registrations, those deleted by the prospective employer prior to the close of the registration period, and those with failed payments.



H-1B Lottery Woes

Registration Data for FY21–FY23

Table 1 – Registration Data			
	FY21 Cap Year	FY22 Cap Year	FY23 Cap Year
Total Registrations	274,237	308,613	483,927
Total number of unique beneficiaries*	253,331	235,720	357,222
Number of unique beneficiaries with 2 or more registrations	13,443	25,654	49,739
Total number of registrations submitted for beneficiaries with multiple registrations	34,349	98,547	176,444
% of total registrations for beneficiaries with multiple registrations	12.5%	31.9%	36.5%
Number of beneficiaries with 5 or more registrations	700	6,369	9,155
Largest number of registrations submitted for 1 beneficiary	18	41	83
Source: USCIS Office of Performance and Quality			
* Unique beneficiaries were identified using country of citizenship and passport number; if passport number was not available, name, date of birth, and country of birth were used to identify beneficiaries.			

A Proposed Rule by the Homeland Security Department on 10/23/2023 titled “Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers” would change how H-1B beneficiary registrations will be submitted.

An individual who has 10 registrations will have the same chance of being selected as someone with only one.

Because the integrity of the new selection process would rely on USCIS's ability to accurately identify each individual beneficiary, DHS proposes to require the submission of valid passport information, including the passport number, country of issuance, and expiration date, in addition to the currently required information.



Possible Alternatives to H-1B

If an individual is pursuing a PhD/Master's degree and they know that they will need some sort of employer sponsorship to achieve permanent residency (EB-1B or O-1A) or plan to self-petition (EB-1A or EB-2 NIW) you should plan on keeping records of these sorts of activities:

Requests from other researchers to collaborate or learn more about that research

Requests for review work by journals or other professional publications

Any media reports about the research

Invitations to present posters at conferences or other symposiums

Maintain a strong professional network – both in academia and industry – of peers or other colleagues

Is the individual born in India or China? Visa retrogression for those two countries hampers permanent residency options. Is the individual eligible for an EB-1B Outstanding Researcher/Professor? If they are born in a country that is not India or China is an NIW feasible?

O-1A Alien of Extraordinary Ability in the Sciences

EB-1B Outstanding Researcher

EB-2 National Interest Waiver Petition ("NIW")



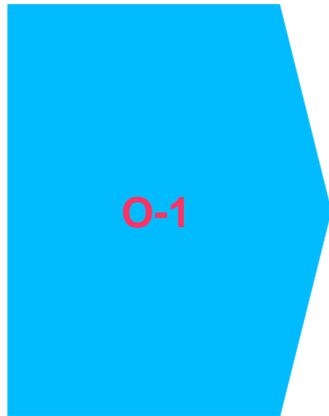
Possible Alternatives to H-1B

O-1A Visa

Employer must petition; in order to transfer O-1 status, new employer has to file a new O-1 petition. Granted initially for 3 years and then can be extended in one-year increments. There is no numerical limit for the O-1 category.

Requires a totality determination to be made by USCIS.

Demonstration that the beneficiary has sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of the following:



1. Receipt of a major internationally recognized award (think Nobel Prize); or
2. At least three of the following forms of documentation:
 - a. Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field for which classification is sought;
 - b. Documentation of the alien's membership in associations in the field, which associations require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
 - c. Published material about the alien in professional or major trade publications or other major media relating to the alien's work in the field;
 - d. Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization;
 - e. Evidence of the alien's original scientific, scholarly, artistic, athletic or business-related contributions of major significance in the field;
 - f. Evidence of the alien's authorship of scholarly articles in the field in professional or major trade publications or other major media;
 - g. Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;
 - h. Evidence that the alien has commanded or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence; or
 - i. Documentation of other comparable evidence if the foregoing types of evidence do not readily apply to the alien's occupation.



Possible Alternatives to H-1B

EB-1B Outstanding Researcher

Employer must petition for EB-1B classification. Requires a final merits determination to be made by USCIS.

Evidence that the researcher is recognized internationally as outstanding in the specific academic area. Such evidence shall consist of at least two of the following:

Documentation of the beneficiary's receipt of major prizes or awards for outstanding achievement in the academic field;

Documentation of the beneficiary's membership in associations in the academic field which require outstanding achievements of their members;

Published material in professional publications written by others about the beneficiary's work in the academic field. Such material shall include the title, date and author of the material and any necessary translation;

Evidence of the beneficiary's participation on a panel, or individually, as the judge of the work of others in the same, or an allied, academic field;

Evidence of the beneficiary's original scientific or scholarly research contributions to the academic field; or

Evidence of the beneficiary's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.

