

# HARRY GEE & ASSOCIATES, PLLC

## NON-IMMIGRANT VISA CLASSIFICATION

Immigration and Nationality Act, Section 101(a)(15) – Summary

- A. Ambassadors, ministers, diplomats, consular officials, accredited foreign government employees and personal servants.
- B. Business visitor or visitor for pleasure - Alien having a foreign residence which he has no intention of abandoning and who is visiting the U.S. temporarily.
- C. Alien in immediate and continuous transit through the U.S.
- D. Alien crewman.
- E. Treaty trader or investor - Solely to carry on substantial trade between U.S. and his country or to develop and direct operations of enterprise in which he has invested or is actively in the process of investing a substantial amount of capital.
- F. Student - Alien having a foreign residence which he has no intention of abandoning and attending an accredited school.
- G. Member of international organization or de jure government official.
- H. Specialty Occupation - Requiring theoretical and practical application of highly specialized knowledge and attainment of a Bachelor's or higher degree or its equivalent or a fashion model; labor certified temporary worker and industrial trainee having a foreign residence which he has no intention of abandoning.
- I. Member of foreign press, radio, or information media.
- J. Exchange student, scholar, trainee, teacher coming to teach lecture or study - alien having a foreign residence that he has no intention of abandoning.
- K. Fiancé or fiancée of U.S. Citizen; spouses of U.S. citizens married outside of the United States waiting approval of their immigrant visa petitions.
- L. Intra-company transferee - Alien who within 3 years preceding the application has been employed by a firm or corporation or other legal entity at least one year continuously and will be coming to the U.S. temporarily to work for the same employer or a subsidiary or affiliate in a managerial, executive, or position of specialized knowledge.
- M. Vocational or non-academic student - Alien having a foreign residence which he has no intention of abandoning and accepted to attend accredited school.
- N. Parents and children of certain special immigrants.
- O. Alien with extraordinary ability in the sciences, arts, education, business or athletics demonstrated by sustained national or international acclaim, or demonstrated record of extraordinary achievement in movies or television or accompanists and assistants as integral part of actual performance with critical skills and experience not of a general nature with a foreign residence with no intention of abandoning.
- P. Alien with foreign residence with no intention of abandoning who is an athlete, individually or part of a team at an internationally recognized performance and with a sustained and substantial relationship with the group for one year entering U.S. temporarily and solely for the purpose of performing as artist or entertainer.
- Q. Alien with foreign residence with no intention of abandoning coming temporarily as part of an international cultural exchange program to provide practical training, employment and the sharing of history, culture and traditions of one's home country and employed under the same wages and working conditions as domestic workers.
- R. Alien who for two years immediately preceding application has been a member of a religious denomination having a bona fide non-profit, religious organization in the United States entering for a period not to exceed five years as a minister of a religious denomination.
- S. Alien who possesses certain reliable information critical to a federal or a state government investigation and/or prosecution of an individual in a criminal organization or enterprise **OR** an alien who possesses critical information sought by certain federal authorities and who might be placed in danger for supplying such information and who is eligible for the "terrorism information" (reward).
- T. Victims of international trafficking in persons
- U. Victims of spousal or child abuse
- V. Spouses and minor children of lawful permanent residents who have been waiting more than three years for permanent resident to enter the United States and be granted work authorization.

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## IMMIGRANT VISA CLASSIFICATIONS

### Summary

- I. Immediate Relatives – Spouses, minor children of U.S. citizens and parents of U.S. citizens over 21; certain widows and widowers of U.S. citizens.
- II. Family-sponsored Immigrants
  1. Unmarried sons and unmarried daughters of U.S. citizens.
  2. Spouses and unmarried sons and unmarried daughters of permanent resident aliens.
  3. Married sons and married daughters of U.S. citizens.
  4. Brothers and sisters of U.S. citizens.
- III. Employment-based Immigrants
  1. First Preference – Priority Workers
    - a. Aliens with extraordinary ability in the sciences, arts, education, business, or athletics.
    - b. Outstanding professors and researchers.
    - c. Certain multi-national executives and managers.
  2. Second Preference – Certain Professionals
    - a. Members of the professions with advanced degrees or the equivalent.
    - d. Aliens of exceptional ability in sciences, art, or business.
  3. Third Preference – General Workers
    - a. Skilled workers with at least two years training or experience.
    - b. Professionals with baccalaureate degrees and professional jobs.
    - e. Other workers or unskilled labor.
  4. Fourth Preference – All Special Immigrants Except Returning Residents and Former U.S. Citizens.
  5. Fifth Preference – Employment Creation

Aliens engaging in a new commercial enterprise which has been established or is actively in the process of investing a specified amount creating full time employment for not fewer than ten U.S. workers and which will benefit the U.S. economy.

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## NAFTA PROFESSIONALS

Immigration and Nationality Act, Section 214(e)(2)

The North American Free Trade Agreement (NAFTA) allows citizens of Canada or Mexico to temporarily come to the United States to engage in business activities at the professional level if they are employed in one of the following occupations and possess the minimum required qualifications. In most cases, applicants must possess a Baccalaureate or Licenciatura degree. In some cases, a state/provincial license may also be sufficient.

