

# Visas After Graduation

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**\*\*F-1 to OPT to H-1B to Labor Certification to Green Card\*\***

Many foreign students see this progression as "the way" to permanent residence, with each step falling naturally into place. The reality is much more complicated. Not all foreign students are eligible for their full year of Optional Practical Training. Not all employers will sponsor a foreign worker for an H-1B. Not all jobs lend themselves to Labor Certification. And not all workers with an approved Labor Certification will be able to obtain lawful permanent residence. These are just a few examples of how visas are not as easy as they may seem.

Juan is a recent college graduate with a management degree from Paraguay. He has never thought much about visas. Juan has accepted a job at a large New York City marketing firm, and is currently finishing his OPT. The firm has said it has filed an H-1B visa petition for him. During college, Juan obtained a hardship waiver and was allowed to work 20 hours per week during the school year. He actually worked almost 40 hours a week.

When Juan speaks to an immigration attorney, he learns that he has violated his status and will have to return to Paraguay to obtain his H-1B visa. He also learns that he cannot apply on his own for a green card without the company's sponsorship. Moreover, he finds out that obtaining a green card will mean advertising his job in the New York Times, and hoping that no qualified U.S. citizen workers apply. Finally, he learns that his uncle's company in Boston cannot sponsor him for permanent residence unless he really plans to work there.

Now that Juan understands his immigration situation, he can make more informed choices about how to work toward a green card, and avoid unnecessary expense, delay and uncertainty.

This article does not substitute for a detailed consultation with an immigration lawyer about the specific facts of your case. But it *is* a summary of some key points that every international student should know about temporary and permanent visas. It is not possible to describe every option in detail, and there are many generalizations presented in the interest of space. However, a clear understanding of the issues (and the right questions to ask!) will help make the process as smooth as possible.

## **General points about immigration**

If you remember nothing else from this article, keep in mind the following general points about immigration processing:

1. Small violations of immigration law can cause major problems.
2. Plan ahead. Some applications take many months, or even years.
3. If you need to get a lawyer, get a referral. There are many general-practice lawyers who claim to practice immigration law because they think it is easy. Your foreign student office can be a good source of referrals.
4. Keep in mind that the company lawyer represents the company. He or she will not always take the time to investigate different temporary visa categories, or to suggest permanent residence options. It is advisable to get a second opinion from a lawyer outside the company if you have any questions.
5. Always prepare before traveling abroad. Each time you re-enter the United States, you are technically applying for readmission, and the inspecting officer can question your current visa and review your immigration history. Check with your foreign student advisor or an immigration lawyer to see what documents you may need to present, and when it may not be advisable to travel (such as while a petition for a new visa is pending).
6. Remember that the CIS controls immigration matters in the United States, but the State Department issues visas outside the country. Each U.S. consulate abroad run by the State Department has its own local rules and procedures. It may help to use a local agent, such as a travel agent, a visa courier service or an attorney, to process a visa abroad. This can save time, especially given that there is almost no appeal from a visa denial at a consulate.

### **The big picture - Are you an immigrant, or a non-immigrant?**

Everyone in the United States who is not a U.S. citizen needs some kind of visa to be here legally. Visas are divided into two categories, temporary (nonimmigrant) and permanent (immigrant). The goal of most people trying to obtain permanent residence is to maintain a series of valid temporary visas while in the U.S. until he or she becomes eligible to apply for a permanent visa. Interestingly, some people may qualify for a temporary visa and not permanent residence, while others may be able to get a permanent visa, but are not eligible for any temporary visa.

Temporary visas are lettered from A-V with numerous subcategories. The F-1 and H-1B are well known, but many other options may exist for the college graduate. J-1 exchange visas may be available for work with universities or affiliated institutions. The L-1 is a highly desirable visa for those who work outside the United States for a year and then are transferred back to the United States to a position at an affiliated company. And the E visa is for investors or certain employees of companies (large and small) engaged in international trade. There are also visas for diplomats, representatives of NGOs, journalists, religious workers, fiancés, performers, government informants, athletes, and aliens of "extraordinary ability" in any field. Each visa has its own time limitations,

processing times, rules on temporary intent and maintaining a foreign residence, restrictions on work authorization, and provisions for dependents.

