



BUSINESS IMMIGRATION ANNUAL UPDATE

November 12, 2020

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UPDATE TOPICS

- Travel
- Temporary visas
- Permanent residence
- Other [updates](#)
 - New regulations
 - Litigation
 - [Election updates!](#)

TRAVEL

visas | COVID-19 | travel bans | delays

TRAVEL

VISAS

- Visa does not guarantee entry – “ticket” to apply to enter
- Visas only issued at consular posts
- Heightened scrutiny under Trump administration
 - DS160: social media
- 2017 travel ban on certain countries
 - Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen
 - Election update: likely to be lifted

VISA APPLICATIONS + TRUMP PROCLAMATIONS

COVID-19

- Embassies + Consular Posts
 - COVID-19 suspension of visa services
 - Slowly reopening beginning July 15
- Immigrant Visas – Proclamation Restrictions
 - No “new entries” through 12/31/2020
- Nonimmigrant Visas – Proclamation Restrictions
 - H-1B, H-2B, L-1, certain J-1
 - No “new entries” through 12/31/2020
 - Litigation successes
- National Interest Exceptions (NIE’s)
- Election update: likely to free up some restrictions

TRAVEL

ENTRY

- Valid passport
 - Six months beyond requested stay (at least)
- Valid visa stamp
- Canadians
- Visa Waiver Program + ESTA

INTERNATIONAL TRAVEL + TRUMP PROCLAMATIONS

- Canada/Mexico land borders
 - Versus flying into United States
 - National Interest Exemptions (NIE's)
- Physical Presence Exclusions
 - Present in last 14 days in certain countries
 - China, Iran, Schengen Area (parts of Europe), UK, Ireland, Brazil
 - Includes transits/layovers (avoid!)
 - National Interest Exceptions (NIE's)
- Election update: certain restrictions might be lifted

TEMPORARY VISAS

visitors | intracompany transferees | professionals
treaty classifications | students | healthcare professionals

TEMPORARY VISAS

- Visitors: B-1, B-2, Visa Waiver Program (VWP/ESTA)
- Intracompany transferees: L-1
- Professionals: H-1B, H-1B1, E-3, TN
- Treaty traders/investors: E-1, E-2
- Extraordinary ability: O-1
- Students: F-1, J-1
- Healthcare professionals
- Other visa types

BUSINESS VISITORS

PERMITTED

- Attend business meetings
- Attend conferences
- Negotiate contracts
- Limited orientation, training

NOT PERMITTED

- Productive employment
- Freelancing
- “Volunteering”

BUSINESS VISITORS

- B-1 visa
 - Up to 10 years
 - Reciprocity
- Admission
 - 180 days (up to)
- May file for extension or change of status
- Update: potential elimination of B-1 in lieu of H-1B

BUSINESS VISITORS

- Visa waiver program
 - Passport
 - ESTA registration: www.esta.cbp.dhs.gov/esta
- 39 countries (changes over time)
 - UK, France, Japan, Singapore, South Korea...
- 90-day admission
- Cannot extend or change status
 - Update: special procedure during COVID-19 if cannot timely leave

L-1 INTRACOMPANY TRANSFEREES

- Worked abroad for parent, subsidiary, affiliate, branch office
- One year in past three years
 - Executive, managerial, or specialized knowledge capacity
- Spouses may work
 - Must apply for employment authorization (EAD)
 - **Delays**

L-1 INTRACOMPANY TRANSFEREES

L-1A EXECUTIVES AND MANAGERS

- Seven-year limit
- Executives: set company strategy at highest levels
- Managers:
 - Supervise other managers or professionals
 - Functional managers
- Need not have been executive/manager abroad

L-1 INTRACOMPANY TRANSFEREES

L-1B SPECIALIZED KNOWLEDGE

- Five-year limit
- Specialized company knowledge:
 - Products
 - Practices
 - Procedures
- Specialized industry knowledge will not qualify

L-1 INTRACOMPANY TRANSFEREES

BLANKET APPLICATIONS

- Blanket = USCIS “pre-approval” of company ownership structure
- Individual applies directly for visa stamp abroad with blanket approval
- \$25M in U.S. sales; or 1,000 employees; or 10 L-1 approvals in one year
- L-1B specialized knowledge blanket
 - Need bachelor’s degree
 - Some consulates accept degree equivalent
 - FAM now “reminds” consular officers to require applicants to show eligibility by “clear and convincing evidence”

L-1 INTRACOMPANY TRANSFEREES

UPDATES

- Heightened scrutiny continues at USCIS
 - FDNS site visits possible
- Blanket applications at consular posts receiving more scrutiny
 - BAHA: *Why can't a U.S. worker...?*

H-1B PROFESSIONALS

- Quota: 85,000 annually
 - 65,000 regular
 - 20,000 U.S. advanced degrees (masters OR higher)
- Fiscal year = 10/01 to 09/30
- FY2019: 190,098 petitions filed
- FY2020: 201,011 petitions filed
- Filings used to begin first business day in April (minimum five business-day window)...

