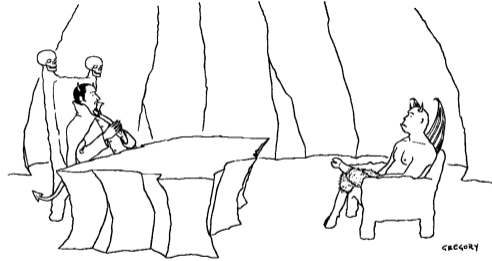




IMMIGRATION FUNDAMENTALS AND CURRENT NEWS

NC Office of the State Controller
2018 Tax Compliance Summit
June 5-6, 2018



*"I need someone well versed in the art of torture—
do you know PowerPoint?"*

Government Agencies Primarily Involved in Immigration

- Department of Homeland Security
 - US Citizenship and Immigration Services
 - Customs and Border Protection
 - Immigration and Customs Enforcement
- Department of Labor
- Department of State (embassies/consulates)

Immigration: Broadly Speaking

- Foreign National is a noncitizen or national of the U.S. (aka “alien”)
- Nonimmigrant: Foreign national seeking temporary entry to the U.S. for a specific purpose. Common classifications include: foreign government officials, business visitors, tourists, international students, treaty traders and investors, temporary workers and trainees, exchange visitors, and others.
- Immigrant: Foreign national admitted to the U.S. as a lawful permanent resident (“green card” holder). Permanent residents have the privilege of residing permanently in the United States and are authorized to work pursuant to their status.
- Employment-based versus Family-based immigration. Some foreign nationals may pursue family-based immigrant status while in a nonimmigrant employment-based status.

Visa Stamps In Passports

- <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/frequently-asked-questions/what-is-us-visa.html>
- Select foreign nationals may be visa exempt (*e.g., most Canadians*).
- The visa stamp issued by a consular officer is not a guarantee of *entry* to the U.S. but allows you to request permission to enter.
- There are nonimmigrant and immigrant visa stamps.
- NOTE: the visa stamp does not dictate authorized stay/status in the U.S. It concerns travel. Some foreign nationals may not have a visa stamp, but are still maintaining a given nonimmigrant status.

Employment-Based Immigration: Sponsorship

- An employer does not have to sponsor a foreign national who lacks independent employment authorization for a nonimmigrant or immigrant. Not doing so will very likely impact your ability to employ him or her.
- Even if an employer sponsors a foreign national for nonimmigrant status (*e.g.* H-1B), the employer is not required to support immigrant sponsorship.
- How do you know if a candidate for a position requires sponsorship in order to be work-authorized? Consult with EEO/HR offices.
- Two acceptable questions for applicants that get you *almost to a definitive answer*:
 - (1) Are you legally authorized to work in the United States? __Y __N
 - (2) Will you now or in the future require sponsorship for employment visa status (*e.g.*, H-1B visa status)? __Y __N

Please see <https://www.justice.gov/crt/technical-assistance-letters>

Employment-Based Nonimmigrant (Temporary) Sponsorship

- Employment-based nonimmigrant sponsorship is more than just filling out papers. A sponsor is making certain attestations and entering into legal obligations.
- Compliance is ongoing.
- Employer may be subject to worksite investigations.
- In order to obtain employment-based nonimmigrant status and thereby **timely** work authorization, certain steps must be undertaken by the employer.
- Each government agency (USCIS, DOL, etc.) works on its *own* timeframe and some steps cannot be expedited.

Narrowed List of Nonimmigrant Classifications

- **H-1B:** Common employment-based nonimmigrant category. Employer, position, and worksite specific.
- **TN:** applicable to Mexican and Canadian nationals. Employer, position, and worksite specific. Finite list of applicable qualifying occupations: Appendix 1306.d.1 of NAFTA Chapter 16.
- **E-3:** Australian nationals. Employer, position, and worksite specific.
- **J-1:** Exchange Visitors with specific categories including Short Term Scholars, Professors, and Researchers. Category specific, employer, and worksite specific.
- **O-1:** based on extraordinary ability in the sciences, arts, education, business, or athletics. Employer, position, and worksite specific, with some room for change.
- **F-1 OPT:** Optional Practical Training for (F-1) International Students in his/her field of study. Limited to 12 months - 36 months, depending on field of study (STEM or not). Work must be related to the field of study.



