

Presentation to the University of Houston: Immigration Options for International Students

Searching for Creative Approaches to Remain in the U.S....

Options to Remain in the U.S. After Graduation
Charles Gillman and Bryce Evans
Gonzalez Olivieri LLC

**...Or in some cases, to temporarily leave, but return to the
United States**

Speaker

- **Charles Gillman** is a partner at Gonzalez Olivieri LLC and head of the business immigration department
- “In a three-decade career in global mobility, working as a Fortune 100 in-house attorney, with major international consulting firms and multi-practice law firms, I’ve had the privilege of learning from some of the finest lawyers in North America. I have regularly assessed the issues arising from a mobility or compliance perspective for universities, businesses, investors, and entrepreneurs. I think of myself as a thoughtful, creative, and diligent lawyer who gets the job done. My goal is modest: to provide you with the perspective and analysis that allows you to pursue a successful outcome as you face ever-evolving U.S. immigration challenges.”

Speaker

- Attorney Bryce Evans is an associate attorney at Gonzalez Olivieri LLC.
- Originally from Los Angeles, California, Bryce's passion for international travel and global affairs began when he was an undergraduate at Texas State University, during which time, he studied abroad in Barcelona, Spain. While in Barcelona, Bryce researched and drafted a term paper focusing on the democratization process in Barcelona, Spain. After receiving his Bachelor of Arts degree in Political Science from Texas State University, he attended Thurgood Marshall School of Law where he received his Juris Doctorate. Bryce has a keen interest in exploring immigration options for international student athletes.

Agenda

- U.S. Immigration
- Non-Immigrant Visas
- Lawful Permanent Resident/Immigrant Visa (Green Card)
- Citizenship (Naturalization)
- **Q&As**

Overview of U.S. Immigration Process

- **Selected Nonimmigrant Visas:**
 - B-1/B-2 Visitor for Business or Pleasure
 - E-2 Treaty Investor/E-1 Treaty Trader
 - E-3 Specialty Worker – Australia
 - H-1B Specialty Occupation Worker
 - H-1B1 - Chile and Singapore
 - L-1 Infra-company Transfers
 - O-1 Extraordinary Ability
 - TN – Trade NAFTA – Mexico and Canada
 - **Cannot** have more than one **status at the same time.**

Overview of U.S. Immigration Process

- **Selected Employment-Based Immigrant Visas (Lawful Permanent Residence):**
 - EB-1
 - Outstanding Researchers
 - Foreign Nationals of Extraordinary Ability
 - Multinational Managers
 - EB-2
 - Advanced Degree/Exceptional Ability/National Interest Waiver
 - EB-3
 - Professionals/Two years experience/Other Workers
 - EB-5
 - Immigrant Investor Program

Overview of U.S. Immigration Processes

- **U.S. Citizenship**
- If a permanent resident is married to a U.S. citizen, you may be able to apply within three years
- Most other permanent residents may be able to apply within five years of obtaining permanent residence

H-1B Basics

- *H-1B Specialty Occupation* – job must require BA/BS or equivalent in a specific field for entry-level requirement
- And employee must have a degree related to the specialty occupation
- Employer-employee relationship
- W-2 employee
- Employer-specific – no moonlighting, but can have concurrent H-1B employment
- Off-site/remote employment permitted if petitioner retains control over work, salary, etc.
- Granted for up to 3 years at a time; maximum of 6 years in H-1B status with possible extensions during the green card process

H-1B visas: the numerical cap

- H-1B Visas Currently Capped at 65,000 per year
- The additional Advanced Degree Allocation of 20,000 visas is reserved for graduates of Master's or higher degree programs from a U.S. college or university
- FY2025 - H-1B Registration is from March 6th to March 22nd, 2024.
- **USCIS received nearly 800,000 submissions in the 2023 lottery, for 85,000 visas

