Immigration Considerations for Postdocs

Attorney Amanda Thompson

- Licensed 17 years
- Focuses solely on U.S. immigration law
- Managed immigration services for the Fermi National Accelerator Laboratory (2007 – 2014)
- Member, American Immigration Lawyers Association (AILA) (1998 – present)
- Vice-Chair / member, AILA Student & Scholars Committee (2009 – 2015)
- Committee Member, National Users Facilities Organization (www.nufo.org) (June 2011 – present)
- Frequent Speaker on immigration topics at national and regional conferences, institutions
- Primary Author, VisaGenius immigration blog
Agenda

• Immigration Terminology
• Immigration versus Career
• F-1 rules
  – OPT options
  – Cap Gap
  – Update on change in STEM OPT extension rules
• J-1 rules
  – Home residence [212(e)] & waivers
  – "Repeat participation"
• Transitioning to H-1B
  – OPT to H-1B – Do's and Don’ts
  – Cap-exempt H-1B vs cap-subject H-1B
  – E-3 / TN and other options
• Permanent Residence
  – Overview of processes
  – Priority Dates and Backlogs
  – Eligibility versus Admissibility
  – Transitioning to PR status
  – Travel and Relocation Outside the US after the Green Card
• Options for Entrepreneurs
• How it all fits together to form your “immigration strategy”

Questions to Ask Yourself

• Which is your priority:
  – Residence in the USA?
  – A specific career?

• If you have employment now, what is the plan?
  – Will your employer have you stay in the U.S. following graduation?
  – Will your employer send you abroad?
  – How long will your first appointment likely be?
    • Will your first appointment will be renewed?
    • Or will be looking for another appointment “soon”?

• What is your long term plan?
  – Do you have a sense of where your career will take you?
    • Is career more likely to be pursued abroad or in the U.S.?
IMMIGRATION TERMINOLOGY

Agencies

Department of Homeland Security
- Customs and Border Protection
  - Grants Status during Admission

US Citizenship and Immigration Service
- Processes petitions and applications for immigration "benefits"

Department of State
- National Visa Center
  - Bridges between DHS and DOS for certain visa applications

US Consulates
- Adjudicate immigrant and nonimmigrant visa applications
Definitions

- **Immigrant**
  - A person who intends to remain indefinitely in the U.S.
  - Everyone arriving in the U.S. is assumed to be an Immigrant unless they can prove otherwise.
  - Spouse of a US Citizen
  - Permanent Employee of a US Organization

- **Nonimmigrant**
  - A person who establishes that they are one of the defined categories of individuals permitted temporary admission to the U.S.
  - F-1 Student
  - H-1B Worker

- **Immigrant Intent**
  - The plan to reside indefinitely in the U.S.
  - Not the same as a “hope” to reside indefinitely in the U.S.
  - Immigration officials decide whether you have Immigrant Intent based on what they think about your behavior
  - Different nonimmigrant visa statuses view Immigrant Intent in different ways

- **Dual Intent**
  - An intention to both comply with the nonimmigrant limits on admission while planning for permanent residence
  - Only very few nonimmigrant statuses permit dual intent
    - H-1B
    - L-1

Visa versus Status

- **Visa**
  - Issued to you by U.S. Consulate abroad.
  - = to an admission ticket.
  - Shows what you would like to do
  - Does not give you the right to do it
  - You can have many unexpired nonimmigrant visa stamps.
  - BUT you only present ONE visa stamp during admission.
  - The expiration of the visa stamp = the end of when you can present it to be admitted after travel abroad.
  - Does not affect your ability to remain in the U.S. if you do not depart.

- **Status**
  - You hold “status” only while physically in the United States.
  - Granted to you by CBP during admission.
  - = the legal rights and obligations you have in the U.S.
    - To study at a school
    - To reside in the U.S.
    - To work only when permitted
    - To leave by a certain date...
  - Evidenced by the electronic (online) “I-94” record of your admission
  - Status (and maintaining status) is important during the permanent residence process
# Options

<table>
<thead>
<tr>
<th>F-1 OPT</th>
<th>J-1</th>
<th>H-1B</th>
<th>O-1</th>
<th>TN / EB</th>
<th>B-1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Location of Employer</td>
<td>In or outside of USA*</td>
<td>In or outside of USA*</td>
<td>US Employers* only</td>
<td>US Employers or Agents</td>
<td>US Employers only</td>
</tr>
<tr>
<td>Location of employment activities</td>
<td>Inside the USA*</td>
<td>In or outside of USA*</td>
<td>Inside the USA</td>
<td>Inside the USA</td>
<td>Employment must be outside Business trip must be inside</td>
</tr>
<tr>
<td>Initial Validity</td>
<td>Up to 12 months</td>
<td>Research Scholar: up to 5 years</td>
<td>Up to 3 years</td>
<td>“Event” – up to 3 years*</td>
<td>1 - 2 years*</td>
</tr>
<tr>
<td>Extended Validity</td>
<td>+ 17 months*</td>
<td>Extensions possible to max 5 years</td>
<td>Then 1 or 2 years outside US before eligible again</td>
<td>6 years – Then 1 year outside US before eligible again</td>
<td>Max = 3 years, No limit on repeat events</td>
</tr>
<tr>
<td>Options after “Max-Out”?</td>
<td>Prohibited</td>
<td>Prohibited</td>
<td>Dual Intent permitted</td>
<td>Regulations are silent</td>
<td>Prohibited</td>
</tr>
<tr>
<td>Notes</td>
<td>Travel might be problematic</td>
<td>* Time spent outside the U.S. is considered “unemployment” unless certain conditions exist</td>
<td>* Repeat participation might limit subsequent J-1s.</td>
<td>* 212(e) might bar H-1B, permanent residence or certain other statuses</td>
<td>8-year maximum = timeline for permanent residence</td>
</tr>
<tr>
<td></td>
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<td></td>
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</tr>
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**IMMIGRATION VERSUS CAREER**
**Career Trajectory**

- **Career trajectory:**
  - The path your jobs take during your working years
  - Can be considered in terms of
    - Field / Industry
    - Occupation / Role
    - Seniority / Supervision
    - Income