### **Optional Practical Training (OPT)**

Most F-1 students are eligible for 12 months of employment authorization after successful completion of their degree program to allow them to apply their newly acquired knowledge in the workforce. This period of time is known as F-1 Optional Practical Training or OPT. To be eligible for OPT, an F student must have been taking a full course of study for at least one full academic year in the United States. For OPT, your sponsoring institution will provide an I-20 for the OPT period, and you must apply for a work authorization card. Plan ahead, as it can take up to 90 days for USCIS to process this card. Applications can be filed up to 90 days in advance of graduation. F-1 status comes with a 60 day grace for students to wrap up their affairs in the U.S. This can be used before your OPT, or after your OPT, or you can use part of the 60 days before your OPT and save the rest for when your OPT is finished.

While you are in OPT status, your school continues to be your sponsor. In a sense, this is because your work on OPT is a continuation of your education. The school is responsible for making sure you comply with all of the requirements of the OPT program and must terminate your status in SEVIS if this does not happen. One requirement is that your employment is related to your field. Another is that you are not unemployed for more than 90 days. Part-time work and unpaid work are both acceptable on OPT.

If your area of study was in Science, Technology, Engineering or Mathematics (STEM), you may be eligible for a 17 month extension of your OPT on top of your 12 months. This is only permitted if you are working for an employer that is enrolled in E-verify, a program that verifies whether foreign workers have employment authorization. You must plan ahead and file for this extension before your regular OPT period expires.

### **The H-1B visa: the most popular choice for graduates**

After considering the range of temporary visas, many college graduates settle on the H-1B visa after their OPT. The most obvious advantage of the H-1B is that it is intended for professional "specialty occupation" workers, which the CIS has defined as those holding a position that requires at least a Bachelor's degree in a given field. This seems like the perfect fit for a college graduate who now holds a Bachelor's degree. However, keep in mind that your degree and the job requirements must line up in some logical way.

For example, a computer science major seeking a job as a computer programmer is a classic H-1B candidate. The job and the degree match nicely. Even a physics major might be able to fit in, with some courses or experience in computers, and a basic presumption that one cannot study physics without gaining a strong knowledge of computers. However, an English major who is a whiz at computers, but only has a couple of summers of experience, may not be eligible -- even if she is a better programmer than the computer science major.

Jobs outside the sciences tend to be even more complicated. Again, there are some obvious matches – an art history degree for an art museum curator job or an economics degree for a job in finance. However, many business jobs that require a Bachelor's degree for entry often do not specify a particular major. Literature or history degrees with a strong liberal arts background may still lead to a position at a consulting firm, or even an investment bank. The CIS will look to the degrees held by others with similar jobs at the same company, and across the industry, to decide whether an H-1B is appropriate.

For an H-1B visa, the employer is the petitioner, and successive filings with the Department of Labor and the CIS are required. The employer must "attest" (promise) that it will pay the prevailing wage for that job in that geographic area, as well as the actual wage paid at that company for others in the same job. There are various other attestations regarding proper treatment of the H-1B worker and U.S. workers at the company. The employer does NOT have to do a test of the labor market through advertising for your position- we will leave that to the green card stage.

One advantage of the H-1B visa is that it does NOT require temporary intent. One can begin the permanent residence process without any effect on the H-1B visa. The H-1B is granted for up to three years at a time, for a maximum of six years. Generally, six years is enough time to apply for and receive permanent residence. However, it is possible to restart the six-year clock by leaving the U.S. for a year and returning. Also, if the permanent residence process is far enough along, you may be able to extend the H-1B visa beyond six years.

One of the major disadvantages of the H-1B visas is that there is a cap on the number of visas issued each fiscal year (October 1- September 30). 65,000 visas are made available for "new" H-1B visas. Once you have been counted towards the cap you do not have to be counted again when you apply for an extension. Certain employers qualify as being "cap-exempt." These include institutions of higher education, non-profit organizations affiliated with these entities, and J-1 waiver physicians. Furthermore, there are an additional 20,000 H-1B visas available to people who have received master's degrees from institutions of higher education in the United States.

