AMERICAN UNIVERSITY
WASHINGTON, DC

H-1B Information Session

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Agenda

- What Can Employer Ask About Employment Authorization?
- Can I “Volunteer”?
- What is an H-1B Visa?
- How Long Can You work in the U.S. on an H-1B Visa?
- When Can/Should You Apply for an H-1B Visa?
- How Do You Maintain Status Between F-1 and H-1B?
- Who Pays for the H-1B Visa Fees?
- What Does Your Employer Do in the H-1B Process?
- How/When Do You Transition to Permanent Residence?

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What Can Employer Ask about Employment Authorization?

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During Interviews/Recruitment

The DOJ Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC") recommends the following two questions to steer clear of discrimination:

1. Are you legally authorized to work in the United States?

2. Will you now or in the future require sponsorship for employment authorization?

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The I-9 Form

- The law requires that employers complete Form I-9 only when the worker actually begins working for pay.
- However, the law allows employers to complete the I-9 Form earlier, as long as the person has been offered and has accepted the job.
- Employers may not use the Form I-9 process to screen job applicants.

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"U.S. Citizens-Only" Policies

- A "U.S. citizens-only" hiring policy is discriminatory except under limited circumstances. Must be required to do so by federal, state, or local law or regulation, or by government contract.

- An employer may not refuse to hire an individual solely because their future employment authorization is temporary or provides a document with an expiration date.

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Can I Volunteer?

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“It Depends”

- “It depends”
- 8 CFR Sec. 274a.1 (h) - The term employment means any service or labor performed by an employee for an employer within the United States for wages or remuneration.
- The question of whether a person is an “employee" is a legal conclusion drawn from the facts:
  - Receiving “wages or other remuneration”?
  - Engaging in activities that would otherwise pay?
  - Would it displace regular employees?
  - Would it usually be a paid position?
  - Will it later become a paid position?

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Types of Student Employment

- **Provided under the F-1 Student Visa**
  - **Curriculum Practical Training (CPT)**

    Employment that is Part of Student's Study Program
  - **Optional Practical Training (OPT)**

    Employment that Simply Relates to Student's Degree of Study
    - Pre-Completion OPT
    - Post-Completion OPT

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What is an H-1B Visa?

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H-1B Basics

- Employer must “sponsor”/petition for applicant.
- Employment limited to employer who petitions, approved locations, and approved wage minimum.
- No need to advertise for U.S. workers
- Must be in a “specialty occupation” i.e. requires at least a bachelor’s degree in a specific field
- Applicant must have that degree or equivalent.
- Degree must be in field of study relevant to occupation.

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More H-1B Basics

- May hold more than one H-1B at a time. If change to new employer, new petition needed but may start when filed.

- H-1B may be part time or full-time.

- Cap Exceptions and Exemptions: Extensions, change of employer, exempt employers i.e. universities, gov’t research org, nonprofit research org, university affiliates).

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How Long Can You Work in the U.S. on an H-1B Visa?

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3/6 Years + Extensions

- **Length of approval and extensions**
  - 3 year initial approval and 3 year extension
  - 6 year maximum – any combination of employers
- **Extensions beyond 6 years**
  - Recapture time out of U.S.
  - 1 year extension if file labor certification application or immigrant petition one year before expiration
  - 3 year extension if immigrant petition approved and quota backlog

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When Can/Should You Apply for an H-1B Visa?

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F-1 to H-1B Timeline

F-1 – attend school

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F-1 OPT – start work (12/29 months)

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F-1 OPT STEM Extension – (29 months)

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H-1B – continue working (6 years)*

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H-1B – Supply and Demand

- Limited to 65,000 per yr w/ additional 20,000 for adv degree holders
- Quota year: October 1 to September 30
- **April 1 is the earliest and best date to apply for the visa**
- Past years' H-1B quota filled:
  - **FY2014 1st Day = Lottery**
  - FY2013 07/11/12
  - FY2012 11/22/11
  - FY2011 01/26/11
  - FY2010 12/21/09
  - **FY2009 1st Day = Lottery**
  - **FY2008 1st Day = Lottery**
  - FY2007 05/26/06
  - FY2006 08/10/05
- If needed, USCIS conducts a "lottery" to select cases to be considered for H-1B approval.

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How Do You Maintain Status Between F-1 to H-1B?

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“Cap-Gap Relief”

- Cap-Gap Issue: The gap in status between end of “normal” F-1 OPT status and beginning of H-1B status on October 1st.
- Cap-Gap Relief: If you file an H-1B application accepted under the cap that will start October 1, and OPT is still valid at the time of filing, then OPT is extended until September 30 to bridge status gap.
- “Cap-Gap” relief lost if applicant travels overseas or if application denied.

