

2011 IMMIGRATION PRIMER

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I. Roles of Government Agencies

U.S. Department of Homeland Security (DHS)
Overall responsibility for immigration benefits and enforcement

U.S. Citizenship and Immigration Services (USCIS, in DHS)
Adjudication of immigration benefits (status)
Exhibit A: I-797 Approval Notice issued by USCIS

U.S. Immigration & Customs Enforcement (ICE, in DHS)
SEVIS
Approval of F-1 sponsoring institutions
Interior U.S. immigration enforcement

U.S. Customs and Border Protection (CBP, in DHS)
Border enforcement
Immigration and Customs
Exhibit B: I-94 issued by CBP at port of entry

U.S. Department of Labor (DOL)
Labor certification for permanent residency
Labor condition approval for H-1B and E-3 temporary status
Prevailing wage determinations, database and analysis

U.S. Department of State (State Department or DOS), and its U.S. consular posts abroad (embassies, consulates)
Passports
Visas
Approval of J-1 sponsoring organizations
J-1 waivers of 212(e) 2-year home country residency requirement
Exhibit C: Visa issued by State Department at consular post abroad

II. Immigration for Students and Scholars

A. *F-1 Students*

1. Generally - for undergraduate and graduate students in a full-time course of study; must enroll in a full course load to maintain status. *Exhibit D: I-20 Certificate of Eligibility for F-1 Status*

2. Employment Authorization

- a. Generally, F-1 students are not permitted to work without an Employment Authorization Document (EAD) issued by the USCIS.
Exhibit E: Employment Authorization Document (EAD)

But there are exceptions:

- i. *On-campus employment*: limited to 20 hours a week while school is in session or full time during vacations:
 - a) On-campus includes an off-campus location which is educationally affiliated with the school
 - b) On-campus employment can be in any position that directly serves the student body including third party employers operating on campus AND it must not displace a U.S. resident. Test: is job usually performed by students?
 - c) On-campus employment as part of a scholarship, fellowship, post-doctoral appointment, etc. (or educationally related or affiliated with the school)
 - ii. *Authorized by DSO*: A student may be authorized by the Designated School Officer (DSO) to work off campus for up to 20 hours a week (or full time when school is not in session) after studying a full academic year
 - iii. *Curricular Practical Training (CPT)*: Curricular practical training is defined to be alternative work/study, internship, cooperative education, or any other type of required internship or practicum that is offered by sponsoring employers through cooperative agreements with the school:
 - a) A student may not engage in CPT during the first nine months in school, except for graduate students
 - b) If the student received more than 1 year of CPT, he/she is ineligible for Optional Practical Training (see below)
 - c) CPT must be noted in SEVIS
 - d) A student may begin curricular practical training only after receiving his or her Form I-20 with the DSO endorsement (an "EAD" is not required prior to beginning the CPT)
- b. USCIS issued work authorizations for F-1 students:
 - i. *Hardship Waiver*:

- a) “Severe economic hardship” caused by unforeseen circumstances beyond the student’s control (8 C.F.R. §214.2(f)(9)(ii)(C))
 - b) There must be no suitable and available on-campus employment opportunity
 - c) The student must have completed a full academic year of study, i.e., nine months
 - d) The student must be in good academic standing
 - e) The DSO must recommend work authorization
 - f) The student can work no more than 20 hours while school is in session
- ii. *Optional Practical Training (OPT):* pre- or post-graduate training in field of study:
- a) *Pre-Completion:* Students may engage in OPT during their annual vacations and at other times when school is not in session AND during the academic year (except for the first year in academic status) provided the employment does not exceed 20 hours per week while school is in session.
 - b) *Post-Completion:*
 - i. Limited to an aggregate total of 12 months for each program of study or degree program
 - ii. Must be completed within 14 months of the student’s graduation or completion
 - iii. DSO must recommend the training, based on whether the training sought is related to the student’s field of study and whether it is appropriate for their educational level
 - iv. DSO must note in SEVIS; Form I-20 with OPT endorsement must be included with I-765 Application for Employment Authorization filed with USCIS
 - c) A student is eligible for optional practical training for a total period of 12 months *per educational level*.
 - d) Proof that a Student is Authorized to Work with OPT Status: OPT status is evidenced by an Employment Authorization Document (EAD) issued by USCIS. The EAD card will have a start date and an end date. From the date of application, it typically takes USCIS 90 days to issue the student an EAD card. The student may *not* begin OPT employment prior to the validity date on the EAD card. Similarly, unless the student obtains another type of employment authorization (such as H-1B temporary work visa status), s/he may not be employed past the end date on the EAD card.
 - e) Once an EAD card is issued, the student may not recapture unused periods of time on the card.