### General

Accountant\*; Architect; Computer Systems Analyst\*; Disaster Relief Insurance Claims Adjuster\*; Economist; Engineer\*; Forester; Graphic Designer\*; Hotel Manager\*; Industrial Designer\*; Interior Designer\*; Land Surveyor; Landscape Architect; Lawyer (including Notary in the Province of Quebec)\*; Librarian\*; Management Consultant\*; Mathematician (including Statistician); Range Manager/Range Conservationist; Research Assistant (working in a post- secondary educational institution); Scientific Technician/Technologist\*; Social Worker; Sylviculturist (including Forestry Specialist); Technical Publications Writer\*; Urban Planner (including Geographer); Vocational Counselor;

### Medical

Dentist\*; Dietitian; Medical Laboratory Technologist\*; Nutritionist; Occupational Therapist; Pharmacist; Physician (teaching or research only)\*; Physiotherapist/Physical Therapist; Psychologist\*; Recreational Therapist; Registered Nurse\*; Veterinarian\*;

### Scientist

Agriculturist (including Agronomist); Animal Breeder; Animal Scientist; Apiculturist; Astronomer; Biochemist; Biologist; Chemist; Dairy Scientist; Entomologist; Epidemiologist; Geneticist; Geologist; Geochemist; Geophysicist (including Oceanographer in Mexico and the United States); Horticulturist; Horticulturist; Pharmacologist; Physicist (including Oceanographer in Canada); Plant Breeder; Poultry Scientist; Soil Scientist; Zoologist

### Teacher

College; Seminary; University

\*These professions have additional or alternative qualification requirements.

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## NON-IMMIGRANT DOCUMENTS

What they control and their use

### Non-Immigrant Work Classifications

The process of obtaining a non-immigrant status for employment begins when the prospective employer files in the U.S. a Petition for Non-immigrant Worker on form I-129 with the USCIS. The USCIS then determines whether the foreign national meets the basic qualifications for a particular category. Once this petition is approved, an I-797 Notice of Action (the approval notice) is issued for a specific period of time with a specific employer. This approval notice may then be used to apply for a visa.

### Visas

With an approval notice, the foreign national (going) abroad should then apply for a visa, generally at their home country consulate. The U.S. Department of State (DOS) is the government agency that issues the visa. Please note that the approval notice does not guarantee visa issuance to a foreign national, because the foreign national must also demonstrate that he or she is admissible to the U.S. The DOS does personal and security background checks to determine a foreign national's admissibility. When approved and issued, the validity period of a visa may vary depending on the non-immigrant classification and the reciprocity agreements between the U.S. and the foreign national's country of citizenship.

The visa does not confer any legal right upon a foreign national to be able to enter the U.S. or otherwise guarantee entry into the U.S. The visa merely gives permission for a person to apply for entry to the U.S. The Customs and Border Protection (CBP) agent at the port of entry has the authority to deny entry to anyone who is inadmissible under U.S. laws. Essentially, the visa allows a foreign national to travel to the U.S. (generally board a plane) and request entry.

### Arrival/Departure Records (I-94)

If the CBP official at the port of entry confirms the foreign national's admissibility, he or she will issue the I-94, Record of Arrival-Departure. The I-94 will indicate the status as well as the authorized period of stay in the U.S. that is granted to the foreign national. It is important to make sure that all arrivals and departures from the U.S. are recorded properly. The dates on the I-94 indicate a foreign national's status. If the foreign national remains in the U.S. beyond the date authorized on this document, it generally will result in the foreign national becoming removable (deportable) and the visa being automatically cancelled. Furthermore, if the foreign national remains in the U.S. for an extended period beyond the date authorized, his or her future entry into the U.S. may be barred for several years or more. Accordingly, the I-94 should always be reviewed for accuracy when it is issued.

Extensions and changes of status may update the I-94 by filings with the USCIS. These can be combined with the I-797 (Notice of Action) Approval Notice. The I-94 should be kept with the passport in a safe place, as it will need to be returned to DHS officials upon departing from the United States. Failure to complete these steps could lead DHS to determine that a foreign national has overstayed and lead to visa cancellation.

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## DUAL INTENT

### Immigration and Nationality Act § 214(b)

Every alien (other than a nonimmigrant described in subparagraph (L) or (V) of section 101(a)(15), and other than a nonimmigrant described in any provision of section 101(a)(15)(H)(i) except subclause (b1) of such section) shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under section 101(a)(15). ...

### 101(a)(15)

...