- Careers used to be linear, and largely within one employer:

- Recent hiring trends increase the likelihood of non-linear trajectories across many employers:

**Quick Facts**

- 67% of non-US citizen PhDs who stayed in the US took a postdoc position.¹
  - 33% took “other” roles
  - Only 24% of those roles were “potentially permanent”

- The number of Postdocs taking non-academic positions grew from 4% in 2008 to 16% in 2012.²

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¹ [http://www.aip.org/statistics](http://www.aip.org/statistics)
² [Science Careers, Aug 2012](http://www.aip.org/statistics)
More Facts

- Starting salaries are higher for postdocs at government labs than academe
- Starting salaries are higher in industry than anywhere else

http://www.aip.org/statistics

USCIS and Career Trajectories

- The main structure of the US immigration system was (mostly) created in the 1970s
  - Careers were linear
  - Linear is easy to understand
  - USCIS likes linear careers
- If permanent residence is your ultimate goal:
  - Be sure your career has a recognizable trajectory
    - Change career direction more slowly
    - Or recognize it might delay permanent residence
  - Document your interests and skills
    - Engage in internships, volunteer work, etc.
      » Because….
Immigration and Data

- The US immigration process is all about accumulating hard data
  - Documents take the place of numbers
  - Keep copies of everything as you move through career
    - Emails
    - Paperwork
    - Certificates
    - Get Reference letters after every interaction
    - Etc.
- Each time you document an interest or activity, you create a potential data point to your career trajectory for immigration purposes
  - When it comes time for permanent residence, you select the “dots” that you want to connect, to create the pattern you want to show the USCIS

Career Trajectories
OPT Employment Options
Cap Gap
Update on change in STEM OPT extension rules

1. OPT Employment Options
1. OPT Employment Options

**Traditional employment**
- You perform services for another person or organization
- The Employer
  - Pays you wages in return
  - Tells you which tasks to perform
  - Evaluates you in your performance
  - Provides you with the tools you need to do your work
  - Issues you a W-2 at the end of the tax year detailing your wages and other taxable or tax-exempt benefits and deductions
  - Remits the estimated tax on your earnings to the state and federal governments on a quarterly basis

**Self-employment**
- You provide services to another person or organization
- You set the rate to be paid for the services, and they agree to that rate
- You might
  - Decide which tasks to perform
  - Decide when or when not to engage in the services
  - Evaluate the outcome
  - Provide your own tools
  - Be called “independent contractor”
- You must
  - Remit the estimated tax on your earnings to the state and federal governments on a quarterly basis
  - Your customer might
    - Issue an IRS Form 1099 to you and the federal government detailing how much they have paid you for your services

**Unpaid activities**
- You provide services to another person or organization, and
- You receive no compensation in any form, directly or indirectly

Newly proposed STEM OPT Rules eliminates unpaid activities as an option

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**Interviews and OPT**

<table>
<thead>
<tr>
<th>Question</th>
<th>Visa Status</th>
<th>Situation</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Are you currently authorized to work anywhere in the United States?</td>
<td>F-1</td>
<td>If OPT is approved and EAD is in hand</td>
<td>YES</td>
</tr>
<tr>
<td></td>
<td>F-2</td>
<td>Spouse or child or student</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>J-1</td>
<td>Exchange Visitor Program participant</td>
<td>No*</td>
</tr>
<tr>
<td></td>
<td>J-2</td>
<td>If EAD is in hand</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>H-1B</td>
<td>Specialty Occupation Worker</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>H-4</td>
<td>Spouse of H-1B</td>
<td>Sometimes**</td>
</tr>
<tr>
<td></td>
<td>O-1</td>
<td>Extraordinary Worker</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>O-3</td>
<td>Spouse of O-1</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>AOS</td>
<td>If EAD is in hand</td>
<td>Yes</td>
</tr>
</tbody>
</table>
Interviews and OPT

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Will you require sponsorship for a visa or work permit at any time during the employment?</td>
<td>YES*</td>
</tr>
<tr>
<td>Are you a US citizen or lawful permanent resident?</td>
<td>NO</td>
</tr>
</tbody>
</table>

Tips before Interviews

- Check the employer website thoroughly to see whether the organization has
  - An office that processes visas or provides immigration services
  - General Counsel (lawyer) that manages immigration
  - An immigration sponsorship policy
  - Statements on certain jobs about “US Citizens only”
  - Instructions for posting Labor Condition Applications for workers placed “at” the organization by other employers (who to contact, etc.)
- Check the size / demographics of the organization’s workforce:
  - Large and highly international?
  - Small and highly international?
  - Small and apparently all “American”?
- What are the demographics of the degree program sought by the organization?
  - Are the majority of the students in the degree program international?
Tips During the Hiring Process

- Do not mention visas, sponsorship or immigration during the first interview
  - Unless the organization brings it up
- Start the discussion with the Hiring Manager or Committee Member who seems most friendly / interested in you
  - That person already sees you as a potential asset
  - HR will see you as extra work / uncertainty
- Be knowledgeable about what needs to be done, when, and how
  - Don’t just drop an expensive and time-consuming problem on their lap and expect them to be happy about it
- If the organization is not international, expect HR and the Committing / Hiring Manager to be alarmed
  - Respect that you now cost more money and have more risk than any other candidate
  - Collaborate with them about how to move forward

- Be able to articulate why hiring you is worth the extra time, money and risk
  - Emphasize how your international background adds value
  - Connect your specific skills – including your international background – to the soft requirements of the job and organization

