

Pursuing Work Authorization After Leaving the University and Legal Updates

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Basic Immigration Terms

- Non-immigrant: Foreign national approved for temporary entry into the U.S. for a specific purpose
- Immigrant: Foreign national approved for lawful permanent residence in the U.S.
- Visa: Travel document issued by a U.S. Consulate or Embassy abroad that allows a foreign national to apply for admission at a U.S. port of entry
- Status: Period of authorized stay, as indicated on the Form I-94

H-1B Status

- 6 years total of H-1B status (3 year extensions)
- Position must be in a “specialty occupation” and require a baccalaureate degree in a directly related field
- Foreign national must possess the required degree or equivalent
- Allows for dual intent-immigrant intent
- Family members – H-4: Allowed to go to school but cannot work (exception for H-4 spouses if primary H-1B has an approved I-140 petition)
- H-1B audits and RFEs are common

H-1B Status

- Position and employer specific
- Can be for part-time or concurrent employment
- Not for independent contractor
- Portability: Once in H-1B status can transfer employers once petition with new employer filed and received. Do not need to wait for decision on petition.

H-1B Numerical Cap

- 65,000 new H-1B “numbers” per year
- 20,000 additional H-1B numbers for holders of U.S. Master’s degree or higher degree
- Cap filings begin on April 1. New registration system this year from March 1-March 20. Those chosen in lottery will have 90 days to file H-1B application.
- Uncertainty with new process. USCIS has advised it may cancel registration system if it experiences “technical difficulties.”
- Cap reached on April 1-5, 2019; April 2-6, 2018; April 3-7 2017; April 1-7 2016; April 1-7 2015; April 1-5 2014; April 1-5, 2013; June 11, 2012; January 26, 2011
- Normally, visas gone immediately, and lottery held for available slots

H-1B Numerical Cap: Who is Not Subject?

- Institution of Higher Education
- Affiliated Non-Profit Entity: Associated with an institution of higher education, through shared ownership or control or attached as a branch, cooperative, or subsidiary
- Non-profit research organization or governmental research organization
- Individuals who previously held H-1B status
- Individuals currently in H-1B status
- Note: If going from cap-exempt to cap-subject employer, must apply for H-1B number

H-1B Labor Condition Application

- Employer attests that it will pay higher of the prevailing wage or the actual wage
- Prevailing wage = market wage as determined by DOL or wage source accepted by DOL
- Actual wage = the wage that is actually being paid to similarly situated workers
- Must pay actual wage if more than prevailing wage
- Employer attests that it will provide same working conditions to foreign worker as to U.S. worker
- Employer must provide notice of the LCA to other employees
- LCA takes 7 calendar days to process

