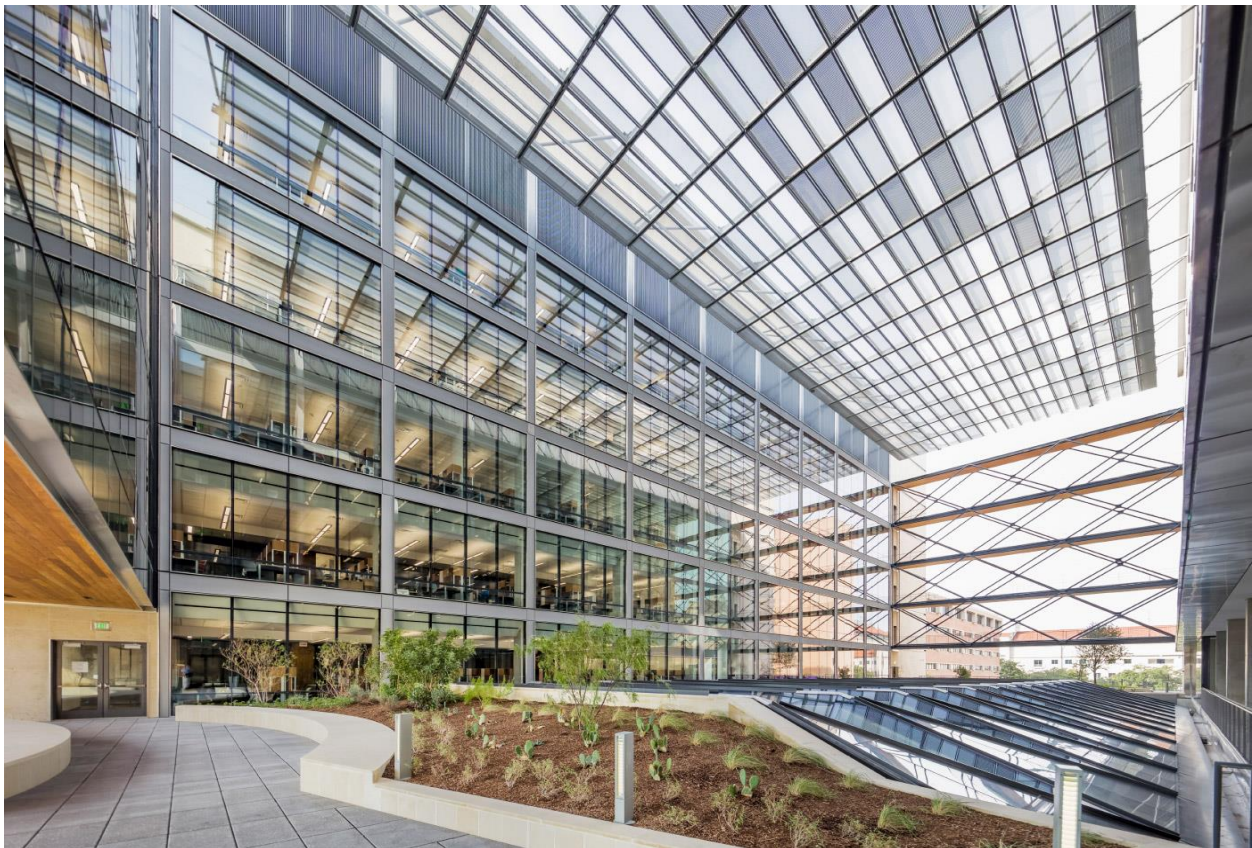


GUIDE FOR COLLEGE STUDENTS, FACULTY AND RESEARCHERS



Finding your way through U.S. immigration law



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U.S. IMMIGRATION AND NATIONALITY LAW

Immigration-Pros.com

Purpose and Scope



In the United States, all persons are presumed to know the law. Ignorance of the law is no excuse. When answering to administrative regulations, common sense must be forgotten and the "rules" must be learned and understood. The authors, in this manual, will focus on areas that are of specific interest to students and recent graduates. The information contained in this manual is based not only on the pertinent law, regulations, and case decisions but also, and perhaps more importantly, on experience. The Attorneys and Paralegals of this law firm bring over fifty years of combined experience to this project. Therefore, throughout this manual we have incorporated that experience to provide a practical perspective in addition to the formal rules. However, anyone reading this guide must understand that immigration law and regulations, like all other areas of the law, are fluid and ever changing. What the rule is today may well be different tomorrow. Understanding this principle, one realizes why it is critical to consult with a qualified professional prior to taking action which may end disastrously if the requirements are not fully understood and the "rules" not carefully followed.

This brochure also provides information for foreign faculty and researchers. The introductory chapters of the brochure contain general information and strategies which should be reviewed carefully. These chapters are intended to highlight issues and potential problems which will have to be addressed in almost every case. The chapters which follow the introductions contain specific legal requirements for different categories including F-1, J-1, H-1 and permanent residence through employment. Before you analyze these legal requirements, please review the introductory chapters to obtain an overview of the process.

US Immigration Law: A Guide for Students, University Faculty and Researchers

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You are encouraged to make copies of this manual. However,
please copy the entire manual, rather than a portion. Thank you.

David Swaim
Managing Partner

Board Certified in
Immigration and Nationality Law
by the Texas Board of
Legal Specialization

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General Immigration Issues for College Students and Recent Graduates

If you are an F-1 or J-1 student, either still in school or working on your practical training or academic training, you may consider the possibility of working in the United States and perhaps living here permanently. If so, there are some very specific issues which you must become familiar with and ultimately devise a strategy to deal with.

The simple fact is that in order to obtain immigration benefits in the U.S. you will most probably have to obtain employment. In particular, you will have to obtain employment with a company which will agree to sponsor you throughout a multiple-year process and that employment must be in a professional technical field.

Once you graduate, or if you have already graduated, you should receive either optional practical training or academic training. This will allow you to find an employer, hopefully, who will employ you and sponsor you through the immigration process. This is obviously not an easy task since most U.S. employers would prefer not to deal with the immigration process especially if they can find qualified U.S. workers. However, the immigration process does provide one extremely important advantage to employers: since the process will take several years to complete, you essentially will be required to work for that employer as you go through the process. In other words, the immigration process works as a retention tool for employers. Some employers already realize how important the

immigration process is either for finding skills which are not readily available or simply for the fact that the foreign employee will be tied to the company for several years. Many companies are not aware of this, and it is up to the student to convince them of this advantage.

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In addition to finding an employer who will sponsor you, you also must ensure that you obtain a skill set which is not readily available in the labor market. Eventually, you and your employer will have to go through a test of the labor market to show that there are no qualified and available U.S. workers for a given position.

In order to do this, the job must obviously require things which are somewhat specialized. Otherwise, many U.S. workers would be eligible for the position.

The Immigration Process for Faculty and Researchers

If you are a faculty member at a college or university or are conducting research without teaching responsibilities, there are several options which you should consider if you wish to obtain permanent residence in the U.S. The information contained in this brochure explains the technical rules involved in the different categories and is essentially the information contained in the Immigration Service's regulations and the information which is commonly available to the public. However, there are several issues which need to be discussed in depth to provide you with an accurate understanding of the options available to you.

For faculty members with teaching responsibilities, the most important option for obtaining permanent residence is referred to as the "special handling" labor certification process. The reason this option is so important is that it is virtually guaranteed to be successful if the procedures are followed properly. In other words, the Department of Labor and the Immigration Service have almost no discretion to deny these cases. However, the requirements must be strictly adhered to in order to guarantee this level of success. For example, the application for labor certification must be filed with the Department of Labor no later than eighteen months after the initial job offer is made. If the application is filed in a timely manner, the employer is allowed to use the competitive recruiting process which was undertaken prior to making the job offer to you. Note that the recruiting period does not have to occur within eighteen months of filing the application, only the job offer must be within eighteen months. Further, the employer must have included in the recruiting

process at least one print advertisement for the position. Many times,

universities and colleges do not use print advertisements since so many things are based on the internet. However, the Department of Labor requires a print ad for this type of case.

If the eighteen-month period has passed (and the employer has chosen not to re-recruit and make a new offer), or if you are engaged solely in research, there are generally four other options available. The first option is referred to as the "extraordinary ability" category which applies only to those who have achieved international recognition in their field. This is obviously a very high standard and applies to very few individuals. However, the criteria listed in this brochure should be consulted to determine whether or not you think this may be an option. Keep in mind, however, the Immigration Service is very strict in interpreting the evidence submitted for this category.

The second option is referred to as the "outstanding professor or researcher" category. The basic requirement for this category is a PhD and two years of teaching or research experience. However, the real issue in these cases is whether or not we can establish that your accomplishments are "outstanding" as compared to others in your field. In other words, we are going to compare you against the other people who are doing the same type of work. Although the Immigration Service has listed a number of criteria which can be met to establish eligibility in this category, there are actually several objective criteria which carry much more weight. For example, in terms of research publications we submit statistical evidence regarding the percentage of research which a given

publication will accept. This is obviously a very good objective type of evidence which the Immigration Service will give more credibility than other types.

