

POST-OPT : WORK VISAS & PERMANENT RESIDENCE OPTIONS



Presentation for Boston College

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AGENDA

- Overview of Categories
- Temporary Work Visas
- Green Card Pathways
- Q&A

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BEFORE WE BEGIN

- The information provided in this presentation is for educational purposes only. The opinions expressed in this presentation are solely those of the presenters. No attorney-client relationship is created or intended to be created by virtue of this presentation.
- Immigration law is complex and nuanced. This presentation provides information in general terms. Please seek individualized guidance from a competent professional before taking any action.
- The information presented today is current as of January 27, 2023. However, immigration statutes, rules, policies and procedures change frequently. Accordingly, before taking any action, it is imperative to seek guidance from a licensed attorney.

U.S. IMMIGRATION CATEGORIES

U.S. Citizens

At Birth (law of the soil and law of blood)

Through Naturalization

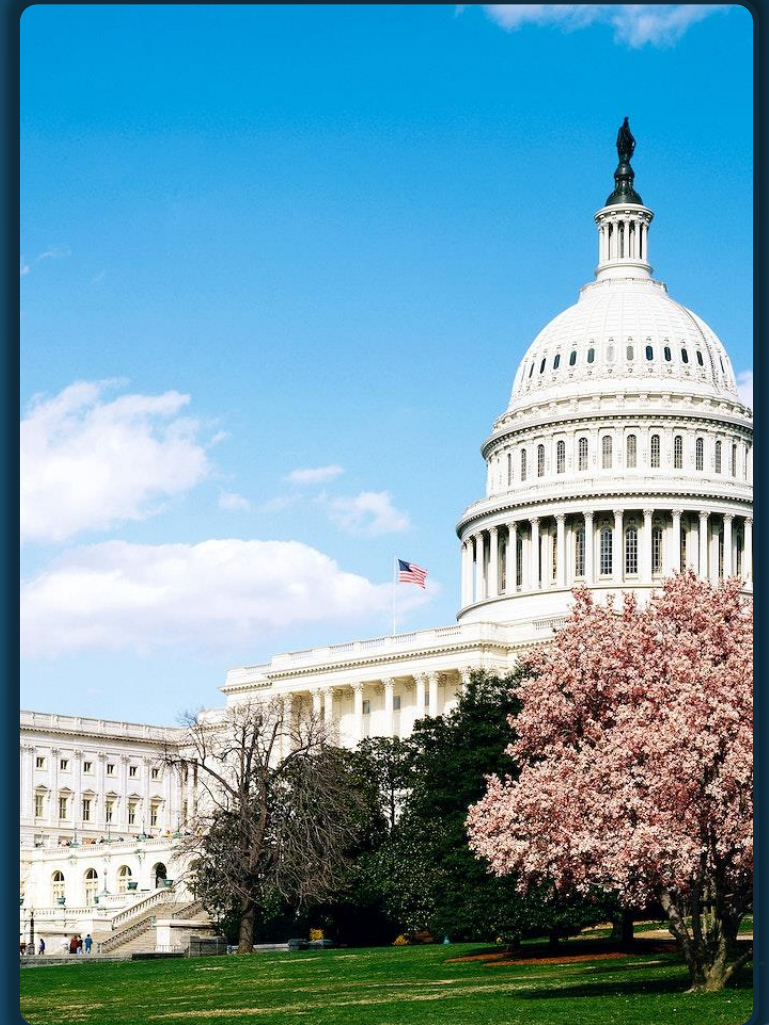
Non-Citizens

Immigrants: Lawful Permanent Residents ("green card holders")

Nonimmigrants: Persons Permitted in U.S. for Temporary Stay

Humanitarian Categories: Refugees; Asylees; Temporary Protected Status (TPS); Deferred Action for Childhood Arrivals (DACA); Parolees

Persons present without lawful status



F-1 STUDENT CURRICULAR PRACTICAL TRAINING (CPT)

- Needs to be approved **BEFORE** starting internship
- **CPT is noted on I-20s** and should be granted even when student is doing a paid OR unpaid internship or practicum (proof of employment authorization to avoid status issues)
- What if I “**volunteer**”?
 - If you are engaged in bona-fide volunteer work – no one would normally be paid or receive a benefit for that work to be performed – generally, that would not be defined as employment.
 - But **work without payment for a job that would otherwise be paid to someone else can be construed as employment and needs authorization**

Work closely with your International Office to ensure proper filing and CPT approval.