H-1B Cap Subject vs. H-1B Cap Exempt

- H-1B Cap exempt employers - No numerical cap for:
- Colleges/universities
- Nonprofit or government research organizations
- Nonprofit entities that are affiliated with or related to institutions of higher education
- Possible concurrent employment with, or employment at, a cap-exempt entity

- Transferability limitation
- General rule: can transfer from one H-1B employer to another upon submission of new H-1B petition (“portability”)
- Can transfer to another cap-exempt organization
- Cannot transfer to a non-exempt organization (cap-subject), without going through the H-1B lottery

Continued: H-1B Cap Subject vs. H- 1B Cap Exempt

- Cap-exempt institutions may file H-1B petitions anytime of the year with start dates at any time. This is a significant advantage compared to cap-subject employers who can only place their employees in the H-1B lottery each year and hope that they are randomly selected. Working on a cap-exempt H-1B does not allow the recipient to then transfer to a cap subject employer, however, because the recipient has not been counted against the cap. An employee may have more than one concurrent H-1B. If one is for a cap-exempt H-1B employer, that employee may also work for a cap-subject employer without being selected in the lottery—so long as they maintain the cap-exempt employment.

H-1B Visas for Start-Ups

- H-1B Start Ups
- Company owned by H-1B employee?
 - Must be W-2 employee
 - Separate employer from owner/employee
 - H-1B registration requires an authorized signatory other than the beneficiary
 - Company right of control over employee *may* be evidenced by a Board of Directors
 - Who has ability to hire/fire additional personnel?
 - Bolster petition by “E-1” or L-1 type of evidence

Alternatives to the H-1B

- TN (Trade NAFTA) for Canadians and Mexicans in specified professions
- H-1B1 - Special Free Trade Hs for Chileans and Singaporeans
- E-2s for investors
- E-3s for Australian professionals
- O-1s (Aliens of Extraordinary Ability)
- F-1 students (CPT and OPT)
- H-2Bs for temporary need (usually unskilled workers)
- J-1s for exchange visitors

Work Authorization Options

- Post-completion Optional Practical Training (OPT)
- Temporary employment that is directly related to an F-1 student's major area of study. Eligible students can apply to receive up to 12 months of OPT employment authorization after completing their academic studies
- Fewer restrictions than H-1B
- Not employer-specific (just requires that it be related to degree field)
- No prevailing wage requirements
- No "specialty occupation" inquiry
- Can serve as bridge between completion of degree program and obtaining H-1B visa

Work Authorization for F-1 Students (continued)

- **STEM OPT Extension**
- If a student has earned a degree in certain science, technology, engineering and math (STEM) fields, she may apply for a 24-month extension of her post-completion OPT employment authorization if she:
 - Has an F-1 student received a STEM degree that is included on the STEM Designated Degree Program List
 - Is employed by an employer who is enrolled in and is using E-Verify, and
 - Received an initial grant of post-completion OPT employment authorization based on her STEM degree.
 - Employer and student must jointly complete a detailed Training Plan to describe the training to be received and the supervision of the foreign student's practical training experience
 - Can facilitate multiple entries in the H-1B lottery over several years

Day One CPT Master's

- **"Day 1 CPT"** is drawn from a regulation used by some U.S. master's or doctoral programs that allows international students to start Curriculum Practical Training (CPT) immediately. This means they can begin an internship or work right from the beginning of their program (it's usually the first day of the program).
- **Proceed with Caution**

Treaty-Based Visas

- Several options similar to the H-1B, but limited to nationals of specific countries by way of treaties with the United States
- Like the H-1B, (almost) all require the “specialty occupation” analysis and for the beneficiary to possess a related bachelor’s degree or higher
- H-1B1: nationals of Chile and Singapore
- E-3: nationals of Australia
- TN: nationals of Canada and Mexico
- The TN is slightly different in its requirements, in that the NAFTA/USMCA treaty between US/Canada/Mexico lists specific occupations that will qualify – most are the standard “professions” (engineer, scientist, accountant, lawyer, etc.), with some categories that don’t require a bachelor’s degree (such as management consultant and scientific technician)