(H) an alien

(i)

(b) ... who is coming temporarily to the United States to perform services (...) in a specialty occupation...;

(L) subject to section 214(c)(2), an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

~ ~ ~ ~ ~

*Among the elements that many of the nonimmigrant visa classifications of INA §101(a)(15) require in order to overcome the presumption is that the foreign national maintain a “residence” abroad that he or she does not intend to abandon. The notion that the individual will intend to depart the United States but simultaneously have a permissible long term intent to remain permanently (“dual intent”) is an exemption from the prohibition of abandonment of foreign residence. The three visa classifications exempted by the INA provision are H-1B (but not the Singaporean and Chilean H-1B1), L, and V.*



RECEIPT NUMBER		CASE TYPE I129	RECEIVED MAY 11 2009
RECEIPT DATE April 24, 2009		PETITION FOR A NONIMMIGRANT WORKER	
PRIORITY DATE		PETITIONER	THE LAW OFFICES OF HARRY GEE JR
NOTICE DATE May 5, 2009		BENEFICIARY	
PAGE 1 of 1		<b>Notice Type:</b> Approval Notice <b>Class:</b> H1B <b>Valid from</b> 10/01/2009 to 09/30/2012	
ANDREW H. GEE LAW OFFICE OF HARRY GEE JR & ASSOCIATES 5847 SAN FELIPE ST SUITE 2950 HOUSTON TX 77057			

The above petition and change of status have been approved. The status of the named foreign worker(s) in this classification is valid as indicated above. The foreign worker(s) can work for the petitioner, but only as detailed in the petition and for the period authorized. Any change in employment requires a new petition. Since this employment authorization stems from the filing of this petition, separate employment authorization documentation is not required. Please contact the IRS with any questions about tax withholding.

The petitioner should keep the upper portion of this notice. The lower portion should be given to the worker. He or she should keep the right part with his or her Form I-94, *Arrival-Departure Record*. This should be turned in with the I-94 when departing the U.S. The left part is for his or her records. A person granted a change of status who leaves the U.S. must normally obtain a visa in the new classification before returning. The left part can be used in applying for the new visa. If a visa is not required, he or she should present it, along with any other required documentation, when applying for reentry in this new classification at a port of entry or pre-flight inspection station. The petitioner may also file Form I-824, *Application for Action on an Approved Application or Petition*, with this office to request that we notify a consulate, port of entry, or pre-flight inspection office of this approval.

The approval of this visa petition does not in itself grant any immigration status and does not guarantee that the alien beneficiary will subsequently be found to be eligible for a visa, for admission to the United States, or for an extension, change, or adjustment of status.

THIS FORM IS NOT A VISA NOR MAY IT BE USED IN PLACE OF A VISA.

Please see the additional information on the back. You will be notified separately about any other cases you filed.

IMMIGRATION & NATURALIZATION SERVICE  
 VERMONT SERVICE CENTER  
 75 LOWER WELDEN STREET  
 SAINT ALBANS VT 05479-0001  
**Customer Service Telephone: (800) 375-5283**



Form I797A (Rev. 09/07/93)N

PLEASE TEAR OFF FORM I-94 PRINTED BELOW. AND STAPLE TO ORIGINAL I-94 IF AVAILABLE

Detach This Half for Personal Records

Receipt #  
I-94# 796611687 19

NAME  
CLASS H1B

VALID FROM 10/01/2009 UNTIL 09/30/2012

PETITIONER:

**796611687 19**

Receipt Number  
Immigration and  
Naturalization Service

I-94  
Departure Record

Petitioner: FMC TECHNOLOG

14. Family Name	
15. First (Given) Name	16. Date of Birth
17. Country of Citizenship	



Admission Number

107683997 01

*Return to the United States*

**I-94 Arrival/Departure Record - Instructions**

This form must be completed by all persons except U.S. Citizens, returning resident aliens, aliens with immigrant visas, and Canadian Citizens visiting or in transit.

Type or print legibly with pen in ALL CAPITAL LETTERS. Use English. Do not write on the back of this form.

This form is in two parts. Please complete both the Arrival Record (Items 1 through 13) and the Departure Record (Items 14 through 17).

When all items are completed, present this form to the U.S. Immigration and Naturalization Service Inspector.

Item 7 - If you are entering the United States by land, enter **LAND** in this space. If you are entering the United States by ship, enter **SEA** in this space.

Form I-94 (04-15-86)Y

Admission Number

107683997 01

Immigration and  
Naturalization Service

**I-94  
Arrival Record**

1. Family Name	
2. First (Given) Name	3. Birth Date (Day/Mo/Yr)
4. Country of Citizenship	5. Sex (Male or Female)
6. Passport Number	7. Airline and Flight Number
8. Country Where You Live	9. City Where You Boarded
10. City Where Visa Was Issued	11. Date Issued (Day/Mo/Yr)
12. Address While in the United States (Number and Street)	
13. City and State	

Departure Number

107683997 01

Immigration and  
Naturalization Service

**I-94  
Departure Record**

14. Family Name	
15. First (Given) Name	16. Birth Date (Day/Mo/Yr)
17. Country of Citizenship	

See Other Side

STAPLE HERE

**Primary Inspection**

Applicant's Name \_\_\_\_\_

Date \_\_\_\_\_

Referred \_\_\_\_\_ Time \_\_\_\_\_ Insp. # \_\_\_\_\_

**Reason Referred**

212A    PP  Visa  Parole  SLB  TWOV

Other \_\_\_\_\_

**Secondary Inspection**

End Secondary Time \_\_\_\_\_ Insp. # \_\_\_\_\_

Disposition \_\_\_\_\_

18. Occupation	19. Waivers
20. INS File A -	21. INS FCO
22. Petition Number	23. Program Number
24. <input type="checkbox"/> Bond	25. <input type="checkbox"/> Prospective Student

26. Itinerary/Comments

27. TWOV Ticket Number

Warning - A nonimmigrant who accepts unauthorized employment is subject to deportation.