F-1 STUDENT OPTIONAL PRACTICAL TRAINING (OPT)

- Approved for up to 12 months
- One OPT per higher academic level
- Part-time or full-time
- Employment must be directly related to degree/major permitted on OPT
- Cannot accrue more than 90 days of unemployment
 - Always report employment to SEVIS to avoid Status issues later
- Self-employment allowed
 - Must be able to show business has been legally created to avoid accruing unemployment

Work closely with your International Office regarding OPT and STEM OPT.

IMMIGRATION TERMINOLOGY AND CONCEPTS: CONSEQUENCES OF UNAUTHORIZED EMPLOYMENT

No concrete definition of “employment”

Generally, DHS considers employment as encompassing any service rendered in exchange for remuneration—cash, tuition, fees, books, supplies, room, food, or any other benefit

Bona-fide volunteer activity is not generally employment – civic/humanitarian activity in which there is no expectation of remuneration

Some services rendered without cash payment for an activity that would normally be compensable can be construed as employment

Most “passive investments” are permitted

Severe consequences for unauthorized employment

Loss of status and potential ineligibility for work visas and green card status



CONSEQUENCES OF UNAUTHORIZED EMPLOYMENT: BEWARE OF SIDE HUSTLES

Gig work for ride share app

Renting Properties / Landlord (e.g., parents bought student apartment they now rent out)

Buying and Selling on online auctions and marketplaces

Open Coding

Crowdsourcing or Fundraising for your business

Campus Representative for a product, company, etc.

Blog editor

Publications / Creative Works

Day trading

Investing in start-ups

Investing other people's money



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IMPACT OF SOCIAL MEDIA

How are students portraying themselves in social media?

Example: Stating they are a CEO of a startup and CBP on seeing this thinks they are working in the U.S.?

Not just looking at CV for employment/activity history

Example: Specialized VC funding sites, etc.

This is being reviewed also via a new DS-160 Question regarding applicant's Social Media accounts

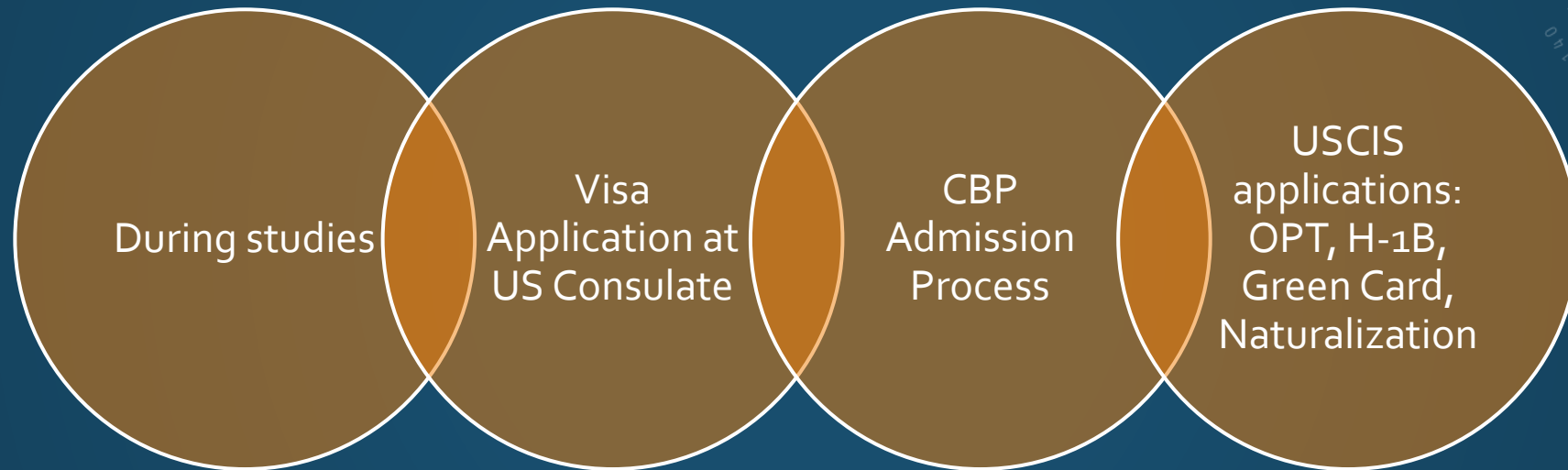
Must provide all identifiers used for all listed platforms.