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Cap-Gap Extension Mechanics

- H-1B cap application must be filed while I-20 still valid which may include during course of study on F-1, during OPT, or during 60-day “grace period”
- Extension automatic for eligible students
- No filing application for extension
- No new EAD needed to work
- Only proof is H-1B I-797 receipt or approval notice
- Though not required to work, go to DSO with the H-1B I-797 receipt or approval notice to update SEVIS which will be reflected on page 3 of I-20

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Who Pays for the H-1B Visa Fees?

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What is the Employee/Employer Required to Pay?

- Prohibition of imposing “business expenses” on H-1B worker.
- The DOL considers “business expenses” to include attorney fees and government filing fees.
- The regulations prohibit the employer from shifting such expenses to the H-1B worker, either directly or indirectly or through a termination repayment provision.

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What are the Fees?

- Base fee - $325
- Fraud Prevention Fee - $500
- “Training Fee” - $1500 ($750 for 25 employees or less)
- Optional Premium Processing Fee (15 days) - $1225
- Regulations require the employer to cover the reasonable travel expense of a return flight to their home country if terminated.

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What Can the Employee be Asked to Pay?

- Translation fees
- Credential Evaluations
- Consular Processing Fees
- Other costs relating to visa application and processing outside the U.S.

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What Does Your Employer Do in the H-1B Process?

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H-1B MYTH:
“The employer must prove that there are no available U.S. citizens”

FACT: Under the H-1B process, employers DO NOT have to document or certify that there are no qualified U.S. citizens for the position.* Such a requirement is for employer-sponsored permanent residence applications.

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Employer's Wage Obligation

Must agree to pay higher of actual or prevailing wage (aka "required wage").

- Actual wage: wage paid to other similarly employed and similarly qualified workers at same worksite.

- Prevailing wage: weighted mean or median wages for similar positions in geographic area of employment.

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“No Benching” Provision

- Employer must pay required wage specified in LCA even if the H-1B worker is in nonproductive status

- Employer does not need to pay wages to H-1B worker that is in nonproductive status due to a “voluntary request and convenience” or which render him or her unable to work (requested leave of absence based on specified non-employer related need).

- Civil monetary penalties - $1,000/$5,000

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What's Filed and When?

- First - Labor Condition Application (LCA) filed with Department of Labor. 5 to 10 days for approval.

- Second - I-129 Petition including LCA, qualifications, job description filed with USCIS.

- If employee maintaining lawful status in U.S., status is changed to H-1B, along with family members.

- If outside U.S., or traveling following change of status, must obtain H-1B visa at U.S. consulate.

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Public Access File

Public Access File Retention Period

- One year beyond last date H-1B worker was employed
- If no individual employed under LCA, one year from date the LCA expired or withdrawn
- Retained either at the employer's place of business or at place of employment

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Public Access File Contents

1. Copy of the completed Labor Condition Application (Form ETA 9035) and cover
2. Wage rate documentation to be paid to H-1B worker.
3. A full, clear explanation of the system that the employer used to set the “actual wage.”
4. Copy of documents used to establish “prevailing wage”
5. Copy of documents showing employer satisfied union/employee notification
6. Summary of benefits offered to U.S. workers in same occupation classification as H-1B

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“Minor” Changes: No New or Amended Petition

- Employer changes its name (but same FEIN)
- Employee’s place of employment is changed (however, a new LCA must be filed)
- Minor changes in job duties
- Salary/wage increases
- Promotion to a higher position within the same occupation

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“Substantial” Changes: Requires New or Amended Petition

- Change in employee’s duties from one specialty occupation to another
- Reduction in number of hours worked per week
- Reduction in salary/wage

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H-1B Portability (Change of Employer)

H-1B worker allowed to start with new employer upon "filing" new H-1B petition before it's approved

- Must currently be in H-1B status
- Must have bona fide offer of employment
- Must not have engaged in unauthorized employment

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How and When Do You Transition to Permanent Residence?

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Myths

- The mere accrual of time spent in the U.S. or on the H-1B visa does not result in Permanent Residence

- Sponsorship by an employer or most family members does not generally result in an automatic right to remain in the U.S. while sponsorship is ongoing; person must have independent nonimmigrant status, e.g., F-1, H-1B.

- Hardship, standing alone, is not a basis for LPR.