H-1B PROFESSIONALS

H-1B CAP 2020 (FY2021)

- Electronic pre-registration: one per petitioner + beneficiary
 - Basic information requested
 - Employer name; individual name; job title; U.S. advanced degree
 - Intent to employ attestation
 - \$10 fee
 - March 1-20, 2020 registration period (minimum 14 days)
- 269,194 registrations submitted
 - Regular cap: 145,950
 - Advanced degree cap: 123,244

H-1B PROFESSIONALS

H-1B CAP 2020 (FY2021)

- Initial selection end of March
- “Wait list” selection in August
- Timing:
 - At least 90-day period for filing (may be longer in USCIS discretion)
 - Must file within timeframe on selection notice (login to view); cannot file more than six months prior to start date
 - Potential impacts
 - Premium processing availability
 - F-1 cap-gap

H-1B PROFESSIONALS

UPDATE: USCIS PROPOSED RULE – H-1B CAP

- Random → wage based selection criteria
- H-1B cap:
 - Run a lottery at each OES wage level, starting at Level 4
 - Maintains U.S. advanced degree preference
- Timing for regulation?
- Biden administration?

H-1B PROFESSIONALS

UPDATES

- Requests for Evidence
 - Level 1 (entry level) RFE's
 - Specialty occupation RFE's
- COVID-19: remote work
- Processing times

H-1B PROFESSIONALS

- Specialty occupation
 - Bachelor's degree in major field related to job
- Subject to six-year limit
 - Exception: AC21 extensions
- Dependents not employment authorized
 - H-4 Spouse Exception: married to H-1B principal AC21 extension beneficiary
 - Delays
 - **UPDATE:** Proposed regulation to rescind H-4 employment authorization?
 - Litigation “stalled” given regulation to rescind in process
 - Biden administration approach?



H-1B PROFESSIONALS

UPDATE: DOL INTERIM FINAL RULE

- Effective: October 8, 2020
- Prevailing wage attestation
- Raised calculation of OES wage survey levels
 - Level 1: 17th percentile → 45th percentile
 - Level 2: 34th percentile → 62nd percentile
 - Level 3: 50th percentile → 78th percentile
 - Level 4: 67th percentile → 95th percentile

H-1B PROFESSIONALS

UPDATE: DOL INTERIM FINAL RULE

- Private wage surveys can still be used!
 - Key requirements
 - Metropolitan Statistical Area (MSA)
 - Sample size
 - Most recent survey; last two years
- Litigation
- Biden administration?

H-1B PROFESSIONALS

UPDATE: USCIS INTERIM FINAL RULE

- Effective: December 7, 2020
- Specialty occupation definition
 - Cuccinelli: will support increased denials by 1/3
- Worksite and third party worksite
- Employer/employee relationship
- Corroborating evidence of specialty occupation work
- Third party placement petitions = one year maximum approval
- USCIS site visits
 - Any time after filing
 - Failure/refusal → grounds to revoke any H-1B at location
- **Litigation; Biden administration?**

TREATY PROFESSIONALS

- NAFTA → [USMCA](#) TN: Mexico, Canada
 - Three-year approvals; no quota
 - Application logistics, Canada vs. Mexico
- E-3 specialty occupation: Australia
 - Two-year approvals
 - Separate quota
- H-1B1 specialty occupation: Chile, Singapore
 - One-year approvals
 - Separate quota

E-1 TREATY TRADERS + E-2 TREATY INVESTORS

- Treaty in force
- “Nationality of company”
 - Only for citizens of same country
- Requisite level of trade or investment
- Limited to:
 - Executives/managers
 - Essential skills
- No period of employment with company abroad required