Consular officers will not request passwords.

Not listing an account could be considered "lying to secure an immigrant benefit."



CONSUL AND DHS OFFICERS MAY INVESTIGATE UNAUTHORIZED EMPLOYMENT



EMPLOYMENT RELATED VISA CATEGORIES

Symbol	Type of employment	Availability
H-1B	Specialty occupation	All nationalities. Cap-subject and cap-exempt. Cap subject quota: 65,000 for bachelor's, add. 20,000 for U.S. master's and above
H-1B1	Specialty occupation	Chile (1,400) & Singapore (5,400)
TN	TN specific occupations listed in treaty	Canadians & Mexicans. No quota.
E-3	Specialty occupation	Australians. 10,500
O-1	Extraordinary ability	All nationalities. No quota.
E-1/E-2	Traders/Investors	Countries w/specific U.S. treaties. No quota.
L-1	Intracompany transferee	All nationalities. No quota.
J-1	Exchange visitor	All nationalities. No quota.
F-1	Higher degree & new OPT	All nationalities. No quota.
F-1	STEM OPT extensions	All nationalities. No quota. ONLY E-verify employers

H-1B VISA PROGRAM

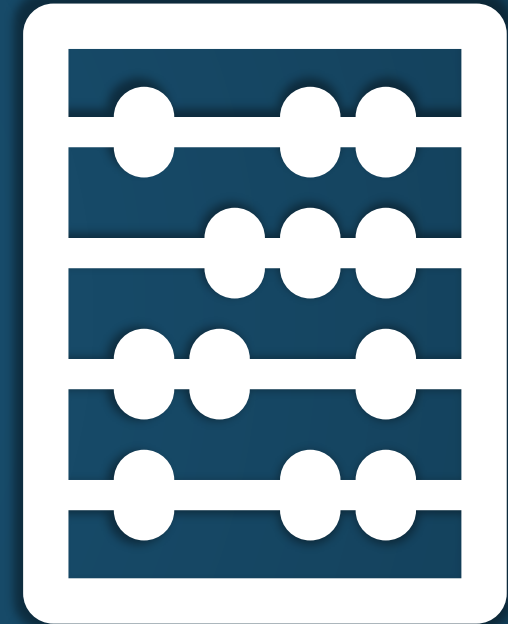
Basic Criteria

Annual Quota & Timing

Benefits and Limitations

Unique issues for entrepreneurs and start-up
companies

Alternatives to the H-1B



BASIC H-1B CRITERIA

- Sponsorship by U.S. Employer
- “Specialty Occupation” = Requires at least a Bachelor’s degree in a specific field related to job duties
- Required Wage
 - Employer must provide public notice of intent to hire H-1B worker and rate of pay
- Ability to Pay
 - Employer must show ability to pay the prevailing wage
 - Wages vary dramatically based on occupation and worksite location
 - Candidate must possess required degree or equivalent at time of filing
- Licensed occupations usually require the license in hand for filing

H-1B VISA BENEFITS

- Preferred way to transition to a green card due to “Dual Intent”
- Permits up to 6 years of work status
- Full-time or part-time H-1B is allowed
 - NOT allowed for permanent residence sponsorship as it must be full-time
- Concurrent employment permitted with separate petition by each employer
- Part-time study allowed
- Non-competitive: Do not have to be the best or only candidate.
 - Labor Certification /PERM (market test) NOT required
- Dependents eligible for H-4 status
- Up to 60 day grace period after loss of job in some cases

H-1B LIMITATIONS

H-1B stay generally may not exceed 6 years

- Extensions beyond 6 years possible
- 6-year clock rewinds if 1 year outside U.S. but must go through lottery again
- Worker can recapture all time spent outside U.S.