The third option is referred to as the "national interest waiver". Essentially, this category requires two things. First, we must establish that the work that you are doing is "in the national interest". This is the easiest of the two elements since virtually any type of research can be construed as being in the interest of the United States. The second, and much more problematic issue, is establishing that your contribution to the particular research is, if not unique, at least not readily available from other researchers in the field. Most often this is proven by establishing that you have a combination of duties which most researchers in the field do not have. There are obviously other methods of

proving this fact, but it is essential that it be addressed carefully. Most national interest waiver cases are denied on this issue.

The fourth option is to do your own recruiting for the university under the "regular" labor certification process. However, if a U.S. applicant meets the minimum requirements for this position, the position will not be certified.

As you read the information contained in the rest of this brochure, keep in mind that there are more subtle issues which need to be addressed other than the technical rules. The information I have outlined above should give you an idea of the different issues which you need to evaluate as you go through the process of determining which category will be best for you.

Maintaining Legal Status in the United States

A visa which is issued by an American Consulate in a foreign country allows an individual to come to the U.S. and apply for admission. If the individual is admitted to the U.S., he or she is given legal "status" which must be maintained at all times. Once admitted to the U.S., the visa has no impact on the individual's ability to remain in the U.S. and only becomes important if the individual travels outside the U.S. and attempts to re-enter.

I. Determining Status

The starting point for determining lawful status in the U.S. is the "I-94" card which is issued to the individual at the port of entry. On this I-94 card, the Immigration Service indicates the date of admission, place of admission, classification of admission and the length of time the individual is

allowed to remain in the U.S. In most nonimmigrant categories, the individual will be given a specific date which indicates the end of that status. For the F-1 and J-1 classifications, the designation "D/S" is provided which stands for "duration of status". This is a term of art which has a specific definition in each classification. It is important for all nonimmigrant status holders to determine the exact requirements for their classification.

II. Failure to Maintain Status

A. Deportation/Removal

As a general rule, anyone who violates their lawful status in the U.S. is subject to removal from the country. In some cases, the individual may be

allowed to leave voluntarily and in other cases the individual may be ordered deported. In many cases, it is extremely difficult, if not impossible, for the individual to return to the U.S.

It is important to note that a violation of status may occur even if the individual has not overstayed the period of time stated on the I-94 card. For example, foreign students who work off campus without authorization are clearly in violation of their status and are subject to removal. The same is true for visitors who work without authorization.

Other violations of status include H-1B professional workers who work on a limited basis for someone other than the petitioning company, a student who takes less than the required number of semester hours or, obviously, committing certain criminal acts.

B. Becoming "Barred" from the U.S.

An individual who has remained in the US beyond the date of the I-94 for more than 180 consecutive days is subject to a three-year bar. This means the individual will not be granted any type of visa or provided with any immigration benefits, such as a change of status or extension of status, until the individual has resided outside the U.S. for at least three years.

If an individual has "unlawful presence" for an aggregate of twelve months or more, he or she would be barred for a period of ten years.

In some cases, such as F-1 and J-1 status, an actual finding of unlawful presence by the CIS or an Immigration Judge is required to trigger the bars. However, this is an area of great uncertainty. Also note that an overstay beyond the time allowed as stated on the I-94 is generally "unlawful presence".

III. Is There Any Hope?

There is a provision of law which allows the Immigration Service to consider a "waiver" of the bars for individuals who have parents, spouses or children who are lawful permanent residents or

U.S. citizens. However, the out of status individual must also prove that "extreme hardship" would result to one of the family members if the individual is barred from the U.S. This is a very difficult legal standard to meet and must be carefully presented to CIS.

One other option available to prevent the imposition of the bars is another section of the Immigration and Nationality Act which provides that applicants for adjustment of status may pay a "penalty" which would prevent the bars from becoming applicable. However, please note that payment of the penalty is only available to an individual who is qualified for adjustment of status and who filed his immigrant petition of labor certification application on or before April 30, 2001. Nonimmigrants who are changing status or extending status are not eligible.



F-1 Academic Students

Introduction

The regulations regarding F-1 students changed dramatically on January 30, 2003, with the implementation of a new system called the Student and Exchange Visitor Information System (SEVIS). This system requires the maintenance of a database with the Immigration Service for all F-1 students admitted to the United States. Virtually all activities regarding F-1 status will be monitored by the Immigration Service with this database. Each school is required to provide the Immigration Service with very specific information regarding the student's status and any changes to that status. Under the new system it is no longer an option for students to merely assume that their status is valid, the school is "taking care of" the student or the Immigration Service has been properly notified of any changes in status or is properly maintaining the information which it receives. In other words, it is the student's responsibility to comply with all of the rules and regulations and to ensure that the school and the Immigration Service are doing their part to maintain accurate information regarding the student and any changes. We recommend that you learn and follow these rules very carefully and do not rely on other people, including the school or the Immigration Service, to monitor your status.

This is the best way to ensure that you always maintain proper status in the U.S. and will not

have any problems even if mistakes are made in the Immigration Service's database.

I. Definition of F-1

Students in colleges, universities, seminaries, conservatories, academic high schools, elementary schools, other academic institutions, and in language training programs 8 C.F.R. §214.2(f)(1).

II. Authorized Period of Stay as an F-1

Duration of Status (D/S)

The length of time during which a student is enrolled as a full-time student in any educational program, plus any period of practical training, plus an additional 60 days to prepare for departure. 8 C.F.R. §214.2(f)(5).

A Designated School Official (DSO) may advise a student to engage in less than a full course of study due to academic difficulties, a medical condition or during the last semester of a degree program. 8 C.F.R. §214.2(f)(6)(iii).

III. Extension of Stay

Under F-1 student regulations, the DSO is allowed to provide for program extensions for the student without authorization from the Immigration Service. 8 C.F.R. §214.2(f)(7)(iii). However, a program extension can only be granted in very limited circumstances. It is imperative that the student discuss a program extension with the DSO prior to the expiration of status.

A. Student Must Have Maintained Status

The DSO must verify that the student has at all times maintained lawful F-1 status even though the program has not been completed within the time stated on Form I-20 A-B.

B. Failure to Timely Complete the Program is not the Student's Fault

The DSO must certify that the delay in not timely completing the program was caused by compelling academic or medical reasons such as changes of major or research topics, unexpected research problems, or documented illnesses. Delays caused by academic probation or suspension are not acceptable reasons for program extensions.

IV. F-1 Reinstatement

If a student fails to maintain proper status, such as not taking enough hours during a semester or an unauthorized failure to complete the program on time, a request for reinstatement must be filed with the Immigration Service. In effect, this is a request to the CIS to place the student back in proper status despite the previous violation. Please note that these requests are entirely discretionary with the Immigration Service. Therefore, it is highly recommended that the need for reinstatement be avoided at all costs by properly maintaining status. The reinstatement process is extremely arbitrary and there is certainly no guarantee that a reinstatement request will be approved by the Immigration Service.

A. General Requirements for Reinstatement

To prepare an application for reinstatement, the school must first review the student's situation and make a recommendation to the Immigration Service for reinstatement. Once the school has indorsed the I-20 with the reinstatement recommendation, the formal application to the Immigration Service is prepared.

In order to file for reinstatement, the student must establish that he or she has not been out of status for more than five months prior to filing a request for reinstatement, unless the failure to file within five months was a result of exceptional circumstances and the student filed the request for reinstatement as promptly as possible under these exceptional circumstances.

B. Specific Requirements for Reinstatement

The reinstatement request must establish that the student does not have a record of repeated or willful violations of the student regulations; he is currently pursuing or intends to pursue a full course of study at the school which issued form I-20; has not engaged in unlawful employment; is not deportable on any ground other than as a violation of status; and establishes to the satisfaction of the Service that either the violation of status was beyond the student's control (such as injury or illness, closure of the institution, oversight or neglect on the part of the DSO, etc.) or the violation is related to a reduction in the student's course load that would have been within the DSO's power to authorize, and that failure to approve reinstatement would result in extreme hardship to the student.

V. Employment Other Than Practical Training

A. On Campus Employment

Regulations provide that so long as a student is maintaining a full course of study, he or she is authorized to be employed not to exceed 20 hours per week on the physical premises of the campus that he or she is authorized to attend. The student may work full time on campus when school is not in session, but must terminate his or her employment: (1) on graduation, (2) when he or she ceases to be a full-time student at the university, or (3) if a request for reinstatement has been filed with the Immigration Service and not yet approved. No special request to CIS need be made for this type of on-campus employment.

If the employment is in conjunction with a scholarship, fellowship, assistantship, or postdoctoral appointment which is a part of the student's academic program, the regulations permit the student to perform services at an off-campus location that is educationally related to the school if it is done in conjunction with the student's educational program. An example might be a research assistantship at another school if the two schools have a joint degree program. Another example is contractually funded research projects at the post graduate level between private companies and the school. 8 C.F.R. §214.2(f)(9)(i).

B. Off-Campus "Severe Economic Hardship" Work Authorization

An F-1 student may request off-campus employment work authorization based upon severe economic hardship caused by unforeseen circumstances beyond the student's control. These circumstances may include loss of financial aid or off-campus employment without fault on the part of the student, substantial fluctuation in the value of currency or the exchange rate, inordinate increases in tuition and/or living costs, unexpected changes in the financial condition of the student's source of support, medical bills or other substantial and unexpected expenses. 8 C.F.R. §214.2(f)(9)(ii)(F). Please contact your international office for further information.