**Important - Retain this permit in your possession; you must surrender it when you leave the U.S.** Failure to do so may delay your entry into the U.S. in the future. You are authorized to stay in the U.S. only until the date written on this form. To remain past this date, without permission from immigration authorities, is a violation of the law.

Surrender this permit when you leave the U.S.:

- By sea or air, to the transportation line;
- Across the Canadian border, to a Canadian Official;
- Across the Mexican border, to a U.S. Official.

Students planning to reenter the U.S. within 30 days to return to the same school, see "Arrival-Departure" on page 2 of Form I-20 prior to surrendering this permit.

**Record of Changes**

Port: \_\_\_\_\_ Departure Record

Date: \_\_\_\_\_

Carrier: \_\_\_\_\_

Flight #/Ship Name: \_\_\_\_\_

For sale by the Superintendent of Documents, U.S. Government Printing Office  
Washington, D.C. 20402

Detached Portion (usually stapled to passport)

Front

Back



# HARRY GEE & ASSOCIATES, PLLC

## B VISITOR & VISA WAIVER PROGRAM

The B visitor classification enables foreign nationals who are visiting temporarily for business (B-1) or tourism (B-2) to apply for a visitor's visa. **B visitors are not permitted to work or study.** B-1's are prohibited from being employed, but are permitted to attend meetings and consult with clients. B-2's are permitted to engage in recreational activities such as visiting family & friends. Essentially, B visitors must demonstrate that they have a residence abroad, possess no intention of abandoning their foreign residence, and have adequate financial resources to support their U.S. trip. B visitors are generally admitted for either business (B-1) for the length of the trip or for tourism (B-2) for a period of up to 6 months.

The Visa Waiver Program (VWP) enables nationals of certain countries to travel to the U.S. for the same business or tourism purposes of a B-1 or B-2 without obtaining a visa for stays of 90 days or less. VWP travelers are required to apply for authorization through the Electronic System for Travel Authorization (ESTA); are screened at their port of entry into the U.S.; and are enrolled in the Department of Homeland Security's U.S. VISIT program which is an automated entry/exit control system that identifies overstays and persons posing a national security threat.

Currently, 36 countries participate in the Visa Waiver Program, as shown below:

Andorra	Denmark	Hungary	Liechtenstein	New Zealand	Slovenia
Australia	Estonia	Iceland	Lithuania	Norway	South Korea
Austria	Finland	Ireland	Luxembourg	Portugal	Spain
Belgium	France	Italy	Malta	San Marino	Sweden
Brunei	Germany	Japan	Monaco	Singapore	Switzerland
Czech Republic	Greece	Latvia	the Netherlands	Slovakia	United Kingdom

Nationals of the 36 countries participating in the Visa Waiver Program may use VWP if:

- They have received an authorization to travel under the VWP through ESTA (<https://esta.cbp.dhs.gov>);
- They present the appropriate type of passport valid for six months past their expected stay in the United States (unless [country-specific agreements](#) provide exemptions);
- The purpose of their stay in the United States is 90 days or less for tourism or business. Transit through the United States is generally permitted. Note also that travelers planning to work or study cannot travel on VWP, and they must obtain the appropriate visa to travel to the United States;
- If arriving by air or sea, they are traveling on an approved carrier and have a return trip ticket to any foreign destination;
- They can demonstrate the intent to stay 90 days or less in the U.S. and demonstrate sufficient funds to support themselves while in the U.S.

VWP travelers who have been admitted under the VWP and who make a short trip to Canada, Mexico or an adjacent island generally can be readmitted to the U.S. under the VWP for the balance of their original admission period. Because the 90 day original admission period cannot be reset, these short trips can be a problem if the VWP traveler exceeds the 90 day admission period.

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## **Travel on the Visa Waiver Program (VWP)**

### **Information for New Member Countries**

**You may be eligible for VWP travel if you can answer "YES" to all of the below questions:**

**Are you a citizen or national of a Visa Waiver Program member country?**

- If you are a citizen of the **Czech Republic, Estonia, Hungary, Latvia, Lithuania, Republic of Korea, or the Slovak Republic**, you are eligible for VWP travel on or after **November 17, 2008**.

**Does your passport meet the VWP passport requirements?**

- Machine-readable passports issued or renewed/extended on or after 10/26/06 must have an integrated chip with information from the data page (e-Passport).
- If you are a citizen of the **Czech Republic, Estonia, Hungary, Latvia, Lithuania, Republic of Korea, or the Slovak Republic**, you must travel on a passport with an integrated chip (e-passport) to be eligible for VWP travel. (See CBP Website below for more about e-passports.)
- Your passport must be valid for six months past your expected stay in the United States (country-specific agreements may provide exemptions).
- You must not have reported your passport lost or stolen.

**Is the purpose of your stay in the United States 90 days or less for tourism or business and can you demonstrate sufficient funds to support yourself?**

**(Note: Travel for media/journalists, students, or employment is not permitted on VWP.)**

- Transit through the United States is generally permitted.
- If in doubt, check with the nearest U.S. Embassy or Consulate.