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“Dual Intent”

Unlike the F-1 visa:

- Dual intent permits concurrent green card processing
- No requirement to prove intent to return to foreign country

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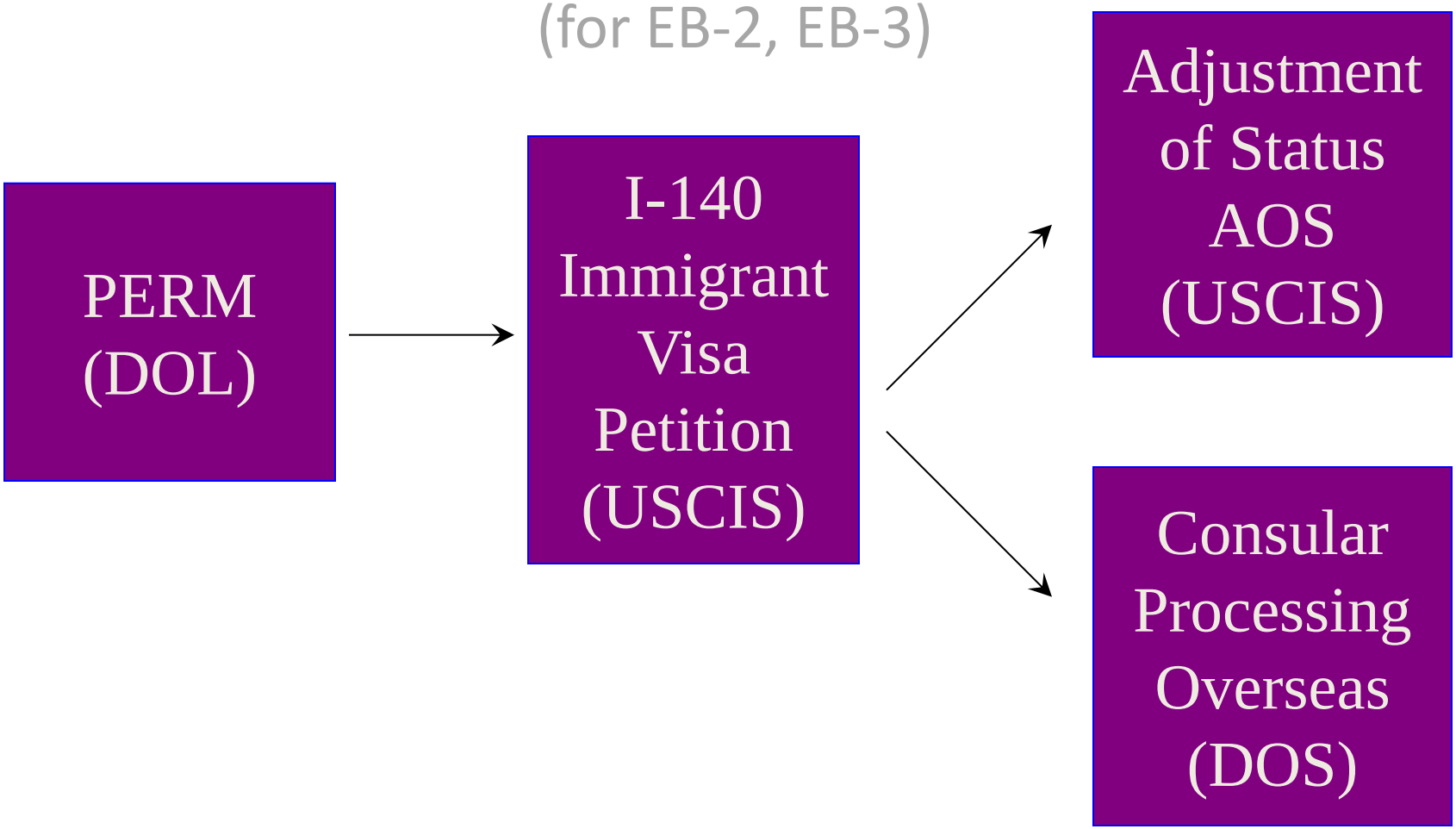
The Employment-Based Green Card Process

(for EB-2, EB-3)



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H-1B to LPR

4th Year H-1B status – start thinking about LPR

↓

Maintain H-1B status until LPR

↓

If labor certification was filed more than 365 days ago, H-1B worker may get extensions in 1-year increments

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If I-140 has been approved and immigrant visa number unavailable, H-1B worker may get extensions in 3-year increments.

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Employment-Based Permanent Immigration

- Generally, DOL must make a determination and certify that there are not sufficient United States workers who are able, willing, qualified, and available for the position being offered.

- This processes is called Labor Certification – PERM (Program Electronic Review Management process).