H-1B Status: Filing Fees

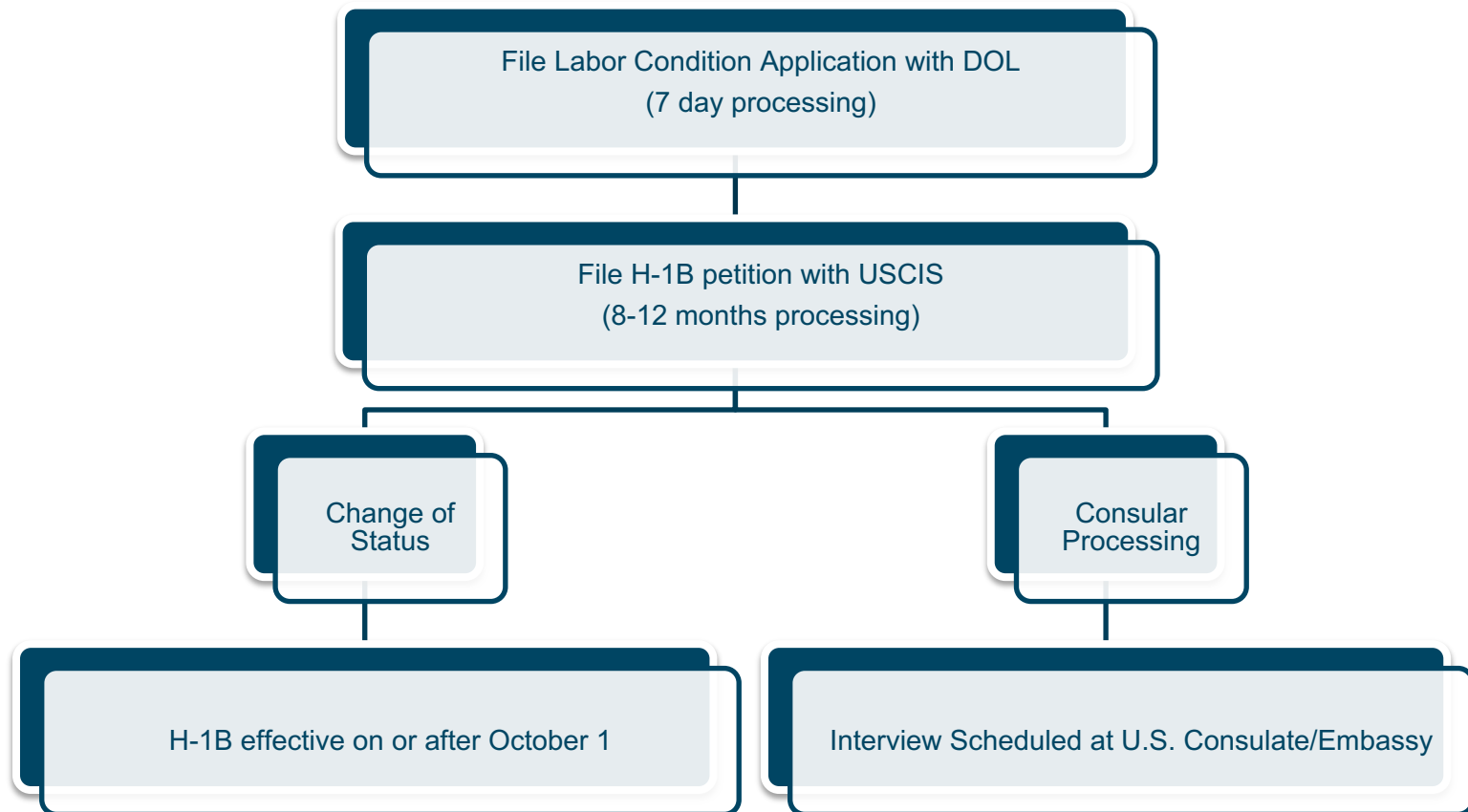
- REQUIRED OF ALL PETITIONS
 - \$460 application fee
 - \$500 USCIS Fraud Fee
- IF FEWER THAN 26 EMPLOYEES
 - \$750 - ACWIA
- IF 26 OR MORE EMPLOYEES
 - \$1500 – ACWIA

- *OPTIONAL \$1,440 TO PREMIUM PROCESS IN 15 DAYS

Preparing the H-1B Petition

- After LCA is certified, file petition
- H-1B petition filed with the USCIS
- Regular processing times depend on type of H-1B filed and range from 6-10.5 months
- Premium processing in 15 days by paying USCIS an additional \$1,440
- Once approved, USCIS issues Form I-797 approval notice and either change of status or consular processing

H-1B Cap Flowchart



Change of Status or Consular Processing

Change of Status	Consular Processing
File petition with USCIS	File petition with USCIS
Stay in US (BEWARE: departing US while petition is pending can result in denial of change of status)	Receive approval
Receive approval	Depart US
Status change goes into effect on requested date	Take original approval notice to interview at US Consulate
If travel abroad, must obtain visa at US Consulate	Obtain visa
	Re-enter US

H-1B Status

- Employer must pay H-1B wage within 30 days of employee's entry into U.S. or 60 days if a change of status application
- Must apply for visa at U.S. Consulate abroad once travel abroad if change of status (unless Canadian). Make sure to check processing times as delays are common.
- Must notify USCIS of any address changes within 10 days
- If terminated, there is a discretionary 60 day grace period
- Employer is required to pay return transportation back to home country if terminated prior to H-1B expiration date

Gap Cap Regulation

- Allows F-1 students to remain in the U.S. and continue to work on their OPT if a timely-filed H-1B petition remains pending or has been granted by the USCIS.
- OPT must be valid on April 1 to qualify
- Applies to all F-1 students who are successful under the H-1B lottery and have a pending or approved H-1B petition.
- H-1B must be approved by September 30 or employment must stop.

OPT Dates and H-1B Submission

OPT Expiration	When to apply for H-1B	Special Notes
April – September 2020	April 2020	Will need to work under H-1B gap cap from OPT expiration until 09/30/2019
October 2020 – March 2021	April 2020	Will lose some of OPT time

Advantages to H-1B and OPT

OPT	H-1B
May work for any employer as long as related to field of study	Allowed a total of six years (with further extensions possible)
Allowed 90 days of unemployment	Can start permanent residency process
No employer sponsorship required (note that STEM OPT requires a training plan with a specific employer)	Counted once in H-1B “numbers”
Can be unpaid (note STEM OPT must be paid employment)	Must be paid the prevailing wage
Can be independent contractor, though NOT for STEM Extension	Must be an employee and receive same benefits as other employees

