



Industry Collaboration & Entrepreneurship

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Disclaimer



This presentation provides general information on immigration matters and should not be relied upon as legal advice.



If you require legal advice, you should retain qualified legal professionals to advise you in the context of your particular circumstance.



Nonimmigrant Visas

Nonimmigrant Visa Options

Visas for Business Visitors

- Visa Waiver Program (VWP) | B-1

Visas for Visiting Scholars and Researchers

- J-1

Visas for Treaty Countries

- E-2 (Treaty Investors – Managers, Executives, Specialized Knowledge)

Visas for Intercompany Transfers

- L-1A (Managers / Executives)
- L-1B (Specialized Knowledge)

Visas for Professional Specialty Occupations

- H-1B

Visas for those with Extraordinary Ability

- O-1

H-1B Visa – Basic Requirements

Bachelors or higher degree

- Determine U.S. equivalence of foreign degree
- Combination of education and experience

Job Offer (that will apply the academic/ specialty knowledge)

- Part-time or full-time
- **Concurrent employment**

Specialty occupation

- Job requires bachelors or higher degree in specific field
- Thus, music teacher easier to prove than musician

Prevailing wage – Labor Condition Application

Requires Employer-Employee relationship (W-2 Wages)

O-1 Visa: Individuals with Extraordinary Ability or Achievement

- O-1A: Extraordinary Ability in the sciences, education, business, or athletics
- O-1B: Extraordinary Ability in the arts or Extraordinary Achievement in motion picture or television industry
- O-2: Essential individuals who will accompany an O-1, artist or athlete (does not apply to business)
- O-3: Dependents of O-1s (spouses, unmarried children under 21)
 - No work authorization



O-1 Visa

- O-1A (Sciences, athletics, and business): “one of the small percentage who have arisen to the very top of the field of endeavor.”
- Must be filed by U.S.-based employer or agent
 - 2016 Foreign Affairs Manual revisions: “USCIS regulations provide that the petitioner may be either an employer or agent. While O-1 beneficiaries may not self-petition, a separate legal entity owned by the O-1 beneficiary may be eligible to file a petition on behalf of the O-1 beneficiary.”
 - **O-1 concurrent employment v. O-1 agent sponsorship**
 - If Agent, must provide Itinerary/proof of prospective activities
- Peer consultation/advisory opinion required
- Length of Stay- 3 year initial, with 1-year extensions; can extend indefinitely. Or can create a new “event.”
- Recent policy memoranda instructs adjudicators to give greater weight to criteria achieved while a student.

O-1 Visa

- Evidence needed:
 - Receipt or nomination of major national or international award such as a Nobel Prize;
- OR 3 of the following (paraphrasing):
 - Significant and original contributions
 - Authorship of scholarly articles in journals;
 - Media attention (Press)
 - Membership in Associations which require outstanding achievements
 - High Salary
 - Recognition from Experts
 - Judging the work of others
 - Other comparable evidence

See 8 CFR 214.2(o)(3)(iii) – (v)

“Employment” for H-1B and O-1

- Employment is considered within the immigration world to be:
 - Any activity, service or labor
 - For which remuneration (compensation) is
 - Actually provided,
 - Promised to be provided in the future,
 - Normally provided in the industry, even if it is not actually provided in this case, or
 - Received indirectly as a result of a barter or exchange
- The question is...
 - NOT “whether you have received more funds,”
 - BUT “whether you have, directly or indirectly, prevented a US worker from potentially receiving funds”
 - *Fair Labor Standards and Opportunity Cost for US workers*
- *It's a matter of perception v. reality -*

Relationships with Industry: H-1B & O-1

- **Affiliations**

- Faculty and researchers commonly pursue and value affiliations
 - E.g. Courtesy Appointments
- Essential Elements:
 - No wages, honoraria or other funds exchanged
 - No recurring access to laboratories or facilities
 - Primarily facilitates conversations, “pre-collaboration” exploration, mentorship, etc.
- Faculty like to list affiliations on their CV
 - Petitions include CVs, and Government Agencies closely review CVs and social media
 - For a variety of purposes including but not limited to potential flags for violation of status / unauthorized employment
 - *Entering the US and protecting yourself and sensitive information*
 - Sometimes, depending on how the affiliation is presented, it may lead to a misperception that the affiliation is “employment” which in the case of a visa holder would be “unauthorized employment”
 - Affiliations are not bad but describe them carefully / strategically on the CV

Relationships Continued

- **Guest Appearances**

- E.g. Colloquia, Guest Lecture, Virtual Instructor, Adjunct Faculty
- Faculty and researchers commonly seek out opportunities to present to their peers at other institutions / educate new members within the discipline
- Essential Elements:
 - Ranges from occasional unique events to a series of scheduled, recurring events
 - Ranges from unpaid, to provision of honoraria, reimbursement of expenses, etc.
- Receipt of funds from organizations other than your USCIS-approved employer is problematic
 - Honoraria are not permitted
 - Reimbursement of travel and reasonable incidental expenses are permitted (retain documentation just in case)
- Public presentation of an ongoing relationship or recurring events could create the impression of 'employment'
 - Which means "unauthorized employment" for visa holders
 - Describe these events carefully / strategically on CVs

