

Visa Options for Startup Employees

Elise A. Fialkowski, Esq.
Andrew Zeltner, Esq.

This summary of employment options for foreign nationals under the U.S. immigration laws is divided into three parts: visas authorizing temporary employment; obtaining employment authorization without a working visa or permanent residence; and obtaining permanent resident status through employment.

I. Visas Authorizing Temporary Employment

A. Student Employment (F-1 Visas):

Foreign national students at U.S. universities and colleges on F-1 student visas have a number of employment options available during and after their studies. Generally, an F-1 student who is registered as a full-time student may work on campus no more than 20 hours per week while attending courses when school is in session, and up to 40 hours per week during school breaks. This employment may be for the school or may be for a business located on the campus that provides direct services to students. Students suffering from severe economic hardship based on unforeseen circumstances, such as currency fluctuations or natural disasters in their home country, are eligible for employment off campus. The

USCIS authorizes this type of employment.

In addition to the types of work authorization discussed above, F-1 students may obtain authorization for “practical training” in their fields of study. “Curricular practical training” (CPT) is authorized during the course of study for programs such as alternate work/study programs, internships, cooperative education programs and practicum experiences that are required by a course or the student’s degree program. The foreign student advisor authorizes this form of practical training. “Optional practical training” (OPT) is a block of 12 months of full-time work authorization that a student may take during school breaks, while school is in session, after completion of all course requirements except a thesis or dissertation or after completion of studies. The employment may be full-time or part-time, but it must be part-time if the student is still attending courses. The foreign student advisor recommends this form of practical training, but it must be approved by the USCIS before the student can begin working. Any student who works for one year or more in full-

time CPT is not eligible for optional practical training.

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Students in a STEM field may also be eligible for an additional two years of OPT. In order to hire a student on STEM OPT, the employer's worksite must be registered with E-Verify. The employer is also required to complete the Form I-983, which provides a description of the training program and explains how the student will be supervised on-site. Based on applicable guidance, a student could potentially work at a startup, but it may be more difficult for small startups to meet the current requirements. Under the current requirements, a bona-fide employer/employee relationship must be established. The guidance also provides that there must be staff available to provide the training. The student must also complete a minimum of 20 hours of work per week and must be compensated in a manner that is comparable to that of U.S. workers who perform similar duties and have similar educational and professional experiences. The student may also not replace a full or part-time U.S. worker.

B. Exchange Visitors (J-1 Visas):

J-1 visas are issued to students, scholars, interns, trainees, teachers, professors, research assistants, doctors and specialists or leaders in fields of specialized knowledge or skill who are coming to participate in a program authorized by the Department of State ("DOS"). Many universities, hospitals and large businesses have been authorized by

DOS to employ exchange visitors. A variety of program sponsors may authorize interns as well as business and industrial trainees to be employed by companies that do not have their own approved exchange visitor programs.

Interns are limited to 12 months of employment. Business and industrial trainees are limited to 18 months of employment. J-1 interns and trainees must be undertaking training related to their degree and/or experience.

Teachers, professors, research scholars and specialists may be employed for up to three years, with extensions available in certain circumstances. Exchange visitor students may be employed part-time off campus with the approval of the exchange visitor program sponsor, normally the university. In addition, exchange visitor students may obtain "academic training" following the completion of studies for a period of 18 months, or for 36 months in the case of certain postdoctoral programs.

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The research scholar category may also be of particular interest to startup companies. If an employee will be engaged in research activities, a J-1 visa may be able to be obtained for a period of up to five-years.

Startups will require a sponsoring organization to support a J-1 visa filing. Sponsors may also have requirements regarding the number of employees an entity must have and how long the business has been

operating in order to sponsor the J-1 visa, be it an intern, trainee or research scholar visa.

C. Temporary Workers in a Specialty Occupation (H-1B Visas):

The H-1B visa category is a frequently-used method for U.S. employers to hire foreign nationals on a temporary basis. A U.S. employer using this program must attest that (1) the foreign national will be paid at or above the higher of the rate paid for a similar position at the employer's own offices and the prevailing rate paid by other employers in the geographic area; (2) employment of the foreign national will not "adversely affect" the working conditions of U.S. colleagues; (3) U.S. colleagues will be given notice of the professional's presence among them; and (4) there is no strike or lockout at the worksite.

The employer must also demonstrate that the position requires a professional in a specialty occupation and that the intended employee has the required qualifications. As a general rule, to be considered a "specialty occupation" the position must require a bachelor's or higher degree (or foreign equivalent) in a specific specialty as a minimum requirement for entry into that occupation. The position must also require "theoretical and practical application of a body of highly specialized knowledge." If a foreign national has not completed a degree, experience may be substituted in a ratio of three years of experience for each year of

post-secondary education that is lacking, if the experience exhibits progressively more responsible positions relating to the specialty field.

