The H-1B Visa
The H-1B Golden Ticket

- The key to working in the U.S. after F-1
- Very few other nonimmigrant visas granting authorization to work
- Obtaining legal permanent residency is usually a long process
Other Nonimmigrant Visas

• Treaty NAFTA (TN)
• E-1 and E-2 treaty trader and treaty investor (India and China *not* included)
• L-1 intracompany transferee
• O-1 extraordinary ability alien
• E-3 professional for Australians
Cont. Other Nonimmigrant Visas

- F-1 student
- J-1 exchange visitor
- B-1 or B-2 visitor
- P entertainer or athlete
- Miscellaneous others
Summary of the H-1B Visa

- Nonimmigrant (temporary) visa
- Six years (with certain exceptions)
- Professional or “specialty” occupation requiring a bachelor’s degree
- Employer specific
- Location specific
Concurrent Employment

• An alien can work concurrently for two or more employers pursuant to H-1B petitions.
General Requirements
Sponsorship by an Employer

- Filing by employer
- No self-employment
- Alien can establish a company
  - Not for single-member LLCs
Definition of Specialty Occupation

The position must require:

1) The theoretical and practical application of a body of specialized knowledge, and
2) A bachelor’s degree or higher in a related field
Examples of Specialty Occupations

• Examples:
  • Engineer
  • Computer scientist
  • Market research analyst
  • Professor
  • Accountant
  • Teacher
Examples of Non-Specialty Occupations

- Waitress with a Ph.D. in linguistics
- Life insurance agent
- General/office manager
- Customer service representative in nontechnical field
- Registered nurse
Cont. Specialty Occupation

- The alien must have at least a bachelor’s degree in the related field or:
  1) Foreign academic equivalent;
  2) Equivalent work experience (3/1 rule); or
  3) Combination of both.
Prevailing Wage for the H-1B

• Higher of the prevailing wage or the actual wage
• Minimum requirements and the area of intended employment
• Department of Labor’s website
• Private survey or employer’s survey
No Benching Allowed

• Pay required for nonproductive periods
• Exceptions where voluntary leave:
  1) Maternity leave;
  2) Extended vacation;
  3) Etc.
Processing Procedures
The H-1B Cap on Visa Numbers

- 65,000 for bachelor’s degree
- 20,000 for master’s degree or higher from a U.S. institution.
Fiscal Year for the H-1B Cap

• October 1\textsuperscript{st} to September 30\textsuperscript{th}
• Earliest filing date for those subject to cap is April 1\textsuperscript{st} of each year
• Earliest start date is October 1\textsuperscript{st} of that same year
**Cont. H-1B Cap**

- When cap is reached is dependent on economic conditions
- H-1B cap in both the bachelor’s and master’s categories for fiscal year 2013 (10/1/12 to 9/30/13) was reached in June 2012.
Cont. H-1B Cap

- H-1B cap in both the bachelor’s and master’s categories for fiscal year 2009 (10/1/08 to 9/30/09) was reached on April 7, 2008.
- Petitions received from April 1st to April 7th were subject to a computerized random lottery.
Cont. H-1B Cap

• After April 1, 2013, petitions subject to the cap with a start date on or after October 1, 2013, can be filed up until the cap is reached.

• Can file after October 1st if numbers still available

• Cannot file more than 6 months prior requested start date
Cont. H-1B Cap

- USCIS returns petitions that do not receive a number.
- Can refile without prejudice
Changing Status from F-1 to H-1B

• File petition and remain in the US and automatically acquire H-1B status
• For most nonimmigrant visa classifications, the alien must be in valid nonimmigrant status to change to another nonimmigrant status.
H-1B Cap Gap and F-1 and OPT Extension

- Unlike other nonimmigrant classifications, F-1 students can have a gap in their status between the date the H-1B petition is filed and October 1st.
- Allows F-1 students to change to H-1B status even if their F-1 status or OPT will expire before October 1st.
Rules on OPT Extension and the Cap-Gap

• Automatic extension of stay and work authorization until October 1st for all eligible F-1 students with a gap
• Extends OPT from 12 to 29 months for F-1 students with a degree in science, technology, engineering or math (STEM) who are employed by a company enrolled in E-Verify.
Requirements for Cap-Gap Extension of Status and Work Authorization