E-2 Visas

- Available to nationals of certain countries with whom the US has a treaty of trade and commerce
- Notable exceptions include India and mainland China
- Have invested, or be actively in the process of investing, a substantial amount of capital in a bona fide enterprise in the US
- Be seeking to enter the US to develop and direct the investment enterprise (at least 50% ownership interest, or operational control)
- Enterprise cannot be “marginal” – i.e., must create jobs for US workers or for individuals beyond just the investor himself/herself
- Status can be extended in two-year increments, indefinitely, as long as the business continues operating and remains profitable

L-1 Intracompany Transferee

- To qualify for L-1 classification in this category, the employer must:
 - Have a qualifying relationship with a foreign company (parent company, branch, subsidiary, or affiliate, collectively referred to as *qualifying organizations*); and
 - To qualify, the named employee must also:
 - Generally, have been working for a qualifying organization abroad for one continuous year within the three years immediately preceding his or her admission to the United States.
 - May be a viable approach in the face of H-1B cap quotas for multinational employers.

J-1 Cultural Exchange Visas

- Intended as a Cultural Exchange Opportunity
- Administration through U.S. Dept. of State
- Employer must be authorized by DOS to sponsor J-1 visas themselves (universities, hotel chains, medical centers) OR
- Employer must work through approved sponsoring agencies for defined
 - categories: J-1 Trainees, Summer Work Study, etc.
 - Approved sponsors listed on DOS website
- Various Categories of J-1 Visas
 - Professor / Research Scholar (5 years) – common option for postdocs
 - Specialist (12 months)
 - Short-Term Scholar (6 months)
 - Trainee (18 months) / Intern (12 months)
 - Au pair (2 years) / Camp counselors (4 months)
 - Teachers - primary and secondary (3 years)

Limitations of the J-1 Visa: Home Residency Requirements

- **TWO-YEAR HOME RESIDENCE REQUIREMENT**
 - Some participants in J-1 programs must return to home country for 2 years before eligible for a change of status, H or L visa, or 'green card'
 - Either U.S. or home **government funded** the exchange program in the US;
 - Country has filed **Skills List** with DOS designating study areas which are needed in country – no matter who paid for the study; or
 - Participant has engaged in Graduate Medical Education/Training in US.
 - "Home country" = country of citizenship or last residence at time of J visa issuance
- **WAIVER OF HOME RESIDENCE REQUIREMENT BY DOS**
 - 4 statutory grounds for waiver application; decision is always discretionary:
 - "No Objection" (good option if no government funding received)
 - Exceptional Hardship to US citizen spouse or child
 - Persecution
 - Interested Government Agency/Clinical waivers for physicians
 - Some situations where waivers are almost NEVER granted: Fulbright, USAID

