



# Immigration Considerations for Entrepreneurs

Presentation for Harvard University

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# BEFORE WE BEGIN

- The information provided in this presentation is for educational purposes only. The opinions expressed in this presentation are solely those of the presenters. No attorney-client relationship is created or intended to be created by virtue of this presentation.
- Immigration law is complex and nuanced. This presentation provides information in general terms. Please seek individualized guidance from a competent professional before taking any action.
- The information presented today is current as of February 9, 2023. However, immigration statutes, rules, policies and procedures change frequently. Accordingly, before taking any action, it is imperative to seek guidance from a licensed attorney.



# AGENDA

- Immigration Basics
- What is Work and Unauthorized Work?
- CPT, OPT and STEM OPT for Entrepreneurs
- Temporary Work Visas for Entrepreneurs
- Green Card Pathways for Entrepreneurs
- Q&A





# U.S. IMMIGRATION CATEGORIES

## U.S. Citizens

At Birth (law of the soil and law of blood)

Through Naturalization

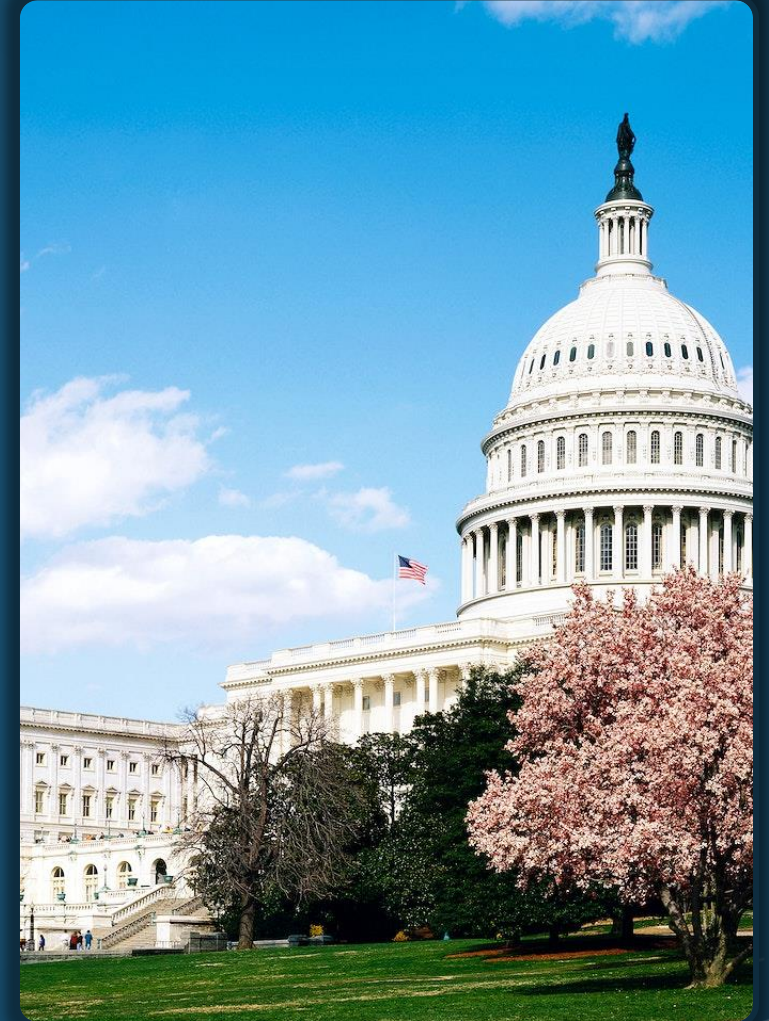
## Non-Citizens

Immigrants: Lawful Permanent Residents (“green card holders”)

Nonimmigrants: Persons Permitted in U.S. for Temporary Stay

Humanitarian Categories: Refugees; Asylees; Temporary Protected Status (TPS); Deferred Action for Childhood Arrivals (DACA); Parolees

Persons present without lawful status



[illegible]



# “EMPLOYMENT” ACCORDING TO IMMIGRATION REGULATIONS

- **Immigration & Nationality Act (INA)**
  - Does not provide a definition of employment or work.
- **Control of Employment of Aliens @ 8 C.F.R. § 274a**
  - **§274a.1(h)** *Employment* means any service or labor performed by an employee for an employer within the U.S.
- **Fair Labor Standards Act (FLSA)**
  - U.S. Supreme Court has indicated there is no single rule or test for determining whether an individual is an independent contractor or an employee & it is the total activity or situation which controls. Factors include:
    - Extent to which the services rendered are an integral part of the principal's business.
    - Permanency of the relationship.
    - Amount of the alleged contractor's investment in facilities and equipment.
    - Nature and degree of control by the principal.
    - Alleged contractor's opportunities for profit and loss.
    - Degree of independent business organization and operation.