Working virtually from a home office is permissible

- However, if already in H-1B status, working remotely may require an H-1B amendment petition be filed with USCIS if the home office is outside the Metropolitan Statistical Area (MSA)

H-4 spouses may apply for Employment Authorization (EAD) in LIMITED situations

No self-employment or contract work

Employer must demonstrate *bona fide professional* job

- Critical issue for new employers and entrepreneurs

H-1B FOR ENTREPRENEURS

Start-ups permitted to file H-1B petition for founders

- Must prove bona-fide employer/employer relationship
 - Ability to be supervised
 - Ability to be disciplined
- Various strategies to demonstrate employer/employer relationship
 - Diversity of ownership
 - Board of Directors with Independent Members
 - Board of Advisors
 - Shareholder agreements
- USCIS closely scrutinizes petitions involving entrepreneurs and founders

ANNUAL H-1B QUOTA & TIMING

- Applies to Cap-Subject employers (i.e., private industry)
- Annual, national quota (“cap”) of 65,000 new H-1B positions
- Additional 20,000 H-1Bs for holders of a U.S. master’s degree or higher
- Visas become available October 1st each year
- ‘Cap gap’ protection for F-1 students on OPT
- Colleges, universities & affiliated non-profits, and non-profit research organizations exempt from quota

ADVANCED REGISTRATION

Advanced Online Registration

- Employers transmit certain details of sponsored worker to USCIS via on-line system and create a registration, available February 21, 2022, noon (EST)
- Employers may submit a registration during registration period: Noon Eastern time March 1 to noon Eastern time March 17, 2023
- USCIS will then run random computer-generated lotteries and notify employers of results by the end of March 31, 2022
- If registration is selected, Employer allowed to submit I-129 petition to USCIS between April 1 to June 30
- USCIS runs general 65,000 lottery first then U.S. Master's degree lottery second
- This order gives U.S. Master's degree graduates greater likelihood of selection

H-1B LOTTERY EXEMPTIONS

- Employment by college or university
- Employment by non-profit organization CLOSELY affiliated with college or university
- Employment by non-profit or governmental research organization
- Part-time or full-time employment by university/college with concurrent employment by for-profit enterprise (each employer must file separate petitions)
- Employment by for-profit enterprise where work location is “at” university/college

ALTERNATIVES TO H-1B

FREE TRADE AGREEMENT PROFESSIONALS

- **TN: Mexico & Canada**
 - Basics:
 - No quota
 - Valid for 3 years at a time
 - Requires employment by U.S. employer.
 - Offered job must be one that is identified by the treaty, approximately 63 occupations identified
 - Application Process:
 - Canadians may apply at the border
 - Mexicans must obtain a visa at U.S. Consulate

OTHER FREE TRADE AGREEMENT PROFESSIONALS

- **H-1B1: Singapore and Chile**
 - Similar to H-1B
 - High quota, low usage
- **E-3: Australia**
 - Similar to H-1B
 - Employer required to make wage attestations
 - High quota, low usage
 - Spouse eligible for employment authorization
- Application Process for H-1B1 and E-3:
 - No USCIS pre-approval required
 - Worker may apply for visa directly at US Consulate

E-1 TRADERS & E-2 INVESTORS

- Available to a citizen of a country that has a treaty of commerce and navigation (trade) with the U.S.
- U.S. employer must then also be owned $\geq 50\%$ by nationals of the same treaty country
 - Over 80 countries have either E-1 or E-2 or both types of treaties with U.S.: <https://travel.state.gov/content/visas/en/fees/treaty.html>
- **E-1 Treaty Trader:** Engaged in substantial trade with treaty country and U.S.
- **E-2 Treaty Investor:** Substantial investment in the U.S.
- Typically, process is completed at a U.S. Embassy or Consulate but can also elect change of status without leaving the U.S.