2. Cap Gap
What is the Cap?

- Immigration law limits the number of foreign nationals who may be approved for a new “H-1B” each fiscal year (October to September)
  - New H-1B visa stamp
  - Change to H-1B status
- “New H-1B” means
  - Eligibility for up to 6 years of H-1B status, as long as qualifying employment and sponsorship exists
- The Cap
  - Statutory limit is 65,000
  - Exemptions from the limit
    - 30,000 foreign nationals
      - With a master's or higher degree from U.S. universities from the cap on H-1B visas
      - The master's degree does not need to be required for the H-1B job
      - All H-1B non-immigrants who work at (but not necessarily for)
        - Universities
        - Non-profit research facilities associated with universities
        - Government research facilities
    - Carve-outs from the limit (Free Trade Agreements)
      - 1,400 H-1B1 visas for Chilean nationals
      - 5,400 H-1B1 visas for Singapore nationals
    - If reserved visas are not used, then they are made available in the next fiscal year to applicants from other countries
- Once these maximums are met, “cap-subject” employers are unable to sponsor new H-1B workers until the next fiscal year
  - Potentially 18 months away

Cap Gap

- Only relevant if employment is with a cap-subject employer
- Automatically extends your F-1 OPT through to September 30 under certain conditions
  - H petition must be filed (and accepted in lottery) during H-1B Filing Season (first week of April)
  - F-1 status must be unexpired on the date of filing
    - During the program of study
    - During OPT
    - During 60-day Grace Period
    - In this case, the student is allowed to remain in the US but is not work authorized!
  - Number of total permissible days of unemployment does not increase
    - Work Authorization still does not begin until October 1
If the H-1B petition is …

- **Selected** in the lottery
  - Student should provide DSO with receipt
  - SEVIS is updated with Cap Gap extension
  - DSO issues new I-20 showing OPT extended to September 30
    - Employer needs this to verify ongoing work authorization

- **Denied, withdrawn, revoked, or is not selected**
  - The student has the standard 60-day grace period to depart the USA
    - from the date of the rejection notice or their program end date, whichever is later

- **Students cannot travel during Cap Gap**
  - Once you depart the US, you must remain abroad until the H petition is adjudicated.
    - Consulates allow students to apply for H visas as early as July
    - Admission is not allowed until September 20
    - Work Authorization still does not begin until October 1

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3. Update on OPT Litigation
Update on OPT Litigation

- **April 8, 2008**: USCIS published the “original” rule allowing for 17-month extensions of OPT for STEM students (The “STEM OPT Rule”)
  - “Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students With STEM Degrees and Expanding Cap gap Relief for All F-1 Students With Pending H-1B Petitions.”
- **October 6, 2013**: USCIS issues a memo clarifying the STEM OPT Rule
  - F-1 students who are currently in a period of post-completion OPT while completing their thesis and have completed all other course requirements for the STEM degree, are eligible to apply for a 17-month STEM extension, notwithstanding the fact that the student has not yet completed the thesis requirement or equivalent for his or her STEM degree.
- **March 28, 2014**: lawsuit filed challenging the STEM OPT rule
  - WashTech argued DHS did not
    - Have authority to pass a rule creating a STEM OPT benefit, and
    - Act in accordance with the Administrative Procedure Act (APA) when it promulgated the STEM OPT extension rule in 2008, since it published it in the form of an interim final rule that became effective on the day of publication, without the usual public notice and comment period required by the APA.
- **August 12, 2015**: Court found in favor of the Plaintiff
  - DHS’ failure to provide notice and invite public comment at the time of the 2008 STEM OPT extension rule was “a serious procedural deficiency” that merits “vacatur” (eliminating) the STEM OPT Rule.
  - To avoid “chaos” Court gave USCIS until Feb 12, 2016 to get a new rule in place
  - Court held that DHS did have the regulatory authority to establish the STEM OPT benefit

- **August 18, 2015**: WashTech filed a notice of appeal with the United States Court of Appeals for the District of Columbia Circuit [Civil Action No. 1:14-cv-529]
  - WashTech likely will challenge the District Court’s August 12, 2015 determination that establishing the STEM OPT benefit in 2008 was within the scope of DHS’s regulatory authority
- **October 19, 2015**: USCIS published a new proposed rule with request for comments
  - The comment period closed in November with an rumored 50,000+ comments
- **December 22, 2015**: DHS filed a request to have their deadline extended to May 10, 2016
- **January 11, 2016**: WashTech filed a response arguing that the District Court should not grant the extension
- **January 23, 2016**: Court granted DHS’s motion to extend the stay of the vacatur of the STEM OPT rule until May 10, 2016
- **February 5, 2016**: DHS sent the final STEM OPT rule to OMB for review
  - The final rule will have to be published by about March 10, 2016 to accommodate the May 10, 2016 vacatur date of the current rule

- Right now, USCIS is accepting and processing EAD applications based on the "old" STEM OPT 17-month extension rule.
Proposed OPT Rule

- Defines “STEM” by reference to the Department of Education Classification of Instructional Programs (CIP) taxonomy
  - mathematics
  - natural sciences (including physical sciences and biological/agricultural sciences)
  - engineering/engineering technologies, and
  - computer/information sciences, and related fields
- Increases STEM extension to 24 months, from 17 months
- Expands deadline from 30 to 60 days to file STEM Extension application
  - As before, authorizes continued employment while application is pending
- Eliminates the “once per lifetime” rule
  - If a student earns a second, higher STEM degree, would be eligible for a second STEM OPT extension after completing the initial post-completion OPT
- Enables students to connect the STEM OPT Extension to a prior degree rather than the most recently obtained degree
  - Students who complete (1) STEM degree and (2) non-STEM degree
  - Students with double major or dual degrees, where only one degree/major is STEM
- Increases the number of additional days of unemployment permissible from 30 to 60
- Retains the original “Cap Gap” mechanism
- Limits STEM OPT extensions only to accredited U.S. educational institutions
- Gives DHS the authority to conduct site visits

- Requires employers to
  - Implement
    - Formal mentorship and training programs
      - Proposed Form I-910 “Individualized Mentoring and Training Plan
      - Requirements for the student and employer
      - DSO must review and approve before the DSO may recommend a STEM OPT extension
    - Might have to be included in the Form I-765 Application
  - Evaluation procedures including
    - Documentation of student progress toward the training goals described in the Mentoring and Training Plan
    - Receiving evaluations at least every six months
    - Concluding evaluations
      - Each evaluation must be signed by student and employer and submitted to DSO
  - Strongly parallels the requirements of the J-1 Internship or Training categories
  - Certify
    - Wages and working conditions
      - “The terms and conditions of a STEM practical training opportunity during the period of the 24-month OPT extension, including duties, hours, and compensation, must be commensurate with terms and conditions applicable to the employer’s similarly situated U.S. workers in the area of employment.”
      - Eliminates unpaid opportunities for STEM OPT Extensions
      - Requires a minimum of 20 hours per week of activities
    - Have an Employer Identification Number (EIN)
  - Demonstrate E-Verify participation with
    - Valid E-Verify company or
    - Client company ID number
Proposed OPT Rule - Transition