# UNAUTHORIZED “EMPLOYMENT” ACCORDING TO IMMIGRATION REGULATIONS

- **Unauthorized Employment (INA § 245(c)(2) and (8))**

- Unauthorized employment is any service or labor performed for an employer within the U.S. by a FN who is not authorized by the INA or USCIS to accept employment or who exceeds the scope or period of their employment authorization.
- Neither DOL nor DHS will permit employers to sponsor FN “independent contractors” to work in the U.S.
- But DHS will find that a FN performing work for a company in the U.S. as an “independent contractor” is in fact an employee for purposes of finding the employer and the FN in violation of the INA.
  - For example, anyone who receives some compensation in return for their efforts on behalf of a U.S. company while in the U.S. will be considered an employee who otherwise required sponsorship to be in the U.S. *See Matter of Hall* , 18 I & N Dec. 203 (BIA 1982).

# VOLUNTEERING

- Compensation is a leading indicator, but not the only indicator
- “Volunteering”:
  - If volunteering for the benefit of others (e.g., charity) and no pay this is not “employment”
- Employer / university / start-up can’t avoid employee obligations by characterizing a worker as a volunteer
- Other risks of treating individual as a contractor, or as a volunteer



# COMPENSATION

Leading indicator goes back to whether the worker is “compensated” and the key questions to ask:

- Is this considered remuneration for which a service is to be provided that is benefitting someone other than the FN?
- When was the product created?
- Where - inside or outside the U.S.?

Compensation can take many forms:

- Paycheck
- Tips
- Stock options (vested or unvested?)
- Room & board
- Travel arrangements
- Royalties
- Instagram “influencer” (products to sell) / TikTok / YouTube

# WHERE IS THE LINE?

## Business: When does a startup become employment?

- Developing a Business Plan = **OK**
- Interviewing individuals in the field area = **OK**
- Registering company = **OK**
- Outreach to Venture Capital / Investors / Fundraising / Crowdsourcing = **Possible Employment**
- Contractually signing with a VC Venture Capital = **Employment**
- Manufacturing beyond a prototype = **Employment**
- Cultivating suppliers or buyers = **Employment**
- Signing contracts for services or sales = **Employment**

# WHAT ABOUT THE SIDE HUSTLE?



Uber / Airbnb	<b>Income</b> for a service that benefits others
Poshmark / eBay	Regularly done as a source of <b>income</b>
Landlord Rental Properties	Owning property = <b>NOT Employment</b>  Operating / Maintaining property = <b>Employment</b>
Renting Properties	Subletting where student is not receiving funds beyond actual cost = <b>NOT Employment</b>  Renting properties and is earning income = <b>Employment</b>
Investments	Passive = No service requirement = <b>NOT Employment</b>  Non-Passive = If providing advice or making investments for others = <b>Employment</b>

