

# Post Graduation Employment Options for Students

Presented by:

David A.M. Ware, attorney at law

[www.david-ware.com](http://www.david-ware.com) [dware@david-ware.com](mailto:dware@david-ware.com)

800 537 0179

National Practice with Offices Across the Gulf South  
and Seattle, WA



# General Matters

- **WARNING:** This presentation provides general information only and cannot substitute for individualized legal advice about your particular case. In the world of immigration, *very small* factual differences can make a huge difference in your case.
- In order to receive such advice consult our firm individually or seek a qualified immigration attorney of your choice.

# General Matters

- **DON'T** get advice from friends or relatives.
- **ONLY** get advice from your international office or a qualified, experienced immigration attorney.
- **NEVER** consult a non attorney who does not work in the international office for immigration advice (including your academic advisor or a *notario*).
- **ALWAYS** follow the advice of your international office.

# Where Do I Start?

- Your career in the US after graduation should ALWAYS start with Optional Practical Training (OPT). OPT ideally acts as a bridge between your studies and the workplace.
- It allows you to “get your foot in the door” with a US employer without any paperwork on their part: vitally important.
- It allows you to try more than one job if you wish.



DavidWare & Associates

# Can I Skip A Step?

- While in some cases it *may* be possible to proceed directly to H1B or even permanent residence without OPT, this is usually unadvisable, as the H1B could be denied, and permanent residence almost always takes more than one year.
- In cases where you have no OPT available, you have been in H status during the prior six years or are offered a quota exempt job, or are offered a job in the middle of school year, going directly to H could be an option, but only after very careful consideration of strategy and options.



David Ware & Associates

# Cross The Bridge

- You must apply *within the 90 days before completing your program or up to 60 days after completion.*
- Apply early and **follow school's instructions:** all OPT must end within 14 months of program end date.
- Thus if you apply *after* completion, **you may get less than one year OPT!**

# How Do I Cross?

- Eligible for one year of OPT for each *higher* degree
  - Don't need job offer to apply
  - Employment must be directly related to major field of study
  - Apply by filing Form I-765 with USCIS with OPT I 20
    - Apply no more than 30 days after school authorizes in SEVIS

# While On OPT.....

- While engaged in OPT, you must report change of your name, address, or e-mail address, change of employer's name or address, loss of job, and changes of employer to your advisor. Failure to do so could result in denial of future immigration benefits.
- While on STEM, you must also report in to your international office each six months, whether or not anything has changed.



DavidWare & Associates



# Grab onto the STEM!

## – STEM extension of OPT

- Students who earn bachelor's or higher in a science, technology, engineering or mathematics (STEM) field may receive **one** 17-month extension, for 29 months total OPT. See

<http://www.ice.gov/doclib/sevis/pdf/stem-list.pdf>

- Apply by filing Form I-765 **before** initial 12 months of OPT expires; automatic extension of 180 days
- Employer must enroll in E Verify. See [uscis.gov/everify](http://uscis.gov/everify)
- Any change of employer while on STEM extension must be to E Verify enrolled employer.
- Self employment OK on STEM as long as company enrolls in E Verify.

# The Bridge Stops Here

- Unemployment may lead to violation of status
  - Allowed 90 days unemployment during initial period of OPT
  - SEVP says paid or unpaid employment of at least 20 hours per week suffices, even on STEM, and may be with more than one employer. SEVP 4/23/10. Volunteer!
  - SEVP says self-employment, independent contractor work, or through agency or consulting firm are acceptable, but not on STEM.
  - No grace period between jobs.
  - Time outside U.S. does not count as unemployment if you are employed before leaving U.S. and are authorized by your employer to be abroad.
  - ***This is current guidance from SEVP and could change, so get advice from your International Office!***



David Ware & Associates

# The Next Step: H1B

- H1B is the principal immigration status available for persons temporarily working in professional level jobs (“specialty occupations”) in the US.
- Who sponsors? [www.immihelp.com/hib-sponsoring-companies-database/](http://www.immihelp.com/hib-sponsoring-companies-database/); [www.myvisajobs.com](http://www.myvisajobs.com)
- It generally requires that the employee have at least a four year degree or equivalent *AND that the position require a minimum of a bachelor’s degree.*
- So, for example, engineer, accountant, yes; store clerk, cook, secretary, no.