Employment-Based Nonimmigrant Sponsorship: H-1B

- Petition filed with U.S. Citizenship and Immigration Services
- Limited to specialized occupations-meaning it requires theoretical and practical application of a highly specialized knowledge and attainment of a bachelor's or higher degree in a specific specialty is minimum for entry into the occupation.
- Strict wage requirements apply.
- Limited to 6 years, but may extend beyond 6 if certain timely steps have been taken towards permanent resident status.
- Annual federal limit on limit on H-1Bs. Some employers "H-1B Cap Exempt."
- 3rd Party Worksite Issues:
<https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf>
- There has been a significant increase in challenging Requests for Evidence (RFEs) over the past year.
- Dependents (Spouse and Children): H-4 Nonimmigrant Status.
- AGAIN: Employer, position, and worksite specific. Employer-Employee relationship.
- Practice: Employer pays filing fees and associated costs.



Employment-Based Nonimmigrant Sponsorship: H-1B

H-1B Wage Requirements

- **Required Wage:** Employer must pay the higher of the prevailing wage and the actual wage.
- **Prevailing Wage:** wage rate set for the occupational classification in the geographical area of employment.
- **Actual Wage:** wage rate paid by the employer to all individuals with experience and qualifications similar to the H-1B nonimmigrant's experience and qualifications for the specific employment in question at the place of employment.
- <https://www.dol.gov/whd/immigration/h1b.htm>
- Employer signs off on attestations as part of ETA-9035 Labor Condition Application, which once certified by Department of Labor is filed with H-1B petition.



Employment-Based Nonimmigrant Sponsorship: H-1B

H-1B CAP

- 65,000 per year for regular cap
- 20,000 per year for beneficiaries with U.S. master's degree or higher
- Filing window for October 1 of a given year is the first week of April of that year
- Always more petitions than numbers available
- Some H-1B employers are cap exempt: Institutions of higher education as defined by the Higher Education Act of 1965, nonprofit research organizations, government (local, state or federal) research organizations, and non-profit entities related to or affiliated with an institution of higher education. 8 CFR 214.2(h)(8)(ii)(F)
- Nonprofit is considered related to or affiliated with an institution of higher education if: shared ownership or control by same board/federation; operated by institution of higher education; attached to institution of higher education as a member/branch/cooperative/subsidiary; OR, entered into a formal affiliation with institution of higher education (where fundamental activity of nonprofit is to directly contribute to research and education mission of institution of higher education).
- Also, there is an "employed at" exemption. 8 CFR 214.2(h)(8)(ii)(F)(4)



Employment-Based Nonimmigrant Sponsorship: TN

- Not subject to numerical limits per fiscal year
- Provided for by the North American Free Trade Agreement (NAFTA).
- Limited to Canadian and Mexican citizen-professionals.
- May be eligible to apply at port of entry or petition to U.S. Citizenship and Immigration Services.
- Although limited to Canadian and Mexican *citizens*, worker need not be a citizen by birth to qualify.
- No required wage obligation
- Self-employment generally is prohibited.
- TN classification strictly limited to engagement in one of the 63 NAFTA-specified occupations listed in Appendix 1603.D.1 of Annex 1603 of the NAFTA.
- List of Occupations and 8 CFR §214.6(c).
- Dependents (Spouse and children): eligible for TD classification.
- AGAIN: Employer, position, and worksite specific



Employment-Based Nonimmigrant Sponsorship: E-3

- Limited to 10,500 per year
- Provided for by the Free Trade Agreement
- Limited to Australian nationals
- Although limited to Australian *citizens*, worker need not be a citizen by birth to qualify.
- Required wage same as H-1B. Need certified Labor Condition Application.
- Position must qualify as specialty occupation like the H-1B.
- Can apply at consulate or through petition to U.S. Citizenship and Immigration Services.
- Dependents (Spouse and children): eligible for E-3 classification
- AGAIN: Employer, position, and worksite specific



Employment-Based Nonimmigrant Sponsorship: O-1

- Petition to U.S. Citizenship and Immigration Services
- Limited to Individuals of Extraordinary Ability to Achievement. Requires extensive documentation.
- Position must require an individual of extraordinary ability.
- No required wage
- No annual limit
- Dependents (Spouse and children): eligible for O-3 classification.
- Again: Employer specific, but...an agent can file on behalf of multiple "employers."