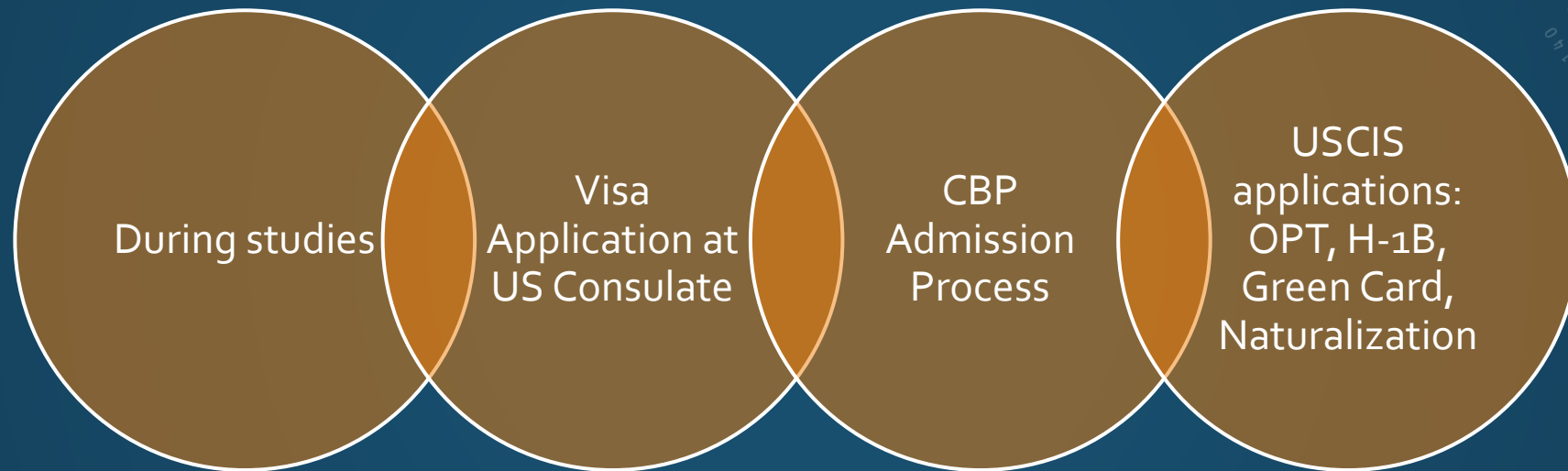


# WHAT ABOUT THE SIDE HUSTLE?



Open Source Coding	Paid or not? Accepting advertisements = <b>Employment</b>
Campus Rep for a Company	Paid or not? Providing service to an organization = <b>Employment</b>
Blog Editor Gigs Art Work Publications	Who benefits? Individual vs. contractor? If paid = <b>Employment</b>
TikTok YouTube	Paid or not? If paid = <b>Employment</b>
Internship Practicum	Done as authorized under F-1 CPT, OPT, SSR, J-1 AT or other

# HOW WILL THEY KNOW???



# WARNING: SOCIAL MEDIA PRESENCE

- How are students portraying themselves in social media?
  - Example: Stating they are a CEO/Founder of a startup and CBP seeing this thinks they are working in the U.S.
- New DS-160 Question regarding FN's Social Media accounts
  - Must provide all identifiers used for all listed platforms.
  - Consular officers will not request passwords.
  - Not listing an account could be considered “lying to secure an immigrant benefit.”
  - Developing “content” that later generates income
  - Line between social media presence and “paid” activity
  - Creative work done as a student under academic coursework





Is this U.S. Employment requiring  
U.S. Work Authorization?

# 7 CONSIDERATIONS For International Students

1

## **WHEN IS THIS ACTIVITY TAKING PLACE?**

- Is this activity starting in the future? the past?
- Did (or will) the activity take place during a time when you have correct U.S. authorization?

## **WHERE IS THIS ACTIVITY TAKING PLACE?**

- Is this activity taking place from in the U.S.?
- Are you conducting service for a U.S. organization?

2

3

## **WILL YOU RECEIVE ANY COMPANSATION?**

- Will you receive pay?
- Will you receive other compensation for your services? (lodging, expenses, etc.)
- Is is taxable as U.S. earnings?

## **WHAT IS THE AIM OR INTENT OF THE ACTIVITY?**

- Is it a school project?
- Is it being done for fun?
- Are you gaining professional experience?

4

5

## **WHO BENEFITS FROM THE ACTIVITY?**

- Is this being done primarily for my benefit or for the benefit of others?

## **WHAT ARE YOUR FUTURE OBLIGATIONS?**

- Is there an commitment or obligation to future service or work?
- Have you signed a contract requiring future activity?

6

7

## **ARE YOU ABLE TO OBTAIN AUTHORIZATION?**

- Is there a U.S. employment authorization that covers this activity?
- Are you eligible to be authorized?

**FOR INFORMATION ABOUT F-1 STUDENT  
U.S. WORK AUTHORIZATIN OPTIONS, CHECK OUT:**

**[HTTPS://STUDYINTHESTATES.DHS.GOV/STUDENTS/  
WORK/WORKING-IN-THE-UNITED-STATES](https://studyinthestates.dhs.gov/students/work/working-in-the-united-states)**

Created by Mary Walsh, Esq. and Andrea Popa | NAFSA Region XI (2022)