**Have you complied with the conditions of previous admissions to the United States and have not been found ineligible for a U.S. visa?**

- If you have been arrested, even if the arrest did not result in a criminal conviction, have a criminal record, have certain serious communicable illnesses, have been refused admission into, or have been deported from, the United States, or have previously overstayed on the VWP, you may not be eligible for VWP travel and should not attempt to travel without a visa.
- If you have been refused a U.S. visa under Section 212 of the Immigration and Nationality Act, you may not be eligible for VWP travel and should contact the nearest U.S. embassy or consulate for additional information.

**If arriving by air or sea, are you traveling on an approved carrier and do you have a return ticket abroad?**

- Travelers with onward tickets terminating in Mexico, Canada, Bermuda, or the Caribbean Islands must be legal permanent residents of those areas.

**Do you have an approved ESTA?**

- An ESTA authorization is required for new VWP member countries as of their date of admission into the VWP program. An ESTA authorization is required for current VWP member countries as of January 12, 2009.
- See [www.cbp.gov/esta](http://www.cbp.gov/esta) for additional information on applying for an ESTA.

**About entry into the United States:** Please note that neither possession of a valid passport, nor meeting the basic requirements for traveling visa-free on the VWP, guarantees admission to the United States. As with most countries, immigration officials at the port of entry make the final determination of admissibility.

**Additional Information:**

Find a U.S. Embassy: <http://www.usembassy.gov/>

Department of State website: [http://travel.state.gov/visa/temp/without/without\\_1990.html](http://travel.state.gov/visa/temp/without/without_1990.html)

DHS/CBP VWP information: [http://www.cbp.gov/xp/cgov/travel/id\\_visa/business\\_pleasure/vwp/vwp.xml](http://www.cbp.gov/xp/cgov/travel/id_visa/business_pleasure/vwp/vwp.xml)

# HARRY GEE & ASSOCIATES, PLLC

## EMPLOYMENT ISSUES FOR STUDENTS

### **CPT – Curricular Practical Training**

Once authorized for CPT by the Designated School Official, students are able to work in an integrated vocational program for up to 12 months. Students who have received one year or more of full time curricular practical training are ineligible for post completion training and OPT.

### **OPT – Optional Practical Training**

Students may apply for OPT with the U.S. Citizenship & Immigration Services (USCIS) for training related to your area of study. Students are generally limited to a total of 12 months of OPT, and this must be completed within 14 months of completion of study.

### **STEM OPT extensions**

The period of OPT is extended from 12 to 29 months for qualified F-1 non-immigrant students with a degree in science, technology, engineering, or mathematics (STEM) who are employed by businesses enrolled in the E-Verify program.

### **Cap Gap provisions**

A Cap Gap situation arises generally where a student's OPT authorization expires prior to the beginning of the fiscal year (October 1st ) beyond the normal 60 day grace period, thus resulting in a gap of status between the OPT expiration and an H-1B start date of October 1st. This situation would prevent students from filing for a change of status from F-1 to H-1B in the U.S. Further, it would then require students to apply for an H-1B visa at a U.S. consulate abroad, to then be able to seek readmission to the U.S. in H-1B status.

The Cap Gap provisions automatically extend the student's F-1 status and OPT authorization until the October 1 effective date for foreign nationals who timely filed for an H-1B petition. Thus, these provisions allow such students to change status in the U.S. from F-1 to H-1B without having to apply for an H-1B visa abroad and re-enter in H-1B status. A trip to a U.S. consulate would still be required for international travel as an H-1B.

### **Duration of Status**

Students are considered in legal student status as long as they are pursuing a full course of study – 12 or more certified hours of undergraduate instruction or postgraduate study. During OPT, students who accrue more than 90 days of unemployment would fail to maintain status. With a STEM OPT extension, students are granted a total of 120 days. USCIS considers "employment" to be working at least 20 hours per week. Once students fail to maintain a full course of study or accrue more than the applicable days of unemployment, they will be out of status immediately.

### **Preparation for departure "Grace Period" – Non H situations**

When students complete their course of study or practical training, they are permitted 60 days for preparation of departure or to transfer to a new program. We have found that the USCIS has often been generous in interpreting this grace period liberally to include change of status. However, if you withdraw from classes you are only permitted 15 days to depart the U.S.

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## H-1B INFORMATION FOR STUDENTS

### H-1B Overview

The H-1B is a temporary non-immigrant status that permits a foreign national to work in the U.S. in a specialty occupation that requires the services of a professional, which is essentially defined as a position minimally requiring a Bachelor's degree.

### The Quotas

The H-1B is subject to an annual limit. The quota is 65,000 for foreign nationals with Bachelor's degrees, and an additional 20,000 for those with Master's or higher degrees from U.S. universities. By treaty 6,800 numbers are held for Singapore and Chile, and the unused numbers should be added back the following year. Quota exemptions are only available to university workers, or certain research organizations working on projects for a university or the government. A foreign national may port (switch) from a cap-exempt company to a cap-subject company when the quota is exhausted as long as the cap-subject company's H-1B petition is eventually approved and other requirements are satisfied. Time spent in H-1B status with a cap-exempt company still counts towards the 6 year limitation.