Evidence that the beneficiary has at least three years of experience in teaching and/or research in the academic field.

An offer for a permanent research position in the beneficiary's academic field with a department, division or institute of a private employer employing at least three persons full-time in research positions and with documented accomplishments in the academic field.

Evidence that the petitioner has the ability to pay the wage offered.

EB-1B



Possible Alternatives to H-1B

National Interest Waiver “NIW”

Specifically, in the exceptional ability context, the INA requires that all petitions for a person of exceptional ability show that the person’s presence in the United States would substantially benefit the national economy, cultural or educational interests, or welfare of the United States in the future. A petition filed with a request for a national interest waiver on behalf of a person does not need to be supported by a job offer; therefore, the person may file as a self-petitioner.

First Prong: The Proposed Endeavor has both Substantial Merit and National Importance

Ultimately, if the evidence of record demonstrates that the person’s proposed endeavor has the significant potential to broadly enhance societal welfare or cultural or artistic enrichment, or to contribute to the advancement of a valuable technology or field of study, it may rise to the level of national importance.

Second Prong: The Person is Well Positioned to Advance the Proposed Endeavor

Evidence that may demonstrate that the person is well-positioned to advance a proposed endeavor includes material very similar to what is needed for an EB-1B or O-1A. This would include but is not limited to Awards, Publications, Judging, Published Information About Alien, etc.

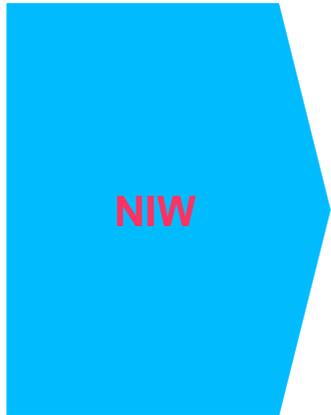
Third Prong: On balance, it would be beneficial to the United States to waive the job offer and thus the permanent labor certification requirements

Once officers have determined that the petitioner met the first two prongs, they proceed with the analysis of the third prong. This last prong requires the petitioner to demonstrate that the factors in favor of granting the waiver outweigh those that support the requirement of a job offer and thus a labor certification.

Specific Evidentiary Considerations for Persons with Advanced Degrees in Science, Technology, Engineering, or Mathematics (STEM) Fields:

The person possesses an advanced STEM degree, particularly a Ph.D.; the person will be engaged in work furthering a critical and emerging technology or other STEM area important to U.S. competitiveness; and the person is well positioned to advance the proposed STEM endeavor of national importance.

The Role of Interested Government Agencies or Quasi-Governmental Entities. While not required, letters from interested government agencies or quasi-governmental entities in the United States (for example federally-funded research and development centers) can be helpful evidence and, depending on the contents of the letters, can be relevant to all three prongs.





Possible Alternatives to H-1B

L-1A/L-1B - L-1A and L-1B visas are available for temporary intracompany transferees who work in managerial positions or have specialized knowledge. There is no quota or specified time period during the year when L-1 petitions can be filed

The L-1A visa is for intracompany transferees who work in managerial or executive positions in a company that is located outside the United States for at least one year in the preceding 3 years when the petition is filed. This is valid for a total of 7 years

The L-1B visa is for intracompany transferees who work in positions requiring specialized knowledge and who have been employed for at least one year in the preceding 3 years when the petition is filed. This is valid for a total of 5 years

Spousal Considerations

Is an individual married and if yes, what is the status of the spouse?

If spouse is a foreign national, are they further along in the permanent residency process? Is spouse born in India or China? If no, then an individual can be cross charged to the country of birth for the spouse

Is spouse a US citizen or permanent resident?