# CASE EXAMPLES:

- 1) I own a small company in Europe, where I worked prior to starting my Harvard studies. Can I still design for that it, although I am currently in the U.S?
  - **No. Place of activity/work would be in U.S.**
- 2) One of my films has been on Amazon for the last ten years. I continue to receive royalties from my distributor. Can I receive them as an F-1 student or J-1 scholar?
  - **Yes. Look to when you originally created the work or performed the activity. It was done outside the U.S. when you were authorized so ok to receive royalties.**
- 3) I am a photographer. Can I sell prints of my work?
  - **Place of activity is U.S. so no.** Does it change if photos were taken before my arrival to the U.S.?
- 4) I'd like to buy a condo or 2 family house so that I can use it/one of the units as income property. Is that allowed?
  - **Grey area.** Earning an income for which there will be tax implications.
- 5) I am making money off a TikTok that I made in my home country. Can I continue to make revenue from posts I made before coming to the U.S.? Can I continue to post and make money off of new content from the U.S.?
  - **Look to when you originally created the work or performed the activity. It was done outside the U.S. when you were authorized so ok to receive royalties. You cannot create new content in the U.S. if you are at a level at which you generate revenue.**

# ENTREPRENEURIAL ACTIVITY DURING F-1 STATUS

## During school:

Limited activities possible under F-1 status—must be pre-approved and related to curriculum (CPT) or as Pre-Completion OPT

Must secure permission from school's International Office—in advance!

## OPT:

Start-up and self-employment permitted during regular OPT

Must be directly related to degree field

Must be able to demonstrate active work on a business venture: business license, incorporation documents, etc.

## STEM OPT:

Requires a training plan outlining activities, objectives, and supervision of student during 2-year STEM period

Available only for training with E-Verify employers

Mentorship and oversight required

Pure self-employment not possible





# CASE EXAMPLES:

1. Can I work on my startup while in school on a student visa without ANY income at all.
2. For STEM OPT, do you have any recommendations for how to change or amend the structure of my business if I have a co-founder to meet the STEM OPT requirements? Do you see any trends from USCIS Request for Evidence when filing H-1B or O-1 or Investor visa applications questioning employment for a start-up while on F-1 STEM OPT?
3. I am working on a start up at one of the Harvard incubators (I.e., the iLabs). Do I need Curricular Practical Training for that? At what point does the work become income generating such that I would need work authorization? What kinds of activities in incubators or starting my own business independently of my school can I undertake using my F-1 status without off-campus work authorization?

# WORK VISA OPTIONS POST- OPT

Symbol	Type of employment	Availability
H-1B	Specialty occupation	All nationalities. Cap-subject and cap-exempt. Cap subject quota: 65,000 for bachelor's, <b>additional</b> 20,000 for U.S. master's and above
H-1B1	Specialty occupation	Chile (1,400) & Singapore (5,400)
TN	TN specific occupations listed in treaty	Canadians & Mexicans. No quota.
E-3	Specialty occupation	Australians. 10,500
O-1	Extraordinary ability	All nationalities. No quota.
E-1/E-2	Traders/Investors	Countries w/specific U.S. treaties. No quota.
L-1	Intracompany transferee	All nationalities. No quota.

# H-1B VISA PROGRAM

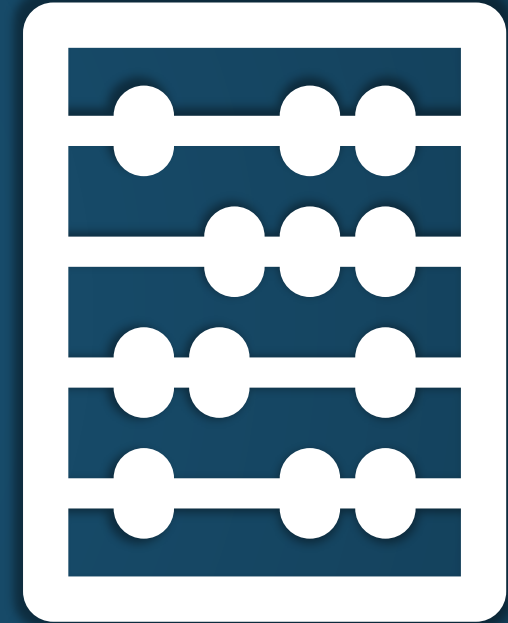
Basic Criteria

Benefits and Limitations

Annual Quota & Timing

Unique issues for entrepreneurs and  
start-up companies

Alternatives to the H-1B





# H-1B BASICS

- Sponsorship by U.S. Employer
- “Specialty Occupation” = Requires Bachelor’s degree in a specific field related to job duties
- Required Wage
- Ability to Pay
- Must possess required degree or equivalent at time of filing
- Preferred way to transition to a green card due to “Dual Intent”
- Permits up to 6 years of work status
- Full-time or part-time H-1B is allowed
- Concurrent employment allowed--separate petition by each employer required
- Part-time study allowed
- Non-competitive: Do not have to be the best or only candidate
- ***Up to a 60-day grace period available for job loss or change of employer***

