

Gaining O-1 Status or Permanent Residence in the US

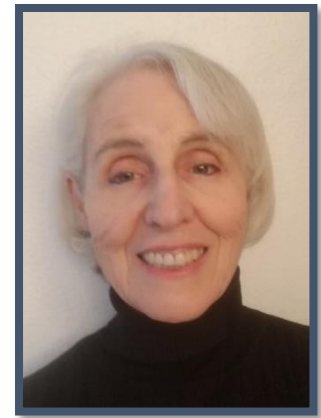
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Introduction

Marlene Stanger, Immigration Attorney (formerly
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Remember to type questions in the chat.



What is your current immigration situation?

- You are here as a nonimmigrant: F-1, J-1, maybe-H-1B, other nonimmigrant status that authorizes employment e.g. J-2, L-2
- Your underlying status ending soon... coming to end of J-1, lab funding ending, no H-1B position at Scripps Research, you ARE in H-1B status, but your sixth-year is coming up...
- You want to continue working in the U.S.



PLEASE TAKE OUR POLL.

The O-1 nonimmigrant visa option

- For those with “extraordinary ability” in science, sports, education, business, the arts
- Among those at **top of their field** who have **received sustained national or international acclaim**
- When to consider:
 - Approaching **6th year limit in H-1B** for cap-exempt institution **or**
 - You **do not yet have 212 (e) waiver** of two-year home residence requirement (if applicable to your J-1 status) **or**
 - **H-1B cap has been reached** within industry and for-profit institutions **or**
 - **New salary requirements for H-1B too high**
- Meet at least 3 of 8 criteria:
 - **original contribution of major significance** to field,
 - won national or international **awards**,
 - **judged work of others**,
 - **published** in international journals,
 - been **written about**,
 - played **lead or critical role** for distinguished organizations,
 - commanded a **high salary**,
 - **invited membership** to professional or academic organization based on accomplishments.



O-1 continued –

- Adjudicated on preponderance of evidence test – “more likely than not.” This is the same standard of review for all immigration cases.
- O-1 requires only a quantitative analysis – you must meet 3 out of 8 criteria
- U.S. institute or company must submit O-1 petition in duplicate to the USCIS. You cannot self-petition for an O-1.
- The filing fees are currently \$460 (basic fee) and \$2500 for Premium Processing to expedite adjudication within 15 days.
- If you are in J-1 status & subject to 212(e) waiver but have not yet received the waiver – or have not yet applied for one – can get O-1 petition approved but have to go to your home country to apply for O-1 visa.
- If you already have a waiver, the petitioner can file for a change of status inside the U.S.
- Need I-94 indicating O-1 status before you can work for petitioner.
- O-1 issued for 3 years. Extensions - 1 year if identical position; 3 years if different position.

O-1 Dependents

- Your spouse and dependent children under the age of 21 will obtain O-3 status
 - O-3 status not authorized to work in the U.S.
 - O-3 may study



Are there other nonimmigrant visa options?

Yes.

- Non-cap subject H-1B at non-profit or university
- Cap-subject H-1Bs for private companies not available again until October 2022.
- TN as Scientist – for Canadians or Mexicans
- E-3 for Australians
- H-1B1 for those from Chile or Singapore. Unlike H-1B, not dual intent
- All must be sponsored by employer and timely filed

Immigrants

- “Green card holders” = “permanent residents” = “immigrants”
- Coming to U.S. permanently
- Numerically limited
 - Visa bulletin
 - Priority date
- Can become U.S. citizens after 3 - 5 years



Employment-Based Categories

- EB-1: Priority workers
- EB-2: Advanced-degree professionals & aliens of exceptional ability*
- EB-3: Professional, skilled & unskilled workers*
- EB-4: Special immigrants
- EB-5: Employment creation



* labor certification required unless applying for NIW in the EB-2 category

First Preference: Priority Workers

- No labor certification required for First Preference categories: (EB-1)
 - Persons of “Extraordinary Ability” in Science, Sports, Education, Business & the Arts
 - Outstanding Professors & Researchers
 - Multinational Managers and Executive



First Preference:

Category 1 – Extraordinary Ability (EB-1A)

- Sustained national or international acclaim in science where contributions have made a significant impact on the field and among the very few at top of field
- The highest standard of adjudication
- No offer of employment required
- Document minimum 3 criteria for scientists (same criteria as for O-1)
- *Kazarian* test: Apart from quantitative requirements, subject to qualitative analysis. i.e. final merits test.
- Highly subjective.
- Beneficiary can self-petition.
- Possible to pay expedite fee (Premium Processing) for adjudication in 15 days (\$2500 in addition to current base fee of \$700)

First Preference: Category 2 – Outstanding Professors/Researchers (EB-1B)

- International recognition
- 3 years experience as professor or researcher
- Tenured/tenure-track position or comparable research position with research facility or academic institution, being offered full-time “permanent” research position (postdoc positions do not qualify)
- Offer of employment required
- 2 of 6 criteria: original scientific research, international awards, publications, been written about, judged the work of others, membership in organizations requiring outstanding accomplishments.
- High standard of review and *Kazarian* test applies as well.
- Premium Processing option

EB-2: Advanced-Degree Professionals & Persons of Exceptional Ability

- Advanced degree (or Bachelor's degree plus five years of progressive experience in the field) OR
- Exceptional ability in science, the arts or business
- Labor Certification required unless **National Interest Waiver** obtained



EB-2 (cont'd)

- Criteria for NIW determined by court case *Matter of Dhanasar*.
- What are these criteria?
 - Research constitutes an area of substantial merit & national importance
 - Beneficiary is well positioned to advance the endeavor in which he/she works
 - On balance, it will be in the U.S. national interest to waive recruitment & employment offer
- Easier to qualify for NIW than for EB-1A because *Kazarian* does not apply
- Must have advanced degree in related field OR exceptional ability*
- Premium Processing not yet available

*acclaim, experience, membership, longevity in field, etc.