- **Other Types of Employment Must Not be Available**

To be eligible for "Severe Economic Hardship" off-campus employment, the student must demonstrate that on-campus employment is unavailable or insufficient.

To apply for severe economic hardship work authorization, the Service's regulations require the student to follow the following procedures (8 C.F.R. §214.2(f)(9)(ii)(F)(11):

- (a)** The student must submit Form I-20 ID, Form I-538 (or SEVIS documentation) and Form I-765 with the required fee to the Immigration Service.
- (b)** The student must submit supporting documentation, such as affidavits, which provide details regarding the unforeseen circumstances (such as those listed above) that require the student to seek employment authorization.
- (c)** The student must provide a certification from the DSO on form I-538 (or SEVIS documentation) to the effect that the DSO is un-aware of employment

opportunities based upon off-campus employment as well as on-campus employment. If the DSO is student will not be eligible for severe economic hardship off-campus authorization.

(d) If the student is approved for severe economic hardship off-campus aware of employment opportunities based upon on-campus employment, this certification is not available and the authorization, the Service will issue an EAD card authorizing the student to work for a period of one year. The student may renew the EAD work authorization card after the one-year period if he or she still meets the requirements. Please note that the student is not eligible to begin employment until the Service actually issues the EAD card. No appeal of denial of this type of work authorization is permitted. It also is automatically terminated if a student fails to maintain status. 8 C.F.R. §214.2(f)(9)(ii)(F)(2).

VI. Practical Training

Practical training is available to F-1 students who have been lawfully enrolled on a full-time basis for at least nine consecutive months. Students in an English language training program are not eligible for practical training. Employment through practical training must be in a position which is directly related to the student's major area of study. 8 C.F.R. §214.2(f)(10).

A. Curricular Practical Training

1. Employment Required for the Degree

If employment is required by the degree program, an undergraduate student must have completed nine months of study before being eligible for curricular practical training. A graduate student may accept curricular practical training at any time if the employment is required for the degree. It is

important to note that the employment that is required for the degree does not have to be "for credit" in order to qualify for curricular practical training.

2. Employment That is Optional but Not Required for the Degree

In some situations, employment that is made optional for the degree may qualify for curricular practical training. In order to qualify, the student must receive academic credit for the employment, the employment must be listed in the school's handbook with an indication that the course/employment is designed to give the student practical experience and an assigned faculty member must be responsible for the course. If the employment meets these criteria, the student will be eligible for curricular practical training even though the employment is not required for the degree.

3. Requirements for Curricular Practical Training

The DSO may authorize a student to participate in a curricular practical training program which is an integral part of an established curriculum. Curricular practical training is defined to be alternate work/study, internship, cooperative education, or any other type of required internship or practicum which is offered by sponsoring employers through cooperative agreements with the school. Students who have received one year or more of full-time curricular practical training are not eligible for any post completion practical training. However, if a student used all of his optional practical training in a previous degree program, he is still eligible for curricular practical training. (also Note the requirements for pre-completion practical training below).

4. Procedures for Curricular Practical Training

The student must make a request for curricular practical training to the DSO. Once the DSO has

approved the curricular practical training, the procedures with SEVIS will be initiated.

B. Pre-completion Practical Training

Pre-completion practical training is a type of work authorization that differs from curricular practical training in that it is not required for the degree, nor will the student receive course credits for the employment. An applicant for pre-completion practical training must establish that he or she has been enrolled on a full-time basis for at least nine consecutive months. There are three types of pre-completion practical training available:

- "Vacation" Pre-Completion Practical Training

A student is allowed to request pre-completion practical training for the annual vacation and other times in which the school is not in session, if the student is currently enrolled, has been maintaining full-time student status and intends to register for the next term or session. 8 C.F.R. §214.2(f)(10)(ii)(a)(1).

- While School is in Session

The student is allowed to obtain pre-completion practical training for not more than twenty hours per week while school is in session. 8 C.F.R. §214.2(f)(10)(ii)(a)(2).

- "Completion of Course Work" Pre-completion Practical Training

If the student has completed all course requirements for the degree, but has not completed the thesis, he or she may apply for the pre-completion practical training while working on the thesis. 8 C.F.R. §214.2(f)(10)(ii)(a)(3).

1. Requirements for All Types of Pre-completion Practical Training:

To be eligible for all types of pre-completion practical training, the student must establish that he or she is enrolled as a full-time student, has maintained full-time status and, if applying for a vacation period, intends to enroll for the next term or session. Although it is not required that the student actually obtain a job offer prior to applying for pre-completion practical training, it is required that the employment that the student does obtain directly relate to the degree program. As with all practical training, the student must be in full-time student status for at least nine months prior to applying.

2. Procedures for Obtaining Pre-completion Practical Training

An applicant for pre-completion practical training must first obtain from the DSO certification on Form I-538 that the proposed employment is directly related to the student's major area of study and equal to the student's educational level. The DSO must also endorse and date the student form I-20 ID with the designation of either "full-time" or "part-time" and the dates of intended employment. The student must then mail the endorsed I-538 and I-20 ID to the CIS Service Center along with Form I-765 with the application fee in order to obtain the EAD employment authorization card from the Service. The student is not allowed to engage in pre-completion practical training until such time as the Service actually issues the EAD card. 8 C.F.R. §214.2(f)(10)(ii)(C) and (D). If using the SEVIS system, the DSO will favor the requirements of 8 C.F.R. §214.2(f)(cd)(ii)(E) and §214.2(f)(11).

IMPORTANT NOTE: Pre-completion practical training will be deducted from post-completion practical training. F-1 students are only allowed to work for twelve months total in either pre-completion or post-completion practical training. Part-time pre-completion practical training will be deducted from post-completion practical training. For example, six months of part-time, pre-completion practical training will result in a reduction of three months of post-completion practical training. Six months of full-time, pre-completion practical training will result in a reduction of six months from post-completion

practical training. Also see section D below related to "STEM" extensions. 8 C.F.R. §214.2(f)(11).

C. Post-Completion Practical Training

Post-completion practical training is authorized for a period of 12 months beginning with the completion of the student's studies. The student must complete the 12 months of practical training within the fourteen-month period following the completion of studies. An additional seventeen months of optional practical training is available to students with degrees in Math and Science. In addition, an extension may also be available for students who that apply for a change of status to the H-1b professional worker category. Both of these extensions are discussed below.

1. Procedures for Post-completion Practical Training:

To initiate the process to obtain post-completion practical training, the DSO must certify on Form I-538 that the proposed employment is directly related to the student's major area of study and equal to the student's educational level. It is important to note that it is not required that specific employment be offered to the student at the time the endorsement is made by the DSO. 8 C.F.R. §214.2(f)(10)(ii)(D).

The DSO must also endorse and date the I-20 ID to show the student's post completion.

practical training is in the student's major field of study and will begin on the date of completion of the course of study. The DSO will then return the endorsed I-20 ID to the student and send Form I-538 to the Service's Data Processing Center. In order to receive work authorization for post completion practical training, the student must then: Id.

(a) Prepare Form I-765 (Request for Work Authorization) with a check for the filing fee;

(b) File Form I-765 (with the filing fee), along with the I-20 ID received from the DSO, with the Service Center of the Immigration Service which has jurisdiction over the place of residence of the student

during the filing period. 8 C.F.R. §214.2(f)(11).

(c) If using the SEVIS system, the DSO will follow the requirements of 8 C.F.R. §214.2(f)(11).

2. Restrictions on Post-completion Practical Training:

An F-1 student who has engaged in pre-completion practical training will not be eligible for a full one year of post-completion practical training. The student must deduct from post-completion practical training the total amount of time the student has used in pre-completion practical training. Part-time, pre-completion practical training will be deducted at one-half the full-time rate. For example, a student who has engaged in twelve months of part-time pre-completion training will have to deduct six months from the post-completion practical training available. A student who has engaged in twelve months of full-time, pre-completion practical training or 24 months of part-time pre-completion practical training is not eligible for any post-completion practical training. A student who has engaged in 12 months or more of full time curricular practical training is not eligible for any post-completion practical training. 8 C.F.R. §214.2(f)(11).

3. Filing Period for Post-completion Practical Training:

The I-765 with the required fee and the endorsed Form I-20 ID must be filed with the Service Center during the 150 days. Which begins 90 days before completion of studies and ends 60 days after completion of studies. Although there is some confusion as to which date determines the 150-day period, it is logical to assume that the term "completion of studies" means the completion of all of the requirements for the degree rather than the actual award of the degree during graduation ceremonies. This is an issue which has not been settled and the Service continues to issue conflicting statements. The debate will no doubt continue.

A new one-year period of practical training is available following each degree. For example, one

year is available after completion of a Bachelor's degree and another year is available after completion of a Master's degree. However, the seventeen-month extension of OPT which is available to certain graduates is not available more than once. However, a new period of curricular or optional practical training is only available if the next degree is in a "higher" degree program.

4. The Student Must Obtain Work Authorization from INS Before Beginning Employment:

The student is not allowed to begin employment until the Service has given the student the EAD card. Therefore, it is important that the request for post completion practical training be submitted to the Service as early as possible to ensure the ability to begin employment as soon as possible following completion of studies. 8 C.F.R. §214.2(f)(11).

IMPORTANT NOTE: Any change of name or address, as well as change in employment, must be reported to the DSO immediately during optional practical training. 8 C.F.R. §214.2(f)(12).