- Students already on a 17-month extension may request extra 7 months if they meet all requirements of the new proposed rule, including submission of the Mentoring and Training Plan
  - The extension can be filed up to 120 days before the end of the 17-month period

- Students whose OPT Extensions were filed under the old rule but which are still pending at the time the new rule comes into effect would have two choices:
  - Withdraw the existing application and then file a new application under the new rule; or
  - Not withdraw the existing application and have the EAD issued under the old rule, and then file again for the additional 7 months under the new rule
Home Residence

- Arises under Section 212(e) of the Immigration and Nationality Act
- Also called Return Residence
  - If you are resident in a country other than your home country when you become subject, you might have to return to that "other" country
- Only applies to certain J-1 visa holders
  - And their accompanying J-2 family members
- Requires residence in the home country (or country of last residence)
  - For 2 years (790 days)
  - Before being eligible for
    - H-1B visa status
    - Permanent residence
    - Or certain other visas (K, L)
- Does not bar trips to the US in other visa statuses
  - B-1 or B-2
  - More J-1s
  - F-1
Waivers

Waivers of 212(e)

• No Objection
  – You must obtain Statements from
    • Home Country government, and
    • Sponsor of J program
  – Not available to foreign medical physicians who received graduate medical education or training
  – If available, this is the easiest option for most
  – You file online DS-3035 Application to DOS Waiver Review Board
    • DOS issues recommendation to USCIS

• Request by an Interested U.S. Federal Government Agency ("IGA")
  – You must be engaged providing services to the agency and the agency must demonstrate that your absence for 2 years would be detrimental to its interests
  – Available to any (all) U.S. federal government agencies
  – Most agencies have well-developed internal policies about whether they will request such waiver and if so, how and when
  – Agency submits request directly to the DOS Waiver Review Board
    • DOS issues recommendation to USCIS

• Conrad State 30 Program
  – Available only to foreign medical graduates
    • Very limited - each Department may request only 30 such waivers per year.
  – Department issues request directly to DOS
    • DOS issues recommendation to USCIS
Waivers of 212(e)

- Persecution
  - Available if you can demonstrate that you will be persecuted based on your race, religion, or political opinion if you return to your home country
  - Request goes directly from the Agency to the DOS
    - DOS issues recommendation to USCIS

- Exceptional Hardship to a U.S. citizen
  - Available if you can demonstrate that your departure for 2 years would cause "exceptional hardship" to your U.S. citizen or LPR spouse or child
    - "Exceptional hardship" is a high standard
      - If the US spouse chooses to live abroad
        - Must be more than mere "anxiety, loneliness, and altered financial circumstances"
      - If the US Spouse chooses to remain in the U.S.
        - Separation is then a self-imposed hardship
        - Separation is a problem many families face and does not by itself represent hardship
  - Discomfort and/or inconvenience from mere separation from family is not enough
  - Application is submitted directly to USCIS

Repeat Participation
Repeat Participation

- 13 categories of J-1 program
  - Research Scholar
  - Student
  - Intern
- Regulations restrict participation in the same category of J-1 Exchange program a second time
  - Regardless of whether the visa is sponsored by the same or different organization, or whether it is for the same or different research activity.
- Repeat participation rules also are 2 years
  - J-1 Research Scholars must wait 2 years before being eligible for J-1 Research Scholar status again
  - Also not eligible for J-1 Research Scholar status if you were in the U.S. in any J status (except Short Term Scholar) for more than 6 months of prior 12 month period
  - Trainees must wait 2 years before being eligible for J-1 Trainee status again
  - Interns must wait 2 years before being eligible for J-1 Trainee status
  - Au pairs must wait 2 years before being eligible for J-1 au pair status again
- Home Residence Rule bars H-1B, permanent residence and certain other visa statuses.
- Repeat Participation Rules bar certain J visa statuses

H-1B Overview
- OPT to H-1B – Do’s and Don’t’s
- Cap-exempt H-1B vs cap-subject H-1B
- E-3 / TN and other options

TRANSITIONING TO H-1B
1. H-1B Overview

- Authorizes certain work in the U.S. for U.S. employers in Specialty Occupations:
  - The job duties involve the practical application of a body of highly specialized knowledge, and
  - The minimum educational requirement usually is the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent)
- Is subject to LOTS of regulations, including about wages
  - Sometimes this causes problems
- Must meet Dept. of Labor thresholds for the level and occupation
- Is one of few visa statuses that allow immigrant intent
  - This is the easiest status from which you can jump to permanent residence without interruption in your ability to work
- Is limited to 6 years in total.
  - Post 6th-year extensions of H-1B visa status are possible if you have reached a certain stage of your permanent residence process by 365 days before the end of the 6th year
Characteristics of H-1B Workers

2. OPT to H-1B
## OPT versus H-1B

**OPT**
- Work activities must be “related to your degree field”
- DSOs and USCIS interpret this somewhat flexibly
  - Facilitate broadest options to graduating students in launching careers
- Example:
  - Physics PhD involves a lot of computing and simulations
  - Work in computing therefore related to the degree field

**H-1B**
- Job must be in a “specialty occupation” that requires a specific degree or degree fields.
  - And the worker must have the specific degree required for the job.
- Example:
  - Physicists requires Physics degrees
  - Computer Professionals requires computing degrees