# H-1B HURDLES FOR ENTREPRENEURS

Start-ups permitted to file H-1B petition for founders

- Must prove bona-fide employer/employee relationship
  - Ability to be supervised
  - Ability to be disciplined
- Various strategies to demonstrate employer/employee relationship
  - Diversity of ownership
  - Board of Directors with Independent Members
  - Board of Advisors
  - Shareholder agreements
- USCIS closely scrutinizes petitions involving entrepreneurs and founders

# ANNUAL H-1B QUOTA & TIMING

- Applies to Cap-Subject employers (i.e., private industry)
- Annual, national quota (“cap”) of 65,000 new H-1B positions
- Additional 20,000 H-1Bs for holders of a U.S. Master’s degree or higher
- Visas become available October 1<sup>st</sup> each year
- ‘Cap gap’ protection for F-1 students on OPT
- Colleges, universities & affiliated non-profits, and non-profit research organizations exempt from quota

# ADVANCED REGISTRATION

- Employers transmit sponsored worker's bio data on-line to USCIS
- Registration submission allowed only during official registration period: Noon Eastern time March 1 to noon Eastern time March 17, 2023
- USCIS will run random computer-generated lotteries and notify employers of results by the end of March 31, 2023
- USCIS runs general 65,000 lottery first then U.S. Master's degree lottery
- Order of lotteries gives U.S. Master's degree graduates greater likelihood of selection
- ***If registration is selected, Employer must submit H-1B petition to USCIS between April 1 to June 30***



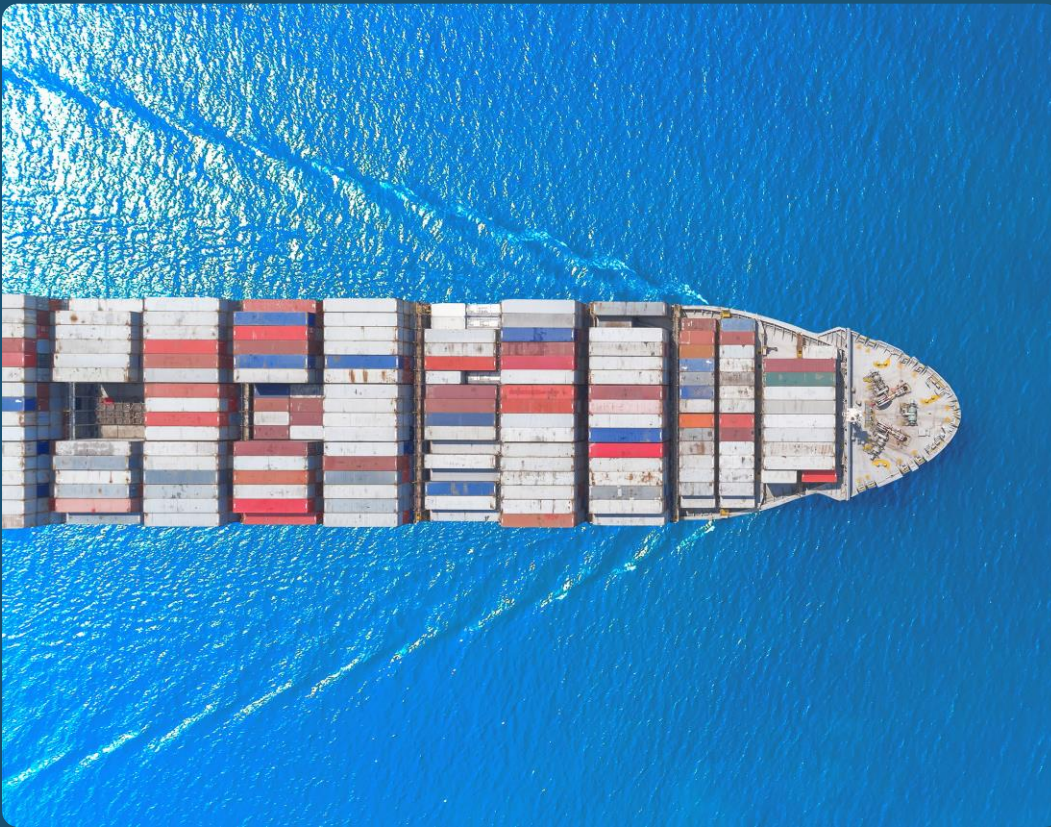
# H-1B LOTTERY EXEMPTIONS

- Employment by college or university
- Employment by non-profit organization CLOSELY affiliated with college or university
- Employment by non-profit or governmental research organization
- Part-time or full-time employment by university/college with concurrent employment by for-profit enterprise (each employer must file separate petition)
- Employment by for-profit enterprise where work location is “at” university/college