# What Are the Limitations of H1B?

- Employment is limited to the employer(s) who petition(s) for the student. May hold more than one H1B at same time. H1B may be part time.
- Employment is generally limited to six years with ALL employers (unless employment-based permanent residence begun by end of 5<sup>th</sup> year).
- Employment must be directly related to degree program— either current program or any prior degree program.
- H1B's are limited by strict fiscal year quotas. Federal FY = 10/1 to 9/30 each year.
- The H1B beneficiary may have “dual intent”.



David Ware & Associates

# What Are the Employer's Obligations?

- Must agree to employ beneficiary as set out in the petition (no fraud).
- Must need the services of the employee (no uncles with corner stores).
- Must agree to employ H1B only in geographic location(s) set out in labor condition application.
- Must offer to pay return transportation to country of nationality if H1B terminated before end of visa petition approval.

# 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.
  - Basically, this means that a *competitive* wage must be offered.
  - There are four levels of wages and separate wage data for higher ed and certain other employers. See:
    - [www.flcdatacenter.com/oeswizardstart.aspx](http://www.flcdatacenter.com/oeswizardstart.aspx)

# Employer's Obligations?

- Must be no strike or lockout (unionized jobs).
- Must notify other workers of terms of job (two 10 day postings or letter to union).
- Must agree to pay certain fees to USCIS (next slide).

# What Are the Fees?

- Regular filing fee: \$325
- Filing fee for dependants: \$290
- Premium fee: \$1225—15 day processing
- “Anti fraud” fee: \$500
- ACWIA fee: \$1500 (if 26 more FT employees) or \$750 (if 25 or fewer)
- Attorney’s fees: vary widely: no standard amount.



David Ware & Associates



# Who Pays for What?

- Except for ACWIA fee, which the employer **MUST** pay, until recently, there was no hard and fast rule.
- A series of judicial decisions now makes clear that the employer must pay all costs and fees required to get the employee on the payroll.
- Employer could incur huge liabilities if they don't pay.
- What to do if they don't want to pay? Have them discuss issue with experienced immigration attorney.
- Note: employer not responsible for dependants.

# What's Filed and When?

- First is Labor Condition Application (LCA). Filed electronically with Department of Labor. Takes about five to ten business days to be approved.
- Next is H1B Petition, together with LCA, evidence of qualifications, and description of job, filed at either VT or CA Service Center of USCIS, depending on place of employment, or CA if quota exempt.
- If employee maintaining lawful status in US, status is changed to H1B, along with family members.
- If outside US, or traveling following change of status, must obtain H1B visa at US consulate, unless going for 30 days or less to Canada/Mexico.



David Ware & Associates

# The Magic Approval

- Processing of the H generally takes three to seven months.
- Fifteen day *premium processing* is available for \$1,225; PP also guarantees easier communication with USCIS via phone/email.
- Once approved, the H employee may “port” to a new employer once that employer *files* a new petition. Approval of new petition is not necessary to “port”. BEWARE: “porting” is difficult if you have not been counted against the quota.



DavidWare & Associates

# The Cursed Quota

- How many H visas are made available per year?
  - Currently H1B's are limited to about 78,200 per fiscal year.
  - ~58,200 for those with no US earned Master's.
  - 20,000 for those with US earned Master's or higher.
  - ~6,800 reserved for H1B1 for citizens of Chile, Singapore.