J-1 Exchange Visitors

- Requires a J-1 sponsor recognized by the U.S. Department of State
- Very specific categories, such as alien physician, au pair, intern, professor or research scholar.
- Very limited and specific authorization to work
- May be subject to a two-year foreign residence requirement at conclusion of J-1 program.
- Dependents (spouse and children): eligible for J-2 classification



F-1 Optional Practical Training

- Note: there are separate provisions for off-campus (and on-campus) employment for F-1 International Students enrolled in course of study.
- Two types of Optional Practical Training (OPT):
 - Pre-completion OPT
 - Post-completion OPT: more common
- OPT is applied for through application to U.S. Citizenship and Immigration Services---but school's Designated School Officer must recommend first. Timing issues.
- If OPT approved, an Employment Authorization Document (EAD) is issued. Need EAD in hand for proof of employment authorization (see M-274 for narrow exceptions).
- OPT work must be related to program of study.



F-1 STEM-OPT

- STEM-OPT is applied for through application to U.S. Citizenship and Immigration Services---but school's Designated School Officer must recommend first. Timing issues.
- Must be in OPT period when applying for STEM-OPT
- Specific as to which STEM fields qualify
- Employer must be willing to complete (and sign) Form I-983. Need authorized signatory and read the attestations/certifications.
- Employer takes on reporting obligations
- <https://studyinthestates.dhs.gov/employers-stem-opt-reporting-requirements>
- If STEM-OPT approved, another Employment Authorization Document (EAD) is issued. If STEM-OPT application is timely filed, employment authorization pursuant to OPT continues while STEM-OPT application pending.
- STEM-OPT work must be related to program of study
- <https://www.uscis.gov/working-united-states/students-and-exchange-visitors/students-and-employment/stem-opt>
- **New issue: Third-party placements**



F-1 Curricular Practical Training (CPT)

- May not see CPT all that often.
- CPT is any alternative work/study, internship, cooperative education, or other type of required internship or practicum that is offered by sponsoring employers through cooperative agreements with the school. CPT must be an integral part of an established curriculum.
- CPT abuse is a present concern for Congress and US Citizenship and Immigration Services.
- May not find out it is an issue until filing H-1B petition. Becomes a failure to maintain status issue if CPT was not appropriate.



B-1 Business Visitors

- B-1 Business Visitors may **not** be employed.
- May not be paid—narrow exception for honoraria.
- Length of stay and activities are very limited:
 - (1) Engage in commercial transactions, which do not involve gainful employment in the United States (such as a merchant who takes orders for goods manufactured abroad);
 - (2) Negotiate contracts;
 - (3) Consult with business associates;
 - (4) Litigate;
 - (5) Participate in scientific, educational, professional, or business conventions, conferences, or seminars; or
 - (6) Undertake independent research.



Others who may have employment authorization

- Foreign nationals with Temporary Protected Status
- Asylees or refugees
- Deferred Action for Childhood Arrival recipients.
- Foreign nationals with a pending Application for Permanent Residence Status (green card)
- And more...

Automatic Extension of Certain EADs

- Foreign nationals in certain employment eligibility categories who file an EAD renewal application may receive automatic extensions of their expiring EAD for up to 180 days. The extension begins on the date the EAD expires and continues for up to 180 days unless the renewal application is denied.
- Automatic EAD extension requirements (with some exceptions for TPS):
 - Timely filed an application to renew their EAD before it expires ;
 - Eligibility category on the face of the EAD is the same eligibility category code on the Form I-797C Notice of Action, the employee received from USCIS indicating USCIS's receipt of their renewal application; and
 - Eligibility category is listed on uscis.gov as eligible for EAD automatic extensions: A03, A05, A07, A08, A10, C08, C09, C10, C16, C20, C22, C24, C31 and A12 or C19.

TPS

- TPS –country specific designation based on conditions in a specific country that temporarily prevent the country's nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately.
- Many countries long designated TPS are or in the process of being phased out.
- Currently: El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria and Yemen.

H-4 Dependent Work Authorization

- Certain H-4 Spouses of H-1B workers are eligible to file for an Employment Authorization Document.
- Anticipated that the regulations will be withdrawn.
Department of Homeland Security indicated it will publish notice in June 2018.

Hiring & Time-Limited EADs

- Case to follow: <https://www.bizjournals.com/charlotte/news/2018/05/07/bank-of-america-being-sued-in-federal-court-over.html>
- <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/06/180.pdf>
- <https://www.justice.gov/sites/default/files/crt/legacy/2012/09/27/161.PDF>:
 “[A]ll individuals with employment authorization, including those falling outside the definition of a ‘protected individual,’ are protected from national origin discrimination under 8 U.S.C. § 1324b(a)(1) and from document abuse under 8 U.S.C. § 2 1324b(a)(6). Consequently, employers may not use the ‘temporary nature’ of an individual’s employment authorization as a pretext for discrimination on the basis of national origin.”