Some years the cap is filled very early, so it is necessary to plan ahead. In 2007, the entire cap for fiscal year 2008 was filled on April 1<sup>st</sup>, the first day they became available. The following list shows the date when the cap was filled for each fiscal year. As you can see, the economic situation in the United States plays a big role in how quickly the H-1Bs run out:

- ▶ FY 2006: **August 10, 2005**
- ▶ FY 2007: **May 26, 2006**
- ▶ FY 2008: **April 1, 2007**
- ▶ FY 2009: **April 7, 2008**
- ▶ FY 2010: December 21, 2009
- ▶ FY 2011: January 26, 2011
- ▶ FY 2012: November 22, 2011

- ▶ FY 2013: **June 11, 2012**
- ▶ FY 2014: **April 5, 2013**

At first, the timing of H-1B application period created a disadvantage for students, who tend to finish their OPT in May or June, several months before the next available H-1B period begins. Students would often have to leave their positions after their OPT ended and wait until October to return to work. In 2008, Congress created “Cap-Gap” to solve this issue. “Cap-Gap” allows students to continue working in the United States after their OPT expires if they have a pending or approved H-1B application to begin work in October. Travel is not permitted in the cap-gap period.



- 1) F-1 until around May of last year of school
- 2) Must apply for OPT to begin within 60 days of graduation (may apply up to 90 days in advance)
- 3) Apply for H-1B in April of the following year, to reserve a spot in the quota for October
- 4) Begin “Cap-Gap” when OPT runs out- no travel!
- 5) Begin H-1B in October

Beyond the problems with the cap, H-1B visas have very high fees. Private employers must pay a training fee of \$1500 (\$750 for companies with 25 employees or less) that cannot be passed on to the individual, as well as a \$500 fraud prevention fee in addition to the filing fee of \$325. The H-1B ties the visa holder to a particular job in a particular location at a particular salary. The employer is also now required to pay all legal fees for the petition. Because of these costs, some employers are hesitant to sponsor employees for H-1B visas. An immigration lawyer can often work with companies to make the process feel more comfortable.

Spouses and children can receive an H-4 visa, which allows them to study but not work. Unmarried partners may be able to use the B visa category to join the H-1B visa holder in the United States.

## **The Next Step - "green card" or permanent residence**

Some people think that you must go through the H-1B process before applying for a permanent visa. Although this is a common path, you do not have to have an H-1B in order to get a permanent visa. You can switch to a green card from any status if you are eligible to do so.

Permanent visas fall into four basic groups:

- Special programs of Congress;
- Employment;
- Family;
- Asylum

Special programs:

Be sure to consider all categories that may apply to you, and realize that you may be able to apply in more than one category at a time. First, there are special programs of Congress that benefit a particular group. These include amnesty programs that periodically occur, and registry (a path to a green card for those who have been in the United States since January 14, 1972). The most important program for students is the Diversity Lottery, which is held every year. The goal of the program is to promote diversity by encouraging immigration from countries that are underrepresented in the United States. Therefore, natives of over-represented countries such as Mexico, China, the Philippines and India are not eligible. Details of the lottery program appear on the State Department's webpage:

[http://travel.state.gov/visa/immigrants/types/types\\_1322.html](http://travel.state.gov/visa/immigrants/types/types_1322.html).

Although the application appears simple, be sure to follow the directions carefully. A winner does not automatically obtain a green card. Rather, winners then submit immigrant visa applications. Of the roughly 8 million entries last year, there were about 100,000 "winners," of whom only 50,000 received permanent residence. Therefore, if you win, you must apply right away.