# Quota Statistics

- In 2008, USCIS accepted H petitions for five business days beginning April 1 and all cases received put into a lottery.
- All 78,200 numbers were exhausted.
- In 2009: same system, but about 20,000 visas left at end of process.
- Both regular and Master's quotas exhausted 12/21/09.
- In 2010: On December 24, 2010 the Master's quota was met and by January 26, 2011 the regular quota was met as well.
- In 2011: Master's quota, October 19; regular quota November 22.
- In 2012: Masters, June 7; regular June 11.
- In 2013, both caps exhausted on April 5.
- New quota opens April 1 for employment to begin October 1. **Quota likely to be open til April 7.**



David Ware & Associates

# Who's Exempt from Quota?

- Exempt from the quota are
  - Persons *already counted against it within past six years.*
  - persons who work in higher education and affiliated nonprofit entities.
  - Those who work “at” rather than for a quota exempt employer, that is on physical premises of employer
  - Employees of non profit **research** and government **research** organizations. **Note that most government entities and non profits are NOT exempt from quota.**
  - J 1 physicians granted a waiver of the two year home residence requirement to work in underserved area.
  - Persons engaged in concurrent quota exempt/quota subject jobs, that is working simultaneously for quota exempt and quota subject employers.



DavidWare & Associates

# So Called “cap gap” OPT

- In April, 2008, in order to assist students caught by the H1B quota, USCIS created so called “cap gap” protection which automatically extends OPT and DS through September 30 of any year, if:
  - The student’s employer properly filed an H1B petition on his/her behalf prior to the expiration of his/her OPT (**which must end on or after April 1**);
  - The H1B petition shows a start date of October 1.
  - Cap gap OPT ends midnight September 30.
  - **If the H petition is filed during the student’s grace period, after expiration of OPT, then the “cap gap” extends status only, but not work authorization.**
- In order to fully document the “cap gap”, the student should seek a “cap gap” I 20 from his/her school.

# Cap Gap Caveats

- If a cap exempt petition is filed on behalf of a student, the student does NOT receive cap-gap protection.
- If the student's OPT expires less than 60 days before April 1, he/she will receive extension of stay but no work authorization.
- If the student's OPT expires more than 60 days prior to April 1, NO cap gap protection.



DavidWare & Associates



# Travel While In “Cap Gap”

- You should not travel while in the cap gap as you will have no valid EAD card. Reentry to the US on OPT generally requires:
  - I 20 endorsed for travel
  - Valid passport and F 1 visa (unless visa exempt)
  - **Valid EAD card**
  - Employment letter

# Cap Gap Example

- Maria's OPT ends May 15, 2014.
- Her employer files an H petition for her on April 1, 2014, with a start date of October 1, 2014 (the earliest date that can be requested).
- The H is pending, but not approved, until, September 15 (it MUST be adjudicated by September 30).
- Maria's F status and OPT will automatically be extended to midnight, September 30, 2014.
- She may (but does not have to) request a "cap gap" I 20 from her school.
- What if Maria's OPT ends on March 15?



DavidWare & Associates

# When Looking for a Job, Beware...

- Many beginning positions in business do not require a degree: eg, sales, management trainee slots. **See next slide.**
- Many entry level jobs pay partly or solely on commission. Commission or sales bonuses generally cannot be included in the wage computation.
- Beware of “make work” or make believe jobs from friends or relatives. Pay stubs, W 2’s will be required when you go abroad for visa issuance, apply for future immigration benefits!
- Also beware of fly-by-night companies which may “bench” you until they place you in a job.
- Paying a company to file for you when you have no intention of working for them is **FRAUD**—can jeopardize your future in the US.
- Startups, financially troubled businesses, and those that take a tax loss each year will NOT be able to sponsor for permanent residence!