Relationships Continued

- **Consultations**

- Faculty and researchers commonly seek out opportunities that present them as an expert within an area of specialization
 - Peers and colleagues may seek to characterize you as a consultant as a term of respect, or to facilitate what they perceive as fair compensation for your guidance or other intellectual contributions
- **Essential Elements:**
 - Ranges from informal requests for conversation or mentorship, to formal relationships where a deliverable or an end result is identified
 - Ranges from unpaid, to reimbursement of expenses, to payment of fees or other income, etc.
 - Generally does not involve formal employment (W-4) but rather involves payment of services fees on either a “fixed fee” (service) or hourly basis
- Again, receipt of funds from organizations other than your USCIS-approved employer is problematic
 - Reimbursement of travel and reasonable incidental expenses are permitted (retain documentation just in case)
 - Payment of services fees, consultancy fees or other funds are **not** permitted
 - **Payment of wages are not permitted unless the organization is approved as a concurrent USCIS-approved employer**
- Public presentation of an ongoing consultancy relationship could create the impression of ‘employment’
 - Which means “unauthorized employment” for visa holders
 - Describe these events carefully / strategically on CVs

Relationships Continued

- **Collaboration**

- Working with another to produce or create something
- Essential Elements:
 - Ranges from informal discussions, to sharing of mutual expertise, to combining expertise to “create” something new
 - Collaborations often form the basis of funding requests
 - Because intellectual property rights in the ‘created’ something are a concern, collaborations often are formalized through agreements
 - Issue then becomes the nature and identify of who the co-collaborator is
 - Collaborating with another individual (human being) is less complicated
 - Collaborating with a legal entity (institution, research center, organization) is more complicated (but not impossible)
- Again, receipt of funds from organizations other than your USCIS-approved employer is problematic
 - Ownership and equity if passive, is permissible. If **active** it is problematic.
- Public presentation of an ongoing consultancy relationship could create the impression of ‘employment’
 - Which means “unauthorized employment” for visa holders
 - Describe these events carefully / strategically on CVs
- The existence of multiple, ongoing connections to an entity similarly might be challenging

Relationships Continued

- **Co-Employment**

- Usually involves completion of a W-4 for the other employer
- Essential Elements:
 - Acceptance of an offer of employment for another institution, other than Purdue University
 - Employment co-exists with the Purdue Employment
- Options
 - Adjust your Purdue “FTE” to accommodate ongoing activities for the “Other Employer”
 - Take unpaid Leaves of Absences from Purdue to accommodate intermittent activities for the “Other Employer”
- The “Other Employer” must be USCIS-approved
 - The work visa classification requested by each employer must be the same
 - The USCIS approval of the “Other Employer” must be “in hand” prior to your commencement of the activities there
 - You may reduce or adjust your Purdue activities once we file the petition

E-2 Investor Visa | *thinking outside the box*

- **E-2 Treaty Investor – Available to only nationals of countries where U.S. has E-2 treaty.**
<http://travel.state.gov/content/visas/english/fees/treaty.html>
 - No treaty with Brazil, Russia, India, China, South Africa
- **Needs to be a “Substantial investment.” No exact amount but proportional to start up costs.**
- **E-2 and company must have nationality of the Treaty country.**
- **Investor has EQUITY**
- **Business needs to be real “Real and operating” business.**
 - Show with lease, license, capitalization
- **Cannot be marginal – show income to other people than investor**
- **Spouses CAN work by virtue of their status (E-2S).**



Immigrant Visas

Routes To Permanent Residency

- **Preference Categories**

- EB (our focus today) and FB
- Separated by Preference Category (EB-1 through EB-5; FB-1 through FB-4)
- Tremendous backlogs in some categories
- Oversubscription: Throttles visas based on country of BIRTH (not nationality)
- Filing date = your place in line. First-in, First-out system.

- **Immediate Relative**

- US Citizen Spouses, Children, parents – Never a backlog

Employment-based Preference Categories (Self-Sponsorship Options)

- **1st Preference (EB-1):**
Extraordinary Ability, Outstanding Researcher / Professor
- **2nd Preference (EB-2):** National Interest Waiver (for self-sponsorship) or Labor Market Test (PERM)
- **3rd Preference (EB-3):** Requires Employer Sponsorship