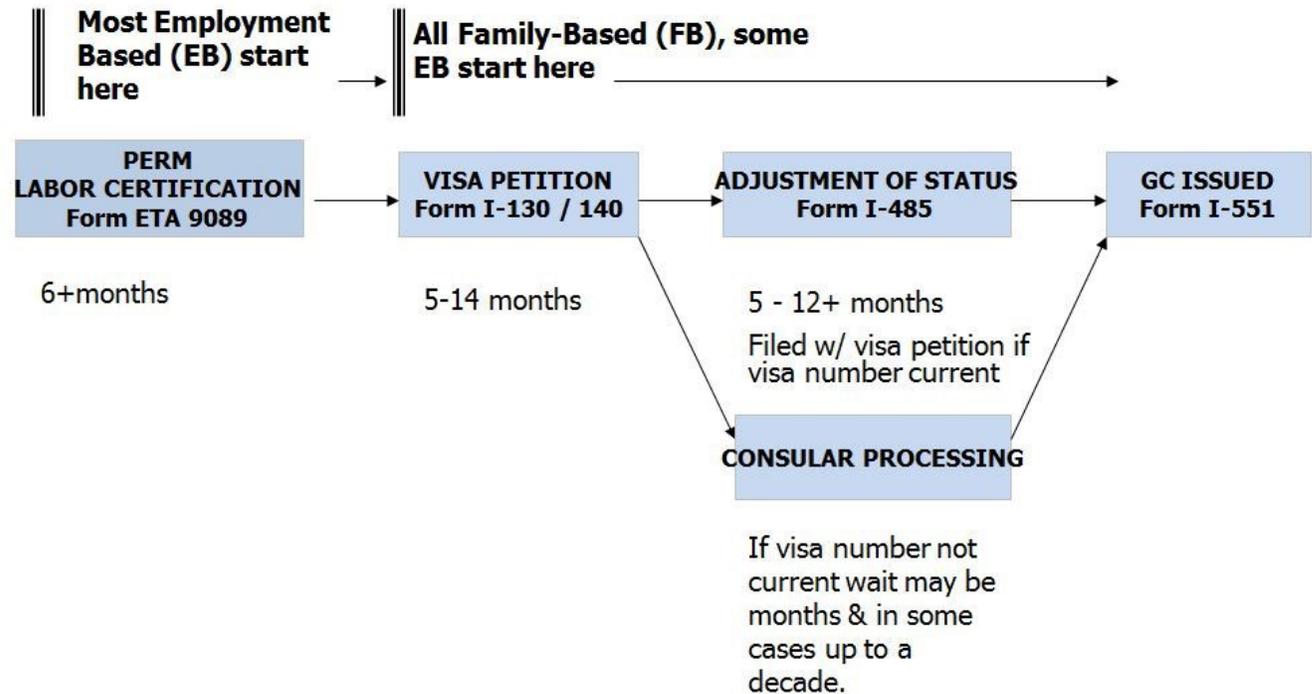
O-1 Extraordinary Ability Visas

- **Individuals with Extraordinary Ability or Achievement Science, Education, Business or Athletics (O-1A), or Arts (O-1B)**
- **The record must include at least three different types of documentation corresponding to those listed in the regulations, or comparable evidence in certain circumstances, and the evidence must, as a whole, demonstrate that you meet the relevant standards for classification**
- **National or International Acclaim**
- **Letters of support**
- **Publications**
- **High salary**
- **Media, citations, press**
- **Judge work**
- **Awards, critical acclaim**
- **Selective professional memberships**
- **Employment in a “critical” or “essential” capacity**

P-1A Visa

- The P-1A classification applies to you if you are coming temporarily to the United States solely for the purpose of performing at a specific athletic competition as:
 - An internationally professional athlete or athletic team seeking to enter the U.S. to compete or participate in an event of international standing.
 - Required Evidence: Legal K with a major U.S. sports league, Itinerary of explanations of the nature of events or activities, written consultation from a sport-appropriate labor organization.
 - Two of the following: Evidence of participation in U.S. major sports league in prior season; participation in international competitions with a national team; written statement from sports media; significant participation in a prior U.S. major league season.
 - Spouse and unmarried children under the age of 21 may obtain P-4 NIS.
 - Essential Support personnel may obtain P-1S.
 - Period of Stay/Extension of stay: Time needed to complete event not to exceed five years- Individual Athletes or one year – internationally recognized team.

Overview: Permanent Residence Process



Quotas and Priority Dates

- Each type of green card (preference category) has numerical limits: numbers vary by year and by usage
- Approximately 140,000 employment-based GCs in all categories
- Approximately 226,000 family-based GCs in all categories
- *Each country is also limited to a ceiling number of visas, regardless of demand*
- When either preference group or country quotas are met, waiting lists build
- **PRIORITY DATE DETERMINES PLACE ON WAITING LIST**
- When waiting lists build, cases are processed in priority date order
- Priority date established at the first official filing date of the paperwork (USCIS, DOL)
- **GLOBAL VS. COUNTRY WAITING LISTS**
- Country which hits country ceiling taken out of the worldwide visa pool and given its own separate pool of visas (approximately 7% of total available)
- Ensures even distribution of visas across all GC categories but penalizes citizens of countries with high rates of immigration such as India and China.
- Leads to longer waits in many categories.
- The Visa Bulletin (www.travel.state.gov): priority dates for each month.