• H-1B petition timely filed (during the course of F-1 study or post-completion OPT)
• Requested change of status
• October 1st start date
• No violations of F-1 status
• Terminates upon the rejection, denial or revocation of the H-1B petition
Cap-Gap F-1 Status Extension

• If F-1 in 60-day grace period when H-1B filed but OPT has expired
• Automatic extension of F-1 status until October 1st
• Employment authorization *not* extended
• Example: OPT expires February 15, 2012 and H-1B petition filed April 1, 2012 – status but not EAD extended
Cap-Gap F-1 OPT EAD Extension

• OPT EAD is valid at the time the H-1B petition is filed
• EAD, along with F-1 status, is automatically extended through October 1st
• Example: EAD is valid until July 14, 2013 and H-1B petition is filed April 5, 2013: EAD extended through October 1st
Rejection, Denial or Revocation of the H-1B petition

• If USCIS denies, rejects or revokes an H-1B petition for an F-1 student covered by the cap-gap extension, the student will have the 60-day grace period (from notification) before the student must depart the US.
No Grace Period for Status Violators and Fraud

- If the H-1B petition is denied because of a status violation, or if the petition is revoked based on fraud, then the 60-day grace period will no longer apply and the F-1 student immediately is out of status.
No Travel Abroad with Immediate Reentry for Expired OPT EADs

- If OPT EAD has expired and F-1 is here pursuant to the automatic extension, then cannot depart US and reenter until October 1\textsuperscript{st}. 
Requirements for OPT STEM 17-Month Extension

1. Currently in 12-month period of approved post-completion OPT

2. Degree that is the basis of OPT must be at least a bachelor’s degree in science, technology, engineering or mathematics (STEM), which include:
Fields of Study for OPT STEM Extension

- Computer Science Applications
- Actuarial Science
- Engineering or Engineering Technologies
- Life Sciences
- Math
- Military Technologies
- Physical sciences
Cont. Fields of Study for OPT STEM Extension

• Veterinary sciences
• Food and plant sciences
• Field of study with CIP (Classification of Instructional Program) codes ending in “99”
Bachelor’s & Graduate Degrees under STEM

• An F-1 student who received a bachelor’s STEM degree, but whose graduate degree is in a non-STEM field and whose current OPT is based on that graduate degree, is not eligible for the STEM extension.

• USCIS proposing new rules to allow for prior degree to be in STEM
Major and Minor Fields of Study

• *Cannot* qualify for the STEM OPT extension based on student’s minor.
• If dual major, and one of fields is STEM-designated, and the job is directly related to the student’s STEM degree, STEM eligible.
Cont. OPT STEM Extension

• Working for US employer in job directly related to major area of study
• Employer must be enrolled in USCIS’s E-Verify program
Cont. OPT STEM Extension

- Report to the DSO regarding changes in the program or address
- Properly maintain status in the US
- Cannot obtain more than one OPT STEM extension
When to Apply for OPT STEM Extension

• Must apply before the current post-completion OPT expires
• If file for STEM extension before the OPT expires, then student’s OPT is extended automatically.
• May apply during the cap-gap extension period
Requirements for Post Extension Approval

• The student must report to the DSO by email, within 10 days, any change in certain personal and employment contact information.

• The student must report to the DSO every 6 months by email confirming the information (even if no changes)
Requirements Post Extension Approval

• The requirement to report continues even past the 17-month OPT extension if the student’s OPT is further extended by the cap-gap extension.
E-Verify

- Free, internet-based system operated by the Social Security Administration and USCIS
- Determine employment eligibility of newly-hired employees
- Electronically reviews Form I-9 (employment eligibility verification form) information with records in the SSA and DHS databases
Cont. E-Verify

• It is a flawed system with false positives for US citizens.
• An increasing number of employers are enrolled.
Types of Employment During OPT STEM Extension

- Work at least 20 hours per week
- E-Verify-enrolled employer
- Position directly related to the student’s STEM degree
- May work at multiple jobs, but all the employers must enroll in E-Verify
Hidden “Stick” in New OPT Rules: Limits on Periods of Unemployment

• The F-1 student may not aggregate more than 90 days of unemployment during the first 12 months in OPT.
• The F-1 student may not aggregate more than 120 days of unemployment during the entire 29-month, extended OPT period.
Limits on Periods of Unemployment

- During cap-gap extension, continue to be subject to the 90-day limitation on unemployment.
- For each new period of post-completion OPT, the student will have a 90-day period of unemployment.
Cont. Limits on Periods of Unemployment

• Each day that the F-1 student is unemployed during OPT counts as a day of unemployment.