## Keep in Mind
- OPT is an opportunity to establish data points in your career trajectory toward a chosen target career
- **BUT in 36 months** you will need H-1B sponsorship in a “specialty occupation” that “requires your degree”
  - Be wary of jobs that cannot, ultimately, support H-1B sponsorship if you want to remain in the US after OPT
    - “Degree equivalencies” sometimes are possible
      - Combines your actual degree with your experience to yield an “equivalent” education in the required field
3. Cap Exempt to Cap-Subject H-1B

H-1B Cap

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Total # filed</th>
<th>Total # Approved*</th>
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<tr>
<td>2010</td>
<td>247,617</td>
<td>192,990</td>
</tr>
<tr>
<td>2011</td>
<td>267,654</td>
<td>269,653</td>
</tr>
<tr>
<td>2012</td>
<td>307,713</td>
<td>262,569</td>
</tr>
<tr>
<td>2013</td>
<td>299,467</td>
<td>286,773</td>
</tr>
<tr>
<td>2014</td>
<td>318,824</td>
<td>315,857</td>
</tr>
</tbody>
</table>

*Includes:
- New
- COS
- Extensions
- Amendments
- Concurrent
- Cap-Exempt
H-1B Cap

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Date Cap Reached</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010</td>
<td>12/21/09</td>
</tr>
<tr>
<td>2011</td>
<td>01/26/11</td>
</tr>
<tr>
<td>2012</td>
<td>11/22/11</td>
</tr>
<tr>
<td>2013</td>
<td>06/07/12 Bachelors Degree 06/11/12 Master's Degree</td>
</tr>
<tr>
<td>2014</td>
<td>04/07/13</td>
</tr>
<tr>
<td>2015</td>
<td>04/07/14</td>
</tr>
</tbody>
</table>

Fiscal Year | Total # Petitions Filed | Percentage of Petitions Accepted* |
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>124,000</td>
<td>~68%</td>
</tr>
<tr>
<td>2015</td>
<td>233,000</td>
<td>~36%</td>
</tr>
</tbody>
</table>

* Extremely rough estimate. No breakdown of how many of "Total" were bachelors versus masters.

Employer Perspective

**Cap-Exempt**
- May petition any time
- Work may begin any time
- Lower cost because exempt from some fees
- No lottery
- H-1Bs are less expensive and less risky for cap-exempt employers

**Cap-Subject**
- Must petition in April
- Employment may begin no sooner than October
- Additional/higher fees for some employers
- 1 in 3 chance of petition being selected
  - If not selected
    - All other costs, including lawyer fees, still must be paid
    - Government filing fees are not paid
    - Company loses the worker
      - Unless more OPT time available
- H-1Bs are expensive and risky for Cap-Subject employers
**Cap-Exempt to Cap-Subject - Option 1**

1. Work for Cap-Exempt Org in H-1B Status
2. In April, Cap-Subject Org files H-1B petition to start in October
3. H-1B Petition selected in lottery
4. H-1B Petition approved
5. On October 1, start new job

Employer #2 must wait 6 months for you to begin work. Not all employers like this Option.

---

**Cap-Exempt to Cap-Subject - Option 2**

1. Work for Cap-Exempt Org in H-1B Status
2. Cap-Subject Org files "Concurrent" H-1B petition (in April)
3. H-1B Petition is selected in lottery
4. Start part-time employment with Cap-Subject Org under portability rules
5. Continue employment with Cap-Exempt org
6. H-1B petition approved
7. On October 1, move 100% to Cap-Subject Org
8. Cap-Subject Org files amending petition to change job to fulltime
Cap-Exempt to Cap-Subject – Option 2

- “Concurrent Employment”
- Requires coordination between the Cap-Exempt and Cap-Subject employers
- Does not delay the start of the employment with the Cap-Subject employer but
  - You are able to work only “half” the time for each employer
- Cap-Exempt employer might also need to file a petition to reduce your hours to part-time
  - Depends on how it characterized your employment and wages in its H-1B petition
- Is slightly more expensive for the Cap-Subject employer
  - Two filings to get to where it wants, instead of merely one
- If the petition is not selected in the Lottery, your Cap-Exempt employer still knows you want to leave
  - Not usually a problem with PostDocs

Other Options
E-3 and TN

• Similar to H-1B visa status except
  – E-3 is limited to Australian citizens
  – TN is limited to Canadian and Mexican citizens.
• Does NOT allow immigrant intent
• Does not have a 6-year maximum period, but
  – It is unwise to hold these statuses for a “really long” time, and
  – The longer you remain working in the U.S., the more important it is to have strong ties to your home country.

O-1

• “Extraordinary Ability”
  – Sustained national or international acclaim
  – A level of expertise indicating that the person is one of the small percentage who have risen to the very top of the field of endeavor
• Standard
  – Softer standard than for permanent residence
  – Higher standard than a few years ago
• Valid for an “event” up to 3 years
  – No limit to the number of “new” events therefore (in theory) no limit to the number of O-1s you seek
• Does not prohibit immigrant intent
• Not barred by Home Residence Rule
• Categories of Evidence:
  – Major, international prizes or awards, OR
  – At least three of:
    • National or international prizes or awards
    • Certain membership in certain associations
    • Published material about you or your work
    • Publications by you in scholarly journals or comparable media
    • Judge of the work of others
    • Original contributions to the field
    • Employment in critical or leading roles by distinguished organizations
    • High salary
1. Overview of PR Process
Greencards

Table 2.
Lawful Permanent Resident Flow by Major Category of Admission: Fiscal Years 2011 to 2013

