Knowledge is Power: Visa Options and Advocacy Approaches for International Postdocs

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Deirdre Griffin
Projected increases in STEM Jobs: 2015-2020

- 16% increase in Mathematics jobs
- 22% increase in Compute Systems Analyst jobs
- 32% increase in Systems Software Developers jobs
- 36% increase in Medical Scientists
- 62% increase in Biomedical Engineers
- 14% increase in all STEM occupations
Foreign Students Earn Large Share of Advanced Degrees in Many STEM Fields

Top fields of study by share of degrees earned by foreign students in 2012-13

<table>
<thead>
<tr>
<th>DOCTORAL DEGREES</th>
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<tbody>
<tr>
<td>Engineering</td>
<td>57%</td>
</tr>
<tr>
<td>Computer and information sciences</td>
<td>53%</td>
</tr>
<tr>
<td>Mathematics and statistics</td>
<td>50%</td>
</tr>
<tr>
<td>Engineering tech./ engineering-related fields</td>
<td>49%</td>
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<tr>
<td>Physical sciences and science technologies</td>
<td>40%</td>
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</tbody>
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<table>
<thead>
<tr>
<th>MASTER'S DEGREES</th>
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<tbody>
<tr>
<td>Legal professions and studies</td>
<td>55%</td>
</tr>
<tr>
<td>Construction trades</td>
<td>50%</td>
</tr>
<tr>
<td>Computer and information sciences</td>
<td>44%</td>
</tr>
<tr>
<td>Engineering</td>
<td>43%</td>
</tr>
<tr>
<td>Mathematics and statistics</td>
<td>43%</td>
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<thead>
<tr>
<th>BACHELOR'S DEGREES</th>
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<tbody>
<tr>
<td>Mathematics and statistics</td>
<td>10%</td>
</tr>
<tr>
<td>Mechanic and repair technologies</td>
<td>9%</td>
</tr>
<tr>
<td>Engineering</td>
<td>8%</td>
</tr>
<tr>
<td>Architecture and related services</td>
<td>7%</td>
</tr>
<tr>
<td>Business</td>
<td>6%</td>
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</tbody>
</table>

Source: National Center for Education Statistics
PEW RESEARCH CENTER
Where Foreign Students Come From

Foreign students in the U.S. by region

Source: Institute for International Educations:
National Center for Education Statistics
PEW RESEARCH CENTER
Where Foreign Students Study in the U. S.

Top fields of study among foreign college students (at all levels) from largest source countries 2013-14

<table>
<thead>
<tr>
<th>Source: Institute for International Educations: National Center for Education Statistics PEW RESEARCH CENTER</th>
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<tbody>
<tr>
<td><strong>CHINA</strong></td>
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<tr>
<td>Total 274,439</td>
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<tr>
<td>Business and management 28%</td>
</tr>
<tr>
<td>Engineering 20</td>
</tr>
<tr>
<td>Math/computer science 12</td>
</tr>
<tr>
<td>Physical and life sciences 9</td>
</tr>
<tr>
<td>other 32</td>
</tr>
<tr>
<td><strong>INDIA</strong></td>
</tr>
<tr>
<td>Total 102,673</td>
</tr>
<tr>
<td>Engineering 38%</td>
</tr>
<tr>
<td>Math/computer science 26</td>
</tr>
<tr>
<td>Business and management 12</td>
</tr>
<tr>
<td>Physical and life sciences 10</td>
</tr>
<tr>
<td>other 15</td>
</tr>
<tr>
<td><strong>SOUTH KOREA</strong></td>
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<tr>
<td>Total 68,047</td>
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<tr>
<td>Business and management 17%</td>
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<tr>
<td>Fine and applied arts 13</td>
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<tr>
<td>Engineering 13</td>
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<tr>
<td>Social sciences 12</td>
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<tr>
<td>other 46</td>
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<tr>
<td><strong>SAUDI ARABIA</strong></td>
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<tr>
<td>Total 53,919</td>
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<tr>
<td>Intensive English 24%</td>
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<tr>
<td>Engineering 23</td>
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<tr>
<td>Business and management 17</td>
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<tr>
<td>Math/computer science 8</td>
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<tr>
<td>other 28</td>
</tr>
<tr>
<td><strong>CANADA</strong></td>
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<tr>
<td>Total 28,304</td>
</tr>
<tr>
<td>Health professions 15%</td>
</tr>
<tr>
<td>Business and management 15</td>
</tr>
<tr>
<td>Social sciences 12</td>
</tr>
<tr>
<td>Physical and life sciences 9</td>
</tr>
<tr>
<td>other 49</td>
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Meeting Employment Demands for STEM Professionals Requires Hiring Foreign Nationals