• Exception: up to 10 days between the end of one job and the beginning of the next job
Cont. Limits on Periods of Unemployment

- An unemployed F-1 on OPT who travels abroad will have all days outside the US counted toward the unemployment limits.
- Travel abroad while employed does not count as unemployment.
Petitions Exempt from the H-1B Cap

- Certain employers and petitions are not subject to the visa cap.
Cont. Cap Exemption

• If not subject to the H-1 cap:
  • H-1B petition can be filed at any time
  • Employment may commence at any time
• The cap exempt petitions include:
Cont. Cap Exemption

- Any alien counted against the cap within the past six years, unless:
  - out of the country for a year;
  - seasonal & intermittent worker; or
  - in the US less than six months per year.
Cont. Cap Exemption

- J-1 who has obtained a waiver through the State 30 program
- Institutions of higher education
- Nonprofit entities affiliated with institutions of higher education
- Nonprofit or governmental research organizations
Cont. Cap Exemption

• Changing H-1B employers, unless was working at a cap-exempt institution previously

• Extensions of H-1B status
Filing Fees and Attorney Fees

• The employer must pay an ACWIA fee of $1,500 (more than 25 workers) or $750 (fewer workers)

• The employer may *not* request reimbursement from the employee.
ACWIA Filing Fee Exemptions

• This fee is waived for certain employers and situations, including...
Cont. ACWIA Filing Fee Exemptions

• Institutions of higher education and affiliated nonprofit entities
• Nonprofit and governmental research organizations
• Second H-1B extension requests
• Amended petitions with no extension
• Primary or secondary institutions
Fraud Filing Fee

- $500 fraud detection fee applies to new petitions and change of employer petitions
- Should be paid by the employer, with certain exceptions
Other H-1B Filing Fees

• The base fee of $325 can be paid by the employer or employee.
• The premium processing fee of $1,225 can also be paid by either party.
Who Can Pay Attorneys Fees

• Employer should pay attorneys fees, unless:
  • Wage offered is exceeds the higher of the actual wage or prevailing wage by amount of attorneys fees
  • A third party payor allowed
  • Challenges for public schools
Changing Status from F-1 to H-1B

Premium Processing

• $1,225 filing fee
• USCIS must adjudicate the petition within 2 weeks of receipt or request additional evidence within this time frame
• Not necessary to obtain a visa number
Consular Processing for an H-1B Visa

• If an F-1 student cannot change status in the U.S., then the student must obtain an H-1B visa at a U.S. consulate abroad before working in H-1B status
When Consular Processing is Required

• USCIS makes a formal finding of a status violation against the F-1 student
• A status violation can include:
  • A gap in status
  • Working without authorization
  • Not maintaining a full course load
Change of Status Versus Consular Processing

• In both cases, H-1B status is granted to the alien.

• The only difference between change of status and consular processing is the process for obtaining H-1B status.
Obtaining A New H-1B Visa Abroad

• If F-1 originally changed status to H-1B, then the alien must obtain an H-1B visa before re-entering the U.S. after a trip abroad.

• Exception: Travel to Mexico or Canada or the adjacent islands for fewer than 30 days
Post-filing Issues
Portability

• H-1B change of employer petitions
• Employee can commence employment with the new H-1B employer upon the filing of an H-1B petition.
Admission and Extension

- 6 years with 3 years maximum at a time
- May exceed 6 years if at a certain stage in the legal permanent residency process
- File extension when still in H-1B status, unless USCIS forgives gap in status
Exceptions to the Six-Year Period

• The alien may seek H-1B status indefinitely beyond the six year period under the following situations…
1) A labor certification (1\textsuperscript{st} stage of green card process for most) or Form I-140 immigrant visa petition (2\textsuperscript{nd} stage) was filed at least one year before the end of the six-year period in H-1B status