Other Non-Immigrant Visas

Visa classification	General requirements
TN	Canadians or Mexicans are eligible for TN status for a position designated in NAFTA. Schedule 2 of NAFTA identifies the requirements for each position. Can be issued in 3 year increments.
L-1A L-1B	Intra-company transferee. (Manager or Executive) or (Specialized Knowledge). Must work abroad for one year within the last 3 years with overseas employer before transferring to U.S. Must be employed as a manager or executive (L-1A) or with specialized knowledge (L-1B). May apply for permanent residency without going through labor certification process if manager/executive. Limited to 7 years in L-1A status and 5 years in L-1B status.
O-1	Persons of extraordinary ability in the arts and entertainment, athletics, sciences, business and education. No numerical quota. Initial visa for 3 years and renewable annually indefinitely.

Other Non-Immigrant Visas (cont'd)

Visa classification	General requirements
J-1	Cultural exchange visa. Used for trainees, research scholar, short-term scholars, or specialists. Limits vary according to type of program. Beware – some individuals will be subject to two-year return requirement.
E-1 and E-2	Treaty investor. Must be from a country with a treaty of commerce and navigation with the US. Must be coming to US to carry on substantial trade or to develop/direct operations of an enterprise in which the foreign national has invested. Valid for 2 years, but renewable indefinitely.
E-3	Visa for Australian nationals. Similar to H-1B visa as position must require a Bachelor's degree and foreign national must possess a Bachelor's degree. Renewable indefinitely. Cap of 10,500 per year.

Permanent Residency Sponsorship

- Employment-based sponsorship:
 - PERM sponsorship (employer proves shortage of minimally qualified US workers)
 - Outstanding Researcher
- Self-sponsorship
 - National Interest Waiver application
 - Extraordinary ability
- Family-based sponsorship:
 - Immediate relative (parent of USC child over 21, spouse of US citizen, children under 21 of USC)
 - Preference based categories (relationship to USC not mentioned above or legal permanent resident)
- Asylum
- Diversity Visa Lottery
- Investor (typically requires investment of over \$1 million with additional regulatory requirements)

Change in Adjudications

- Extreme vetting for non-immigrant and immigrant petitions
- USCIS Memo of August 9, 2018 on accrual of unlawful presence for F, J, and M nonimmigrants effective August 9, 2018 states that unlawful presence begins accruing on date of status violation.
- USCIS Memo of July 13, 2018 provides USCIS adjudicators the discretion to deny an application without first issuing an RFE or notice of intent to deny (NOID) effective September 11, 2018.
- USCIS Memo of June 28, 2018 expanding the range of circumstances in which USCIS officials may issue a Notice to Appear (NTA) to a foreign national after denial of an immigration benefit. This policy memo has been postponed until operational guidance is issued.
- USCIS Memo of October 23, 2017 rescinds prior USCIS guidance giving deference to previously approved petitions.
- Interviews for all employment based green cards starting October 1, 2017.
- New unofficial rules for adjudications learned by trial and error.



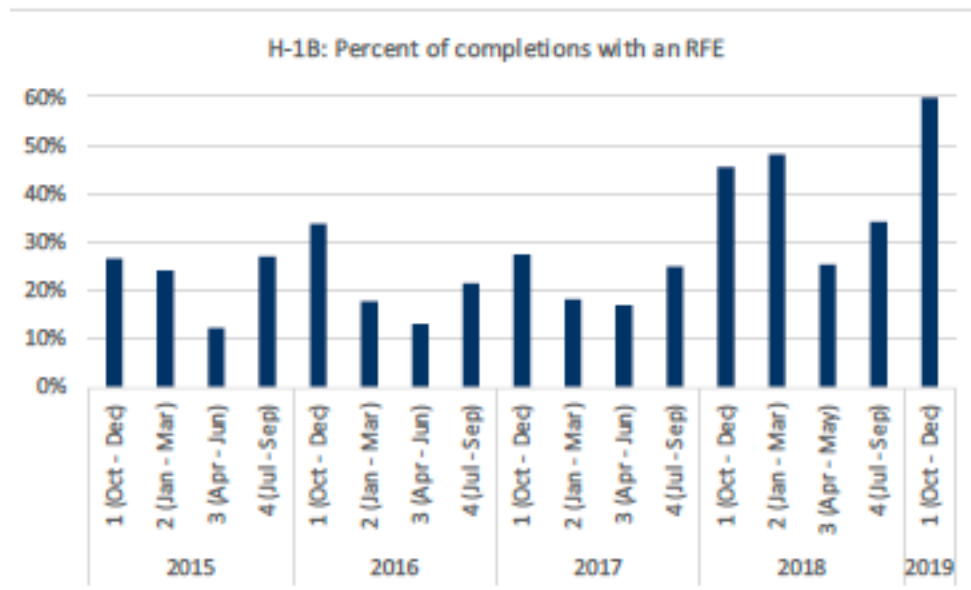
**U.S. Citizenship
and Immigration
Services**