- Meeting employment demands for STEM professionals requires hiring foreign nationals (a person who is not a U.S. citizen or permanent resident); thus recruiters and managers need working knowledge of:
  - Visa types that authorize employment and lawful U.S. stay
  - Length of visa validity and restrictions on employment
  - Lawful vs. illegal discrimination in hiring practices
Restrictions on Employment Authorization

- There are restrictions on work authorization and visa status, a person legally in the U.S. with a non-immigrant visa is not automatically authorized to work for all employers

- The type and duration of employment authorization should be discussed with the employer before an offer of employment is accepted

- The potential costs and processing times to obtain and maintain the required work authorization should be considered – generally such costs are considered the employer’s “business expense”

- Spousal work authorization – expanded opportunities but still limited options
Immigrant and Non-Immigrant Visas

- An immigrant is a person who seeks to come to the US permanently, but “home country” citizenship can be maintained.

- A non-immigrant is a foreign national who will be coming to the US temporarily, but non-immigrant visas can extend for several years.
An individual who has a non-immigrant employment based visa:

- Holds work authorization for a limited period of time
- Can only work for the petitioning employer
- May work in either a temporary or permanent position
- May work full time or part-time; or for more than one employer concurrently
Types of Non-Immigrant Employment Based Visas

- B-1 Business Visitor
- E-2 Spouse of Investor or Treaty Trader
- F-1 Student (Optional Practical Training)
- H-1B Specialized Occupation Workers
- H-2B Temporary/Seasonal Worker
- J-1 Exchange Visitors
- J-2 Spouse of Exchange Visitor
- L-2 Spouse of Intra-Company Transfer
- O-1 Extraordinary Ability Aliens/Outstanding Researchers
- R-1 Religious Workers
- TN NAFTA Workers
B-1 Visas

- Are for “visitors for business”

- Will not grant U.S. employment authorization (the employer must be a foreign entity and pay must come from outside the U.S.)

- Can be used for international exchanges of information, training, and the like, including independent medical research
F-1 Visas

- Are for “students”

- Generally, provide for one year of “practical training” after graduation from a bachelor’s or master’s program

- Also permit “curricular training” for internships and co-op work

- Require a change of status, often to an H-1B visa, to maintain work authorization beyond the authorized “practical training”
H-1B Visas

- The H-1B non-immigrant category allows qualified workers to engage in temporary professional employment in the U.S.

- Employers can recruit and hire foreign workers to perform services in “specialty occupations”

- Can be granted for an initial 3 year period of stay, with a general maximum validity of 6 years
1. Hold a baccalaureate or higher degree required by the specialty occupation from an accredited U.S. college or university; or

   - Hold a foreign degree determined to be the academic equivalent of such U.S. degree; or

   - Have education, specialized training or progressively responsible experience that is the equivalent of a U.S. baccalaureate degree.

2. Hold an unrestricted state license or certification to practice the specialty occupation, when offered employment in a licensed profession.
The H-1B petition must be supported with U.S. Department of Labor certification of the employer’s properly filed Labor Condition Application (“LCA”)

The LCA provides key information on the job offered to the foreign national and represents a binding contract on certain terms and conditions of employment, which can be enforced either by the U.S. Department Labor or the foreign national employee.
A general “cap” or limit of 65,000 H-1B visas exists for each fiscal year.

An additional 20,000 visas are available for workers having a Master’s or higher degree from a U.S. institution.