DavidWare & Associates

# Does This Job Require a Degree?

- **Complexity of job:** Does the job require the application of theoretical and practical knowledge typically acquired in a relevant four year degree program?
- **Employer reqts:** Has the employer consistently required a minimum of a Bachelor's in particular major(s) for position? Or is the requirement simply an employer preference? Or is the employer simply making up the requirement to get you an H1B?
- **Other, similar:** What are industry standards for this type of job? Check ads on internet, DOL's *Occupational Outlook Handbook*.
- **\$\$\$\$:** Is the salary commensurate with a professional-level position?

# Employers' H1B Misconceptions

- Employer believes that it must recruit, prove American workers not available, or prove that student is exceptional, special, or unique in order to sponsor.
- FALSE: No recruitment required. Special qualities not required. Two ten day postings or letter to union are for notification only.



David Ware & Associates

# Misconceptions—Trouble, Money

- Employer thinks the process “will get them in trouble with immigration” (not unless they have otherwise shady practices or lie in the paperwork).
- Employer doesn't want to reveal financial information to USCIS: in the H1B context financial info almost never needed. If so, does not have to be revealed to employee.



DavidWare & Associates

# Misconceptions--Paperwork, Salary

- Employer thinks “it’s too much trouble, paperwork” (a few signatures, two ten day postings, no advertising; attorney can simplify process).
- Employer worries about posting the employee’s wage (post a range!).
- Employer thinks H can be skipped, go directly to PR. Because of the time needed for PR processing, in most cases this is impossible.



DavidWare & Associates

# Misconceptions—“Contract”?

- Employer worries that sponsorship may constitute contract of employment (no, but if they're worried, do a memo of understanding both sign).
- Employer worries that employee is later going to ask for PR and leave the company—they've been burned before (Sign a “one way” contract; employee has to repay legal fees if leaves before a certain date; but employer retains right to “employ at will”).



DavidWare & Associates



# What About Starting My Own Business and H?

- To be an H1B employer, an entity usually must have at least one employee other than the H1B and must have a Board that can fire the H1B. Very difficult to get a “self employed” H petition approved (despite Obama’s promises). Also, difficult for new company to pay required wage.
- Usually not a wise idea to start your own business, unless you have loads of money (at least 500K to 1 million) or qualify for investor visa (treaty required—we will discuss later).
- Why not? Generally, business owners cannot sponsor themselves for permanent residence.
- Consider E, O or L instead of H (see below).
- Resource: <http://www.uscis.gov/eir/visa-guide/entrepreneur-visa-guide>



David Ware & Associates

# Are There Alternatives to the H?

- TN (Treaty NAFTA) for citizens of Canada and Mexico only. Occupations listed at 8 Code of Federal Regulations Sec. 214.6(c) mostly require a minimum of Bachelor's degree, except Scientific Technician/Technologist. But MBA's beware: "Management Consultant" is carefully scrutinized; generally must be independent contractor. TN given in three year increments; requires residence abroad (no dual intent).



DavidWare & Associates

# Other Alternatives?

- H1B1 visa for Chile, Singapore: very similar to normal H1B, except granted in one year increments, requires residence abroad (no dual intent).
- E 3 for Australian citizens; again very similar to H1B; two year increments; minimum Bachelor's, dual intent ok; spouses may work.
- H-3 trainee. 2 yrs max; training must be for job abroad.
- J-1 trainee. 18 mo. max; looser than H 3, but some J sponsors will not sponsor if you are in US.
- J-1 professor/researcher, "specialist", short term scholar, K-12 teacher, camp counselor, summer work-travel.