Employment:

- 1) Labor Certification
- 2) I-140 Petition for Immigrant Worker
- 3) I-485 Application to Adjust Status (green card application)

An employer may sponsor a foreign worker for permanent residence, using the above three steps. In general, the employer must show that it cannot find qualified U.S. workers for the position by advertising the job in a variety of ways, and keeping a detailed record of all applicants. This process is called Labor Certification. If qualified U.S. citizens apply, then the Department of Labor will not grant certification, and the employer cannot file an application with CIS. This process is considerably more complicated than most

graduates realize, and, as with the H-1B, some jobs lend themselves to Labor Certification better than others.

For example, a large retail company in Los Angeles may sponsor a marketing manager for permanent residence by filing a Labor Certification application with the Department of Labor. The application will require ads in the Los Angeles Times, a posting at the job location, advertising with the State Workforce Agency of California, and at least three other methods of recruitment (such as radio ads, internet advertising, community papers, employer website, job fairs...) If the minimum qualification for the job is an MBA, then the Labor Certification cannot be granted if a U.S. citizen with an MBA applies. The Department of Labor has extensive written guidance on how the ads can be drafted and how candidates can be excluded.

Even once the Labor Certification is approved sometimes there are waiting periods for employment-based immigration at the I-485 stage. Each level of professional is assigned a different waiting period (there are currently four levels), and there are longer waiting periods for India and China. The waiting periods change each month, and can be found on the State Department's website on the Visa Bulletin, found at this link: [http://www.travel.state.gov/visa/bulletin/bulletin\\_1360.html](http://www.travel.state.gov/visa/bulletin/bulletin_1360.html) and pictured below:

for all qualified applicants; and "U" means unavailable, i.e., no numbers are available. (NOTE: Numbers are available only for applicants whose priority date is earlier than the cut-off date listed below.)

Employment-Based	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C
2nd	C	22OCT07	01SEP04	C	C
3rd	22DEC06	01JUL06	01NOV02	22DEC06	15AUG06
Other Workers	22DEC06	01JUL03	01NOV02	22DEC06	15AUG06
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

\*Employment Third Preference Other Workers Category: Section 203(e) of the Nicaraguan and Central American Relief Act (NACARA) passed by Congress in November 1997, as amended by Section 1(e) of Pub. L. 105-139, provides that once the Employment Third Preference Other Worker (EW) cut-off date has reached the priority date of the latest EW petition approved prior to November 19, 1997, the 10,000 EW numbers available for a fiscal year are to be reduced by

For college teachers, the Labor Certification process is streamlined, and referred to as "Special Handling." In Special Handling, the employer must show that they completed their usual competitive recruitment process and that the foreign national was the best qualified applicant for the position. This is a major advantage over the regular Labor

Certification process, which requires a showing that there are NO qualified U.S. workers for the position besides the foreign national.

It is also possible to skip the Department of Labor in certain cases for multi-national managers, high level researchers, those doing work "in the national interest," or doctors working medically underserved areas, those with "extraordinary" or "exceptional" ability in almost any field, registered nurses, physical therapists, investors and religious workers.

Family:

There are various categories of family relationships that range from spouse of a U.S. citizen (the fastest) to sibling of a U.S. citizen (the slowest, now taking well over 10 years and over 20 for some countries). In between there are several categories, including children and spouses of permanent residents. The specific groups and the waiting times can be found at the Visa Bulletin on the State Department's website (except for spouse and minor children of U.S. citizens, who do not have to wait at all). You are not granted status to remain in the United States while waiting for your number to become available, so many foreign nationals seeking permanent visas through family have to rely on other visas for years or return to wait in their home country.

Asylum:

Finally, an alien can seek asylum in the United States if she has a "well-founded fear of persecution" in his or her home country. If you think you might qualify for asylum, seek the help of an immigration lawyer or CIS approved nonprofit agency. Remember that fear of economic hardship or general criminal activity is not a basis for asylum - it must be fear of persecution by the government (or a group that the government is unable or unwilling to control) on account of one's political views, race, ethnicity, social group, or religion.

### **Conclusion**

As you move away from the security of having the international office at your school guide you through the maze of U.S. immigration law, remember to keep asking questions and keep reassessing your options. In that way you will be best prepared to achieve your goals.