The cap applies only to new issuance of H-1B visas or grants of H-1B status.

Colleges, universities, and qualifying non-profit research institutions are cap exempt employers for the quota purposes, as are non-profit organizations with qualified affiliations with U.S. colleges and universities.
If an applicant is already in the United States in H-1B status with another employer, the law allows the foreign national to “transfer” or “port” the H-visa status to a new qualified employer.

The prospective employer must file a petition, seek authorization for “new employment” with a request for extension of the foreign national’s H-1B stay in the United States – immediate interim work authorization granted upon filing.
O-1 Visas

- Requires extraordinary ability in the sciences, arts, education, business, or athletics

- Requires peer group, labor union, or management organization to confirm “extraordinary ability”

- Proof of ability under certain criteria, i.e. national awards, published materials in peer reviewed or professional journals, patents, high compensation compared to others in the field
J-1 Visas

- Are for “exchange visitors”

- Require that the employer have an approved J program or use an “umbrella” organization’s program with approval of the foreign national’s training, research, teaching, or other approved activities with the U.S. employer

- Can be used for variety of categories, including researchers, professors, teachers, scholars, trainees, and students; commonly used for medical residency and fellowship training programs
J-1 Visas (continued)

- J-2 derivative visa holders (spouses of J-1 visa holders) are allowed to work in the U.S.

- J-1 Visas for medical residency or fellowship training generally requires return to the foreign home country for two years (limited waivers available)
J-1 Waiver Options:

- “No objection” letter from home country, indicating that country has no objection to the individual not returning to fulfill the 2-year foreign residency requirement; required only if foreign government funding provided – not sufficient alone for J-1 physicians

- Exceptional Hardship—must show U.S. departure would impose exceptional hardship on J-1 visa holder’s U.S. citizen or permanent resident spouse or child

- Claim of Persecution—must show persecution due to race, religion, or political affiliation if the J-1 visa holder is required to return home

- Attorney General Waiver—U.S. Attorney General may waive 2-year foreign residency upon recommendation by an interested U.S. government agency or by showing a waiver and continued U.S. stay is in U.S. “national interest,” i.e. NIH research, VA facility employment

- U.S. Department of State waiver may be granted to foreign medical graduates when a waiver is recommended by a state government public health department—Conrad 30 Waiver Program
No Objection Waiver

- Country issues no-objection statement regarding J-visa holder’s decision not to return home
  - Not available to medical graduates unless they came to the U.S. as a J to observe, consult, teach, or do research
  - Generally insufficient if the U.S. Government provided direct or indirect funding for participating in an educational or cultural program
Are available to citizens of Canada and Mexico under NAFTA

Require that the candidate be working in a “profession” listed in the treaty – including Computer Systems Analyst, Engineer, Mathematician, Chemist Geologist, and other STEM professionals

May be issued to Canadians without preapproval by the USCIS; Canadians apply directly at the border to USCBP

Are granted for three years at a time, with no limit on extensions – but prohibit an “intent to immigrate”
Under the OPT program, students who graduate from colleges and universities in the U.S. are able to remain in the country and receive training through work experience for 12 months.

Students who have received a bachelor’s, master's, or doctorate degree in a STEM eligible program may extend their post-completion Occupational Practical Training (“OPT”) for an additional 17 months.
STEM Eligible Programs

- Scientific, Technology, Engineering, or Mathematics
  - Over 420 Degree Programs.
  - STEM-Designated Degree Program List maintained by US Immigration and Customs Enforcement ("ICE").
Eligibility Requirements:

- Recent degree in a STEM designated program.
- Apply for STEM extension while in your initial 12 month OPT period.
- Pay $380 fee.
- Have a job or job offer with an employer who uses E-Verify.
- Never previously applied for STEM extension.
Applicants may apply up to 120 days before Employment Authorization Document ("EAD") end date.

Application may take up to 90 days to be approved.

Once STEM extension application has been submitted you may continue to work on OPT for up to 180 days after original EAD expiration.
U.S. District Court invalidated the federal regulation establishing the STEM OPT program because DHS did not follow the proper administrative process to implement the rule.