L-1 INTRA-COMPANY TRANSFERREES

Requires sponsorship by U.S. employer

- Employee must have worked abroad for one complete year in the last three years
- Qualifying employment must be with the Parent, Branch, Subsidiary or Affiliate of the U.S. employer
 - Managers/Executives:
 - ✓ 7 years max
 - Specialized Knowledge Employees:
 - ✓ 5 years max

O-1 Person of Extraordinary Ability

Must prove sustained national or international acclaim

Receipt of major, internationally recognized award such as Noble Prize

OR Three of the following:

- Receipt of nationally or internationally recognized **prizes or awards** for excellence in the field of endeavor
- Membership in associations that demand outstanding achievement of members
- Published material about the scholar in professional publications
- Judged the work of others, either individually or on a panel
- Original scientific, scholarly, artistic, athletic, or business-related contributions of major significance to the field
- Authorship of scholarly articles in professional or major trade publications or other major media
- Performance of a leading or critical role in distinguished organizations
- Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence
- Comparable Evidence: If a particular criterion is not readily applicable to the beneficiary's occupation, comparable evidence may be submitted

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O-1 TOTALITY OF THE EVIDENCE STANDARD

- Articles in particularly highly-ranked journals relative to other journals in the field, e.g. impact factor
- Published work is highly cited relative to others in the field
- High h-index-for the field
- Employment or research experience with leading institutions in the field, such as U.S. universities, or foreign universities with comparably high research activity, or highly regarded
- Receipt of unsolicited invitations to speak or present research at nationally or internationally recognized conferences in the field.

PATHWAYS TO LAWFUL PERMANENT RESIDENCE

- Employment Based
- Family Based
- Diversity Lottery
- Investment
- Asylum/Refugee
- Others: Registry, Cuban Adjustment Act, others special statutes

EMPLOYMENT-BASED GREEN CARD CATEGORIES

- Requires a **FULLTIME** job offer from a U.S. Employer
- Must be in legal nonimmigrant status on the day you file green card in the U.S. (no violation of status***)
- Ideally, you also have an underlying status while waiting for green card approval
- Must File “Immigrant Petition” as foundation to apply for Green Card

TRANSITION TO GREEN CARD FROM NONIMMIGRANT VISA

Maintain Nonimmigrant Status

Examples:

- * H-1B (Ideal)
- * F-1
- * J-1
- * Etc.

Immigrant Petition Filed with USCIS

Different Employment-based categories (NOT A VISA):

- EB1
- EB2
- EB3

File Green Card

May file Green Card application with immigrant petition, or after immigrant petition approved-- strategies involved.

CATEGORY & COUNTRY QUOTA BACKLOGS

- Annual Quota of 144,000 green card numbers is divided by Preference Categories (EB-1, EB-2, EB-3) and Nationality (country of **birth** not citizenship)
- Backlogs can occur in both **category** and **country** queues
- Significant backlogs in some categories and for some countries
- A monthly report is issued by the US Department of State entitled, the “Visa Bulletin” that reports green card usage by category and country
 - Dual Charts – Dates for Filing and Final Action
- The date the first step toward your green card is filed establishes your **priority date** and potentially your place in the queue, if there is one.

VISA BULLETIN FEBRUARY 2023

FINAL ACTION DATES

EMPLOYMENT BASED CATEGORIES	ALL OTHER	CHINA	INDIA	PHILIPPINES	MEXICO
EB-1	Current	1 Feb 22	1 Feb 22	Current	Current
EB-2	1 Nov 22	8 Jun 19	8 Oct 11	1 Nov 22	1 Nov 22
EB-3	Current	1 Aug 18	15 Jun 12	Current	Current

EMPLOYMENT-BASED GREEN CARD CATEGORIES

EB-1:

- EB-1A Persons of Extraordinary Ability
- EB-1B Outstanding Professors & Researchers
- EB-1C Multinational Managers & Executives

EB-2: Masters Degree or equivalent

- National Interest Waiver (NIW)
- PERM (Labor Certification) – Majority Fall Into this Category

EB-3: Bachelors Degree/Skilled Workers

- PERM (Labor Certification) – Majority Fall Into this Category

TYPICAL EMPLOYMENT-BASED PROCESS FLOW

Step 1: PERM Labor Certification

Request prevailing wage determination from DOL (8-12+ months)

Test local labor market through advertisements and postings (90-120 days)

File application with DOL (min 6-month review)

Step 2: Immigrant Visa Petition

Prove Ability to Pay Offered Wage

Demonstrate candidate fully qualifies for PERM or where PERM not involved fully qualifies for immigrant category

Step 3: Candidate's Application for Adjustment of Status

Review of Immigration History including past statements on visa applications and criminal history databases

May file applications for interim employment and travel authorization

Spouse and minor unmarried children may file applications at same time as principal applicant.