Visa Bulletin: March 2024

Employment Categories	World-wide	China	India	Mexico	Philippines
EB-1	C	15JUL22	01OCT20	C	C
EB-2	22NOV22	01JAN20	01MAR12	22NOV22	22NOV22
EB-3	08SEP22	01SEP20	01JUL12	08SEP22	08SEP22

PERM: Labor Certification

▪ Method Most Often Used For Employment-Based Permanent Residence Process

- Application by employer to US Department of Labor (DOL) to certify individual and position after statutorily mandated recruitment campaign — “Test of the labor market”
 - Nearly all positions qualify, but substantial waiting periods for non-professional positions, vs. usually shorter or no waiting for positions with higher requirements
 - EB-2 “advanced degree” category = Master’s degree (or higher); or Bachelor’s degree plus five or more years of progressively responsible work experience
 - EB-3 category – Bachelor’s degree requirement or lesser requirement.
 - Process requires significant employer involvement, including payment of all costs and legal fees
- Streamlined process available for college/university faculty – submit within 18 months of date of selection/conclusion of competitive search for the position; “most qualified” standard, so presence of a minimally qualified US worker does not block the process

PERM Recruitment Steps

- Define job and skills on DOL forms in compliance with DOL requirements
- Obtain DOL prevailing wage determination
- Advertise with the State Workforce Agency/Job Bank, and two Sundays in newspaper of general circulation in the geographic area
- Professional positions: 3 additional recruitment steps (job fairs, web ads, etc.)
- Interview and evaluate applicants; prepare recruitment report
- Submit ETA 9089 to DOL
- DOL reviews and will either approve or issue audit request
- Random audits in approximately 20% of cases
- PERM Labor Certification process takes approximately 18 months (or longer) to complete – *critical importance of planning ahead*

Other Employment- Based Green Card Approaches

- **Extraordinary Ability Individual (EB-1A)**
-
- **Outstanding Researcher (EB-1B)**
-
- **Multinational Manager (EB-1C)**
-
- **National Interest Waiver (EB-2)**
-
- ***All of the above are exempt from the labor certification requirement**

Extraordinary Ability

- **Must demonstrate extraordinary ability in the sciences, arts, education, business, or athletics. “Extraordinary Ability” means sustained national or international acclaim and that your achievements have been recognized in your field of expertise through extensive documentation. Limited to those who have risen to the very top of their field of endeavor.**
- **Must be seeking to enter the United States to continue work in your area of extraordinary ability.**
- **Flexibility:**
 - **Can apply to a wide variety of fields**
 - **Can be filed as a self-petition; does not require an employer sponsor**

Extraordinary Ability: Evidentiary Requirements

- *Can be a self petition without having an employer*
- Documentary Evidence must include at least 3 of the following:
 - Evidence of receipt of lesser nationally or internationally recognized prizes or awards for excellence
 - Evidence of your membership in associations in the field requiring outstanding achievement of members
 - Evidence of published material about you in professional/major trade publications or other major media
 - Evidence that you have been asked to judge the work of others, either individually or on a panel
 - Evidence of original scientific/scholarly/artistic/athletic/business-related contributions of major significance to the field
 - Evidence of authorship of scholarly articles in professional/major trade publications or other major media
 - Evidence that your work has been displayed at artistic exhibitions or showcases
 - Evidence of your performance of a leading or critical role in distinguished organizations
 - Evidence of a high salary or significantly high remuneration compared to others in the field
 - Evidence of your commercial successes in the performing arts
- Must also pass USCIS's "final merits analysis"