D. Post Completion OPT Requires Employment: Periods of Unemployment Must Be Calculated Very Carefully

F-1 students are allowed to engage in the following types of employment for post completion OPT: paid employment of at least twenty hours per week, multiple paid employment for at least twenty hours a week in the aggregate, short term appearances for artist and entertainers, work as an independent contractor, self-employment, employment through an agency of at least twenty hours per week and unpaid internships of at least twenty hours per week. More importantly, if the F-1 student is not engaged in one of these areas of employment, this "non-activity" may lead to a loss of status.

During the OPT, the student will lose F-1 status if he or she accumulates ninety days of non-activity in the aggregate. Only non-activity accumulated after April 8, 2008, will count toward the total. Also, if there is a gap between employment less than ten days, those days do not count towards the 90-day aggregate.

Students are also required to report a loss of employment to the DSO within ten days. Departure from the United States during the OPT period does not “toll” the unemployment period. Therefore, if the student leaves the US without employment, all of the time spent out of the country counts toward the aggregate ninety days.

Students who receive the seventeen-month STEM extension are allowed an aggregate of a hundred and twenty days before there is a violation of status.

E. Extensions of OPT When an H-1 Change of Status is Approved: The “Cap Gap” Extension.

When a student applies for a change of status to the H-1 professional worker category on April 1st of each year, there may be a gap between the expiration of the OPT and the beginning of H-1 status on October 1st. The Immigration Service provides a “cap gap” extension of OPT work authorization and F-1 status from the expiration of the OPT until October 1st.

F. STEM Extension for Optical Practical Training

F-1 Students who have received a Bachelor's, Master's, or Doctoral degree in the U.S. in the past ten years may apply for a 24-month extension of OPT after the initial 12 months of OPT.

1. Employer's Requirements

(a) Employer must be enrolled in the Service's E-Verify program

(b) Employer must prepare a Mentoring and Training Program; prepare and sign Form I-983.

(c) The employer must report any changes in employment or training; must report to USCIS if the student is absent for five consecutive business days.

2. Student's Requirements

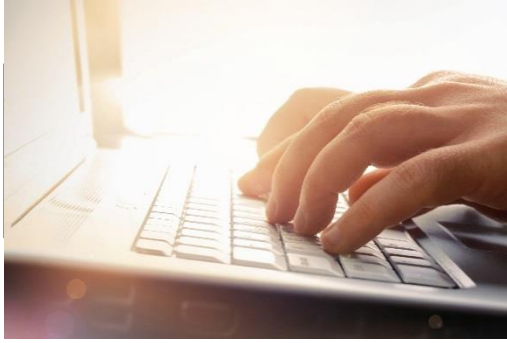
(a) Student must have a U.S. STEM degree (Science, Technology, Engineering, Math) awarded within the last 10 years; STEM extension can use past U.S. degree - not required to use most recent degree.

(b) STEM categories are found at www.ice.gov/sevis/stemlist.htm. Initial 12 months of OPT and 24 months STEM extension can be granted upon completion of all coursework but before thesis/dissertation is completed.

(c) Students have 6 month and 12- month reporting requirements to their school and/or USCIS. Also, must report any change in address, employer, or training program.

(d) STEM Extension must be filed within 6 months of expiration of 12-month OPT; it cannot be filed during 60-day grace period. Additional 24 STEM extension is available if the student completes a higher degree and is in 12-month OPT period for that degree.

Notes



H-1B/Specialty Occupations

A. Specialty Occupation

Under the 1990 amendments to the Immigration and Nationality Act, the H-1B classification applies only to nonimmigrants in "Specialty Occupations." Prominent individuals are now classifiable under the "O" and "P" nonimmigrant classifications. "Specialty Occupation" is equivalent to the former CIS definition of "Profession"; that is, it requires theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation in such fields of human endeavor as architecture, engineering, mathematics, physical sciences, social sciences, business specialties, medicine and health, education, accounting, law, theology and the arts. A specialty occupation requires completion of a specific course of education at an accredited college or university, culminating in a baccalaureate or higher degree in a specific occupational specialty, where attainment of such degree or its equivalent is the minimum requirement for entry into the occupation in the United States.

B. Numerical Limits on the H-1B Classification

Under the pre-1990 law, no limit on the number of nonimmigrants who could be classified as H-1B was imposed. Under the amended Immigration Act, beginning in fiscal 1992 (October 1, 1991 to September 30, 1992), only 65,000 nonimmigrants per year could be issued visas or given status as H-1B. That number was raised to 195,000 in fiscal year 2001. Beginning on October 1, 2003 the cap will only be 65,000 per fiscal year. Spouses and children of the primary nonimmigrant will

not be counted toward this limit. Individuals who have obtained Master's degrees in the U.S. are subject to a separate 20,000 cap. The CIS will control the number of H-1Bs based on the order in which petitions are filed.

Each petition filed will be assigned a number in date order and numbers assigned to petitions that are denied will be reassigned to the petition next in line. When all of the numbers available for the fiscal year are used, CIS will reject new petitions and notify such petitioners that no numbers are available until the next fiscal year. We anticipate the 65,000 cap will be reached each year between April and August for the next fiscal year.

C. Burden of Proof

Before the CIS may approve an H-1B petition, it must be established that:

- The position offered is within a specialty occupation;
- The prospective employee - you, the beneficiary is qualified within a specialty occupation;
- The employer - the petitioner on your behalf - has a legitimate temporary need to employ you and has filed and presented to CIS a labor condition application approved by the Department of Labor (see discussion below) and;
- The employer can afford to employ you for the temporary period.

D. Applying for H-1B classification

If you are in the United States and eligible to change your status to H-1B (and your family members to H-4), the application process consists of these steps:

- Your employer, who petitions the CIS on your behalf, must obtain an approved labor condition application valid for the period of your temporary employment;
- Your employer files a petition and its supplement in which the CIS determines whether you have met the burden of proof summarized above. Any application(s) to

change or extend your dependents' status must be simultaneously filed on individual applications for each family member; and

- Employers must submit a statement assuming liability for reasonable transportation costs, in the event an H-1B nonimmigrant is dismissed before the end of the authorized period of stay and must therefore return abroad.

H-1B petition approvals start on October 1 of each year. Once 65,000 are approved there are no more available that fiscal year until the next one starts on the following October 1. Therefore, it is very important that you plan for the H-1 process very carefully, especially based on the expiration of your OPT. Note that Universities are not subject to this 65,000 cap, nor are any H-1 extensions. It only applies to the first time you obtain an H-1 petition. Also, those with U.S. Master's degrees from the U.S. have a separate 20,000 cap.

E. Labor condition application

The regulations implementing the 1990 Immigration Act require that an approved labor condition application (LCA) in the specialty occupation must be submitted with each H-1B visa petition. The validity period for an LCA is three years. The dates of intended employment must coincide with this three-year validity period. LCA's are filed with the Department of Labor, which must approve them.

The petitioning employer must state in the LCA that it is offering the prevailing wage and working conditions, that there is no strike or lockout and that the employer has given its employees proper notice that the LCA has been filed. The employer also must provide certain details about the job offer, including the salary offered, the prevailing wage and its source and must make copy of the LCA available at its office for public inspection.

Pursuant to amendments to the law in 1998 and new DOL regulations in 2000, the employer may be required to attest to additional measures as well, if the employer is deemed to be "H-1B dependent" under a complicated formula.

Employers who fail to meet the conditions set forth in their LCA, or who make misrepresentations in the LCA, may subject themselves to sanctions, including civil fines, back pay awards and one-year disqualification

from filing job-related immigrant petitions or H, L, O or P nonimmigrant petitions.

F. Validity period of the petition

An approved petition seeking classification as an H-1B in a specialty occupation is valid for a period up to three years. The validity period of the petition may not exceed the approval period of the LCA submitted with the petition, so that employers will need to keep their LCA's on file and up-to-date.

After the application has been prepared, it is filed with one of four Service Centers (SC) in the United States. The selection of the SC is determined by the location where you are to be employed. Regardless of which SC is selected, the filing procedure is the same. The application must be filed by mail.

The filing fee for the petition and any requested change or extension of status must be paid at the time of filing. Dependents must pay a separate filing fee.

The filing date is extremely important. The filing of the application begins various events:

- It puts your application in line for consideration by CIS. Applications are acted upon in the order in which they are received. In view of the annual numeric cap on H-1Bs, it is even more critical under the current law than in the past; and
- It determines when your employment authorization expires.

G. Approval: How long will it take?

The actual length of time will vary according to how many officers are working in the particular SC at any given time, and the number of applications being considered. Also, how well and how completely the application is presented has a direct bearing on the length of time it takes CIS to adjudicate the petition. To file the application prematurely or incompletely can only serve to delay or defeat a favorable decision by CIS.

The Immigration Service also allows for "premium processing" which is a special program to expedite the approval of certain cases. Employers and H-1 employees can request premium processing by paying an additional

\$1225 fee and they are guaranteed a response within fifteen days. Please note that a "response" does not necessarily mean an approval since the Immigration Service may simply ask for additional information or documentation.