<table>
<thead>
<tr>
<th>Category of admission</th>
<th>2013 Number</th>
<th>2013 Percent</th>
<th>2012 Number</th>
<th>2012 Percent</th>
<th>2011 Number</th>
<th>2011 Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employment-based preferences</td>
<td>161,110</td>
<td>16.3</td>
<td>143,998</td>
<td>14.0</td>
<td>139,339</td>
<td>13.1</td>
</tr>
<tr>
<td>Priority workers</td>
<td>38,978</td>
<td>3.9</td>
<td>39,314</td>
<td>3.8</td>
<td>25,251</td>
<td>2.4</td>
</tr>
<tr>
<td>Professionals with advanced degrees</td>
<td>63,026</td>
<td>6.4</td>
<td>50,959</td>
<td>4.9</td>
<td>66,831</td>
<td>6.3</td>
</tr>
<tr>
<td>Skilled workers, professionals, unskilled workers</td>
<td>43,632</td>
<td>4.4</td>
<td>39,229</td>
<td>3.8</td>
<td>37,216</td>
<td>3.5</td>
</tr>
<tr>
<td>Special immigrants</td>
<td>6,933</td>
<td>0.7</td>
<td>7,866</td>
<td>0.7</td>
<td>6,701</td>
<td>0.6</td>
</tr>
<tr>
<td>Investors</td>
<td>8,543</td>
<td>0.9</td>
<td>6,628</td>
<td>0.6</td>
<td>3,340</td>
<td>0.3</td>
</tr>
<tr>
<td>Diversity programs</td>
<td>45,618</td>
<td>4.6</td>
<td>40,320</td>
<td>3.9</td>
<td>50,103</td>
<td>4.7</td>
</tr>
</tbody>
</table>

"US Lawful Permanent Residents: 2013"
USCIS Annual Flow Report

Types of Filings

Credentials-Based

- Foundation is YOUR CREDENTIALS.
  - Education
  - Experience
  - Expertise
  - Accomplishments

Job-Based

- Foundation is “THE JOB”
  - Duties
  - Required education, skills and training
  - Terms and conditions of employment
  - Unavailability of “minimally qualified American workers.”
3 Stages of Permanent Residence

0. Application for Permanent Labor Certification
   - Employer filed with U.S. Department of Labor
   - Describes your JOB and argues that "minimally qualified American workers" are unavailable.
   - Not filed for everyone...

1. Form I-140 Petition for Immigrant Worker
   - Employer filed with U.S. Citizenship and Immigration Service (USCIS)
   - Describes your CREDENTIALS in the context of either the FIELD or the JOB.

2. Form I-485 Application to Adjust Status Or Consular Processing of Immigrant Visa
   - You file with USCIS
   - Describes YOU - the PERSON

OPT Versus Permanent Residence

• OPT rules are very flexible
  - Activity must relate to your field of study
  - Broadly interpreted to maximize opportunities

• H-1B rules are rigid
  - Degree field must be required by the “specialty occupation”
  - Narrowly interpreted to protect the American workforce

• Permanent Residence rules include both
  - Some processes are flexible
    • But require significant accomplishments in the field
  - Some processes are rigid
    • But are available to people who are not yet "amazing" in their field
2. Self-Sponsored PR Categories
**EB-1 Extraordinary Ability**

- Very high threshold to satisfy
  - "...One of that small percentage who have risen to the very top of the field of endeavor..."
  - “Sustained” national or international acclaim
    - National or international acclaim on more than one occasion
    - Acclaim existed in the past and continues to exist at the time of filing
    - Predicts likelihood of accomplishments in the future
- Your achievements must “be recognized in the field of expertise.”
  - The law sets out 9 ways to show “Extraordinary Ability.”
    - You must show you satisfy at least 3 of these in your petition.
    - More is better!
- Does not require that you have an offer for “permanent employment” in the United States.
  - But you must show that you will “continue work in the area of expertise.”

**EB-2**

**Advanced Degree**
- You are a member of a “Profession”
  - Engineer, scientist, doctor, lawyer, etc.
- You have an education above that of a bachelor’s degree (i.e. Master’s or PhD)
  - Sometimes experience in combination with an education can work
  - Even more rarely, a combination of education might be considered an Advanced Degree
- You have an offer for a “permanent” job
  - The job requires the higher level degree

**Exceptional Ability**
- You have "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business"
  - Immigration law sets out 6 ways to show you are "exceptional"
    - You must include 3 in your petition
    - More is better!
- There is an offer of “permanent” employment in the U.S. to work in the field of your exceptional ability

- This is useful for individuals who cannot document that they are “extraordinary” or “outstanding”
- This is a very challenging category
  - Demonstrating EB-2 Exceptional Ability can be more difficult than demonstrating EB-1 Extraordinary Ability
National Interest Waiver

- Seeks to waive the requirement for a permanent offer of employer
  - This waives the requirement for Labor Certification (a “Labor Market Test”)
  - Tests whether minimally qualified American workers are available for “the job”
- Ultimately, the petition must answer these three questions:
  - How much does the USA “care” about the skills and abilities you have?
  - If a Labor Market Test was required, would it identify an individual with comparable abilities to you?
  - If not, why not?

I-140 Petition

- **Personal**
  - CV
  - Degrees
  - Awards
  - Testimonial Letters
- **Communications**
  - Emails confirming peer review
  - Emails requesting guidance
  - Invitations to speak or present
- **Publications**
  - Publication List
  - Citation Report
  - Information about journals
- **Internet**
  - Printouts from conference webpages
  - Printouts from experiment websites
  - Organization Charts
- **Employer**
  - Research activities
  - Your department / team
  - Internal Newsletters
- **Colleagues / Peers**
  - Testimonial Letters
  - Their courses, publications, etc.
  - Impact of your work on their research
Testimonial Letters

- Testimonial Letters are NOT employment reference letters.
  - They are not written to persuade someone to hire the beneficiary.

- Testimonial Letters must
  - Confirm that the beneficiary is
    • Recognized
    • Internationally
    • For Outstanding Research
      - That has had an Impact
      - And is Original
    • Within the Academic Field

- Testimonial Letters may
  - Verify elements for which independent documentation is not available

- Testimonial Letters should
  - Explain the Beneficiary’s research in the academic field in a way that is meaningful to the adjudicator.
  - Enable the adjudicator to appreciate the beneficiary’s impact in the field.
  - Make the adjudicator care about the research.