Outstanding Researcher

- Intended to accommodate prospective immigrants who are recognized nationally or internationally for their outstanding achievement in their field and who have made original contributions of major significance. An employer must submit this petition on behalf of a prospective permanent resident.
- USCIS regulations provide that applicant must demonstrate international recognition for outstanding achievements in a particular academic field, as well as at least 3 years' experience in teaching or research in that academic area.
- Applicant must be entering the United States in order to pursue tenure or tenure track teaching or comparable research position at a university or other institution of higher education, or for organizations that employ other researchers.

Outstanding Researcher Requirements

- Evidence must include at least 2 of the following:
- Evidence of receipt of major prizes or awards for outstanding achievement
- Evidence of membership in associations that require their members to demonstrate outstanding achievement
- Evidence of participation, either on a panel or individually, as a judge of the work of others in the same or allied academic field
- Evidence of authorship of scholarly books or articles (in scholarly journals with international circulation) in the field
- Must also pass USCIS's "final merits analysis"

National Interest Waiver (NIW)

- NIW is granted to those who have an advanced degree or exceptional ability whose employment in the U.S. would greatly benefit the nation in the areas of business, health care, economy, national security, or other vital areas
- 3-Prong Test for evaluating NIW cases
- You must show that you plan on working in the United States in an area of substantial intrinsic merit and/or national importance
- **You must show that you are well-positioned to advance work in your field of endeavor
- You must show that, on balance, it would be beneficial to the United States to waive the requirement of a job offer and thus of a labor certification
- *Can be filed as a self-petition (no employer sponsor required)*

National Interest Waiver (continued)

- As noted, a NIW can be filed as a self-petition (no employer sponsor required)
- No requirement of having a permanent job offer
- Flexibility to change employers during the process without impacting validity of green card process

- Many proposed endeavors that aim to advance STEM technologies and research, whether in academic or industry settings, not only have substantial merit in relation to U.S. science and technology interests, *but also have sufficiently broad potential implications to demonstrate national importance.*
- USCIS considers an advanced degree, particularly a doctoral degree, in a STEM field tied to the proposed endeavor and related to work furthering a critical and emerging technology or other STEM area important to U.S. competitiveness or national security, an especially positive factor to be considered along with other evidence for purposes of the assessment under the second prong.
- When evaluating the third prong and whether the United States may benefit from the person's entry, regardless of whether other U.S. workers are available (as well as other factors relating to prong three discussed above, such as urgency), USCIS considers the following combination of facts contained in the record to be a strong positive factor:
 - The person possesses an advanced STEM degree, particularly a doctoral degree;
 - The person will be engaged in work furthering a critical and emerging technology or other STEM area important to U.S. competitiveness; and
 - The person is well positioned to advance the proposed STEM endeavor of national importance.

Schedule A: Fast Track for Nurses and Physical Therapists

- Schedule A is a list of occupations for which the U.S. Department of Labor has determined that there is an insufficient number of U.S. workers who are able, willing, qualified and available. Inclusion on Schedule A also establishes that the employment of foreign workers in such occupations will not adversely affect the wages and working conditions of U.S. workers similarly employed. The advantage of being on Schedule A is that the foreign worker can obtain a green card without first having to go through the entire labor certification process.
- Currently, only two occupations are explicitly listed on Schedule A: Professional Nurses and Physical Therapists
- *The Administration is proposing adding other occupation at this time.*

Contact Information

- Charles Gillman
- cgillman@gonzalzolivierillc.com
- Bryce Evans
- bevans@gonzalezolivierillc.com

- *Please note that the information in this presentation is intended as general background information on immigration law and employment eligibility issues. It is not to be considered as legal advice with regard to any specific immigration issue. Immigration law changes often and information becomes rapidly outdated. Please consult your immigration counsel before taking action on immigration matters.*

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Question and Answers

- **Thank you!**