# FREE TRADE AGREEMENT PROFESSIONALS

- **TN: Mexico & Canada**
  - Basics:
    - No quota
    - Valid for 3 years at a time
    - Requires employment by U.S. employer (no self employment)
    - Must be occupation identified by the treaty (approximately 63 occupations)
  - Application Process:
    - Canadians may apply at the border
    - Mexicans must obtain a visa at U.S. Consulate
  - ***Up to a 60-day grace period available for job loss or change of employer***

# OTHER FREE TRADE AGREEMENT PROFESSIONALS



- **H-1B1: Singapore and Chile**
  - Similar to H-1B
  - High quota, low usage
- **E-3: Australia**
  - Similar to H-1B
  - Employer required to make wage attestations
  - High quota, low usage
  - *E-3 Spouse eligible for employment authorization*
- Application Process for H-1B1 and E-3:
  - No USCIS pre-approval required
  - Worker may apply for visa directly at US Consulate
- ***Up to a 60-day grace period available for job loss or change of employer***

# E-1 TRADERS & E-2 INVESTORS

- Available to a citizen of a country that has a treaty of commerce and navigation (trade) with the U.S.
- U.S. employer must then also be owned  $\geq 50\%$  by nationals of the same treaty country
  - Over 80 countries have either E-1 or E-2 or both types of treaties with U.S.:  
<https://travel.state.gov/content/visas/en/fees/treaty.html>
- **E-1 Treaty Trader:** Engaged in substantial trade with treaty country and U.S.
- **E-2 Treaty Investor:** Substantial investment in the U.S.
- Typically, process is completed at a U.S. Embassy or Consulate but can also elect change of status without leaving the U.S.
- *Up to a 60-day grace period available for job loss*



# L-1 INTRA-COMPANY TRANSFERREES

- Requires sponsorship by U.S. employer and can be good path to Green Card
- No restriction on ownership %
- “Dual Intent” allowed
- Employee must have worked abroad for one complete year in the last three years
- Qualifying employment must be with the Parent, Branch, Subsidiary or Affiliate of the U.S. employer
  - Managers/Executives:
    - ✓ 7 years max
  - Specialized Knowledge Employees:
    - ✓ 5 years max
- *Up to a 60-day grace period available for job loss*

# O-1A Person of Extraordinary Ability

Must prove sustained national or international acclaim

Receipt of major, internationally recognized award such as Noble Prize

OR

Three of the following:

- Receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor
- Membership in associations that demand outstanding achievement of members
- Published material about the scholar in professional publications
- Judged the work of others, either individually or on a panel
- Original scientific, scholarly, artistic, athletic, or business-related contributions of major significance to the field
- Authorship of scholarly articles in professional or major trade publications or other major media
- Performance of a leading or critical role in distinguished organizations
- Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence
- Comparable Evidence: If a particular criterion is not readily applicable to the beneficiary's occupation

# O-1 TOTALITY OF THE EVIDENCE STANDARD

- Articles in particularly highly-ranked journals relative to other journals in the field, e.g. impact factor
- Published work is highly cited relative to others in the field
- High h-index-for the field
- Employment or research experience with leading institutions in the field, such as U.S. universities, or foreign universities with comparably high research activity, or highly regarded
- Receipt of unsolicited invitations to speak or present research at nationally or internationally recognized conferences in the field.
- O-1 Petition can be approved for up to 3 years
- ***Up to a 60-day grace period available for job loss or change of employer***

# PATHWAYS TO LAWFUL PERMANENT RESIDENCE

- Employment Based
- Investment
- Family Based
- Diversity Lottery
- Asylum/Refugee
- Others: Registry, Cuban Adjustment Act, other special statutes





# EMPLOYMENT-BASED GREEN CARD CATEGORIES

## EB-1: Priority Workers

- EB-1A Persons of Extraordinary Ability
- EB-1B Outstanding Professors & Researchers
- EB-1C Multinational Managers & Executives

## EB-2: Professionals with Advanced Degrees or Exceptional Ability

National Interest Waiver (NIW) or PERM (Labor Certification)

## EB-3: Professionals/Skilled Workers

PERM (Labor Certification)