### Timing

The fiscal year begins on the 1st of October. This is the first day foreign national gaining their H-1B may work for the sponsor company for that fiscal year. Applications may be received up to 6 months in advance of the effective date. In lottery situations, an application for the next fiscal year should be submitted during the first 5 business days in April.

### 6 Year Limit

Once approved, H-1B status is granted generally for three years and foreign nationals are eligible for an additional extension of up to 3 years for a total of 6 years. H-1B status may be extended for 1 year periods beyond the 6 year limit if a Labor Certification has been filed and has been pending for 1 year. Furthermore, 3 year extensions are available if the foreign national is a beneficiary of an approved I-140, but visa numbers are not available due to per country limitations. If the foreign national leaves the U.S. for one year, he or she is eligible for another 6 years of H-1B status. However, the foreign national will be subject to a new quota number.

### Quota Number

Once in H-1B status, the number will remain available until the 6 year limit is reached. As the numbers are allocated to foreign nationals, a company which has obtained an H-1B for one foreign national cannot transfer the quota to another employee.

### Employer and Position Specific

The H-1B approval is limited to the job that the sponsor company describes in the application. Thus, the foreign national will not be able to work second or side jobs without obtaining such additional approval. This also means a new approval is required when changing positions. There is leeway given to progressive positions, so the foreign national may be given certain additional duties in the same discipline or promoted to a position that is substantially similar without requiring an immediate amendment to be filed. These minor amendments can be made when a routine extension is necessary. We do suggest that these changes in duties be reviewed with an attorney, because certain new job responsibilities mandate immediate amendments.

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## **Portability**

Portability provisions allow H-1B beneficiaries to port (switch) to a new employer upon the filing of a new H-1B petition as long as he or she is lawfully admitted and subsequent to such lawful admission, the foreign national must not have been employed without authorization. Furthermore, the new petition must be “non-frivolous” and filed before the expiration of the period of authorized stay. The foreign national is eligible for portability, which allows for a transfer to another company upon proper filing. The total H-1B time remains 6 years of aggregate work with all employers.

## **H-4 Family**

Principal H-1B beneficiaries are able to sponsor their spouse and children for H-4 status as long as the H-1B is maintained. H-4's are eligible to study in the US, without obtaining F-1 status. However, H-4's are not eligible to apply for work authorization through the H category.

## **H-1B Fees**

The issue of fees has recently become quite significant as the U.S. Worker Training fee has increased to \$1,500 for companies with 26 or more employees, and \$750 for those with 25 and fewer. This fee must be paid by a company on the first two applications for each foreign national, as well as a \$500 Fraud Fee for the initial application. In August 2010, the U.S. government instituted a new fee of \$2,000 for initial and change of employer H-1B petitions if the sponsor company has 50 or more employees in the U.S. and more than 50% of those employees are in H-1B, L-1A, or L-1B status. These fees are in addition to the standard application fees for the H-1B beneficiary and family, not to mention legal fees. By planning ahead, the need for Premium Processing should be avoided, which adds at least the government filing fee of \$1,225, and typically requires associated expedite legal fees.

## **Labor Condition Application - LCA**

The sponsor company is required to pay the foreign national the prevailing wage and give notice to its employees that a foreign national is being hired. To comply with the regulations it must post this information within the company. This document is often confused with the Labor Certification (which is to prove the unavailability of qualified and able U.S. workers requiring a recruitment process), which employers are generally reluctant to deal with. However, the two are different in purpose and scope, so if this is an issue, a prospective employer should be educated.

## **Visa**

If a foreign national travels outside the U.S., he or she will need to obtain a visa to return to the country. Furthermore, the foreign national should check the current timing at the home or permitted consulate, as seasonal changes affect such timing.

## **Dual Intent**

One of the great advantages of the H-1B is the benefit of Dual Intent. This principle allows the foreign national to concurrently maintain non-immigrant status while at the same time applying for permanent immigration to the U.S. This is generally not allowed, as immigrant intent precludes a foreign national's qualification for many non-immigrant classifications.

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## EMPLOYMENT BASED (EB) IMMIGRANT VISAS

### General

- EB-1: Priority workers
  - EB-1(1) – Aliens with extraordinary ability in the sciences, arts, education, business or athletics
  - EB-1(2)-Outstanding professors and researchers
  - EB-1(3)-Certain multinational executives and managers
  - No labor certification required. May file I-485s concurrently with I-140s if visa numbers are available.
- EB-2: Aliens holding advanced-degrees or aliens of exceptional ability in sciences, art, or business
  - \* Labor certification required unless National Interest Waiver (NIW) obtained
- EB-3: Skilled workers with at least 2 years training or experience, professionals with baccalaureate degrees, and other workers with less than 2 years training or experience
  - \*Labor certification always required unless the occupation is on Schedule A
- EB-4: Certain special immigrants
- EB-5: Employment creation

### EB-1(1) Extraordinary Ability

- Aliens with "extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation."
- Need to show that the alien is one of "that small percentage who have risen to the very top of the field of endeavor."
- Evidence:
  - Major award recipient (Nobel Prize, Olympic Medals, Academy Award, Grammy, etc.) OR three of the following ten:
    1. Receipt of lesser nationally or internationally recognized prizes or awards for excellence;
    2. Membership in associations in the field which demand outstanding achievement of their members;
    3. Published material about the alien in professional or major trade publications or other major media;
    4. Evidence that the alien has judged the work of others, either individually or on a panel;
    5. Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance to the field;
    6. Evidence of the alien's authorship of scholarly articles in professional or major trade publications or other major media;
    7. Evidence that the alien's work has been displayed at artistic exhibitions or showcases;
    8. Performance of a leading or critical role in distinguished organizations;
    9. Evidence that the alien commands a high salary or other significantly high remuneration in relation to others in the field;
    10. Evidence of commercial successes in the performing arts.