Kazarian

- On December 31, 2003, Poghos Kazarian, a researcher at Los Alamos National Laboratory, filed a petition requesting permanent residence on the basis that he had extraordinary ability as a theoretical physicist.
  - In August 2005, the USCIS denied the petition
  - Kazarian appealed the denial to the Administrative Appeals Office (“AAO”)
  - The AAO dismissed the appeal
  - Kazarian filed an appeal in the Central District of California
  - The Court granted summary judgment to the USCIS

- The decision is a precedent immigration decision
  - It is binding on USCIS

- USCIS has implemented the Kazarian decision into its procedures
  - Created a “two-part” analysis
    • Step 1: is the required regulatory evidence submitted, relevant, and convincing?
      - This is the “2 out of 9” evidence of Awesomeness and Renown
    • Step 2: does the submitted material, considered as a whole, demonstrate that the individual rises to the level required by immigration law?
      - Called a “final merits determination”
  - Applied this new analysis procedure to:
    • Extraordinary Ability
    • Outstanding Researchers
Evidence = Paperwork

The “standard of proof” for most immigration filings is the “preponderance of the evidence” standard

Is each claim you make “more likely than not” or “probably true”?

3. Transitioning to PR Status

- Adjustment
- Priority Dates
- Eligibility versus Admissibility
- Travel outside the US after the Greencard
Filings

Form I-140 (Immigrant Petition)
- Approval renders you eligible for the next step
  - It confirms that you are a specific category of immigrant
- Can be filed at any time
- Is filed only by the “primary” beneficiary or the employer

Form I-485 (Adjustment)
- Approval gives you the greencard
  - It changes your immigration status to Lawful Permanent Resident
- Can be filed only if an “immigrant visa” is available
- Is filed by every member of the family

Adjustment / Visa Application

Personal
- Passport
- G-325 Biographic Data
- Drivers License (if any)

Family
- Marriage certificate
- Birth certificate(s) / registry
- Passports / travel documents / ID

Employment
- Employment Confirmation
- Advisor / Colleagues
- Professional Associations

History
- Criminal Background
- Military Background
- Medical Exam

Immigration
- Past Approval Notices
- I-20 / DS-2019
- EADs, visas, etc.

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Nonimmigrant Visa Status versus Adjustment

• The filing of the Form I-485 Application for Adjustment
  – Is a clear expression of immigrant intent.
    • If you are in a nonimmigrant status that prohibits immigrant intent you instantly violate your visa status
      – F-1
      – J-1
  – Places you (by law) “in a period of stay authorized by the Attorney General of the United States.”
    • This does not give you “status”
    • This does not mean you are “legal”
    • It simply means that you are not illegal
  – This lasts until the moment the Adjustment is decided. Then:
    • If it is approved, then you are an LPR (instantly), or
    • If it is denied, you (instantly) have no further right to be in the US
      – (unless you appeal)…

Organizing Immigrants

• Worldwide immigration to the U.S. is limited based on “Preference Categories.”
• Preference Categories are organized based on how much or how little the US “prefers” a certain type of immigrant, according to:
  • Basis for permanent residence, and
  • Citizenship of the individual.

Basis

• Employment (skills) versus Family (relationships)
  – The USA “prefers” immigrants with more skills over immigrants with fewer skills.
  – The USA “prefers” immigrants with closer family ties over immigrants with fewer ties.
• US law describes 5 “EB” categories of workers who may immigrate to the U.S. on the basis of their professional skills or employment.
  – Abbreviated as EB-1, EB-2, EB-3, etc.

Citizenship

• US law also restricts the total number of immigrants that may enter the U.S. from each country.
  – Based on country of birth.
  – Current citizenship is irrelevant.
  – Called your “country of chargeability”.
  – An immigrant can “claim” the spouse’s country of birth.
• No more than 7% of total immigration each fiscal year can be from a given country.
Counting Immigrants

- The Department of State (DOS) is responsible for monitoring yearly immigration.
- Follows the government fiscal year (October 1 to September 30)
  - Each October 1, there is a new “release” of immigrant visas for the year.
- Lists the availability of immigrant visas based on
  - The different immigrant bases (Employment or Family)
  - Different preference categories (EB-1, EB-2, EB-3, etc.), and
  - Different countries of chargeability.
- Issued in the middle of each month.
- Forecasts what will be available the next calendar month.
  - DOS must
    - Balance new availability against “backlogged” immigrants who filed before the current fiscal year but still await green cards.
    - Anticipate new filings that will be made through the fiscal year by individuals of different skill levels and birth countries.

### Preference Categories

<table>
<thead>
<tr>
<th>Category</th>
<th>Label</th>
<th>Based on</th>
<th>Filed by</th>
<th>Begins with</th>
<th>Backlog?</th>
</tr>
</thead>
<tbody>
<tr>
<td>EB-1</td>
<td>Extraordinary Ability</td>
<td>Abilities, accomplishments, Experience</td>
<td>Employer + Yourself</td>
<td>Form I-140</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>Outstanding Researcher</td>
<td></td>
<td>Employer</td>
<td>Form I-140</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Multinational Manager</td>
<td>Employment with qualifying multinational organization</td>
<td>Employer</td>
<td>Form I-140</td>
<td></td>
</tr>
<tr>
<td>EB-2</td>
<td>Advanced Degree Professional</td>
<td>With National Interest Waiver of Requirement for Permanent Employment (NIW)</td>
<td>Employer</td>
<td>With NIW: Form I-140</td>
<td>China: 3.5 years, India: 7.5 years</td>
</tr>
<tr>
<td></td>
<td>Exceptional Ability</td>
<td>With NIW: Formal education, Abilities / accomplishments, Experience, Job</td>
<td>Employer + Yourself (with NIW)</td>
<td>Without NIW: Labor Cert</td>
<td></td>
</tr>
<tr>
<td>EB-3</td>
<td>Professional (Bachelor's Degree)</td>
<td>Job</td>
<td>Employer</td>
<td>Labor Cert</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Skilled Worker</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Eligibility versus Admissibility

- **Eligibility**
  - Do you meet the requirements for the Preference Category
  - Is there a backlog?

- **Inadmissibility**
  - Is there some reason that the US might not want you to live indefinitely the US anyway?