- f) *STEM Extension*: Students in science, technology, engineering and math (STEM) fields may apply for an additional 17 months of OPT but only for employment with employers enrolled in eVerify.

B. *J-1: International Exchange Visitors*

- i. International exchange programs are administered by the DOS:
 - 1. Sponsors are designated by DOS for specific categories
Exhibit F: DS-2019 Certificate of Eligibility for J-1 Status
 - 2. Higher education institutional categories include students, professors, research scholars, short-term scholars, specialists, and medical trainees
 - 3. INA §212(e): Many J-1 nonimmigrants are subject to a two-year home residency physical presence requirement at the completion of their J period
 - a. Persons subject to 212(e) may not obtain permanent residence or H or L nonimmigrant visas (or change status in the U.S. to most other types of temporary visas), until they spend two years in their home country or country of last residence prior to coming to the U.S.
 - b. If a J-1 status holder obtains a waiver of the 212(e) two-year home residency requirement, then s/he may apply for the above-referenced visa benefits.
 - c. Persons become subject to the two-year home residency requirement if:
 - i. their participation in the J-1 program was financed in whole in or in part by an agency of the government of the U.S.;
 - ii. their participation in the J-1 program was financed in whole in or in part by the government of his or her nationality or last residence; or
 - iii. their field of study or training is listed on a “Skills List” published by the Department of State, designating areas of skills or knowledge which are in short supply in the foreign national’s country.
 - iv. they are a foreign medical graduate pursuing training in the U.S.
 - 4. Work-authorized categories, without prior USCIS approval, include professors, research scholars, short-term scholars, and specialists, who may work as part of their J-1 program:
 - a. Occasional lectures or consulting outside the J-1 sponsoring institution may be permitted – if it is “occasional lectures” or consulting outside the academic units with the approval of the J-1 sponsor
 - b. Moonlighting and other types of employment are not permitted

5. Hiring J-1 Students: college and university students in J-1 status are entitled to remain in the U.S. for the duration of their program, and are authorized to engage in “Academic Training” in a field relating to their area of study for up to 18 months following completion of the program. J-1 students’ employment authorization is evidenced by an endorsement of the student’s DS-2019 by the college or university Responsible Officer and/or by a separate letter authorizing employment written by the Responsible Officer.
6. Obtaining a Waiver of the 212(e) Two-Year Home Residency Requirement
 - a. There are several different ways of obtaining a waiver of the two-year home residency requirement. Those most relevant to our discussion are:
 - i. Obtaining a “no objection” letter from the foreign national’s government addressed to the Department of State (DOS), confirming that the government does not object to the individual remaining in the U.S.;
 - ii. An Interested Government Agency (IGA) seeks a waiver on behalf of the individual;
 - iii. Compliance with the requirement would impose “exceptional hardship” to the J-1 participant’s U.S. citizen or permanent resident spouse or child.
 - b. “No Objection” Waivers: These are the easiest type of waiver to obtain, assuming the individual’s country is receptive to the idea of recommending a waiver. It is common for governments to grant waivers where the basis for the two-year requirement is that the person’s skill is listed on that country’s Skills List, as being in short supply in that country. It is much less common for governments to recommend waivers where the basis for the two-year requirement is that the individual’s J-1 program was financed by the U.S. government, because they know that the DOS generally opposes granting waivers in these circumstances. DOS will make occasional exceptions, but it is far more common for DOS to oppose a waiver in these circumstances, than to recommend a waiver, regardless of the home country recommendation
 - c. Interested Government Agency Waivers: Where a J-1 exchange visitor is working on a project of importance to a U.S. government agency, such as the Department of Defense (DOD), which believes that the individual’s departure from the U.S. would be detrimental to the project, the agency may wish to recommend a waiver.

- d. Hardship Waivers: Hardship waivers are difficult to obtain. The chance of success depends upon the facts and circumstances of the situation. Only harm to the U.S. citizen or lawful permanent resident spouse or child is considered. Most approved cases involve medical hardships, but occasionally cases are approved where other forms of hardship are proved. No matter what type of hardship is argued, it must be proved that the family member would suffer the hardship both if he/she accompany the J-1 relative back to the home country AND if he/she does not accompany the exchange visitor relative to his or her home country.
- e. Alternative to Obtaining a Waiver: A J-1 visa holder who is subject to a two-year home residency requirement may obtain O-1 status to work for an employer, based on extraordinary ability in their field. The two-year home residency requirement remains in effect.