Other
Options

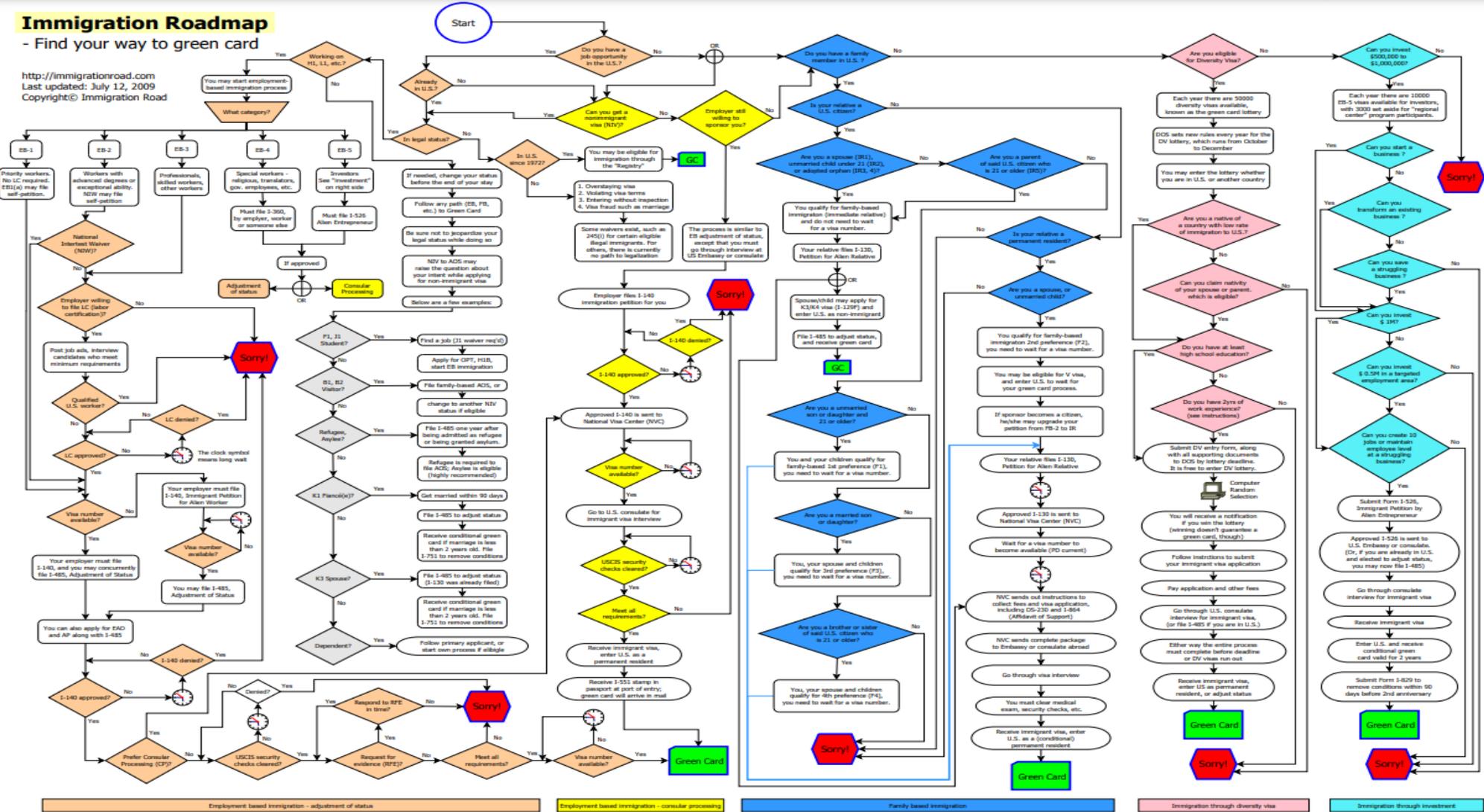


Why is US Immigration So Complicated?

Immigration Roadmap

- Find your way to green card

<http://immigrationroad.com>
Last updated: July 12, 2009
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Employed-Based Permanent Residency

Employment-based preference immigrants		Numerical Limit
1 st Preference	Foreign nationals of "extraordinary ability," outstanding professors and researchers, multinational executives and managers	40,040
2 nd Preference	Foreign nationals who hold advanced degrees or demonstrate exceptional ability in the sciences, arts, or business	40,040
3 rd Preference	-- "Skilled workers" (foreign nationals capable of performing skilled labor, requiring at least two years of experience) -- "Professional workers" (foreign nationals who hold at least a baccalaureate degree) -- "Other workers" (foreign nationals capable of performing unskilled labor)	40,040 (but no more than 10,000 visas are available for "other workers")**
4 th Preference	"Special immigrants," including religious workers, international organization employees, and children who cannot be reunited with a parent because of abuse, abandonment, or neglect.	9,940
5 th Preference	Immigrant investors	9,940

Almost all employment-based immigrants, except some very high-skilled immigrants and investors, must have an employer who will sponsor them for a visa

Spouses and children of immigrants who get an employment-based green card count against the 140,000 cap. This means that roughly less than half of employment green cards given out annually go to people selected for employment reasons



What is a Priority Date and What Does It Mean?