Public Charge Regulation

- Originally effective on October 15, 2019, it was blocked by courts until a ruling by Supreme Court on January 27, 2020 which made it effective on February 24, 2020.
- Under the public charge law, instead of assessing whether an applicant is likely to become primarily dependent on the government for income support, the new rule defines a public charge as a person who receives any number of public benefits for more than an aggregate of 12 months over any 36-month period of time. Each benefit used counts toward the 12-month calculation.
- Before the new rule, use of publicly-funded health care, nutrition, and housing programs were not considered negative factors for purposes of public charge. However, the new rule expands the list of publicly-funded programs that immigration officers may consider when deciding whether someone is likely to become a public charge.
- New forms required for non-immigrant and green card applications as of February 24, 2020 that will require additional information/evidence (credit check for green card applications)

USCIS Trends With H-1B Status

- Increased denials since 2007
- In 2007 78% of H-1B petitions were approved. In 2016, the approval rate was 87%. However, in 2017, the approval rate dropped to 73%.
- 40% increase in Requests for Evidence (RFEs)



Legislation in Congress



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Pending Legislation

116th Congress

H.R. 5327: Resolving Extended Limbo for Immigrant Employees and Families (RELIEF) Act

12/5/2019

On December 5, 2019, Representative Donna Shalala (D-FL) introduced the House companion version of the Resolving Extended Limbo for Immigrant Employees and Families Act or the RELIEF Act, which would eliminate the family- and employment-based green card backlog within five years.

AILA Doc. No. 19120930

H.R. 5038: Farm Workforce Modernization Act of 2019

11/12/2019

On 11/12/19, Representative Zoe Lofgren (D-CA), introduced the Farm Workforce Modernization Act of 2019 (H.R.5038) to amend the Immigration and Nationality Act to provide for terms and conditions for nonimmigrant workers performing agricultural labor or services.

AILA Doc. No. 19103105

H.R. 4803: Citizenship for Children of Military Members and Civil Servants Act

10/23/2019

On 10/23/19, Representatives Jerrold Nadler (D-NY) and Doug Collins (R-GA) introduced the Citizenship for Children of Military Members and Civil Servants Act to ensure children born abroad to Federal Government personnel residing abroad acquire automatic U.S. citizenship.

AILA Doc. No. 19102334

S. 2603, Resolving Extended Limbo for Immigrant Employees and Families (RELIEF) Act

10/16/2019

Senators Dick Durbin (D-IL), Patrick Leahy (D-VT), and Mazie Hirono (D-HI) introduced S. 2603, RELIEF Act, which would eliminate the per-country numerical limitation for employment-based immigrants and eliminate the family- and employment-based green card backlog over five years, among other things.

AILA Doc. No. 19101805

S.J.Res. 55: Immigrant Investor Program Modernization

9/24/2019

On 9/24/19, Senator Paul Rand (R-KY) introduced S.J.Res. 55, a joint resolution providing for congressional disapproval of the Immigrant Investor Program Modernization rule (84 FR 35750, 7/24/19).

AILA Doc. No. 19092709

S. 2540: EB-5 Reform and Integrity Act of 2019

9/24/2019

On 9/24/19, Senator Chuck Grassley (R-IA) and Senator Patrick Leahy (D-VT) introduced the EB-5 Reform and Integrity Act of 2019 to reauthorize the EB-5 Regional Center Program in order to "prevent fraud and promote and reform foreign capital investment and job creation in American communities."

AILA Doc. No. 19052707

S.J.Res. 54: Relating to a National Emergency

9/10/2019

On 9/10/19, Senators Tom Udall (D-NM), Jeanne Shaheen (D-NH), and Susan Collins (R-ME) introduced S.J.Res.54, a joint resolution that would terminate the national emergency declared by President Trump on February 15, 2019.

AILA Doc. No. 19092530

S. 2091: Backlog Elimination, Legal Immigration, and Employment Visa Enhancement (BELIEVE) Act

7/11/2019

Find Enacted Legislation

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Strategy Issues

- **Join the immigration reform movement!**
- **Stay informed—changes happening rapidly (but beware of source)**
- **Research employer's policies regarding sponsorship**
- **Permanent residency—start planning early**
- **Seek legal advice early in the process to assist your planning**
- **Plan graduation date/OPT with H-1B in mind**

Questions or Comments?



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