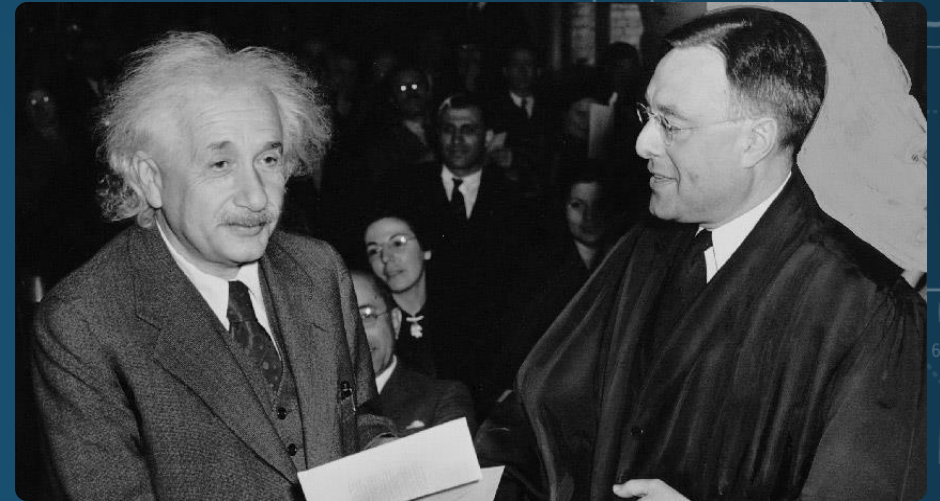
EB-1(A): PERSONS OF EXTRAORDINARY ABILITY

Persons of extraordinary ability in the sciences, arts, education, business or athletics

- May self-sponsor. Labor Certification **NOT APPLICABLE**

Must present evidence of either:

- Receipt of a major, internationally recognized award
- OR**
- Documentation of at least **3** of the following (next slide):



EB-1(A): PERSONS OF EXTRAORDINARY ABILITY

- ✓ Lesser nationally or internationally recognized prizes
- ✓ Membership in associations which demand outstanding achievement of their members
- ✓ Published material about the candidate in major media
- ✓ Judge of the work of others in the same or allied field
- ✓ Original contributions of major significance
- ✓ Authorship of scholarly articles in professional or major trade publications or other major media
- ✓ Display of work at artistic exhibitions or showcases
- ✓ Performance of a leading or critical role in distinguished organizations
- ✓ Command of a high salary or other remuneration compared to others in the field
- ✓ Evidence of commercial success in the performing arts
- ✓ Miscellaneous: If listed criteria do not readily apply, comparable evidence of eligibility may be submitted (i.e., patent or grant funding).

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EB-1(B): OUTSTANDING PROFESSORS & RESEARCHERS

Outstanding professors & researchers.

- Requires sponsorship. Labor Certification **NOT APPLICABLE**

Must present evidence of the following:

1. An **offer of employment** by either:
 - U.S. university or college offering a tenure or tenure-track or permanent research position; **OR**
 - Organization which employs at least 3 full-time researchers
2. At least **3 years of teaching and/or research** in academic field as post-doc; **AND**
3. Evidence that scholar/researcher is recognized internationally as **outstanding in academic field**. This evidence must consist of at least **two** of the following eligibility criteria (next slide):

EB-1(B) ELIGIBILITY CRITERIA

Must establish scholar/researcher is recognized internationally as **outstanding in academic field**

Evidence must consist of at **least two** of the following:

- ✓ Receipt of major prizes or awards for outstanding achievement
- ✓ Membership in associations which demand outstanding achievement of their members
- ✓ Published material about the alien in major media
- ✓ Judging the work of others
- ✓ Original scientific, scholarly contributions to the field
- ✓ Authorship of scholarly articles in professional or major trade publications or other major media

EB-1(C) INTRACOMPANY MANAGER/EXECUTIVE

- Similar to the L-1A Category
- Allows Manager/Executive to skip the labor certification process
- Must prove was a manager/executive at a related company abroad for at least one year in the prior three years before coming to the U.S. (typically in L-1A status)
- Employer sponsorship required
- Related company – parent, subsidiary, or affiliate

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FINAL ACTION DATES

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EB-2	1 Nov 22	8 Jun 19	8 Oct 11	1 Nov 22	1 Nov 22
EB-3	Current	1 Aug 18	15 Jun 12	Current	Current

EB-2: NATIONAL INTEREST WAIVER (SELF-SPONSORSHIP ALLOWED)

Must have a Masters degree (or equivalent) or higher

USCIS may grant a national interest waiver if the Petitioner demonstrates:

- I. Proposed endeavor has both substantial merit and **national** importance
- II. Applicant is well positioned to advance the proposed endeavor
- III. On balance, beneficial to waive the job offer and labor certification requirements

Examples of work deemed to be in the “National Interest”

- Improve wages and working conditions
- Improve education and training programs for children and under-qualified workers
- Improve health care
- Provide more affordable housing for the young and/or old and poor

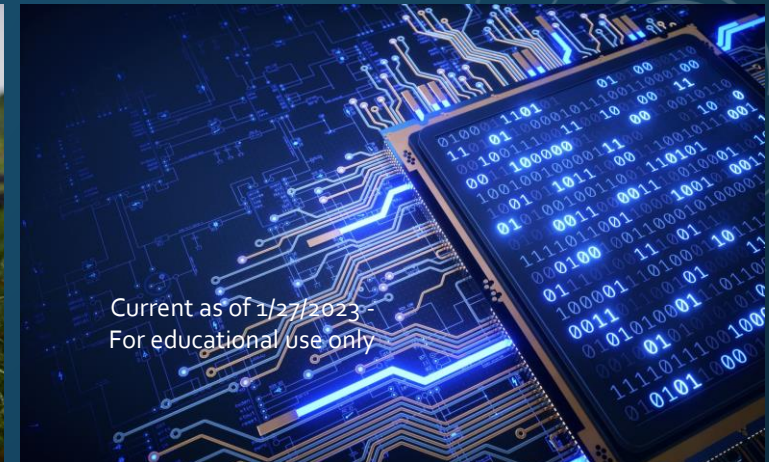
NEW POLICY GUIDANCE FAVORABLE FOR STEM PH.D.'S AND ENTREPRENEURS

In balancing potential benefits or applicant versus protection of US worker opportunities favorable factors include:

- Work furthering a critical and emerging technology
- Work furthering other STEM area important to U.S. competitiveness
- Work that has potential to support U.S. national security
- Work that will enhance U.S. economic competitiveness
- Petition is supported by letters from interested U.S. government agencies



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IMPORTANT: PLAN EARLY...

Employment Based Summary of most common scenarios:

EB-1 – No Labor Certification Required; EB-1A Self-Petition

EB-2 -- NIW self-petition

EB-2 -- Master's degree, Requires Labor Certification

EB-3 -- Bachelor's degree, Requires Labor Certification

Must Maintain Legal Status to Bridge to Green Card

FAMILY-BASED IMMIGRANT CATEGORIES

Sponsored by U.S. Citizen:

- Parent – no quota
- Spouse – no quota
- Unmarried minor children – no quota
- Son or Daughter – married or unmarried
- Sister or Brother

Sponsored by Lawful Permanent Resident

- Spouse
- Unmarried son or daughter

'Spouse' includes same-sex married persons & trans persons of both the same and opposite sex

'Child' includes children adopted before 16 years of age and step-children where the step-relationship was created before 18 years of age

Family-Based Categories: subject to category & country quotas backlogs — See *Visa Bulletin*
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SUBMIT



QUESTIONS?



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