H. The impact of graduation dates and the H-1 change of status

Following graduation, most F-1 students are granted one year of optional practical training (OPT). The OPT period will start generally within two months of graduation and will run for twelve months from the date of approval. For example, some students who graduate in May will have OPT which will run from June until the following June. Students who graduate in December may have OPT which runs from January to the following January. Regardless of the date of graduation, the student will only have twelve months of OPT (except for some "STEM" graduates who may have another 17 months of OPT-see page 11). If the student wishes to remain in the US and continue working, the student must obtain H-1 status through a petitioning employer.

As is discussed in the general information regarding change of status on the following pages, one of the most important aspects of the change of status process is the fact that the student must be in valid status at the time the change of status is requested. In other words, the Immigration Service will not change status for those individuals who do not have status at the time of filing AND at the time the change of status will become effective. You must have status to change status.

As is outlined above, the H-1 process has three steps. The first step is the labor condition application (LCA), the second step is the H-1 petition in which the employer, the position and the H-1B employee are qualified for the category and the third and final step is the change of status request. If the change of status request cannot be granted because the student is not in status, the petition will be approved and sent to the US Consulate where the student will go to obtain an H-1 visa and return to acquire H-1 status.

All of these factors are extremely important and the success of the change of status request is impacted by the date the student graduates. The chart which follows outlines the three normal graduation periods: May, August and December. There are significant differences between each of these graduation dates and the

requirements to obtain a change of status to the H-1 category.

The most common graduation date is in May. In this situation the student will normally have OPT which runs from May to May or June to June of the following year. A student who graduates in August will normally have OPT which runs from September to September. December graduates normally have OPT which runs from January to January. In addition, each F-1 student is granted a 60-day grace period after the OPT expires in which they are allowed to remain in the United States by they are not allowed to work.

The importance of the graduation dates becomes clear when we factor in the quota which applies to the H-1 category. Each year, Congress allows 65,000 H-1s to be granted plus an additional 20,000 for individuals who have obtained a US master's degree. These "new" H-1 "visas" are available on October 1st of each year. However, we are allowed to apply for them six months in advance which means that we begin filing the H-1 petitions and change of status requests on April 1st of each year with an effective date of October 1st. The important thing to remember is that if we file the case on April 1st with an effective date of October 1st, when the H-1s first become available, the student must show that he or she will be in status both at the time of filing and on October 1st. Although the status may be automatically extended while the change of status is pending (see page 12) this only applies if the change of status is approved. It does not apply if the change of status is denied or rejected as not being selected under the "lottery".

As the graphs below indicate, a student who graduates in May will have the most difficulty maintaining status throughout the change of status process. Normally, the OPT for a May graduate will expire in May or June of the following year. This means that although the student will be in status on April 1st, he or she will not be in status on October 1st when the H-1 change of status become effective. This is because the OPT will expire in May or June and if we add the 60-day grace period this will only take us to July or August. In this situation, May graduates would be required to either leave the United States and come back after October 1st with an H-1 visa or obtain a new I-20, enroll in a new degree program for the Fall and actually enter school and began classes until October 1st.

For students who graduate in August, the OPT will run from August or September until the following August or September plus there is a 60-day grace period. In this case, when the H-1 petition and change of status is filed in April, the student can easily prove that he or she will be in status on October 1st because the OPT will not expire until August or September and there is the 60-day grace period. In this scenario the student will be allowed to remain in the US although he or she will have to stop work at some point in August or September until October 1st.

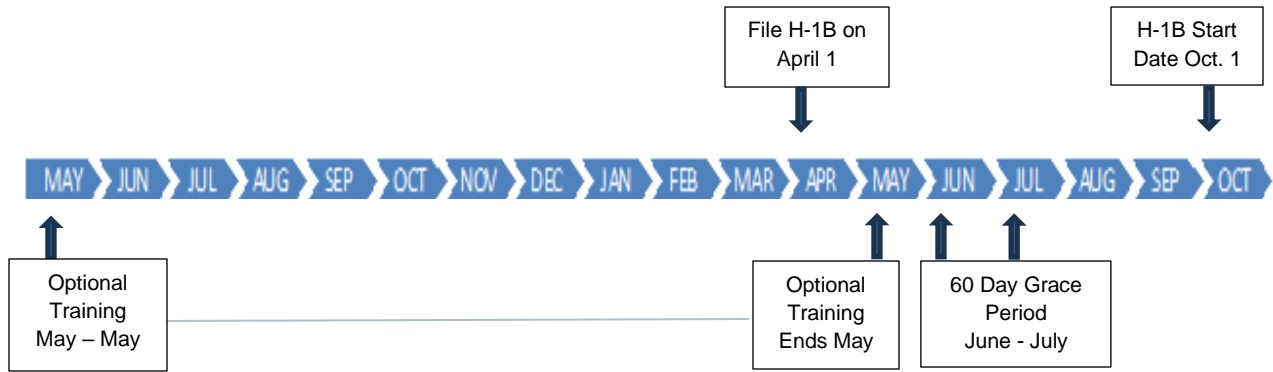
The third and final scenario is obviously the best. A student graduating in December normally will have OPT which will run from January to January. When a student applies for the change of status on April 1st, he or she will obviously still be in the OPT period and will remain in OPT until after October 1st. Therefore, for December graduates, there is normally no gap in employment nor is there any reason to enroll for the following semester.

Please review the timelines below since the relationship between the date of graduation, the expiration of the OPT and the filing dates for the H-1 petition and change of status are critical.

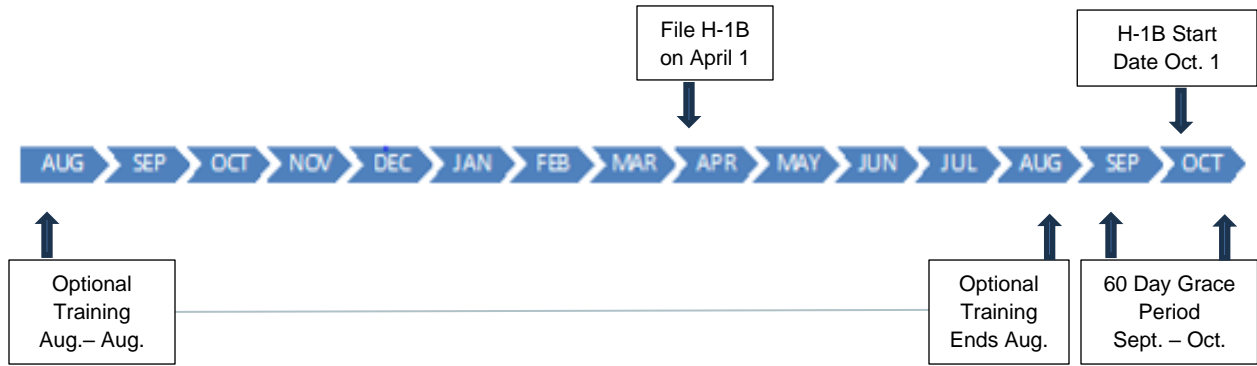
Extension of stay

Upon application for an extension, the CIS under current law may authorize an extension of stay for up to three years for a person in a specialty occupation. Your request for an extension must be accompanied by an approved LCA valid for the time period requested. H-1B nonimmigrants are currently limited to a maximum of six years in the H-1B status. That is, an H-1B nonimmigrant is a specialty occupation who has spent six years in the United States may not seek extension, change of status, or be readmitted to the U.S. in the H visa classification, unless the nonimmigrant has resided and been physically present outside the U.S. for the immediate prior year, excluding brief business or pleasure trips.

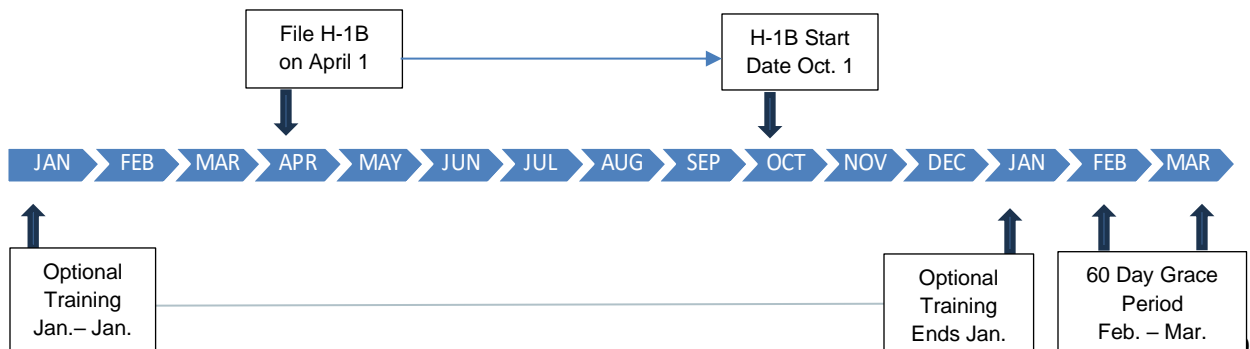
Graduation: MAY



Graduation: AUGUST



Graduation: DECEMBER



If you are currently in an H-1B status and employed by the company for whom your H-1B was approved, and you timely file your request for an extension (it is recommended at least 15 working days prior to the end of your current H-1B period), you may continue your employment for 240 days following the expiration of the H-1B. If at the end of the 240-day period the extension had not been granted, you must request and secure separate employment authorization from the District Director of INS where the position is located.