Is there a reason to say YES?
Is there a reason to say NO?
Ineligibility vs Inadmissibility

<table>
<thead>
<tr>
<th>Ineligibility</th>
<th>Inadmissibility</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not in status in the US at the time of filing the Adjustment</td>
<td>Certain violations of US immigration law (Eg. remaining in the US for more than 6 months after expiration of stay)</td>
</tr>
<tr>
<td>Having worked in the US for more than 180 days without authorization</td>
<td>“Moral Turpitude”</td>
</tr>
<tr>
<td></td>
<td>Based on past activities for which criminal charges resulted</td>
</tr>
<tr>
<td>Absence of approved Immigrant Petition</td>
<td>“Public Charge”</td>
</tr>
<tr>
<td></td>
<td>Terrorism, Polygamy, Money laundering, etc.</td>
</tr>
</tbody>
</table>

---

Temporary Visits Abroad After the Greencard

An LPR “shall not be regarded as seeking … admission into the United States … unless [the LPR] –

(i) has abandoned or relinquished that status, [or]

(ii) has been absent from the United States for a continuous period in excess of 180 days….”

8 U.S.C. §1101(a)(13)(C); [INA §101(a)(13)(C)]

This does NOT mean you just re-enter the USA every 6 months.

“If a permanent resident left the United States on a visit that would not end for twenty years, the visit would not be permanent but it hardly could be considered temporary either. If Congress had intended to allow permanent residents to reenter the United States and retain their status after “all visits abroad that are not permanent” it could have done so. Congress chose instead to use the word “temporary,” and we believe the usage contemplates a return within a relatively short period of time.

Chavez-Ramirez v. INS, 792 F.2d 932 (9th Cir. 1986)
Temporary Visits Abroad
After the Greencard

To retain LPR status, you must show convincingly:

1. That you intend to live indefinitely in the US, and
2. The trip abroad was a temporary departure from the U.S.

"Permission" to reside indefinitely in the U.S.

Obligation

<table>
<thead>
<tr>
<th>Category</th>
<th>Factor to consider, in context of circumstances as a whole</th>
</tr>
</thead>
<tbody>
<tr>
<td>Residence</td>
<td>How long did you reside in the U.S. before the departure?</td>
</tr>
<tr>
<td></td>
<td>How much of that was as a permanent residence, as opposed to other statuses?</td>
</tr>
<tr>
<td>Allegiance</td>
<td>Do you have permanent residence or citizenship in a foreign country?</td>
</tr>
<tr>
<td></td>
<td>Have you voted in foreign elections, or run for public office in a foreign country</td>
</tr>
<tr>
<td>Family</td>
<td>Do you have dependent family in the foreign country? Or are they in the US?</td>
</tr>
<tr>
<td>Property</td>
<td>Do you own anything valuable in the U.S. (even if it is being rented or is in storage)?</td>
</tr>
<tr>
<td></td>
<td>Do you own anything valuable in the foreign country?</td>
</tr>
<tr>
<td>Business</td>
<td>Do you have active or passive business interests in the U.S.? Or do you have this in the foreign country?</td>
</tr>
<tr>
<td>Finances, Investments,</td>
<td>Do you have savings accounts, checking accounts, investments, retirement accounts, etc., and if so, in which country?</td>
</tr>
<tr>
<td>Savings</td>
<td>Closing these accounts in the U.S. suggests an intention not to return – especially closing retirement accounts. Establishing these abroad also suggests an intention not to return.</td>
</tr>
<tr>
<td>Employment</td>
<td>Are you working abroad for a US employer? (GOOD!)</td>
</tr>
<tr>
<td></td>
<td>Or are you working abroad for a foreign employer, foreign government or international organization? (not good)</td>
</tr>
<tr>
<td>US Taxes</td>
<td>While abroad, are you still filing US taxes?</td>
</tr>
<tr>
<td></td>
<td>Are you do this as a &quot;resident&quot; of the US, or as a &quot;non resident for tax purposes&quot;? The latter is highly suggestive of intention to abandon U.S. residence – very difficult to overcome.</td>
</tr>
</tbody>
</table>
Options for Entrepreneurs

- B-1
  - To visit the US to establish the business
  - Does not enable you to remain in the USA to operate the business

- E-1 / E-2
  - For nationals of countries with treaties with the US
  - Authorizes
    - Trade between your home country and the USA
    - A "substantial" investment

- L-1 Multinational Organization
  - Organization:
    - Must be "doing business" in the USA and one other country
  - You:
    - Must have been employed outside the US, for 1 consecutive year
      - Manager / Executive
      - Specialized Knowledge

- H-1B
  - Employer must be separate entity than you
    - Incorporate, preferably with other owners
    - USCIS looks with suspicion on filings from "closely held" organizations on behalf of one of the owner
      - But not impossible
Options for Entrepreneurs

- NIW
  - Business should create jobs
  - Business should be operating in the field of your expertise

- EB-5
  - Immigrant investment visa
    - Must create jobs, invest at least a million
    - Very difficult standard

Entrepreneurial Thoughts

Traditional Employment
- Immigration process
  - Eligibility
  - Documentation
  - Timeline
- Career trajectory

Entrepreneurship
- Immigration process
  - Eligibility
  - Documentation
  - Timeline
- Business Plan
  - Outline of plan
  - Feasibility
  - Market study
  - Budget / costs
- Financial Investment
  - By you
  - By others
- Hire staff
- …
HOW IT ALL FITS TOGETHER TO FORM YOUR “IMMIGRATION STRATEGY”

Think, Plan, DO

• Think
  – Evaluate what your true priorities are
    • Talk with colleagues and family
    • Understand at what you have enjoyed most, and enjoyed least
    • Work
  – Evaluate how you manage
    • Uncertainty
    • Lack of control

• Plan
  – Write down a 5-year plan of where you want to be
    • Immigration (USA versus elsewhere)
    • Career
  – Document everything you do
    • Really – everything
    • Have a Dropbox folder or equivalent where you systematically place emails, articles, copies of every CV you send out, etc.

• DO
  – Follow the plan
    • When you get job opportunities
    • When you job search
    • When you network
  – If at some point you REALLY want to deviate from the Plan
    • Evaluate and understand why
    • Revise your plan (if necessary)
    • Then make your decision