Employment-Based Immigrant Sponsorship

- **Allocation of Immigrant Visas (“green cards”)**
 - Each month DOS publishes the Visa Bulletin which dictates the availability of an immigrant visas based on immigrant classification and birth country.
 - The Visa Bulletin reflects the annual limit on the number of immigrant visas. -
<https://www.uscis.gov/greencard/visa-availability-priority-dates>
- Some types of employment-based sponsorship for permanent residence may only be filed by the employer, while others may be self-petitioned by the foreign national.
- Generally, employment-based immigrant sponsorship requires the approval of the U.S. Department of Labor of a labor certification application (aka PERM labor certification) at the conclusion of test of the U.S. labor market.
- There are exceptions to the having to test the U.S. labor market: such as based on outstanding or extraordinary achievement, or work in the national interest. Also, some occupations, such as RNs, have an acknowledged shortage.

Expedited Processing of USCIS Petitions and Applications

- U. S. Citizenship and Immigration Services offers a premium processing service for ***certain petitions and applications*** for an additional fee of \$1,225. Petitions that ***may*** be expedited include H-1B petitions and ***most*** Immigrant Petitions.
- Premium processing only guarantees that it will process the application or petition within 15 calendar days or refund the fee. This is not a promise of approval or denial within 15 calendar days, but only an obligation to review it and, if appropriate, deny or approve it. USCIS may issue a request for evidence instead.
- Who pays for premium processing? If it is an employer need, the employer pays.



Ongoing Compliance Issues

- Any changes to a sponsored employee's salary, worksite, job duties, etc., may have an impact. Consider before making the change.
- Site Investigations for H-1Bs are up.
- If separation is concurrent with the end of the sponsored nonimmigrant status (*e.g., H-1B*), no action is needed with regard to immigration unless there is a pending application or petition that needs to be withdrawn.
- If separation occurs prior to the end of the sponsored nonimmigrant status, USCIS must be notified *in writing of the separation* whether voluntary or not.
- If separation is not voluntary and occurs prior to the end of the sponsored nonimmigrant status, the employer may be obligated to pay the transportation cost for return of international faculty member to his or her home country.
- Certain nonimmigrants are afforded a grace period at the discretion of U.S. Citizenship and Immigration Services to depart the U.S., change nonimmigrant status, etc.



A Word about I-9 Audits

- ICE worksite enforcement investigations already double over last year
<https://www.ice.gov/news/releases/ice-worksite-enforcement-investigations-already-double-over-last-year>
- Look to the M-274 Manual
- Consider an electronic I-9 system, but can be cost prohibitive



Will we see comprehensive immigration reform
or piecemeal related legislation this year?



Glossary of Terms

- Visa (Stamp in Passport)
- E-Verify
- I-797 Notice of Action
- I-94 Departure Record (electronic or paper)
- Entry Stamp
- I-551 Card (Green Card/Permanent Resident Card)
- I-9 Employment Eligibility Verification Form
- U.S. Citizenship and Immigration Services (USCIS)
- U.S. Department of Labor (DOL)
- U.S. Department of State (DOS)
- U.S. Department of Homeland Security (DHS)
- Customs and Border Protection (CBP)
- Immigration and Customs Enforcement (ICE)
- Student Exchange Visitor Information System (SEVIS)
- I-20 Certificate of Eligibility for Student (F-1) Status
- DS-2019 Certificate of Eligibility for Exchange Visitor (J-1) Status
- Employment Authorization Document (EAD)
- Science Technology Engineering and Mathematics (STEM)
- Optional Practical Training (OPT)
- Supplement J for STEM-OPT
- Temporary Protected Status (TPS)
- Curricular Practical Training (CPT)
- M-274 Manual for I-9 completion
- Lawful Permanent Resident (LPR)
- Visa Waiver Program (VWP)
- Electronic System for Travel Authorization (ESTA)
- Deferred Action for Childhood Arrivals (DACA)
- U.S. Citizen (USC)
- Immigration and Nationality Act (INA)
- Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)
- Immigration Reform and Control Act (IRCA)
- Immigrant and Employee Rights Section, Civil Rights Division, U.S. Department of Justice
- Foreign Affairs Manual (FAM)
- Request for Evidence (RFE)
- Notice of Intent to Deny (NOID)
- Notice of Intent to Revoke (NOIR)

Disclaimer





The information within this presentation does not constitute legal advice and each participant should seek his/her own counsel in addressing specific situations. The University of North Carolina System and the NC Office of the State Controller are providing this content to enhance the knowledge of the participants in this workshop.

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