## EB-5: Investor

Employer sponsorship required for all categories

**Exception:** EB-1A Extraordinary Ability, EB-2 NIW can be self-sponsored & EB-5

Employer must show via PERM (Labor Certification) that no qualified U.S. worker was available for job

**Exception:** All EB-1 cases, EB-2 NIW and EB-5

***ALL CATEGORIES SUBJECT TO STRICT ANNUAL QUOTA —See Visa Bulletin for backlogs***

# CATEGORY & COUNTRY QUOTA BACKLOGS

- Annual Quota is divided by Category (EB-1, EB-2, EB-3...) and Nationality (country of birth not citizenship)
- Backlogs can occur in both *category* and *country* queues, some very severe
- Place in queue ("priority date") determined by filing date of PERM or Immigrant Visa Petition, whichever is earlier
- Planning the entire process early while maintaining legal nonimmigrant status is critical
- Priority date must be "current" at time of filing immigrant visa or adjustment of status application and at time of ultimate green card approval
  - Dual Charts – Dates for Filing and Final Action

# VISA BULLETIN FEBRUARY 2023

## FINAL ACTION DATES

EMPLOYMENT BASED CATEGORIES	ALL OTHER	CHINA	INDIA	PHILIPPINES	MEXICO
EB-1	Current	1 Feb 22	1 Feb 22	Current	Current
EB-2	1 Nov 22	8 Jun 19	8 Oct 11	1 Nov 22	1 Nov 22
EB-3	Current	1 Aug 18	15 Jun 12	Current	Current

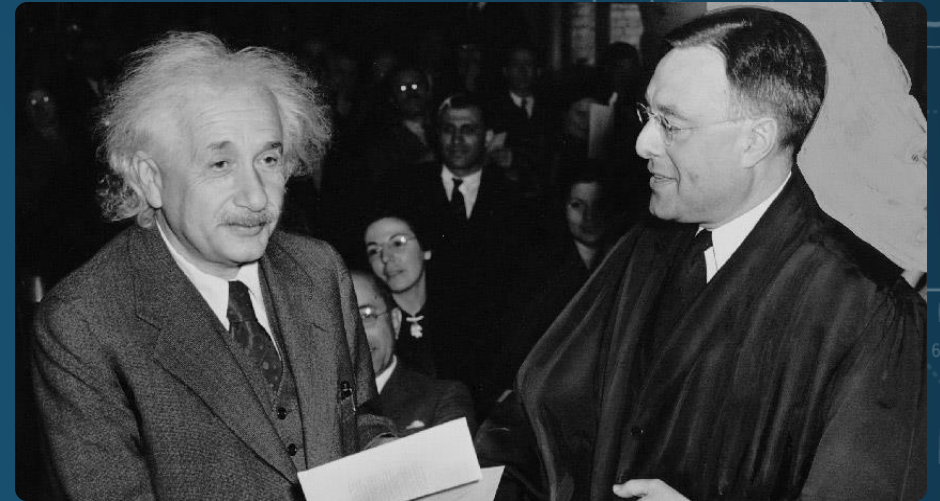
# EB-1(A): PERSONS OF EXTRAORDINARY ABILITY

Persons of extraordinary ability in the sciences, arts, education, business or athletics

- May self-sponsor. Labor Certification **NOT APPLICABLE**

Must present evidence of either:

- Receipt of a major, internationally recognized award
- OR**
- Documentation of at least **3** of the following (next slide):





# EB-1(A): PERSONS OF EXTRAORDINARY ABILITY

- ✓ Lesser nationally or internationally recognized prizes
- ✓ Membership in associations which demand outstanding achievement of their members
- ✓ Published material about the candidate in major media
- ✓ Judge of the work of others in the same or allied field
- ✓ Original contributions of major significance
- ✓ Authorship of scholarly articles in professional or major trade publications or other major media
- ✓ Display of work at artistic exhibitions or showcases
- ✓ Performance of a leading or critical role in distinguished organizations
- ✓ Command of a high salary or other remuneration compared to others in the field
- ✓ Evidence of commercial success in the performing arts
- ✓ Comparable: If listed criteria do not readily apply, comparable evidence of eligibility may be submitted (i.e., patent or grant funding).

# EB-1(B): OUTSTANDING PROFESSORS & RESEARCHERS

Outstanding professors & researchers.