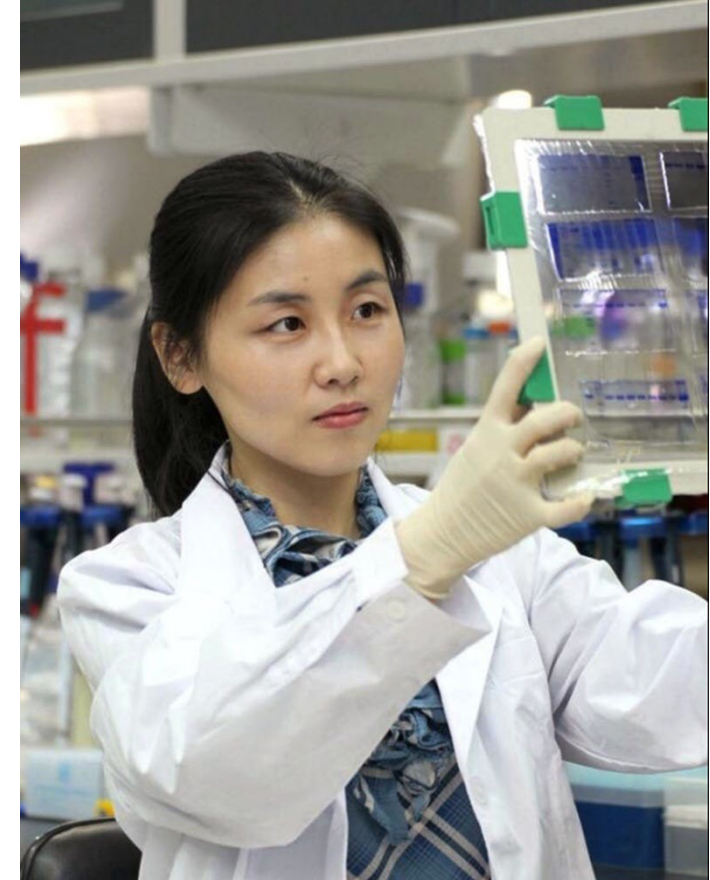
EB-1A – Extraordinary Ability

- **“Alien of Extraordinary Ability”- INA 203(b)(1)(A); 8 C.F.R. Section 204.5(h)(3)**
- **Evidence is similar to that needed for O-1 visa, but standard much higher**
 - “One of a Few at the Top” & “Sustained National or International Acclaim”— One time (e.g. Grammy Award); or
 - As determined by establishing at least 3 of 10 identified criteria
 - Standard is the same for all professions
 - Can self-sponsor OR file through employer, unlike an O-1; must intend to continue work in area of endeavor



EB-1B – Outstanding Researcher / Professor

- **Key Points**
 - Does not require PERM.
 - Foreign National can NOT self-sponsor.
 - Lower standard than EB-1 Extraordinary Ability.
 - Cannot be used for Post-Docs.
- **Requirements**
 - Must show sustained national or international acclaim through extensive documentation.
 - Must prove that foreign national has 3 years of professional experience prior to filing.
 - Issues with using post-doc experience



EB-2 National Interest Waiver

- **Dec. 2016 – Matter of Dhanasar case, opens door to many who couldn't qualify under old case (NYSDOT)**
 - Former stumbling block, showing that impact was “national in scope”
- **New Criteria**
 1. The proposed endeavor is of substantial merit and national importance;
 2. The applicant is well-positioned to advance the endeavor; and
 3. On balance, it would be beneficial to U.S. to bypass usual EB-2 requirement of a job offer and PERM labor market test.
- **Great for self-employed, and entrepreneurial-minded immigrants**
 - Faster, less expensive path to NIW for entrepreneurs creating jobs in the U.S.
- **Recent policy memoranda made clear that U.S. STEM PhD a very favorable trait**
 - Faster, less expensive path to NIW for STEM degrees in “Critical and Emerging Technologies”
- **May not be the best option for China/India**
- **Premium Processing now available (45 days)**

EB-2 NIW (Shortform)

- **“Shortform” NIW Case Study**

- Given recent policy memoranda and premium processing optionality, we performed a “clinical trial” to simplify NIW legal arguments to make the process faster and less expensive
- Works best for Entrepreneurs and/or those with STEM PhDs

- **Entrepreneurs**

- Specific Evidentiary Considerations for Entrepreneurs
- “...many entrepreneurs do not follow traditional career paths ... no single way in which an entrepreneurial start-up entity must be structured.”

- **STEM PhDs**

- Described in USCIS Policy Manual as “an especially positive factor”
- Particularly applies to fields considered “Critical and Emerging Technologies” per a list published by the White House
- Success filing petitions with a short legal argument and minimal evidence (just the PhD diploma and transcripts, a CV and statement of proposed endeavor, and the relevant policy manual and STEM technologies list)

Monitoring the Visa Bulletin

- **October 2023: Dates for Filing of Employment-Based Visa Applications**

Employment-based	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	C	01AUG22	01JUL19	C	C
2nd	01JAN23	01JAN20	15MAY12	01JAN23	01JAN23
3rd	01FEB23	01SEP20	01AUG12	01FEB23	01JAN23
Other Workers	15DEC20	01JUN17	01AUG12	15DEC20	15MAY20
4th	01MAR19	01MAR19	01MAR19	01MAR19	01MAR19
Certain Religious Workers	01MAR19	01MAR19	01MAR19	01MAR19	01MAR19
5th Unreserved (including C5, T5, I5, R5)	C	01JAN17	01APR22	C	C
5th Set Aside: (Rural - 20%)	C	C	C	C	C
5th Set Aside: (High Unemployment - 10%)	C	C	C	C	C
5th Set Aside: (Infrastructure - 2%)	C	C	C	C	C

FOR FURTHER INFORMATION



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