I. H-1B Limited to Petitioning Employer:

You must restrict your employment to the position and with the employer for whom the H-1B petition was approved. While it is possible to have multiple H-1B petitions approved simultaneously, you can only work for the employers for whom petitions have been approved. You may not "moonlight" for another employer even though it is the same position and you may not begin your own business, as CIS also considers self-employment a violation of your H-1B status.

J. Change of status, what is it? Who may? What are the benefits?

What is a change of status? When you entered the United States on your nonimmigrant visa, you were authorized to do certain things and to stay for a certain period of time; if you did acts inconsistent with your particular classification, you were in violation of status and ran the risk of CIS asking you to leave.

Prior to coming to the United States, it was necessary for you to visit the American Consul (except Canadians) and obtain a visa that permitted you to come to the United States. If the inspecting immigration officer believed that you were coming for a purpose other than that allowed by the visa, he would suggest you withdraw your application and leave or hold you for an exclusion and deportation hearing before an Immigration Judge.

However, once you have been admitted to the United States, it may be possible for you to apply to CIS for a change of status that will permit you to engage in other activities that you could not do in your current status and to extend the period of your authorized stay. To obtain a change of status, it is not necessary to obtain a new visa. CIS will generate a new I-94 reflecting that your status has been changed and will also note how long you may remain in that status unless further extensions are

requested and approved. Note that you must be in valid, legal nonimmigrant status in order to change status.

K. Who may be granted a change of status?

CIS regulations, Section 248, permit the change from one nonimmigrant classification to another, with certain exceptions. The following classifications may not be changed within the United States:

- D-1 Crewman;
- J-1 Subject to the two-year home residence requirement, except to an "A" or "G" so long as they remain subject to the two-year requirement;
- J-2 When the principle J-1 is subject to the two-year home resident requirement;
- K-1 fiance or fiancée of a U.S. citizen;
- M-1 Nonacademic students when the training received as an M-1 qualified the person for the H-1B status. Nor may an M-1 change status to F-1.
- TR WOV Persons who have been admitted without a visa solely for the purpose of transiting the United States; and
- Preconceived intent. Persons who INS believes entered the United States with a preconceived intent, i.e., those who came with one visa planning to seek a change to another classification because they could not obtain that visa from the American Consul or else did not want to take the time necessary to meet the requirements prior to coming to the U.S.

The most common examples where CIS will invoke this rule involve persons seeking a change from B-1 (visitor for business) to L-1 (intracompany transferee); B-2 (visitor for pleasure) to F-1 (academic student) or B-2 (visitor for pleasure) to any other classification if within a short period of time after arriving in the U.S. the person takes any action indicating his desire to change status.

The holders of other nonimmigrant classifications may change status to any other nonimmigrant classification

[not just to H-1B] once CIS is satisfied that all the requirements have been met.

L. What are the benefits of changing status?

The primary benefit is that the person does not have to take the time and go to the expense of departing the United States and traveling to an American Consulate to apply for a new visa before being able to assume the rights and duties of the classification sought.

However, it is important to understand that once your status has been changed, should you depart the U.S., YOU CANNOT REENTER THE U.S. UNTIL YOU HAVE VISITED AN AMERICAN CONSUL AND OBTAINED THE VISA consistent with the purpose of your returning.

Exception: You may travel to Mexico, Canada or one of the adjacent islands so long as you do not travel beyond that country or area and are gone for less than 30 days, provided you are in valid status and your passport is valid. In this case you would not surrender your I-94 as you would need it for reentry into the U.S. If you plan such a trip, please contact your attorney to be certain the rule has not changed (they often do) and to further discuss the requirements.

As of April 1, 2002, if you visit Canada or Mexico and apply for a visa at a U.S. Consulate and are denied, you cannot re-enter the U.S. unless you first go to your home country and obtain a visa. Therefore, we do not recommend applying for a visa this way.

This Department of State regulation does not apply to persons traveling on passports issued to citizens of Iraq. Various countries are prohibited from using the "automatic revalidation" rule from time to time so it is important to check before you plan a trip to Mexico or Canada.

IMPORTANT NOTE: On September 30, 1996, the Immigration Act was amended to prohibit most individuals who have overstayed a non-immigrant status from applying at any American Consulate other than the one in his or her home country.

M. The new "transfer" rules and extension of status

Amendments to the Immigration Act in 2000 allow for an H-1B employee to change employers and begin work with the new employer once the new H-1 petition and

extension of status application is filed with the Immigration Service. Prior to this change in the law, the employee was required to wait until the H-1B petition and extension of status was approved. As a practical matter, this means that the employee can begin the new employment in a matter of days as opposed to months.

Please note there are certain risks involved in using the "transfer" rule. The most important risk is that the Immigration Service may not approve the new petition and extension of status. In that situation, the decision would be made several months later and the H-1B employee would have been out of status all of that time. Furthermore, the "transfer" rule may have a significant impact on travel if the employee departs from the U.S. after the H-1 is filed with the new employer but prior to its approval.

N. If you accept H-1B temporary status, are you precluded from seeking permanent residence?

Prior to March 1987, CIS took the position that since the law [Section 101(a)(15), INA] requires you to have a residence outside the United States you have no intention of abandoning, any evidence of a desire to be a permanent resident in the United States would serve to prevent any extensions of your temporary status at best, and at worst, would cause your temporary status to be terminated. You would then be required to leave the U.S. However, in March 1987, CIS formally adopted the Doctrine of Dual Intent thereby alleviating much uncertainty and frustration for both the employee-you- and the employer.

O. Doctrine of Dual Intent

The U.S. Department of State and CIS are now required by statute to recognize the Doctrine of Dual Intent. This statutory requirement is part of the amendments that became effective October 1, 1991. Under the Doctrine of Dual Intent, a petitioner (employer) may legitimately have "dual intent" to use your services for a temporary period and at the same time intend to permanently employ you when the petitioner can legally do so. You may also legitimately have "dual intent" to come to the U.S. temporarily and depart voluntarily at the end of your authorized stay and, at the same time, seek to become a permanent resident of the U.S. at some future date (whether you truly intend to depart voluntarily is a question of fact to be determined from the circumstances).

An American Consul cannot use the filing of a labor certification or preference petition to deny an H-1B visa. This is important in that should you begin a process for permanent residence such as labor certification or otherwise, and then travel outside the U.S. and need to apply for an H-1B visa to return, the Consul would in the past in all probability deny the visa. This is no longer the case. On the application for the temporary visa, questions about labor certification and permanent petitions are included. You must always answer all questions truthfully.

P. Employer Filing Fee Requirements

Most employers are required to pay the Immigration Service a \$1500 filing fee when filing an initial H-1 petition, or the first extension for an H-1 employee.

This fee must be paid by the employer to the Immigration Service and may not be reimbursed by the employee. There are certain exemptions to this rule depending on the type of business. For example, colleges and universities as well as certain non-profit research facilities are exempt from this requirement. Also, companies with less than 25 employees pay \$750.

All employers are required to pay a \$500 "fraud" fee which must be paid for each initial H-1 petition. Based on the statutory language, there does not appear to be any exceptions to this requirement.

Notes

Permanent Residence

Introduction

Two Ways to Qualify for Permanent Residence

For all practical purposes, Congress has made permanent residence available in the United States in only two broad instances: certain close family relationships and offers of employment.

This section of the booklet discusses these two avenues of obtaining permanent residence in the U.S. Although this process is in many ways the most complicated under U.S. immigration law, there are two basic procedural requirements which must be met by any individual applying for permanent residence. First, a petition must be approved by the Immigration Service which establishes that the individual qualifies for that particular type of permanent residence. Although some types of petitions require prerequisite steps such as labor certification, a petition must be approved before an application can be made for the visa. The second step in the process, after the petition has been approved, is to apply for permanent residence either with the Immigration Service (called adjustment of status) or with an American Consul abroad. These two general steps are discussed more fully below.

1. Permanent Residence Based Upon a Family Relationship

Petitions under the family-sponsored system which were filed before October 1, 1991, (the date the current preference system took effect), AUTOMATICALLY are regarded as petitions in the corresponding new family categories as of that date. No special action is required by the petitioner or beneficiary. Although some of the preference categories are re-numbered by the 1990 Act, entitlement to status is unchanged. In addition, derivative immigrant status

for the spouses and children of principal applicants will continue to be provided. The total quota is set at 480,000. In addition, any unused employment-based



immigration visas will be carried over to the family-based categories.

No single foreign state may receive more than seven percent of all family and employment-based visas. In addition, 75 percent of spouses and minor children for permanent residence (under Second Preference) are not subject to any foreign state limits.

A. Immediate Relatives

"Immediate relatives," as defined by revised INA Section 201(b)(2)(A), who themselves remain exempt from numerical limit, are a principal factor in the calculation. A person is considered to be an "immediate relative" if he or she has a parent, spouse or child over the age of 21 who is a U.S. citizen.

The worldwide level of family-sponsored preference immigrants for each year is determined by subtracting from a specified figure (480,000 beginning with FY 1995) the number of immediate relatives who were issued immigrant visas or were granted adjustment of status to permanent residence during the previous fiscal year, plus the total number of children who were admitted without a visa under INA Section 211(a).