O-1 EXTRAORDINARY ABILITY

- Extraordinary ability
 - Arts, sciences, business, athletics
- Three-year approval
 - One-year extensions (no limitation)
 - No quotas
- Top of field
 - Exception for arts: prominence/distinction
- Documentary evidence
 - Examples: major awards; media; high salary; critical role; publications

F-1 STUDENTS

WORK AUTHORIZATION

- During school:
 - Curricular practical training (CPT)
 - Optional practical training (OPT)
- After graduation: post-completion OPT
 - 12 months
 - STEM graduates eligible for 24-month extension
 - Multiple requirements, including e-verify, training plan, reporting
 - Challenge of changing status post-graduation (H-1B quota; process timelines beyond cap-gap)
 - Increase in worksite visits
- **UPDATES:**
 - Unlawful presence policy enjoined
 - Proposed rule to eliminate D/S in favor of admission to date certain

HEALTHCARE PROFESSIONALS

- Temporary visa options:
 - H-1B
 - TN
 - E-3
 - O-1
- J-1 physicians
 - Conrad waivers
- Nurses, physical therapists, med laboratory technologists
 - Requires degree, licensure, and **Visa Screen**

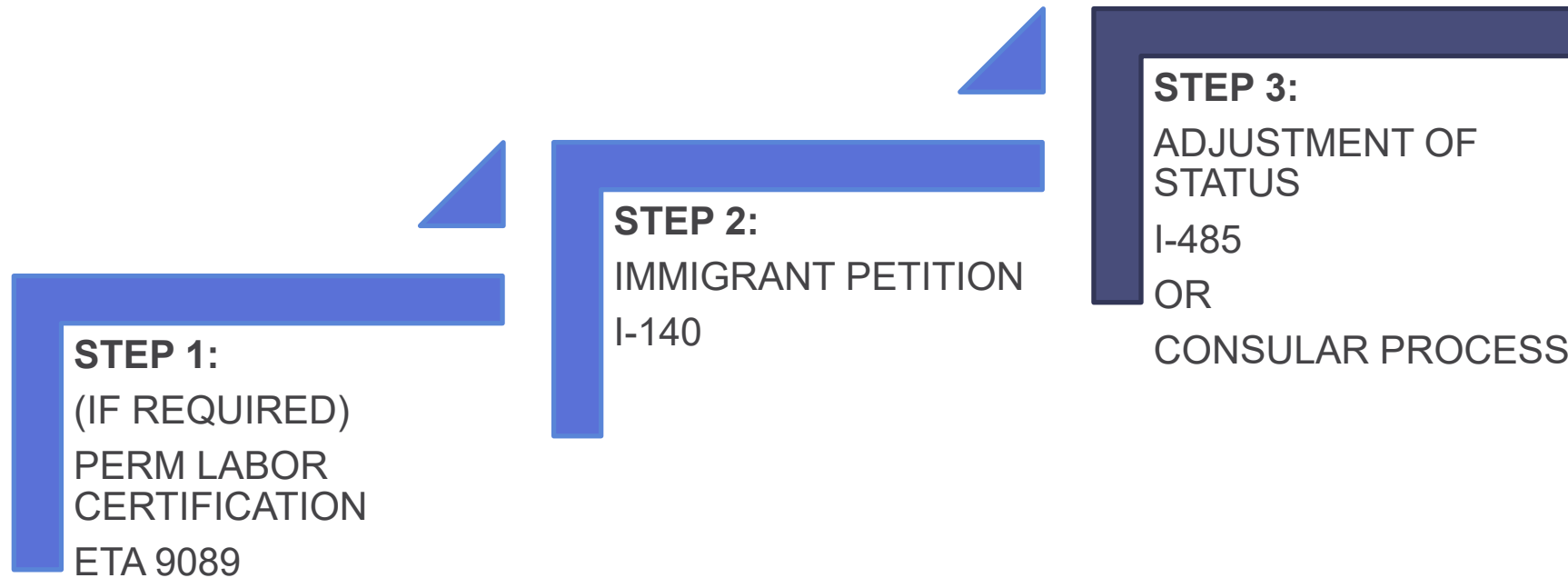
OTHER VISA TYPES

- H-2B Non-Agricultural Temporary Workers
 - Temporary worker (seasonal, peak-load, one-time occurrence, and intermittent); approximately 10 months
- P-1, P-2, P-3, athletes and entertainers
 - Duration of performance/event
- Q-1: International Cultural Exchange
 - Sharing history, culture, and tradition of the country of the person's nationality; 15 months
- R-1: Religious Workers; five years