Before an employer can file an H-1B petition with USCIS, it must first file a Labor Condition Application ("LCA") with the Department of Labor ("DOL"), which reviews the LCA to ensure it is complete and there are no obvious inaccuracies. The employer must attest in the LCA, among other things, that it will pay the H-1B worker the higher of the actual wage the employer pays its other workers with similar experience and qualifications for the specific employment in question or the prevailing wage for that position in the area of intended employment. The prevailing wage may be determined by the use of an industry-standard survey or other published wage source, or by any other bona fide source of prevailing wage information for the area where the individual will be employed. The employer can also submit a prevailing wage request to the Department of Labor but it often takes several weeks to receive a response.

On or before the date the LCA is filed, the employer must either notify its employees' collective bargaining agent of the LCA filing or, if there is no such agent, post notice of the LCA filing in at least two conspicuous locations at the employer's premises for 10 consecutive business days. The employer must also create a "public examination file" containing all the documentation required by the DOL

regulations regarding determination of prevailing and actual wages and the other attestations on the LCA for at least one year beyond the end of the period of employment specified on the LCA.

The DOL has seven working days in which to review the LCA and determine whether to certify it. Once the LCA is certified, the DOL will return it to the employer or the employer's representative, who will file it together with the H-1B petition with the USCIS, along with a description of the position to be offered and the employer's normal educational requirements to be able to perform the position, a description of the duties to be performed and proof that the individual has the qualifications required to perform the position (including evaluation of a foreign degree, if necessary). If the foreign national is in the United States and is seeking change of status or is seeking to change employers within the H-1B category, evidence should also be presented that the foreign national is presently maintaining his or her nonimmigrant status, so that status can be changed or amended in the United States.

If the foreign national is outside the United States, the foreign national will be required to apply for an H-1B visa at a U.S. Consulate. If the foreign national is in the United States in lawful status, he or she will be issued a new I-94, Departure Record, that documents the change of his or her status to H-1B for the petitioning employer.

H-1B visas may be issued for a period of up to three years, with

extensions for a maximum of three additional years (further extensions may be possible if a permanent residency case has been pending at least one year or, in some cases, if an immigrant petition [I-140 has been approved). An extension petition must be accompanied by a new certified LCA. If an employer dismisses an H-1B employee prior to the conclusion of his/her authorized period of employment, the employer is obligated to pay the return costs of transportation to the alien's last place of residence outside the U.S.

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Congress has established an annual quota of 85,000 for new H-1B visa holders. When the quota is reached, no H-1B petitions may be approved for a foreign national who does not hold H-1B status until the following fiscal year, unless the employer is exempt from the quota (such as a university). Of the 85,000 H-1B's available, 20,000 are reserved for applicants with a U.S. Master's degree or higher, giving those applicants a greater chance of obtaining an H-1B. H-1B cap cases subject to the quota are typically filled within the first week of the filing window in April. Last year, USCIS received 201,011 H-1B applications in the first five days of April. The USCIS conducts a lottery based upon the cases filed within the filing period. The government has proposed a new registration process for the H-1B quota/lottery, but as of November 2019, the electronic registration system has not yet been finalized and is still in testing.

Key issues for startups can include evidencing the required employer/employee relationship (when an applicant owns a majority of the company), meeting the prevailing wage requirements, showing specialty occupation work (especially if there are few staff to handle administrative tasks), and evidencing that the company has sufficient work available.

D. North American Free Trade Agreement (TN-1 Nonimmigrant Classification):

Pursuant to the North American Free Trade Agreement (“NAFTA”), Canadian and Mexican nationals are eligible for classification as TN-1 nonimmigrants. This nonimmigrant classification is available to Canadian and Mexican nationals who come to the United States to work in one of a specific list of professions, almost all of which require at least a bachelor’s degree. Canadians may make an application directly at the port of entry, and no specific petition is required. Normally, the request is acted upon at the time the application is made. Mexican citizens must apply at a U.S. Consular office for a TN-1 visa and present both the TN-1 visa and a valid passport at the port of entry. A TN-1 nonimmigrant is admitted for three years, with an unlimited number of extensions permitted.