B. Preference Categories

The Act apportions the 226,000 visas under the quota system (excluding immediate relatives) numbers among the four family-sponsored preferences as follows:

FIRST PREFERENCE: Unmarried sons and daughters of United States citizens (23,400 visas plus any spilldown from the Fourth Preference). 10.35%

SECOND PREFERENCE: Spouses, minor children and unmarried sons and daughters of permanent residents (114,200 visas plus any spilldown from First Preference and any excess over the 226,000 visas not used by immediate relatives). The second preference category is divided into the following categories: 2A) Spouses and minor children of permanent residents (87,934 minimum); 2B) Unmarried sons and daughters of permanent residents (21 years old and over) (26,266 minimum); and LB) spouses and children of legalized beneficiaries (55,000). 50.53%

THIRD PREFERENCE: Married sons and daughters of U.S. citizens (23,400 plus any spilldown from the First and Second Preference). 10.35%

FOURTH PREFERENCE: Brothers and sisters of citizens who are 21 years of age or older (65,000 plus any spilldown from the First, Second and Third Preference Categories). 28.77%

It is important to note that Congress has specifically limited sons and daughters of permanent residents by stating that at least 77 percent of the visas in the Second Preference category must go to spouses and minor, unmarried children of permanent residents.

c. Priority Dates

The most important aspect of the Preference Categories is that there are "waiting lists" for each category. Your place in line on the list is determined by the date the petition is filed by your relative, called a "Priority Date". Your immigrant visa will be available for processing the second step of the case only after your Priority Date becomes "current" on a chart published each month by the Department of State. Also, pursuant to changes enacted by Congress in 2002, the fact that you may turn 21 years of age before your Priority Date is current does not mean you will lose the case. This is a very complicated analysis of the "age out" rules which must

be performed in each case. See Section VII for more information on Priority Dates.

II. Employment-Based Permanent Residence

The employment-based system consists of five basic preferences. The first three categories encompass the "normal" employment categories which are familiar from the Act prior to 1991:

A. Priority Workers (40,000 visas + any spilldown from Special Immigrant and Investor categories)

1. "Extraordinary Ability" in the arts, sciences, education, business or athletics demonstrated by:

- a) Sustained national or international acclaim;
- b) Achievements recognized through extensive documentation:
 - Receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor,
 - Membership in associations in the field which require outstanding achievements as judged by recognized international experts,
 - Published material in professional or major trade publications or major media about the individual and his or her work in the field,
 - Participation on a panel or individually as a judge of the work of others in the field or an allied field,
 - Original scientific, scholarly or artistic contributions of major significance in the field,
 - Authorship of scholarly articles in the field in professional journals or other major media,
 - Display of the individual's work at artistic exhibitions or showcases,
 - Evidence the individual has had lead, starring or critical roles for organizations

or establishments that have distinguished reputations,

- Evidence that the alien has commanded a high salary or other high remuneration for services, or

- Evidence of commercial successes in the performing arts, as shown by box office receipts or record sales, etc.; AND

c) Intent to work in that area of ability which the Immigration Service interprets to require a letter from a prospective employer, employment contracts or at least a detailed plan on how the individual intends to continue work in the U.S.



Employment-Based Permanent Residence

IMPORTANT NOTE: This category does not require an offer of employment or a labor certification in order to secure the visa. In other words, the individual must only have employment prospects in the U.S. but need not have a specific offer of employment from a specific employer).

2. “Outstanding” Professors and Researchers

This category requires proof of the following attributes:

a) Evidence proving international recognition as outstanding in the academic area, such as at least two of the following:

- Receipt of major international prizes or awards for outstanding achievement in the academic field,

- Membership in associations in the academic field, which require outstanding achievements of their members,

- Published material in professional publications written by others about the individual’s work in the academic field, • Participation on a panel, or individually, as the judge of the work of others in the same or an allied academic field,

- Original scientific or scholarly re-search or contributions to the academic field, or

- Authorship of scholarly books or articles, in scholarly journals with international circulation, in the academic field; AND

b) Evidence of at least three years experience in teaching or research in that field; and

c) An offer of employment from a prospective U.S. employer for a position in a tenured or tenure track teaching position or comparable research position. The Immigration Service has interpreted this section to require employment with a U.S. university or an institution of higher education or a private institution only if the private institution or employer currently employs at least three persons full-time in research activities and has demonstrated accomplishments in the academic area.

IMPORTANT NOTE: A labor certification application is not required for qualification under this category).

3. Multinational Executives and Managers

This category requires a petition filed by the U.S. employer along with a statement which demonstrates:

- if the employee is outside the U.S., must have been in a managerial or executive capacity for at least one year in the three years preceding the filing of the petition; or

- if the employee is already in the U.S., he or she must have been employed for at least one year out of the preceding three years in a managerial or executive capacity prior to entry to the U.S. as a nonimmigrant; AND

The U.S. employer is the same employer, subsidiary or affiliate outside the U.S.; and

The U.S. employer has been doing business for at least one year.

No labor certification is required. However, an offer of employment is required.

B. Professionals Holding Advanced Degrees (or equivalent) and Aliens of “Exceptional Ability”. (40,000 + spillover from the “Priority Worker” category)

1. Professionals with advanced degrees:

The Immigration Service’s regulations define “advanced degree” as any degree above that of a Bachelor’s Degree. CIS has determined that a Bachelor’s Degree and five years of progressive experience is the equivalent of an “advanced degree”. However, if a doctorate is required for a particular position, the individual must have actually obtained a Ph.D. Furthermore, the regulations state that experience alone will not substitute for either a Bachelor’s or an advanced degree. Foreign degrees will be acceptable but they must be evaluated in terms of equivalency to U.S. degrees. In other words, to qualify under this category, the individual must have an actual Bachelor’s Degree (with no consideration for equivalent experience) but the advanced degree “requirement” above the Bachelor’s Degree level can be established by experience alone or a combination of experience and education (except for Ph.D.).

2. Exceptional Ability Employees:

The Immigration Service’s regulations specifically distinguish “Exceptional Ability” from the “Extraordinary Ability” found in the priority worker category discussed above. The exceptional ability must be demonstrated in the sciences, arts or business and cannot be established solely by academic credentials, licensure or other credentials within the particular area. The regulations specifically list six criteria of which the employee must meet at least three. The six criteria are as follows:

- (a) An official academic record showing that the individual has a degree, diploma, certificate or similar award from a college, university, school or other institution of learning relating to the area of exceptional ability;
- (b) Evidence in the form of letter(s) from current or former employer(s) showing that the individual has at least ten years of full-time experience in the occupation for which he/she is being sought;
- (c) A license to practice the profession or certification for a particular profession or occupation;
- (d) Evidence that the individual has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
- (e) Evidence of membership in professional associations; or
- (f) Evidence of recognition and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

3. National Interest Waivers:

Both professionals with advanced degrees and those with exceptional ability must have an employer and therefore a Labor Certification unless they can demonstrate that their employment in the U.S. will be in the “National Interest”. This process is referred to as the “National Interest Waiver” because it waives the necessity of having an employer sponsor the applicant.

There are essentially three requirements for the National Interest Waiver. First, the employment must be in an area of “substantial intrinsic merit” this apparently means that the occupation in question must be important in and of itself as opposed to a frivolous endeavor.

The second requirement is that the benefit to the United States must be national in scope. In other words, a benefit to a specific university, a specific employer or even a specific region of the U.S. is not enough; the benefit must be to the entire nation.

The third and final requirement is the most important: essentially the applicant must prove that his or her contribution to the national benefit is above and beyond that contribution which any other qualified employee could provide. In effect this means that the applicant must prove that his contribution is unique. Although in some ways this means the applicant must be "better" than other people doing the same type of work, the distinction is really more of a difference such as an unusual combination of education, experience or even different types of degrees in two different fields which are utilized in the area of intended employment.

C. Skilled Workers, Professionals Holding Basic Degrees and all other Workers. (40,000 + spillover, from Priority Worker and Professional Holding Advanced Degree categories, with cap of 10,000 visas reserved for "other" workers)

This category is broken into three subcategories:

1. "Skilled" workers who have at least two years training/experience (not temporary or seasonal) which means the job offered must require that level of training/experience, i.e., two years. The Immigration Service's regulations consider relevant post-secondary education as training.
2. "Professionals" with at least a Bachelor's Degree. This category requires at least a Bachelor's Degree (from the U.S. or a foreign equivalent) but specifically does not include equivalent work experience.
3. Other Workers, which includes unskilled labor (requiring less than two years of training or experience not of a temporary or seasonal nature).

(NOTE: This last category has a 10,000 visa cap; therefore, "professional and skilled workers" will utilize 30,000 visas per year plus "spillovers". Thus, unskilled workers, i.e., with less than two years' experience/training, will probably experience extensive backlogs.)

D. Special Immigrants

This includes ministers and religious workers who will be allocated 10,000 visas per year. This section applies to an applicant who for at least two years immediately preceding the filing of the petition, has been a member of the religious denomination which has a bona fide,

non-profit religious organization in the U.S. The applicant must be coming to the U.S. solely for one of the following purposes:

1. Carrying on the vocation of a minister of that religious denomination; or
2. Working for the organization, at the organization's request, in a professional capacity or in a religious vocation or occupation for the organization or a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986 at the request of the organization.