2) The Form 140 is approved and a visa number for legal permanent residency is unavailable
The alien can start the process for legal permanent residency either before, during or after filing the H-1B petition.
Monique Kornfeld, Esq.
Immigration Attorney
617.323.5049
mkornfeld@mhkimmigration.com
100 Wells Ave., First Floor
Newton, MA 02459-3210
WWW.MHKIMMIGRATION.COM
Legal Permanent Residency
Legal Permanent Residency

Definition

• Ability to live and work permanently in the US
• Can be acquired through employment and family sponsorship as well as through several other routes
Employment-based Legal Permanent Residency
• An alien being sponsored for legal permanent residency through employment requires a certified labor certification application, with certain exceptions for special immigrant visa petitions.
Special Visa Petitions

• The immigrant visa petition is filed with USCIS without the need for a labor certification.
Cont. Special Visa Petitions

- Extraordinary ability (EB-1)
- Outstanding researcher or professor (EB-1)
- Multinational executive or manager (EB-1)
- National Interest Waiver (EB-2)—requires advanced (master’s) degree
- Investor (EB-5)
Cont. Special Visa Petitions

- Schedule A professional nurses and physical therapists
- May have multiple immigrant visa petitions pending simultaneously, including one based on a labor certification and a special immigrant visa petition
First Stage of the Employment-based Case: PERM Labor Certification
PERM Labor Certification

- The Department of Labor must certify:
  - There are not sufficient workers that are able, available, qualified and willing to fill the position; and
  - The alien’s employment will not adversely affect the wages and working conditions of US workers.
Cont. PERM Requirements

• Designed to protect US workers
• Requires advertising and other forms of recruitment by employers to test the US labor market to determine if there are any able, available, willing and qualified US workers (includes US citizens, legal permanent residents, asylees and refugees)
Cont. PERM Requirements

- Bona fide job offer (no self-employment, business ownership or substantial influence or control)
- Full-time (35 hours), permanent position
- Offered wage must be at least as high as the prevailing wage
Cont. PERM Requirements

• The employer must state the actual minimum requirements of the job (not its preferences or requirements that are neatly tailored to fit the alien’s background and qualifications)

• Alien must have acquired the requirements before starting (exceptions)
Prospective Offer of Employment

• Alien need not be working for the employer at the time the labor certification is filed

• Alien must report to work at the time the legal permanent residency is approved
Online Filing

- PERM labor certification application is filed online after the requisite recruitment is conducted
- Documentation of recruitment provided *only* if audited
- Maintain “audit” file, including tear sheets, notices of posting and recruitment report
Audits under PERM

- Criteria for audits (now up to 40%):
  - Arbitrary, or
  - Based on factors heightening suspicion of a *bona fide* job offer
    - Familial relationship
    - Ownership interest
    - Control or influence
    - Business necessity
Second Stage: Immigrant Visa Petition (Form I-140)
Form I-140 Requirements

- Employer must show ability to pay at the time the labor certification is filed.
- Ability to pay documentation:
  - Employer’s tax returns
  - Annual report or letter from CFO of company
  - Employees Forms W-2 and pay slips
  - Miscellaneous (bank statements)
Cont. Form I-140 Requirements

- Alien submits documents relating to the job’s minimum requirements
  - Education
  - Experience (employment letters)
  - Licensure
  - Training
Second or Third Stage: Adjustment of Status (AOS)
Adjustment of Status

- AOS allows an individual to remain in the US and change from a nonimmigrant to a legal permanent resident.
- May file AOS concurrently with the immigrant visa petition if a visa number is available.
- Otherwise, file AOS after the I-140 has been filed and/or approved.
Visa Number Availability

• Each year 140,000 employment-based visas (or green cards) are allotted to foreigners seeking legal permanent residence based on employment in the U.S.
Preference Categories for Immigrant Visas

• Employment-based visas are distributed across 5 preference categories based on credentials.
• Visas in the higher categories are more available than in the lower-level categories.
• Aliens in the higher categories will obtain legal permanent residency sooner.