- Requires employer sponsorship. Labor Certification **NOT APPLICABLE**

Must present evidence of the following:

1. An **offer of employment** by either:
  - U.S. university or college offering a tenure or tenure-track or permanent research position; **OR**
  - Organization which employs at least 3 full-time researchers
2. At least **3 years of teaching and/or research** in academic field; **AND**
3. Evidence that scholar/researcher is recognized internationally as **outstanding in academic field**. This evidence must consist of at least two of the following eligibility criteria (next slide):

# EB-1(B) ELIGIBILITY CRITERIA

To establish international recognition evidence must consist of at **least two** of the following:

- ✓ Receipt of major prizes or awards for outstanding achievement
- ✓ Membership in associations which demand outstanding achievement of their members
- ✓ Published material about the alien in major media
- ✓ Judging the work of others
- ✓ Original scientific, scholarly contributions to the field
- ✓ Authorship of scholarly articles in professional or major trade publications or other major media

# EB-2: NATIONAL INTEREST WAIVER

May Self-Sponsor – no employer required

Must have a Masters degree (or equivalent) or higher. Labor Certification NOT APPLICABLE

USCIS may grant a national interest waiver if the Applicant demonstrates:

- I. Proposed endeavor has both substantial merit and **national** importance
- II. Applicant is well positioned to advance the proposed endeavor
- III. On balance, beneficial to waive the job offer and labor certification requirements

Examples of work deemed to be in the “National Interest”

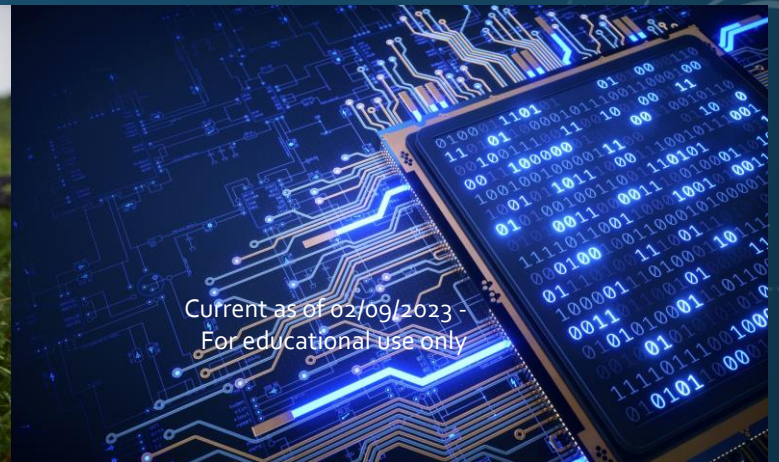
- Improve wages and working conditions
- Improve education and training programs for children and under-qualified workers
- Improve health care
- Provide more affordable housing for the young and/or old and poor



# NEW POLICY GUIDANCE FAVORABLE FOR STEM PH.D.'S AND ENTREPRENEURS

In balancing potential benefits or applicant versus protection of US worker opportunities favorable factors include:

- Work furthering a critical and emerging technology
- Work furthering other STEM area important to U.S. competitiveness
- Work that has potential to support U.S. national security
- Work that will enhance U.S. economic competitiveness
- Petition is supported by letters from interested U.S. government agencies



# PERM-BASED EB-2 & EB-3 PROCESS FLOW

## Step 1: PERM Labor Certification

Request prevailing wage determination from DOL (8-12+ months)

Test local labor market through advertisements and postings (90-120 days)

File application with DOL (min 6-month review)



## Step 2: Immigrant Visa Petition

Prove Ability to Pay Offered Wage if employer sponsored

Demonstrate candidate fully qualifies for PERM or where PERM not required candidate fully qualifies for immigrant category



## Step 3: Candidate's Application for Adjustment of Status, if Priority Date Current

Review of Immigration History including past statements on visa applications and criminal history databases

May file applications for interim employment and travel authorization

Spouse and minor unmarried children may file applications at same time as principal applicant.

# FAMILY-BASED IMMIGRANT CATEGORIES

## Sponsored by U.S. Citizen:

- Parent – *no quota*
- Spouse – *no quota*
- Unmarried minor children – *no quota*
- Fiancé/Fiancée (if abroad) – *no quota*
- Son or Daughter – married or unmarried – quota
- Sister or Brother – quota

## Sponsored by Lawful Permanent Resident

- Spouse – quota
- Unmarried son or daughter – quota



“Spouse” includes same-sex married persons & trans persons of both the same and opposite sex

“Child” includes children adopted before 16 years of age and step-children where the step-relationship was created before 18 years of age

*Family-Based Categories: subject to category & country quotas and backlogs — See Visa Bulletin*



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**SUBMIT**





# QUESTIONS?



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