DavidWare & Associates

# Alternatives?

- O-1 person of extraordinary ability/achievement.
- E 1/E 2: if your country of nationality has an trader/investor treaty with US, investment of as little as 50K in a job-creating business can mean a visa for life, work permit for spouse.
- L 1A/L 1B: if you were employed by a company abroad for at least a year before coming to the US, and they wish to employ you in US; work permit for spouse.
- R-1: possible if job offer has a significant religious component.
- **B-1 business visitor: only possible if employed outside US, no remuneration in US except expenses, and product/service is made/rendered outside US. Sometimes used in lieu of H1B and H3 trainee if based and paid outside US. VERY LIMITED UTILITY.**



DavidWare & Associates

# What If No Job Offer in US?

- Go back to school, retool your skills to fit the market.
- Canada, Australia or other country with demand for your skills are alternatives.
- Canada has an easy point system. See [cic.gc.ca](http://cic.gc.ca).
- Your home country or other country where your language is spoken/your skills are in demand. Many companies, eg, Johnson and Johnson, eagerly hire for home country service, and then often transfer back to the US.

# Permanent Residence



David Ware & Associates

# What is Permanent Residence?

- The right to live and work permanently in the US for any employer.
- A person becomes a permanent resident through adjustment of status in the US or issuance of an immigrant visa outside the US. A person generally must maintain lawful status in order to adjust in the US.
- What can jeopardize permanent residence?
  - Any absence of over six months from the US;
  - Abandonment of residence in the US;
  - Certain types of criminal conduct.
- Permanent residence is usually represented by a plastic card issued by USCIS.
- Permanent residence is not citizenship: that comes usually after a period of permanent residence.



David Ware & Associates

# Routes to Permanent Residence

- Employment-based
- Family-based
  - U.S. citizen or permanent resident spouse
  - USC or PR parent; USC child over 21; USC sibling
  - Long waits for all but spouse of USC or parent of USC child over 21.
- Asylum
- Large Investment
- Domestic Abuse
- Victims of Trafficking and Serious Crimes
- Special Programs
- Private Bills—very rare
- MAVNI, Military Accessions Vital to the National Interest. See [goarmy.com/info/mavni](http://goarmy.com/info/mavni).
- Removal Proceedings
- Diversity Visa Lottery: **only** apply at [www.travel.state.gov](http://www.travel.state.gov). **Next lottery: October 2014**



David Ware & Associates



Countries of Birth NOT eligible for last lottery,  
**unless spouse born elsewhere:**

**BANGLADESH, BRAZIL, CANADA, CHINA (mainland-born), COLOMBIA, DOMINICAN REPUBLIC, ECUADOR, EL SALVADOR, HAITI, INDIA, JAMAICA, MEXICO, NIGERIA, PAKISTAN, PERU, PHILIPPINES, SOUTH KOREA, UNITED KINGDOM (except Northern Ireland) and its dependent territories, and VIETNAM.**



David Ware & Associates

# Employment Based Immigration

- Generally must have full time permanent job offer. Only exceptions, National Interest Waiver, Alien of Extraordinary Ability.
- First step is generally labor certification (LC). Only NIW, Extraordinary Ability, Outstanding Professor/Researcher, Aliens of Exceptional Ability, Nurses, PT's can avoid LC.



David Ware & Associates

# Employment-Based PR--Steps

## 1. Labor certification

- Employer advertises position to “test the labor market”
  - Several forms of advertisement required
- Employer files application through PERM system (online)
- DOL approves, denies, or audits
- Employer must pay attorney’s fees and ad costs.

## 2. Immigrant petition (I-140) with USCIS

## 3. Adjustment of Status Application (I-485) with USCIS

- Must have current “priority date” on Visa Bulletin to file
  - Some categories/countries backlogged, queues of several years
- If “current,” may file petition and application together (“concurrent filing”)
- Can apply for EAD and advance parole “travel document” with adjustment application
- Spouse and unmarried minor children can file AOS at same time.
- Can “cross charge” to place of spouse’s birth.

4. During entire process employee must maintain valid nonimmigrant status.

# Who Has to Wait

- Certain persons are subject to waiting lists and cannot file for adjustment of status until at the top of the waiting list:
  - Persons born in India or China, *unless spouse born in another country.*
  - Persons whose position requires less than a Master's degree OR a Bachelor's plus five years experience (EB 3).