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## **EB-1(2) Outstanding Professors and Researchers**

- Aliens are recognized internationally for their outstanding academic achievements in a particular field.
- Have three years experience in teaching or research in that academic area.
- Seek entry for a tenure or tenure track teaching or comparable research position
- Employer is a university or other institution of higher education. If the employer is a private company rather than a university or educational institution, the department, division, or institute of the private employer must employ at least three persons full time in research activities and have achieved documented accomplishments in an academic field.
- Evidence: at least two of the following six:
  1. Receipt of major prizes or awards for outstanding achievement;
  2. Membership in associations that require their members to demonstrate outstanding achievements;
  3. Published material in professional publications written by others about the alien's work in the academic field;
  4. Participation, either on a panel or individually, as a judge of the work of others in the same or allied academic field;
  5. Original scientific or scholarly research contributions in the field;
  6. Authorship of scholarly books or articles (in scholarly journals with international circulation) in the field.

## **EB-1(3) Multinational Executives and Managers**

- Employed outside the U.S. in the three years preceding the petition for at least one year by with the same employer, an affiliate, or a subsidiary of the US employer
- The positions abroad and in the US both meet either Executive or Managerial Capacity defined as:
  - Executive capacity - means an assignment within an organization in which the employee primarily:
    - ♦ Directs the management of the organization or a major component or function of the organization;
    - ♦ Establishes the goals and policies of the organization, component, or function;
    - ♦ Exercises wide latitude in discretionary decision-making; and
    - ♦ Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.
  - Managerial capacity - means an assignment within an organization in which the employee primarily:
    - ♦ Manages the organization, or a department, subdivision, function, or component of the organization;
    - ♦ Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
    - ♦ If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and

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leave authorization), or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- ♦ Exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

## **EB-2 Aliens Holding Advanced Degrees or of Exceptional Ability**

- Advanced degree – Master’s degree (or higher) or, in certain cases, a Bachelor’s degree plus five years of progressively responsible experience.
- Exceptional ability – similar but less stringent than Extraordinary Ability. Needs to show three of the following:
  - A. An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
  - B. Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
  - C. A license to practice the profession or certification for a particular profession or occupation;
  - D. Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
  - E. Evidence of membership in professional associations; or
  - F. Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.
- Labor certification required unless National Interest Waiver (NIW) obtained.
- NIW not defined in statutes or regulations.
- Matter of New York Dep’t of Transportation (NYSDOT):
  - Area of substantial intrinsic merit
  - Benefit national in scope
  - Benefit outweighs national interest of protecting jobs of U.S. workers

## **EB-3 Skilled workers, professionals, and other workers**

- Generally, Aliens must obtain labor certifications from the Department of Labor that:
  - There are not sufficient U.S. workers who are able, willing, qualified, and available to do the work, and
  - The employment of the alien will not adversely affect the wages and working conditions of US workers similarly employed.
- Traditional Labor Certification – Ended on March 28, 2005
- PERM Labor Certification
  - Effective on March 28, 2005
  - Electronic review of labor certification applications
  - No supporting documentation submitted at time of filing
  - Employer must retain supporting documentation for 5 years from the time of filing
  - Possibility of a 45-60 day processing time. Current processing times are 3 months with no audit and 16-18 months with an audit.
  - Obtain prevailing wage determination from DOL