E. Investors

This category requires an individual to invest at least \$1 million in capital and employ ten or more U.S. workers to qualify. In addition, there are targeted areas in the United States where an investor may be able to invest only \$500,000 and employ a lower number of workers to qualify. This figure is adjustable up to \$1 million by the Attorney General and Secretary of State. Ten thousand visas a year are allocated for this category with 3,000 reserved for "targeted areas."

The regulations have simplified at least one of the important questions raised by the statute. In particular, the statute provides for different amounts of investment depending upon the location of the investment and the relative rate of unemployment within that particular geographical area. The regulations simply state that the initial investment will be \$1 million irrespective of the rate of unemployment within the particular area at least until high unemployment areas are designated by CIS. The regulations specifically state that an investment can be either in a new business which is established after November 29, 1990 or in an existing business in which the investment results in a "substantial change in either the net worth or number of employees, or both" which results in an "increase of at least 140 percent." Unfortunately, the regulations do not define what aspect of the business must increase "140 percent."

III. The Labor Certification Process

Effective March 28, 2005 the labor certification process is referred to as "PERM". This process requires the employer to recruit U.S. workers under a very specific set of guidelines prior to filing the application for labor

certification. Once the application is filed, the Department of Labor will either approve the application, issue an "audit letter" or order the employer to conduct "supervised recruitment". Both the audit letter and the supervised recruitment are potentially serious proceedings with the Department of Labor and must be anticipated carefully before the application is filed with the Department of Labor.

A. Filing Procedures

With very few exceptions, if the application for permanent residence is based on an offer of employment, the employer is required to demonstrate first to the U.S. Department of Labor (DOL) that employment of the foreign worker on a permanent basis will not have a negative impact on the domestic workforce.

First, the employer must offer a prevailing wage for the position. Prevailing wage is determined by the State Employment Commission (SEC) by obtaining averages of the wages paid similarly qualified employees performing a like position in the geographical area of employment.

Second, the employer must prove through a recruitment process that neither an American citizen nor permanent resident who is ready, willing, able and qualified to perform the duties of the position is denied the opportunity in favor of the applicant.

The American worker is not measured against the foreign beneficiary. The worker is measured against the minimum requirements of the position, i.e., education, experience and special requirements.

ALERT: The determination of the minimum education and experience requirements for the position by the employer is the most critical aspect of the entire permanent residence process. The case will be won or loss based upon these requirements and the recruiting which is done to evaluate any US workers who apply for the job. If the minimum requirements of education and experience are not properly analyzed, the case will not be successful.

NEW RULE: Beginning in July of 2007 the Department of Labor requires the employer to pay for the attorney's fee and expenses for the labor certification part of the case. There are three steps to obtaining permanent residence through this type of employment with the labor certification being the first step. The sponsoring

employer must pay the attorney's fee and expenses for the labor certification and the employee is not allowed to reimburse the employer. Either the employer or employee is allowed to pay for the second and third steps of the case.

1. Priority Date

The filing of the labor certification application with the DOL establishes the priority date for the permanent visa. This will be discussed in greater detail in the section on understanding the visa bulletin, discussed below.

2. Exceptions to Labor Certification

In very limited circumstances, the Secretary of Labor has determined there are not sufficient American workers to fill employer's needs or that the granting of permanent residence without the recruitment process described above would not have a negative impact on the American workforce. This determination is referred to as a Schedule A labor certification. Only two professions are included at this time: registered nurses and physical therapists.

3. Special Processing for Teachers in Colleges and Universities

With the exception of positions offered college or university teachers, the employer must show there is no American worker who meets the minimum qualifications of the position offered. For a teacher (and only for teachers or professors) in a college or university offering a degree recognized by other colleges and universities, the employer must show that the applicant selected for the position is more qualified than any American worker applicant. The employer is required to have made this determination on the basis of a competitive recruitment and selection process. Knowledge of the requirements to demonstrate this determination can save the employer much time and expense in the request for labor certification. The "special handling" labor certification must be filed within 18 months of the job offer being made.

IV. Filing the Petition

Once the employer has obtained the labor certification, it must prepare the petition (I-140) to be filed with CIS to determine whether both the position and individual qualify for the visa preference sought. In addition, the employer must prove that it can afford to pay the salary

offered. The employer must prove its financial ability through copies of annual reports, federal tax returns or audited financial statements. In cases where the prospective U.S. employer employs 100 or more workers, a statement from a financial officer of the organization establishing the employer's ability to pay the offered wage may be accepted. Additional evidence such as profit/loss statements, bank account records or personnel records may be submitted.

V. Application For Permanent Residence

Application for permanent residence is the last step in the process for permanent residence. It is in this application the determination is made whether the individual is eligible for permanent residence. Neither the fact that labor certification has been granted nor the petition approved is any guarantee permanent residence will be granted. While the spouse and children of the principal applicant are automatically included in the labor certification and petition, each member of the family must file an individual application for permanent residence and each application will be judged on its own merits. Section 212 of the Act lists different grounds for which an applicant may be denied permanent residence. The most common grounds are convictions for crimes involving moral turpitude, drug offenses, and knowingly making a false statement or withholding a material fact to gain a visa, entry into or other benefit in the United States. If the applicant is in the United States in valid status, has never accepted unauthorized employment since January 1, 1977, and is otherwise eligible to adjust his or her status to that of a permanent resident in accordance with Section 245, INA, an Application for Adjustment of Status, Form I-485 is prepared and filed with CIS if the petition has been previously approved. Current law allows for the I-485 to be filed simultaneously with the I-140 petition.

If the applicant is ineligible to file an application to adjust his or her status in the United States, then the applicant must make arrangements with the appropriate American Consul for a visa interview. Being ineligible to adjust status under Section 245, INA does not render the applicant ineligible for permanent residence. The permanent residence visa would only be denied by the American Consul if the applicant were to be found excludable because of one of the grounds listed in Section 212. To complete the process with the American Consulate, the employer would only file the petition with the CIS Service Center having jurisdiction over the

place of employment and direct CIS to forward the approval to the U.S. State Department.

(NOTE: "Immediate Relatives" as defined in the family section earlier do not generally have to be interviewed at an American Consulate and can adjust status in the U.S.)

VI. Understanding the Visa Bulletin

The Visa Bulletin is a publication of the Department of State showing what permanent visas are available for a particular month. The availability of visas are indicated by a "C", meaning the particular preference is current, i.e., there are more visas than there are registered applicants; a "U" meaning the preference is unavailable because the quota has been oversubscribed; or a date which indicates that an alien with a priority date before the date shown has a visa available that month.

A. Determining the Proper Country

The first step in determining the availability of visas is understanding that it is the individual's country of birth that controls. The country is determined by the political boundaries as it is recognized when permanent residence is granted. For example, a person may have been born in India, part of which was subsequently divided into Pakistan and Bangladesh. If the geographical area in which he or she was born is now recognized as Pakistan, his or her visa would come from the Pakistan quota and not India's.

People often have the misconception that nationality or citizenship determines the quota for a permanent visa. It is not unusual for one born in India to immigrate to Canada and later become a Canadian citizen thinking this would bring him or her under Canada's quota. Such is not the case. The India quota still applies.

An Important Exception: Cross Charging Country Quotas. If a husband and wife are seeking permanent residence and the husband was born in one country and the wife in another, they may select the visa from either country so long as they are immigrating together. Some INS officials interpret this to mean that if the husband were born, for example, in Canada and his wife were born in India and the husband is the principal applicant then the wife may obtain a visa from Canada quota, but if the wife were the principal applicant, permanent visas may not be granted the couple until India's quota is available.

This is absolutely wrong so long as they are immigrating together.

B. Determining the Preference Category

The second step in determining visa availability is knowing which preference category applies. This determination is made by the position offered and background of the employee if based on employment or the family relationship if based on the family-based quotas.

C. Interpreting Priority Dates

The most common mistake made in determining how long an applicant can expect to wait for a permanent visa in a particular preference is consulting only the current month's visa bulletin. The quotas do not necessarily move in a consistent manner; therefore, one should analyze quota movement over a period of at least a year to obtain an accurate prediction.

VII. Legal Requirements After Permanent Residence

A. Employer's Requirements (Employment Based Only)

Once the process has been completed and the employee has been granted permanent residence, the employer's obligations under the law do not terminate at that point. It must be the employer's intention to employ the employee as a permanent employee after the grant of his or her permanent residence.

The term permanent employee means that he or she will be treated as all other similarly employed persons in that position. Should it come to the employer's attention prior to the grant of permanent residence that the position is no longer available for whatever reason, the employer has an obligation to notify CIS, if the employee is an applicant for adjustment of status in the United States, or the American Consul where he or she will be interviewing for permanent residence. Failure to notify the appropriate agency may result in a finding that the employer has participated in fraud, i.e., knowing that the employee has no position in which he or she will be employed after the grant of permanent residence and willful failure to make this information known.

It is suggested the employer notify CIS in writing by certified mail, return receipt requested or the American

Consul by registered mail, return receipt requested. Keep a copy of the notification and receipt in the employee's file.

Should the situation develop that the employer no longer has need of the employee's services after the grant of permanent residence, and the employer did not know this situation would develop prior to the grant of permanent residence, then the employer has fulfilled the requirements under the law so long as he or she acted in good faith.

There is no minimum period of time the employer must employ the person to demonstrate he or she acted in good faith. The law simply states it must be the intention to employ the person as a permanent employee for a reasonable time after he or she has been granted permanent residence.

Notes