Spouse and Children of Green Card Applicants

- Dependents are named as beneficiaries in immigrant petitions.*
 - If not yet married, dependents can be included & AOS must be filed for them prior to adjudication of AOS.
 - If Dependents are overseas, possible to file following to join application (I-824) and Dependents will apply for their immigrant visas at the U.S. consulate in the country where they are living.
- *Children must be under the age of 21.**



Evidence & Timing



- All EB-1 & NIW EB-2 petitions are labor-intensive
- Detailed summary of accomplishments & impact of work
- Expert opinion letters including half from independent referees: typically 4-6 letters, depends on strength of the case
- Evidence needed to support all criteria argued
- Evidence needed to support claims on Resume – e.g. papers, citations, reviews, awards, etc.
- Time between initiating & filing depends on time it takes to gather all required documentation
- Adjudication times differ according to where your case is being adjudicated and times are subject to change. November, 2021:
 - NSC (California applicants) EB1: 10-19 months; NIW: 10-15.5 months
 - TSC (Florida applicants) – EB1: 13-27 months; NIW: 13-27.5 months
- If you entered the U.S. in F or J status, need to discuss earliest time to file for green card. USCIS removed 90 rule from policy manual. See policy changes and updates.

Adjustment of Status (AOS)

- Can file concurrently with preference petition if **priority date (PD) is current** *
- Immigrant visa must be available for preference category & applicant's country of birth
- Dependent family members file AOS at the same time
- Filing fee for AOS is currently \$1225 per adult & \$750 per child under the age of 14
- File for Employment Authorization Document (EAD) & Advance Parole travel document (AP) with AOS application
- EAD/AP combo card issued after approx. 10-12 months (NSC & TSC)
- In November 2021, EB-2 is backlogged for Indian and Chinese nationals, i.e. PD not current and no immigrant visas available. Can file I-140 but must examine impact on underlying nonimmigrant status. Travel only allowed on H-1B or O-1 status while pending immigrant.

* See November 2021 Visa Bulletin on next slide

November 2021 Visa Bulletin



Employment-based	All Chargeability Areas Except Those Listed	CHINA-mainland born	EL SALVADOR GUATEMALA HONDURAS	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C	C
2nd	C	15NOV18	C	01DEC11	C	C
3rd	C	22MAR18	C	15JAN12	C	C
Other Workers	C	01MAR10	C	15JAN12	C	C
4th	C	C	15MAR19	C	01APR20	C
Certain Religious Workers	C	C	15MAR19	C	01APR20	C
5th Non-Regional Center (C5 and T5)	C	22NOV15	C	C	C	C
5th Regional Center (I5 and R5)	U	U	U	U	U	U

Travel after Filing for Green Card



- F-1 & J-1 status: must prove nonimmigrant intent each time you enter the U.S. Must wait for “Advanced Parole” (AP) to travel after filing I-140/AOS
- O-1 status: Can travel with I-140 pending, but must have AP if AOS has been filed
- H-1B status: OK to travel outside U.S. without AP. H-1B has “dual intent.” Can return with valid H-1B visa OR AP document.
- When returning to the U.S. with AP document, you will be sent to Secondary Inspection – normal process

Recent Updates and Changes on the Horizon...

- **Visa issuance resumed abroad** but backlogs are extremely long. Need to check Dept. of State website if planning holiday travel abroad and need to apply for visa before returning to the U.S.
- **National Interest Exception no longer applicable since COVID travel restrictions lifted.** Must prove vaccinated and COVID negative
- **F-1 students may file EAD application for OPT online** - can submit forms electronically, check the status of case anytime from anywhere, and receive notices from USCIS online instead of waiting for them in mail.
- In July USCIS policy changed regarding the **ability to change status to F-1 student status more than 30 days prior to start of study program** so can apply six months prior as with other change of status applications. Useful for example to F-2 spouses who may want to study in the U.S.
- In July USCIS also changed policy regarding the 90-day rule – **no longer presumption of fraud or misrepresentation if a person in F-1 or J-1 status applies for a green card within 90 days of entering the U.S.** in a nonimmigrant status that requires non-immigrant intent on entry. Depends on what you told DOS or CBP.
- **U.S. Citizenship Act of 2021** introduced in Congress earlier this year but absolutely **no further discussion** has happened about this
 - F-1 students will be permitted to have dual intent
 - Ph.D. graduates of U.S. universities in STEM field will not be subject to numerical limitations and can apply right away for green cards
 - Unused immigrant visas available in preference categories
 - Elimination of per country limits to be assessed
 - Extensions of status permitted eg. Where STEM OPT will expire and H-1B still pending, can get extension of STEM status to permit continued employment on EAD card
 - Bill includes NO BAN Act that prohibits discrimination based on religion & limits presidential authority to issue future bans.
 - Increases in Diversity Visas from 55,000 to 80,000 (Visa Lottery)

When to Start the Process

What to consider:



- What is your current status – F-1, J-1 or H-1B? Other status?
- How much time do you have left in current status?
- How strong is your C.V.?
- Do you plan to work in academia or industry? If industry, when will you start your job search?
- Are you planning to get married in the near future?
- Do you have children who will soon turn 21?

Questions?

Please type questions in Zoom Chat



Follow up questions:

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THANK YOU, IT HAS
BEEN MY PLEASURE!