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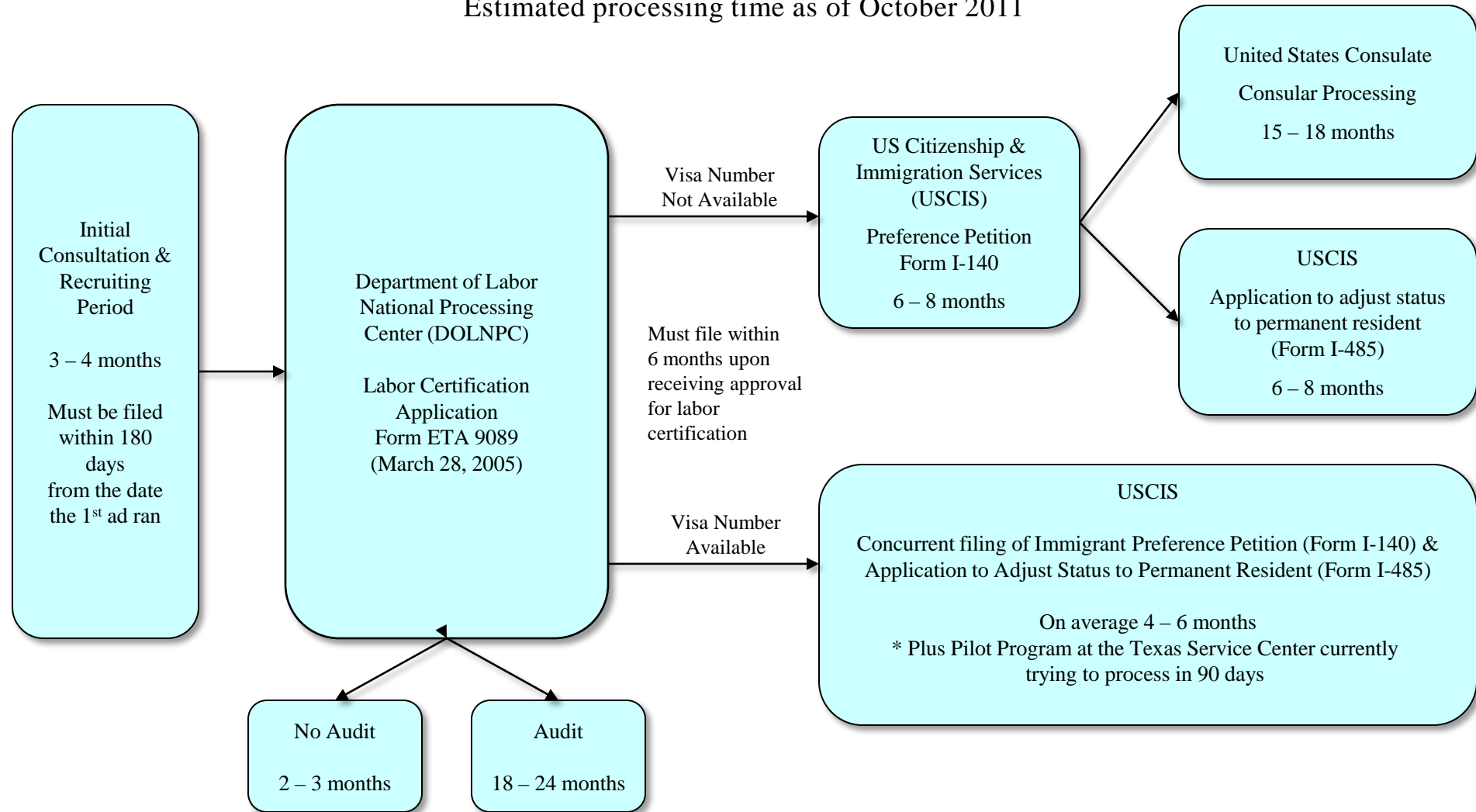
- Require pre-filing recruitment
  - ◆ Nonprofessionals
    - 30-day job order with DOL
    - 2 Sundays ads in the largest local newspaper
    - Notice of Filing
  - ◆ Professionals
    - 30-day job order with DOL
    - 2 Sunday ads in the largest local newspaper
      - One Sunday ad may be substituted with a journal ad if job requires advanced degree and experience
    - Notice of Filing
    - 3 additional recruiting from a list of 10 possible choices
  - ◆ College and University Teachers
    - Need to prove alien is more qualified than the US workers who applied
    - May choose regular recruitment for professionals or the optional special recruitment -
      - Competitive recruitment and selection process
      - At least one ad in a national professional journal
    - Must be filed within 18 months after a selection is made
- All recruitment must be done 30 – 180 days prior to filing of application except that one of the additional steps for professionals may be done within 30 days
- If layoffs occur within 6 months of filing application in listed occupation or related occupation, must notify and consider all potentially qualified laid-off US workers
- Recruitment report
- Setup online account with DOL
- Applications may be filed on-line or by mail
- Certify, audit or order supervised recruitment
- Audit process
- Random pick or based on the information in the application
- Must respond within 30 days of audit request
- Substantial failure to respond may result supervised recruitment for 2 years
- Revocation of approved labor certification upon finding that certification was not justified – No time limit
- DHS or DOS may invalidate labor certification for fraud/misrepresentation

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## Permanent Residence via Labor Certification Processing

Estimated processing time as of October 2011



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## VISA BULLETIN September 2010 Employment Based

	All Chargeability Areas Except Those Listed	CHINA-mainland born	DOMINICAN REPUBLIC	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C	C
2nd	C	08MAY06	C	08MAY06	C	C
3rd	15DEC04	22OCT03	15DEC04	01JAN02	U	15DEC04
Other Workers	22MAR03	22MAR03	22MAR03	01JAN02	U	22MAR03
4th	C	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C	C
5th	C	C	C	C	C	C
Targeted Employment Areas/ Regional Centers	C	C	C	C	C	C
5th Pilot Programs	C	C	C	C	C	C

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## Visa Bulletin September 2011

### Employment Based

	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C
2nd	C	15APR07	15APR07	C	C
3rd	22NOV05	15JUL04	08JUL02	22NOV05	22NOV05
Other Workers	01AUG05	22APR03	01JUN02	01AUG05	01AUG05
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th Targeted Employment Areas/ Regional Centers and Pilot Programs	C	C	C	C	C