



Employment Immigration Issues for Students

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Non-immigrant v. Immigrant visa (green card)

A non-immigrant visa is -

- Only for a specific petitioning employer
- For a limited duration of time
- Spouse and children receive derivative status
- Beneficiary may not petition for independent immigration status of family members

May I apply for immigrant visa (green card) directly?

- Generally, the processing time for the immigrant visa is too long to allow transition directly from OPT to green card
- Exceptions:
 - EB-1 person with extraordinary abilities
 - EB-1 Outstanding professor/researcher
 - EB-2 Advanced degree or exceptional abilities AND NIW or Schedule A worker

Non-immigrant employment based visa options

- H-1B Specialty Occupation
- H-1B1 fast track for Chile and Singapore
- L-1A Manager/Executive Transferee; L-1B Specialized Knowledge
- TN Professionals from Canada or Mexico (NAFTA)
- E-3 Specialty Occupation – Australia nationals
- O-1 Exceptional Abilities
- E-1 Treaty Trader
- E-2 Investor or essential employee of trader/investor

H-1B Non-immigrant visa

- The position must be for a Specialty Occupation (must require the equivalent of Bachelor's degree);
- The Employer must pay 100% of the prevailing wage for this occupation in the area of employment;
- The Employee must satisfy the minimum requirements for the position (license, etc).

Specialty Occupation

- Bachelor's degree is normally the minimum requirement for the position
- Degree requirement is common in the industry in similar organizations
- Employer normally requires a degree
- The nature of the specific duties is so specialized and complex that knowledge required is usually associated with bachelor's degree

Numeric Cap Considerations

- 65,000 visas per fiscal year, plus additional 20,000 for foreign nationals who earned master's or higher degree from a US institution of higher education;
- Timing of filing: to enter the - by end of March

Cap exemptions

- Institutions of higher education
- Non-profit institutions affiliated with institution of higher education
- Non-profit research organizations, and
- Second or subsequent extension

Portability

- Aliens who have maintained valid H-1B status with a prior employer may begin work for the new petitioning employer as soon as the new petition is filed (not necessarily approved).
- Aliens who have held H-1B status in the previous six years are not subject to the numeric cap.

Changes requiring the filing of an amended petition

- Successor company – no new filing in some cases
- Substantial changes in job duties, hours, work location – require filing an amendment

Termination

- Immigration status is valid only as long as the conditions in the H-1B petition are satisfied (any gap in the immigration status may cause complications with change of status or extension of stay)
- FMLA leave does not terminate the H-1B relationship
- Upon termination, the employer must notify the USCIS about the termination and offer to beneficiary return travel costs

Duration

- Generally, the maximum duration of H-1B is six years. The H-1B may be extended beyond the six-year period if a labor certification for a green card has been filed at least one year before the accrual of the six-years in H-1B status.
- Time spent outside the US may be recaptured and added to the six year maximum period.

Processing time

- Regular processing of H-1B petitions may take three to six months. However, by applying premium processing (and paying an additional \$1,440 premium processing fee), the employer may obtain a decision on its petition within fifteen calendar days.
- OPT students who filed for H-1B prior to the expiration of the OPT remain in valid status and are eligible to work after the expiration of the OPT, as long as the H-1B remains pending

Benefits of the H-1B visa

- Does not require qualifying relationship with a foreign entity (prior employer);
- Available to nationals from all countries;
- Provides for a smooth transition to green card (allows dual intent).

Limitations of the H-1B

- Employer must pay 100% of the prevailing wage;
- Employer must offer return transportation costs in the event of termination;
- Benching is prohibited;
- USCIS filing fees, Fraud Prevention Fee and ACWIA training fee must be paid directly by the employer;
- Spouses of H-1B cannot work, except when a petition for immigrant visa I-140 has been approved for the principal alien

EMPLOYMENT-BASED GREEN CARD

Three steps in the green card process

- Labor Certification – by conducting prescribed recruitment steps, the employer demonstrates that there are no minimally qualified U.S. workers for the position.
- Petition for Immigrant visa – the employer confirms (1) its ability to pay the employee's salary, (2) availability of the position for which the petition is filed, and (3) beneficiary's qualifications for the position.
- Adjustment of Status – When a visa number becomes available, the beneficiary applies to adjust status to legal permanent resident.

Processing times

- The more advanced and sophisticated the position is, the faster the process moves
- If the position has requirements that exceed the standard requirements (as determined by the DOL), the employer must be prepared to provide business justification
- Nationals from India and China generally face longer processing times

EB-2 v. EB-3 – Long term strategy

- EB-2 advanced degree
 - Master's or Bachelor's plus five years experience
 - Issues with three-year degrees (not equivalent to Bachelor's)
- EB-3
 - Professionals with Bachelor's degree
 - Skilled worker – 2 yrs. experience
 - Other Workers

Considerations when to initiate the green card process

- Can the position justify EB-2 (advanced degree) and does the beneficiary meet the advanced degree requirements;
- Is the employer committed and is there longevity in the position; moving to a new employer may require starting the process again.
- The green card process must be started not later than 365 days before the expiration of the six-year limit in H-1B status;

When can an existing green card process transfer to a new employer

- **Labor Certification (LCA) completed, I-140 not filed or still pending** but not approved – The new employer must start a new green card process. The employee may have the H-1B extended beyond the six-year maximum period if the LCA was filed 365 days before the extension.
- **Petition for Immigrant Visa I-140 approved** – The new employer must start a new green card process, however, the second process may use the priority date from the first green card process.
- **Petition for Immigrant visa approved and Adjustment Application I – 485 pending for 180+ days** – The new employer may use the first green card process if the new position is in the same or similar occupational classification

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