7. Dependents may apply for work authorization

C. *F-1/J-1 Lapse in Status*

- i. Lapse in status = out of status = not attending school or dropping below a full course of study
- ii. Unlawful presence – there is an intention to add duration of status (D/S) stay to unlawful presence. Currently – only overstay of the I-94 expiration dates may trigger unlawful presence, unless there is a formal finding of CIS or an immigration judge (IJ)
- iii. If lapse in status is less than 5 months – the school may reinstate the F-1/J-1 in SEVIS (New I-20 and I-539 required for reinstatement)
- iv. If lapse in status is more than 5 months – must demonstrate that “failure to file within the 5 month period was the result of exceptional circumstances and that the student filed the request for reinstatement as promptly as possible under these exceptional circumstances”

D. *Roles of the F-1 Designated School Official (DSO) and J-1 Responsible Officer (RO)*

- i. Direct liaison between institution and USCIS, CBP, ICE, DOS
- ii. Delegated regulatory authority and duties from U.S. government
- iii. Advisor and guide for international student population for U.S. culture, campus life and legal compliance
- iv. Administrator for documentary requirements and deadlines with potentially severe legal consequences
- v. NAFSA: Association of International Educators is a valuable resource for DSOs and ROs
- iv. Legal support is critical for DSOs and ROs for institutional purposes

III. Immigration Options for Faculty and Staff

**A. Temporary Non-Immigrant Status
Occupation Worker**

1. H-1B Status for Specialty

Temporary status for maximum of 6 years

Minimum qualification must be four year bachelor's degree or equivalent specific vocational preparation

Normally used for university faculty, can also be used for staff

Exhibit G: I-797 Approval Notice for H-1B status

Note that approval is employer-specific

Labor condition approval required from U.S. Department of Labor

Prevailing wage requirement

Public access file

Labor attestations

Cap exemption for colleges and universities and affiliated nonprofits

Timing and cost considerations:

Approval takes up to 5 months under normal processing.

Government Requests For Evidence can slow down process; most recent RFE template includes questions based on "Validations Instrument for Business Enterprises" (VIBE) which compares submitted information with Dun & Bradstreet report

Premium processing available (\$1,225 USCIS filing fee for premium processing)

Other costs: filing fees (\$325 + \$500 "fraud detection" fee), staff time, document preparation fees (in-house) or attorneys fees

Campus policies vary on H-1B sponsorship and use of in-house staff or outside counsel

2. TN Status Under NAFTA

Available only for citizens of Canada and Mexico, parties to the North American Free Trade Agreement (NAFTA)

Available only for certain professions listed in NAFTA

Exhibit H – list of NAFTA professions

Available in two-year increments of approval.

Renewable indefinitely – no time limit for TN status.

Applications for Canadians can be made at a U.S. port of entry; applications for Canadians can be, and for Mexicans must be, submitted to USCIS for advance approval.

3. F-1 Student Status for Optional Practical Training (OPT)

Available to students in F-1 status for employment for up to 12 months either during a course of study or within 14 months after completing a course of study. Approval for OPT employment is evidenced by an employment authorization document (EAD) and an I-20 with an OPT endorsement. (see Exhibit E)

OPT can be extended for additional 17 months only for those with degrees in STEM fields – to continue employment past expiration of OPT, student must have H-1B sponsorship or some other immigration option available.

4. E-3 Status for Australians

Similar to H-1B status but only available for citizens of Australia. E-3 petitions are submitted directly to U.S. consular post abroad, not to USCIS.

Available in two-year increments of approval.

Renewable indefinitely – no time limit for E-3 status.

5. O Status for Extraordinary Ability

Temporary status for maximum of 3 years initially, then renewable annually

Requires extensive documentation that beneficiary is one of a small percentage who has risen to the top of the field of endeavor, based on statutory criteria.

No labor condition, labor certification or prevailing wage requirements.

Timing and cost considerations:

Approval takes approximately 5 months under normal processing.

Premium processing available (\$1,225 USCIS filing fee for premium processing)

Other costs: filing fee (\$325), time and effort to assemble documentation, document preparation fees (in-house) or attorneys fees

B. Permanent Residency, Labor Certification

Permanent Residents have “green cards” – permanent residents can live and work in the United States indefinitely

Exhibit I: I-551, Alien Registration Card (“green card”)

For employer sponsorship, employment must be permanent and full time

Labor Certification required in most cases

Must test the labor market and establish there is no minimally qualified U.S. applicant ready and willing to take the job

Prevailing wage requirement applies

Automated Labor Certification application process (PERM) subject to audit of file documentation by U.S. Department of Labor

Detailed requirements for test of the labor market

Newspaper advertisement in print (two Sundays)

Print journal advertisement can take the place of one Sunday newspaper advertisement for professional positions

Must post on employer web site if that is customary

Three other recruitment steps required (local or ethnic newspaper, job search web site, job fair, recruiter)

Sponsorship is employer-specific but once approved, permanent resident is not tied to sponsoring employer

Employee can leave the sponsoring employer at a specific point during the application process (180 days after filing of I-485 adjustment application) or anytime after approval

To preserve benefits of pending permanent residency application if employee leaves the sponsoring employer 180 days after filing: only requirements are that a bona fide job opportunity existed and the employee intended to take that job opportunity when the application was filed.

