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
General Requirements
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
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
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 2014 (10/1/13 to 9/30/14) was reached on April 5, 2013.
Cont. H-1B Cap

• Petitions received from April 1st to April 5th were subject to a computerized random lottery.
Cont. H-1B Cap

- After April 1, 2014, petitions subject to the cap with a start date on or after October 1, 2014, can be filed up until the cap is reached.
- Can file after October 1\(^{st}\) 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 1\textsuperscript{st} 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.
Cap-Gap F-1 OPT Employment & Status Extension

• OPT employment (EAD) is valid at the time the H-1B petition is filed
• EAD, along with F-1 status, is automatically extended through October 1\textsuperscript{st}
• Example: EAD is valid until July 14, 2013 and H-1B petition is filed April 5, 2013: EAD extended through October 1\textsuperscript{st}
Requirements for OPT STEM 17- Month Extension

• Currently in 12-month period of approved post-completion OPT
• 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
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
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
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
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

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

• Extensions of H-1B status
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 (1st stage of green card process for most) or Form I-140 immigrant visa petition (2nd stage) was filed at least one year before the end of H-1B status

2) The Form 140 is approved before the end of H-1B status 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.
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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.
Audits under PERM

• Criteria for audits:
  • 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)

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.
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
  - The position must require a master’s degree or a bachelor’s degree and 5 years of progressive experience.
  - If the alien does not have a master’s, then a 3-year bachelor’s degree from India does not suffice.
Cont. EB-2: Second Preference

- 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
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 in similar occupations
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
Other Sources of Legal Permanent Residency
Other Sources of Legal Permanent Residency

- Family Sponsorship
- Diversity Visa Lottery (only certain countries are eligible)
- Investment
- 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
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
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