- Judge has “stayed” her ruling allowing STEM program to remain in place until February 12, 2016.
- Judge granted an extension of deadline until May 10, 2016.
What does this decision mean?

- DHS has until May 10, 2016 to publish the regulation creating STEM OPT for public notice and comment, which should allow the program to continue.
- STEM OPT remains in place, so all extensions approved before May 10, 2016 should remain eligible for the 17 month OPT Extension.
- If DHS fails to publish the regulation creating STEM OPT program before deadline, the STEM extension program will cease.
1. Labor Certification - Most employment based Immigrant Petitions require the U.S. Department of Labor to confirm no minimally qualified U.S. workers are available.

2. Immigrant Petition filed with USCIS seeking classification under an Immigrant Visa preference category.

3. Final visa eligibility review after approval of the Immigrant Petition and Priority Date current – visa must be available under the quota system.
   - Visa availability or quota system Priority Dates are published monthly in the “Visa Bulletin” by the U.S. Department of State:
     - [http://travel.state.gov/visa/frvi/bulletin](http://travel.state.gov/visa/frvi/bulletin)
Immigrant Visas are divided by preference classifications and allocated by country of birth; Priority Dates based on date of filing the petition or labor certification control “place in line” for the quota.

For nationals of many countries lengthy delays to gain permanent resident status are expected to continue.
Permanent Resident Status - The Final Steps

Adjustment of Status

- Lawfully admitted to the U.S. in another visa category and lawful status maintained
- Statutory eligibility cleared - health screen, criminal history, and immigration history

Consular Processing

- Application made before the United States Consulate in home country or another country if that Consulate accepts non-resident filings
- This method also requires statutory eligibility review
Candidates must have received sustained national or international acclaim; major prizes or awards for excellence; or comparable evidence and a high salary or compensation in relation to others in the field;

No job offer or labor certification is required
Immigrant Visas: 1st Preference – Outstanding Professors and Researchers

- Candidates must:
  - Have three years’ teaching/research experience
  - Have received outstanding international recognition
  - No labor certification is required
Immigrant Visas: 2nd Preference

- For members of the professions holding advanced degrees or the equivalent, or

- Aliens who because of their exceptional ability will substantially benefit the national interests of the U.S.

- Labor certification required
2nd Preference Advanced Degree

- Petition for advanced degree professional can be supported by U.S. or foreign degree (masters or higher) or bachelors and proof of at least 5 years progressive experience in the specialty profession

- Labor certification required
To show exceptional ability 3 of the following are required:

- An academic record showing a degree from a college or university relating to the area of exceptional ability
- Letters documenting at least ten years of full-time experience in the occupation
- A license or certification to practice the profession
- Evidence of a salary or other remuneration which demonstrates exceptional ability
- Membership in professional associations requiring exceptional ability
- Recognition for achievements and significant contributions to the field

Labor certification required unless a National Interest Waiver is obtained
2nd Preference-National Interest Waivers

Foreign physician eligibility requires:

- Agreement to work full-time in a clinical practice for 5 years (may include service prior to filing I-140 Petition, but not J-1 visa time)

- Service must be in a Health Professional Shortage Area (HPSA), Mental Health Professional Shortage Area (MHPSA), a Medically Underserved Area (MUA), Veterans Facility or a Physician Scarcity Area (PSA-specialists only)

- A Federal or State Agency-Department of Health must determine work will be in the public interest and issue confirming recommendation letter
This category is for mid-level managers, and like positions which require a bachelor’s degree; USCIS must agree the job requires a bachelor’s degree

- Labor certification is required
  - Schedule A provides for “automatic certification” for RN’s, and physical therapists
The category is for technicians or skilled workers at least two years’ training or experience

- Labor certification is required
Labor Certification for Permanent Resident Status Petitions

- Process starts with prevailing wage request to the U.S. Department of Labor

- Job duties, experience, and educational requirements analyzed to determine prevailing wage