Beginning at a specific point during the application process (upon issuance of employment authorization document) employee can work for any other U.S. employer in addition to the sponsoring employer, can accept stipends and honoraria from other institutions.

1. Standard Labor Certification

For all employees other than classroom teachers

Employer must conduct a full-blown “PERM” recruitment for labor certification and establish that there is no minimally qualified U.S. applicant willing and available to take the position.

2. Special Handling Labor Certification for Teaching Faculty

For college and university classroom teachers only

Can rely on competitive recruitment conducted in the past (recruitment can be more than six months old, but recruitment must include a print ad, subject to current pending litigation)

May conduct the minimum recruitment required by statute for special handling labor certification (not a full-blown “PERM” recruitment)

Can select “most qualified” candidate – rather than showing there is no minimally qualified U.S. candidate

Must file labor certification application within 18 months of “selection” to rely on prior competitive recruitment – otherwise, must test the labor market again with employer’s competitive recruitment (not full blown PERM recruitment) within 6 months before labor certification application

Prevailing wage requirement applies

3. Outstanding Researcher/Professor

Requires documentation of 3 years of teaching and research, plus proof of achievement in at least 2 of 6 statutory criteria.

No labor certification or prevailing wage requirement.

4. Exceptional Ability

Requires documentation of “expertise significantly above that ordinarily encountered.”

Must submit proof of achievement in at least 3 of 6 statutory criteria.

No labor certification or prevailing wage requirement.

5. Extraordinary Ability

No labor certification required.

Requires extensive documentation that beneficiary is one of a small percentage who has risen to the top of the field of endeavor, based on statutory criteria – more stringent standard than for O non-immigrant status based on extraordinary ability.

6. Challenges in the Permanent Residency Application Process:

a. Labor Certification may not be available in all cases

For example:

If the position is not full-time and permanent; or

If there is a more minimally qualified U.S. candidate available and the position does not involve classroom teaching.

b. Visa retrogression

Exhibit J: Visa Bulletin from State Department

Employer can file I-140 Petition for Immigrant Worker and I-140 Petition can be approved, but employee cannot file I-485 Application for Adjustment of Status until a visa is immediately available for the case

Retrogression varies by country of citizenship

Look for visa preference category for which visa is immediately available and applicant is eligible:

EB-1: Employment Based First Preference – Priority Workers

*No labor certification required but requires extensive documentation of eligibility.

*Workers of extraordinary ability (similar to O-1 standard)

*Outstanding professors and researchers (3 years plus 2 of 6 statutory criteria)

OR

EB-2: Employment Based Second Preference

*Labor Certification required

*Advanced Degree Professionals (MA or BA plus 5 yrs of progressive experience) including special handling labor certification for college and university classroom teachers

*Workers of Exceptional Ability (3 of 6 statutory criteria)

OR

EB-3: Employment Based Third Preference –Skilled Workers, Professional and Others

*Labor certification required

*Skilled workers – 2 years of training or experience

*Professionals – BA or equivalent required

*Other workers – less than 2 years of training or experience

c. Security Checks

Delays can be substantial

Delays can vary depending on country of citizenship, with citizens of terrorist watch countries receiving more scrutiny and more likely to be delayed by security check

EXHIBITS

- Exhibit A I-797 Approval Notice issued by USCIS Service Center
- Exhibit B I-94 issued by Customs & Border Protection (CBP) at port of entry
- Exhibit C Visa issued by State Department at consular post abroad
- Exhibit D I-20 Certificate of Eligibility for F-1 Status issued by F-1 sponsor
- Exhibit E Employment Authorization Document issued by USCIS Service Center
- Exhibit F DS-2019 Certificate of Eligibility for J-1 Status issued by J-1 sponsor
- Exhibit G I-797 Approval Notice for H-1B status issued by USCIS Service Center
- Exhibit H List of NAFTA Professions
- Exhibit I I-551, Alien Registration Card (“green card”) issued by USCIS
- Exhibit J Visa Bulletin issued by State Department