- I-485 or consular processing can only commence when employee's “Priority Date” is current. Employee receives work permit and travel permit (Advance Parole) within 90 days.

- Once I-140 is approved, and once I-485 has been pending for 6 months, employee is “portable” and may change employers.

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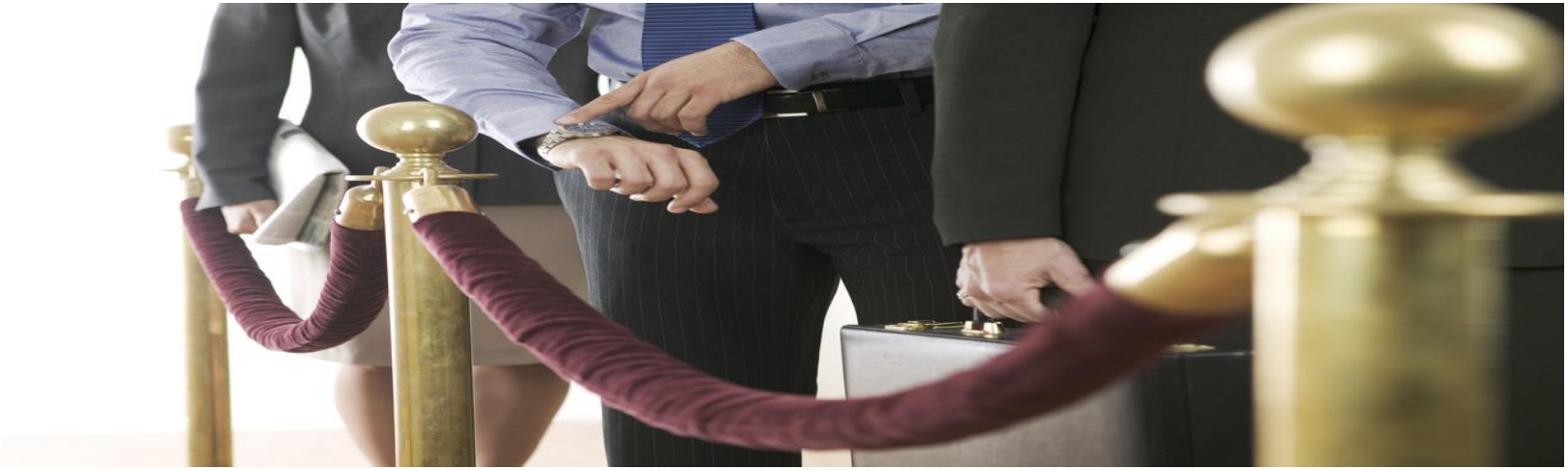
Preference Categories

- Limited to 140,000 total “immigrant visas” per year, including dependents. Only 7% of visas can be allotted to each country. Immigrant visa numbers are assigned to a “preference category” e.g. EB-1, EB-2, EB-3.

- Demand for immigrant visas always exceeds supply. Generally, the higher the preference category, the shorter the wait for a visa.

- Typically no wait for first preference, and generally, it takes a person with a third preference approval longer to immigrate than a person with a second preference approval.



“Priority Date”

- When demand exceeds supply, a visa backlog (“line”) forms based on ones “priority date.” The priority date is used to determine an individual’s place in line in the visa queue. When the priority date becomes current according to the monthly “cut-off date,” the individual will be eligible to apply for an immigrant visa (i.e., file the I-485 or proceed with consular processing).

- The priority date for an employee who is the beneficiary of an employment-based immigrant petition is either:

  – The date the I-140 petition was properly filed with USCIS, or

  – The date the labor certification application was accepted for processing by the Department of Labor (when a labor certification is required).

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“The Visa Bulletin”

- DOS issues the Visa Bulletin monthly, which provides information on available “immigrant visas”

- To be eligible for an available immigrant visa, an applicant’s “priority date” in the particular visa category must be current with respect to the country of birth and preference category as reflected in the current Visa Bulletin

- The State Department “Visa Bulletin”

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EB-1 First Preference

These categories avoid Labor Certification all together:

- Individuals of extraordinary ability;
- Outstanding professors and researchers;
- Individuals who are multinational managers or executives.

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EB-2 Second Preference Advanced Degree

- Individuals with advanced degrees (any U.S. academic or professional degree (or a foreign equivalent) above a bachelor's degree level).

- Bachelor's degree + 5 years of progressive experience also typically qualifies (must be 4 year degree)

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EB-3 Third Preference Professionals & Skilled Workers

- Position requires individuals with bachelor’s degrees in their fields, experience, or 2 years of training.

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