# Permanent Residence Myths

- There is no such thing as “sponsorship” for permanent residence by a friend, someone with “connections”, or distant relative.
- Congressmen can help with PR only by sponsoring a “private bill” in the most extreme situations where no legal remedy exists. Very rare! Otherwise, only can help if case “stuck”.
- Other influential community members generally cannot help.
- Adoption does not confer immigration benefit unless *completed* while under age 16.



David Ware & Associates

# Permanent Residence Myths

- The mere accrual of time spent in the US generally does not make one eligible for PR.
- Sponsorship by an employer or most family members does not generally result in an automatic right to remain in the US while sponsorship is ongoing; person must have independent nonimmigrant status, eg, F 1, H1B.
- Hardship, standing alone, is not a basis for PR.
- Country of origin is largely irrelevant in PR process.



DavidWare & Associates

# Permanent Residence Myths

- J 1/J 2 two year home residence requirement never just “disappears”, eg, diversity lottery winners.
- Research grantor, eg, NIH, usually has no interest in PR process.
- “My friend” got a green card in two weeks (mysteriously).
- Fake marriages work; my friend did it!
- Marriage to a USC results in immediate citizenship or benefits.
- Having a baby in the US leads to PR (yes, in 21 years).

# The Importance of Maintaining Status

- Merely filing an I 130 or I 140, or labor certification does not confer lawful status.
- The person must separately maintain some lawful status if in the US while waiting for PR.
- For students and scholars, very important to do so, as things may change while waiting (petitioner may die or divorce, job may vanish)
- Important to apply for work authorization and advance parole as soon as eligible.



# Finding an Immigration Attorney

- Discuss with your employer
- Ask friends, your school, and others for references
- **Probably a good idea to be wary of those who:**
  - Claim to be experts in immigration and other areas (divorce, injuries, etc.)
  - Have little or no experience with students or exchange visitors (you are subject to complex rules)
  - Offer a guaranteed result or offer to charge you only if they are successful
  - Will not agree to a “flat fee” (unless your case is unusual or complex)
  - Are not familiar to anyone else, especially your advisor
  - Are unusually cheap or promise results different from other lawyers you consult
  - Who ask you to sign things that are not true, or without reading them first (fraud carries permanent and possibly criminal penalties)
  - Who don’t call you back or don’t send you copies of their work on your behalf
  - Are of interest to you **only** because they speak your language or are from your country
  - Are of interest to you **only** because they have an office near you



David Ware & Associates

# About the Speaker



**David Ware** has over 32 years experience in representing universities and their students, faculty, and staff, as well as companies and individuals. His firm is one of only a handful in the nation with a consistent focus on academia, while also handling business, family, removal, asylum, and nationality cases. He has for many years been selected to the Bar Register of Preeminent Lawyers, and has been selected as one of the Best Lawyers in America since 2000. For ten years, Mr. Ware has been selected as among the top immigration attorneys in Louisiana by New Orleans Magazine, and in 2005 and 2008, City Business Magazine selected him as one of the top 50 “Leaders in Law” in Louisiana, the only immigration attorney so chosen. In 2008, he was elected to Who’s Who International’s Top Corporate Immigration Attorneys – one of only 300 in the US and the only in Louisiana. Mr. Ware is a recognized leader among immigration attorneys in practice areas of interest to universities, and he currently serves as a mentor in these areas for other immigration attorneys through AILA. He has been active in NAFSA since 1985. In addition to holding several AILA and NAFSA leadership positions, he has received numerous awards for outstanding service to NAFSA. He regularly serves as an expert speaker and author for both AILA and NAFSA national and regional conferences, and at the meetings of other academically-oriented organizations such as NACUA and CUPA.



QUESTIONS?

¿Preguntas?

Domande?

Câu hỏi?

Fragen?

Qüestiós?

Vragen?

Perguntas?

Kum tum?

dwa

DavidWare & Associates