- // A priority date represents a foreign national's place in line for the green card he or she is waiting to obtain. The priority date for employment-based cases usually corresponds with when the PERM labor certification was filed with the Department of Labor (DOL).
- // For employment-based cases that do not require a PERM Labor Certification, the priority date is the I-140 filing date.
- // Applicants can downgrade from EB-2 to EB-3 if they have an approved I-140 for EB-2 with their current employer while they also have a priority date that is current for EB-3. You can reuse the PERM certification that you have received for EB-2 for your brand new I-140 application for EB-3. You will not be required to submit a new PERM application.
- // Priority date retention allows a beneficiary with an approved I-140 to keep a priority date from a previously approved I-140 and use it for future green card filings. An individual may use the priority date from an approved EB-1, EB-2 or EB-3 I-140 petition for a subsequently approved EB-1, EB-2 or EB-3 petition as long as the earlier approved I-140 was not revoked for fraud or misrepresentation.
- // The only exception to this is an individual cannot have an approved EB-2 priority date through an NIW and downgrade to an EB-3 using another NIW filing.



Employment-Based Preference 1 Categories

EB-1C Manager/Executive

- Most commonly used for L-1A Intracompany Transferees
- Requires managerial executive position at Bayer/Climate entity overseas and in the US (for strongest case) in 1 out of last 3 years
- Must be able to document organizational structure for overseas and US position, detailed descriptions of direct and dotted line reports
- Visas are consistently available in this category (slight retrogression for ROW and significant retrogression for India & China)

EB-1A Extraordinary Ability

- Risen to the top of the relevant field, international acclaim
- Must prove 3 out of 10 evidence categories
- Burden of proof is very high and subjective decision is made by USCIS - this is the toughest of the EB-1 categories to meet
- Visas are consistently available in this category (slight retrogression for ROW and significant retrogression for India & China)

EB-1B Outstanding Researcher

- Risen to the top of the field, international acclaim
- Must prove 2 out of 6 evidence categories (publications, review work, original contributions, honors/awards, membership and published work about employee)
- Requires 3 years of research experience, a permanent research offer and employer files the petition
- Burden of proof is very high and subjective decision is made by USCIS
- Visas are consistently available in this category (slight retrogression for ROW and significant retrogression for India & China)



Employment-Based Preference 2 & 3 Categories

EB-2 National Interest Waiver “NIW”

- Waives labor certification requirement because the national interest and granting of permanent residency to a foreign national employee outweighs the hiring of a US worker
- Must prove work being done is in the national interest; very difficult burden of proof to overcome
- Requires subjective decision by the USCIS and no certainty that result will be positive
- Visas are consistently retrogressed for individuals born in India or China; availability for all other countries usually is retrogressed by about 12-18 months for EB-2 NIW and EB-2/3 PERM

EB-2 PERM/Labor Certification

- Labor certification is required in this category; Bayer/Climate runs recruitment to test the US labor market to determine if any minimally qualified US workers are available to take the position based on the offered salary and minimum requirements
- Foreign national employees that are in roles that require either, at a minimum, a Master's degree or a Bachelor's degree plus five years progressive post-Bachelor's experience are eligible to file in the EB-2 category
- If a test of the labor market is done and a qualified US worker is found, the PERM is placed on hold for 6 months and not filed with the USDOL
- PERM application can be approved, audited or selected for supervised recruitment by the USDOL

EB-3 PERM/Labor Certification

- Labor certification is required in this category; Bayer/Climate runs recruitment to test the US labor market to determine if any minimally qualified US workers are available to take the position based on the offered salary and minimum requirements
- Foreign national employees that are in roles that require either, at a minimum, a Bachelor's degree or equivalent and less than 5 years progressive post-Bachelor's experience are eligible to file in the EB-3 category
- If a test of the labor market is done and a qualified US worker is found, the PERM is placed on hold for 6 months and not filed with the USDOL
- PERM application can be approved, audited or selected for supervised recruitment by the USDOL



Questions?

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