E. Aliens of Extraordinary Ability (O-1 Visas):

This visa category is for foreign nationals with “extraordinary ability in the sciences, arts, education, business or athletics.” Extraordinary ability is defined as “a level of

expertise indicating that the individual is one of the small percentage who have risen to the very top of the field of endeavor.” The position offered to the foreign national must require the services of an alien of extraordinary ability, and the foreign national must document “sustained national or international acclaim and recognition for achievements in the field of expertise.” Written evidence of consultation with an appropriate “peer group” regarding the nature of the work to be done and the alien’s qualification or a peer review letter is mandatory before a petition for an O-1 classification can be approved.

The O-1 visa can be issued for a period of up to three years, with unlimited extensions in increments of one year.

F. Intracompany Transferees (L- I Visas):

This category is for a foreign national who has worked abroad for one year in an “executive, managerial or specialized knowledge capacity” for the same company or a branch, parent, subsidiary or affiliate of the company in the United States to which he or she is being transferred to work in an executive, managerial or specialized knowledge capacity. The one year of employment abroad must have occurred during the three years immediately preceding transfer. In most (but not all) cases, there must be at least a 50 percent common equity interest between the foreign and U.S. companies (exceptions may exist where there is a minority equity relationship but common control).

A “manager” may supervise other professionals or other managers or may “manage an essential function” and “function at a senior level within the organizational hierarchy or with respect to the function managed.” In other words, managers of people, projects and products qualify for this visa.

A “specialized knowledge” employee is one who has “specialized knowledge of the organization’s product, service, research, equipment, techniques, management or other interests and its application in international markets, or an advanced level of knowledge or expertise of the organization’s processes and procedures.”

The L-1 visa petition is filed by the U.S. company with the USCIS and, upon approval, is forwarded to the U.S. Consulate in the foreign transferee’s country, where the foreign transferee will be required to apply for a L-1 visa. The L-1 visa petition can be approved for an initial period of up to three years. Extensions are possible in increments of two years up to a maximum stay of seven years for executives and managers and five years for specialized knowledge employees.

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If the company has been in existence for less than one year in the United States, it would likely be considered a “New Office” petition. Such an approval would be initially valid for a one-year period and should include a business plan with financial projections and a detailed market

research report, in order to evidence viability of the business.

G. Treaty Traders/Investors (E-1 and E-2 Visas):

This visa category is available only to nationals of countries that have entered into treaties of friendship, commerce and navigation or bilateral investment treaties with the United States. It enables executives or supervisors or people with essential skills to work in the U.S.: (a) for a company (or individual) engaged in substantial import or export with the treaty country (E-1 visa), or (b) for a company (or individual) that has invested a substantial amount of money in a business in the U.S. (E-2 visa). In either case, the business must be owned at least 50 percent by the visa applicant or by nationals of the visa applicant’s treaty country who are not permanent residents or citizens of the U.S. An E-2 visa applicant may also qualify based upon his or her own investment of a substantial amount of money in a business in the United States so long as the applicant is developing or directing the business, even if the applicant will not be employed by the business.

The qualification of an E-1 treaty trader company is based upon regular, ongoing trade of goods or services, a majority of which must be with the treaty country.

Qualification as an E-2 treaty investor company is based upon the substantiality of investment, which is not defined by any specific dollar amount, but rather by a comparison of the investment with the total value of the business or, especially in the

case of a new business, with the amount normally considered necessary to establish a viable business of the nature contemplated.

The E visa may be issued for several years, with the exact amount depending on the reciprocity schedule and the consul's discretion. However, the E visa holder may only be admitted to the United States for a maximum initial period of two years with an unlimited number of two-year extensions possible.

II. Employment Authorization for Aliens Without Working Visas

Certain foreign nationals may work in the United States by virtue of their status even though they do not have a specific working visa. These include lawful permanent residents (green card holders); conditional permanent residents (green cards obtained through marriage or investment that are limited to two years validity); lawful temporary residents (beneficiaries of the legalization or special agricultural worker program); refugees and asylees; fiancés and fiancées (K-1 visa holders); and aliens granted cancellation of removal, withholding of deportation, extended voluntary departure or temporary protected status.

In addition, certain other individuals may request employment authorization. These include applicants for asylum, adjustment of status to permanent residence or cancellation of removal; parolees (foreign nationals paroled into the United States for emergent public interest reasons); foreign nationals granted deferred action status; and spouses and children of exchange visitors, intracompany transferees, treaty aliens or

foreign government officials who are employees of international organizations. Spouses of H-1B visa holders who are far enough along in the immigrant visa process can apply for employment authorization.