- Employer must conduct specific recruiting steps and determine no minimally qualified U.S. workers are available
Employer must conduct “good faith” recruiting efforts in local labor market using appropriate sources, screen and interview applicants and demonstrate lack of qualified-available U.S. Workers. Recruiting efforts must include:

- A 30 day job order with the state work force agency/unemployment office, i.e. the Pure Michigan Talent Connect job bank

- Print advertisements on 2 different occasions. Generally, Sunday newspaper advertisements in a local paper with major circulation, plus three additional recruiting efforts from a list of ten options
“Professional jobs,” those requiring a bachelors, must also include 3 additional recruiting efforts chosen from the following:

- Participating in community job fairs
- Posting on the employer’s web site
- Posting on an Internet job search site, can use a posting in conjunction with a print ad
- On-site college campus recruiting
- Posting with trade or professional organizations
- Recruitment through employment placement agencies
- Recruitment through employee referral programs, with identifiable incentives such as cash awards
- Posting at campus placement office
- Ads in local or ethnic newspapers
- Recruitment through radio or television advertisements
Applicant Review

- Employer must be able to disqualify all U.S. workers based on minimum requirements

- Recruitment report must include number of hires lawfully rejected U.S. workers, and declined job offers

- Report should break down applicants by lawful reason for rejection and address whether they could acquire skills within reasonable period

- Report does not require listing of names of rejected U.S. workers, but employer must retain resumes

- Must retain resumes and other recruitment documentation for 5 years-Department of Labor may audit
Illegal Presence

- A person who is illegally present for more than a year will be barred from admission for 10 years

- A person who is legally present for more than 180 days will be barred from admission for three years

- Waivers of such bars have become increasingly difficult to obtain.
Layoffs and Reductions in Force

- Whenever layoffs or reductions in force are necessary there is an obligation to notify the USCIS of any material changes in the terms of employment (i.e. a reduction in hours, change of duties, change of location) and of employment termination.

- There is a prohibition of displacing U.S. Citizens or permanent residents while retaining an H-1B worker who is performing an “essentially equivalent” position.

- There is a prohibition of “benching” H-1B workers, an H-1B worker may not be temporarily laid off without pay due to a lack of work.

- Employers are liable for the H-1B worker’s return transportation cost in the event of involuntary termination.
Other Employer Risks:

- Deemed Export Rule – Certain technologies are subject to export controls and access granted to a foreign national employee is a “deemed export”

- Post 9-11 Security Measures
Nationals of any of the Watch List countries will receive increased scrutiny and are subject to additional security-based procedures before a visa will be granted.

The Watch List includes: Afghanistan, Algeria, Bahrain, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Turkey, and the United Arab Emirates and Yemen.
Visa Holders and Travel Outside of the U.S.

- Visa holders may always leave the U.S. without difficulty; but return to the U.S. requires inspection by U.S. immigration officials and proof of continued lawful visa status and continued employment.

- Foreign nationals without proper visas and accompanying documentation will be denied reentry into the United States. The employee’s services could be unavailable for weeks or months, while the proper visa or documentation is obtained. The additional cost and inconvenience to the employer can be extensive.
Travel Tips for Visa Holders

- Your employer needs to know the following things:
  - The purpose of the travel
  - The destination
  - The return port of entry
  - The identity of the employee’s travel companions
  - The length of stay outside the U.S.
Your employer should then:

- Consult with legal counsel if any potential problem areas exist, or when any prior travel has been difficult
- Make sure the employee carries the documentation that will be necessary during U.S. Customs and Border Protection inspection
- Confirm the duties of the visa holder to be assumed on return to the U.S. are consistent with those described in the visa petition
- Review questions the employee is likely to be asked during inspection
Employer Sponsorship Policies

Employers set their own immigration sponsorship policies, which may include:

- Eligible visa categories
- Eligible employment positions
- Waiting period before employee can be sponsored
- Cost allocation and/or sharing for legal and filing fees
- Repayment clause for premature departure
- Formal review and approval process
- Signature authority for petitions
- Designated legal counsel
Factors considered when creating an employer’s immigration sponsorship policy include:

- Federal regulations
- Nature of work performed at the organization
- Eligibility of employment positions offered by employer
- Hiring/Recruitment goals
- Availability of human resources (staff, expertise)
- Cost (hiring staff, labor hours, training, legal/filing fees)
- Prior negative or positive experiences
Identify and prioritize your NEEDS vs. WANTS

- NEEDS are requirements (“deal breakers”)
- WANTS are desired, but not essential
- Do this immediately and reevaluate regularly
- Consider both short-term and long-term personal and professional goals
- Understand that compromise in the short-term may be necessary in order to achieve your long-term goals (i.e., play the long game)
Advocacy Step 2: Ask Questions

- Schedule an appointment with your organization’s in-house legal expert to:
  - Discuss legal options you may qualify for based on your education, experience, employment position, personal relationships, etc.
  - Ask questions
  - Develop a plan that will allow you to achieve your short-term and long-term personal and professional goals
Other Information Sources

- Unreliable Information Sources (DO NOT CONSULT):
  - Friends
  - Colleagues
  - Internet blogs/discussion boards

- Reliable Information Sources:
  - Licensed immigration attorney
  - Materials published by professional organizations, law firms, legal groups, universities
  - USCIS stakeholder engagements
    https://www.uscis.gov/outreach/upcoming-national-engagements/outreach
## Consultation DOs and DON’Ts

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<td>Schedule an appointment</td>
<td>Show up unexpectedly, approach in public spaces outside office, etc.</td>
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<tr>
<td>Be honest about long-term goals</td>
<td>Withhold information</td>
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<tr>
<td>Ask questions</td>
<td>Leave with questions unanswered</td>
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<tr>
<td>Listen and be receptive</td>
<td>Believe that you already know the answers or know more than the expert; argue</td>
</tr>
<tr>
<td>Remain open to alternatives/compromise</td>
<td>Be rigid and resistant</td>
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<tr>
<td>Seek knowledge/information</td>
<td>Seek concessions or promises</td>
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Before Accepting Employment

- Request and read employer’s immigration sponsorship policy
- Ask questions:
  - Is employer cap-subject, cap-exempt, H-1B dependent?
  - What visa sponsorship category would you be offered?
  - Are alternative visa sponsorship options available for the proffered employment position?
  - Which employment positions (if any) are eligible for the visa/sponsorship category you ultimately desire? Is advancement into these positions possible?
  - How are sponsorship costs allocated or shared?
  - How flexible is the policy? Have exceptions ever been made?
Advocacy Step 3: Make Your Case

- If employer offers sponsorship in one visa category, but you desire sponsorship in a different visa category:
  - CONSIDER: Is the desired sponsorship category allowed under the employer’s existing policy?
  - DECIDE: Is this a NEED or a WANT? Can I still achieve my long-term goals? Is a compromise possible and/or necessary? Is this a deal breaker?
  - MAKE YOUR CASE: How will your desired sponsorship help you professionally? Why is it in the employer’s interest to provide the sponsorship? If it is a NEED, why is it a need and what will be the negative consequences if you don’t get it (i.e., will you be forced to leave your employer)?
 Advocacy Step 4: Policy Change

- Already employed and desiring CHANGE or EXCEPTION to employer’s current policy?
  - Make yourself indispensable.
  - Seek to understand the employer’s purpose for setting the existing policy.
    - Prohibitive cost? Lack of resources? How would agreeing to this change/exception affect the employer?
  - Identify key decision makers within the organization.
    - Who has authority to influence or change this policy? Who does not?
  - Gain support of your supervisor and other important people.
  - Schedule appointments (following chain of command).
  - Make your case using facts and reason: What is the business purpose for this request? How will the employer benefit? Why would this be a good business decision? Provide supporting evidence, if possible.
In case your advocacy efforts are unsuccessful, you should have one or more contingency plans:

- Self-sponsor the petition (if eligible)
- Adapt and adjust plans according to existing visa limitations
- Seek a new employer within the U.S. who will sponsor you
- Obtain work-authorized dependent status through spouse
- Begin a new degree program
- Depart the United States
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