PERMANENT RESIDENCE

PERM | extraordinary ability | outstanding professors and researchers
multinational executives and managers | NIWs

EMPLOYMENT BASED PERMANENT RESIDENCE PROCESS



EMPLOYMENT-BASED PERMANENT RESIDENCE

- **Labor Certification (PERM)**
- **Alternatives to PERM:**
 - Extraordinary ability
 - Outstanding researchers and professors
 - Multinational transferees
 - National Interest Waivers (NIWs)
 - Schedule A petitions for nurses/physical therapists

PERM

- Filing with U.S. Department of Labor
- Legal standard:
 - No qualified and available U.S. worker(s) meet minimum requirements for position
- Prevailing wage requirement
 - Recruit at prevailing wage in geographic location of proposed permanent employment
 - DOL regulation impact – OES wage levels

PERM

- Recruitment for U.S. workers
 - State job order (30 days)
 - Two Sunday newspaper ads
 - Internal posting notice
 - Three additional forms of recruitment
- 180-day filing window
- Minimum 60-day recruitment period

PERM

- Processing times
 - Prevailing wage determinations: 119 days
 - PERM: 164 days, audit: 308 days
- DOL using email + uploads
- **UPDATES:**
 - New Form 9089 coming?
 - Increased audits due to economy possible
 - Increased processing times possible

IMMIGRANT PETITIONS (I-140)

- File with USCIS
- EB preference category determined
- Legal basis for qualification for employment-based immigration
- Include labor certification (if required)
- Individual meets legal requirements

HEALTHCARE PROFESSIONALS

- Physicians: special green card options for working in Health Professional Shortage Areas
- Nurses, physical therapists: “fast track” option
 - Visa Screen required

QUOTAS

- Quota: 140,000/year
 - Distributed by country of birth and EB classification
- Impact:
 - Ability to file for adjustment of status
 - Approval of permanent residence
 - Immigrant visa not reserved upon filing for permanent residence
- **UPDATE:**
 - Employment based immigrant visa availability moved forward significantly
 - India and China
 - Possibly up to 261,500 immigrant visas in FY2021
- Visa Bulletin: www.uscis.gov/visabulletininfo

ADJUSTMENT OF STATUS (I-485)

- Filed with USCIS
 - Each family member files an application
- Can file concurrently with I-140 *if* immigrant visa number available
 - Check Visa Bulletin
- Employment-based green card applicants and family members:
 - Interviews at local USCIS offices
 - I-485 Supplement J
- **UPDATE:**
 - Public Charge rule
 - Form I-944 (on again, off again, back on!)

LPR STATUS NATURALIZATION

- Must maintain permanent residence (LPR)
 - Pay U.S. taxes
 - Present in U.S. > six months out of year (generally)
- Reentry permits
- Can naturalize after five years as LPR; three years if married to U.S. citizen
 - Within five- or three-year period, as applicable, must meet:
 - Physical presence test: at least 1/2 time spent in United States
 - Continuity of residence test: six months (rebuttable presumption); one year = break
- **UPDATE:** denaturalization task force

OTHER UPDATES

election | marijuana | worksite enforcement | I-9's | litigation

OTHER HOT TOPICS

- Premium Processing – new statute
 - \$2,500 for most existing categories
 - Expand to new categories
- Fee rule – enjoined
- COVID-19
 - Temporary signature policy
 - Response extensions
 - Form I-9
- Marijuana
- Increased worksite enforcement

ELECTION: BIDEN ADMINISTRATION

- Per AIC: over 900 immigration changes during Trump administration
- Per Migration Policy Institute: Trump > 400 executive actions on immigration
- *“Immigrants are essential to the strength of our country and the U.S. economy”*
- Travel bans
- H-1B; wage-based allocation process
- Expand number of “high-skilled visas”

ELECTION: BIDEN ADMINISTRATION

- Expand number of immigrant visas/eliminate per country limits
- Reverse public charge rule
- Reaffirm Diversity Visa lottery
- DACA
- Enforcement priorities

THANK YOU!



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HRCI + SHRM CREDIT

Activity ID:

- **HRCI: Activity ID: 539639 (pending approval)**
- **SHRM: Activity 20-63JCM**

Title: Business Immigration Annual Update: November 12, 2020

Start Date: 11/12/2020

End Date: 11/12/2020

Specified Credit Hours: HR (General)