III. Permanent Immigration Based Upon Employment

There are five preference categories for employment-based immigration:

A. First Preference Priority Workers (40,000 Visas Per Year)

Three categories of workers fall within the first preference, priority worker category: (a) aliens with extraordinary ability in the sciences, arts, education, business or athletics; (b) outstanding professors and researchers; and (c) multinational managers and executives. The identifying characteristics of these three categories are that no labor certification is required; a petition is filed directly with the USCIS; and, given the significant number of visas available, no quota backlogs are expected for most countries, at least for the foreseeable future.

1. Aliens with Extraordinary Ability

- Aliens who are in the "small percentage who have risen to the very top of their field of endeavor" can file for permanent residence without any job offer. The alien must prove his or her qualifications with extensive documentation and show an intention to work in the area of expertise in the United States.

2. Outstanding Professors and Researchers

- Professors or researchers who are “recognized internationally as outstanding in the academic field,” who usually have a minimum of three years of experience in teaching and/or research in the academic field, may qualify. There are extensive documentation requirements. The petition must be filed by the employer. The offer of employment must be:
 - a tenured or tenure track position for a professor; or
 - a permanent research position for a university researcher; or
 - a permanent research position at a private employer that employs at least three full-time researchers and has achieved documented accomplishments in the foreign national’s academic field.

3. Multinational Managers and Executives

This category, which tracks the L-1 intracompany transferee nonimmigrant visa category, enables such transferees to obtain permanent resident status. However, it only applies to managers and executives (in the U.S. and foreign companies) not specialized knowledge employees.

B. Second Preference Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability (40,000 Visas Per Year)

This category includes aliens who are members of the professions holding advanced degrees (master’s or higher or bachelor’s plus five years of progressive experience) and working in a position that requires advanced degrees and aliens of exceptional ability in the sciences, arts or business.

A labor certification is required in most (but not all) cases. The labor certification process was set up to protect the American worker and to ensure that a foreign national is certified for a particular job or position if, and only if, a minimally qualified American worker cannot be found. The employer is required to advertise for the position offered to the alien and prove to the satisfaction of the DOL that it cannot find a U.S. worker who meets the minimum requirements for the position. The fact that a foreign national may possess better qualifications than a given American worker who responds to the employer’s recruitment effort is not considered relevant. Rather, DOL wants to make certain that the job duties and job requirements are the normal minimum requirements for the job identified and that the employer is not demanding excessive experience, education or training requirements.

The DOL normally does not allow an employer to use the experience that a foreign national gained either in the job for which a labor certification is being sought or in a substantially

similar job with that employer. The DOL takes the position that, since the foreign national did not have that experience at the time he or she began the job, requiring such experience from a U.S. worker would be unduly restrictive. However, under current DOL guidelines, experience or training that the applicant gained with a different employer may be used as well as any experience gained with the applicant's current employer, so long as that experience was gained in a sufficiently dissimilar position.

Although foreign nationals who fit within this category normally require a labor certification application, they may be exempt from the requirements of a job offer and of a labor certification if the USCIS determines the exemption would be in the "national interest." Examples of the "national interest" include providing jobs to U.S. workers, improving health care, advancing scientific understanding and improving the cultural life of the United States, among many others. The foreign national generally must show that he or she is engaged in a project with "substantial intrinsic merit" that is national in scope or impact and that he or she has already made, and will likely make in the future, substantial contributions to this field.

C. Third Preference Skilled Workers, Professionals and Other Workers (40,000 Visas Per Year)

For more information contact:

Elise A. Fialkowski, Esq.

Telephone: 215.825.8647

E-mail: efialkowski@klaskolaw.com

Website: www.klaskolaw.com

All workers who fall in this category require an approved labor certification. The category is divided into two parts:

1. Workers who hold at least a U.S. bachelor's degree or a foreign equivalent degree ("members of the professions") as well as workers who are offered and qualify for jobs that require at least two years of post-secondary education, training or experience ("skilled workers").
2. Workers in positions that require less than two years of post-secondary education, training or experience ("unskilled workers"). Only 10,000 visas are available annually for this group of aliens.

D. Fifth Preference Investors (10,000 Visas Per Year)

This is not technically an employment-based preference, but rather an investor category. Investors who invest a minimum of \$1.8 million of capital (\$900,000 of capital if the investment is in a "targeted employment area") and whose investment creates 10 full-time jobs for U.S. workers are eligible to immigrate. The investor need not own any specific percentage of the business, or be an officer or employee of the business, but must be engaged in some way in a policy-making capacity with the business.

For more information contact:

Andrew J. Zeltner, Esq.

Telephone: 215.825.8679

E-mail: azeltner@klaskolaw.com

Website: www.klaskolaw.com