Monique Kornfeld, Esq.
EB-1: 1st Preference Priority Workers

• Persons of extraordinary ability
• Outstanding researchers and professors
• Multinational executives and managers
EB-2: Second Preference

- Members of the profession holding advanced degrees (including National Interest Waivers)
- Aliens of exceptional ability
EB-3: Professionals, Skilled & Other Workers

• Skilled workers (position requires two years of experience and the alien possesses such experience)
• Professionals (requiring a bachelor’s degree)
• Other workers
Cont. Visa Number Availability

• The visas are evenly distributed among all countries with a quota set for each.
• Backlogs for individuals from high-demand countries result even when the overall cap is not reached. Once the quota is met, then only those who applied before a set cut-off date may get visas.
Cont. Visa Number Availability

• The priority date is the date either the labor certification or the immigrant visa petition visa petition (where no labor certification is required) is filed.

• Priority date determines the foreigner’s place in line for a visa number and this date is compared to the cut-off date for the foreigner’s employment-based immigrant visa preference category.
Cont. Visa Number Availability

• If demand is excessive, the category or country is deemed oversubscribed.
• The cut-off date for an oversubscribed category is the priority date of the first applicant who could not be reached within the numerical limitations.
Cont. Visa Number Availability

• If the foreigner’s preference category becomes oversubscribed, then a visa number will be available only when his priority date is **earlier** than the cut-off date.

• *E.g.*, if the priority date for the petition is January 15, 2001, but the cut-off date is October 1, 2002, then a visa number would be available.
Cont. Visa Number Availability

- Visa number availability can be found on the U.S. Department of State’s Visa Bulletin, which is issued monthly.
- It is available online at: http://travel.state.gov/visa/frvi/bulletin/bulletin_3169.html
Benefits of Adjustment of Status

• Confers authorized status in the U.S. so that nonimmigrant H-1B status need no longer be maintained, although there are benefits to maintaining H-1B status.
Cont. Benefits of Adjustment

• Obtain employment authorization and travel permission while the application is pending (including spouse and children)
• No consular processing for AOS
• Avoid three and ten year bars to re-entry
Adjustment of Status (AOS)

485 Portability

• Can switch employers without restarting a new PERM case
• The I-140 immigrant visa petition must have been approvable when filed
• The I-485 must have been pending 180 days
• The original job and new job are substantially similar
Eligibility to Adjust Status

• Maintain continuous authorized status in the US (no working without authorization, overstaying or otherwise violating the terms of your nonimmigrant status)
Exceptions

• 245(i)
  • Petition or labor certification filed before 4/30/01 and physically present in the US if filed after 1/98

• 245(k)
  • Alien did not violate terms of status for more than six months since alien’s most lawful entry
Consular Processing
• Must continue to maintain nonimmigrant status
• Cannot obtain employment authorization or travel documentation
• Requires an interview at the US Embassy abroad
Family-based
• US citizen sponsors spouse, parent, child, married or unmarried son or daughter or sibling (stepchildren—relationship formed before 18)
• Legal permanent resident sponsors spouse, children and unmarried sons and daughters
Family-based

- Derivatives may accompany the primary beneficiary (except for immediate relatives)
- Affidavit of Support (Form I-864) required to be filed by family sponsor
- May obtain legal permanent residency through adjustment of status or consular processing
Immediate relatives may file for adjustment of status immediately. Other preference categories may not apply for AOS/CP but must wait until visa number becomes available (priority date becomes current).
Other Sources of Legal Permanent Residency
Other Sources of Legal Permanent Residency

- Family Sponsorship
- Diversity Visa Lottery (only certain countries are eligible)
- Asylum (must wait one year from the anniversary of the asylum approval and have physically resided in the US during this year)
- Cancellation of Removal
- NACARA
- HRIFA
Naturalization
Naturalization

- **Waiting period** (5 years of LPR, 3 years of LPR for those who gained their LPR through marriage; be careful not to abandon LPR)
- Voting
- Sponsor Family Members
- Government Jobs
- US Embassy Protection Abroad
- Tax Benefits
- Financial Aid
Expert Legal Representation and Counseling in All Areas of Immigration Law.

- Employment-based Immigration
- Family-based Immigration
- Nonimmigrant Visas
- Asylum
- Nicaraguan Adjustment and Central American Relief Act
- Diversity Visa Lottery
- Other Forms of Relief
Monique Kornfeld, Esq.
IMMIGRATION ATTORNEY

617.323.5049
mkornfeld@mhkimmigration.com
100 Wells Ave., First Floor
Newton, MA 02459-3210
WWW.MHKIMMIGRATION.COM