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# Immigration Considerations for Entrepreneurial International Students

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# Considerations

- What is employment
- When am I an “employee”
- What types of employment authorization may be available
- Where do I find help

# Employment

- 8 CFR 274a.1(f) defines “**employee**” as an individual who provides services or labor for an employer for wages or other remuneration
- Broad definition of employment: includes any labor or service performed in return for remuneration; which includes anything of value such as food and lodging (see pg. 3, M-274 I-9 Handbook).
- Applicant entered the U.S. as a nonimmigrant student, F-1. The applicant purchased a franchised restaurant in CA. Director found the applicant failed to maintain his nonimmigrant student status and worked without authorization. Matter of Kung (1978)

# Volunteering

- Volunteers may receive certain benefits from the “employer” as long as the work was entered into without any expectation of compensation/benefit and that the compensation/benefit may not have been offered in exchange for the work.
- Volunteering is not appropriate for work/services for which one would normally pay someone (or should pay someone) or one for which someone will be paid in the future

# Employment Options for International Students

- Academic Training (AT)
- Curricular Practical Training (CPT)
- Optional Practical Training (OPT)

# Academic Training

- J-1 non-immigrant visa in a student category
- 18 months for all degree levels
  - Can be used pre- or post- graduation
- Additional 18 months for PhDs (*36 months total*)
  - Can only be used post-graduation
- May be authorized for any job that can be documented as directly related to degree program

# Academic Training - Authorization

- Authorized by MSU OISS
- Process fairly quick
  - 1 – 2 weeks, depending on volume of requests
- Required documentation
  - [http://www.internationalcenter.umich.edu/immig/jvisa/j\\_emplacadrng.html](http://www.internationalcenter.umich.edu/immig/jvisa/j_emplacadrng.html)
- Authorization is employer specific



# Curricular Practical Training

- F-1 non-immigrant visa
- Must continue to maintain a full course of study in F-1 status during the period of employment
- No limit
- Students who have received one year or more of full time curricular practical training are ineligible for post-completion academic training.
- May be used for internships and other off-campus work opportunities **before** completing degree requirements.
  - Job responsibilities must be **integral** to degree program
  - Employment must be part of the student's major course of study

## Curricular Practical Training – Authorization

- Authorized by MSU Office of International Students and Scholars if approved by Academic Department/Academic Advisor
- Process fairly quick
  - 1 – 2 weeks, depending on volume of requests
- CPT course, approved by the Registrar's Office, required for CPT authorization
- Will need employer offer letter with specific information (*dates, location, description, # of hours/wk*)
- Authorization is employer specific

# Optional Practical Training

- F-1 non-immigrant visa
- 12 month limit –
  - Part-time OPT is deducted from the 12-month limit at 50%.
  - Students in an approved STEM field may be eligible for 17 additional months (29 total)
- Usually used for internships and other full time employment **after** completing degree requirements.
- However, pre-completion OPT is an option for students wishing to pursue employment part-time during studies. May be good solution for self-employment eligibility.

# Optional Practical Training

- Job responsibilities must be directly related to degree program
- Self-employment is specifically permitted for students on OPT.
- Must work >20hrs/wk
- May not surpass 90 days of unemployment during OPT authorization period

# Optional Practical Training - Authorization

- Authorized by US Citizenship & Immigration Services (USCIS)
- Process can take up to 3 months
- Required documentation
  - I-765 Application for Employment Authorization
- Authorization is **not** employer specific
  - Job responsibilities must be related to degree program

# Options after Graduation (Non-immigrant)

## Most Common:

- H-1B Temporary Worker
- TN NAFTA Trade National
  - Canadian and Mexican citizens only

## Less Common:

- E-3 - Australian citizens only
- H-1B1 - Chile and Singapore citizens only
- O-1 Extraordinary Ability
- J-1 Trainee

# Employee/Employer Relationship

- **Q: ..... Are there any examples of when a beneficiary, who is the sole owner of the petitioner, may be able to establish a valid employer-employee relationship?**
- A. Yes. USCIS indicates that while a corporation may be a separate legal entity from its stockholders or sole owner, it may be difficult for that corporation to establish the requisite employer-employee relationship for purposes of an H-1B petition. However, ***if the facts show that there is a right to control by the petitioner over the employment of the beneficiary, then a valid employer-employee relationship may be established.***
- For example, if the petitioner provides evidence that there is a separate Board of Directors which has the ability to hire, fire, pay, supervise or otherwise control the beneficiary, the petitioner may be able to establish an employer-employee relationship with the beneficiary.

# The H-1B Cap

- 65,000 H-1B plus 20,000 for US advanced degrees
- Cycle follows federal fiscal year (Oct. 1)
- Does not apply to all employers
  - Extensions, changes of employers
  - Higher Ed & affiliated research institutions; non-profit & government research institutions
  - Working concurrently for both exempt and non-exempt employer
  - Those counted against the cap within the past six years, whether or not they currently are H-1B
  - Those employed “at” an exempt employer working for the benefit of the cap exempt employer
  - Those who can recapture time spent outside of the U.S. during their H-1B petition periods



## Trade Categories

- TN-1/2 Canadian or Mexican Professional
  - Three years, renewable in 3-year increments
  - Work in profession listed on NAFTA schedule
  - Generally requires a Bachelors degree in field
- E-3 Australian Professional
  - 2-year validity; renewable indefinitely
  - Job must be for a “specialty occupation” as for H-1B
- H-1B1 Chile or Singapore Professional
  - 2-year validity; renewable indefinitely
  - 6,400 per year available for professional positions
  - Job must be for a “specialty occupation” as for H-1B

# Additional Non-Immigrant Options

- O-1 Extraordinary Ability
  - Time? (3 years, renewable 1 year at a time indefinitely?)
  - Must show sustained national or international acclaim
- E-1/E-2 Treaty Trader/Investor
  - 2 years; no limit on extensions
  - Must be owner, executive, manager, or key employee and “citizens” of country with qualifying treaty with U.S.
  - Investment: substantial, active, non-marginal

# Employer-Sponsored Permanent Residence (E-PR)

- Length and cost of process determined by type of position
- Typically requires a test of availability of US workers but there are exceptions
- Employee may be able to self-sponsor if extraordinary or in the national interest

# Typical Categories of E-PR Sponsorship

- **EB1**: Priority workers
  - No labor market test required
  - Extraordinary Ability (*Employee may self-sponsor*)
  - Outstanding Professors & Researchers
  - Multinational Managers
- **EB2**: Advanced degree holders & exceptional ability
  - labor market test typically required
    - national interest, nurses & physical therapists, and renown exempt from labor market test
- **EB3**: Bachelor-level professionals
  - Labor market test required except nurses, physical therapists & those of renown
  - No national interest exception
  - Bachelors level professional

## National Interest Waivers

- EB2 - Waiver of labor certification in the National Interest
- Eligible if applicant holds advanced degree or is of exceptional ability; AND work is deemed to be in the national interest
- Ordinarily, job offer and labor certification required for EB2 advanced degree or exceptional ability - waived if job is in the “national interest”
- To establish national interest, must show:
  - employment will be in an area of substantial intrinsic merit;
  - benefit of alien’s skills will be national in scope
  - national interest would be adversely affected if labor certification required

# National Interest Waivers

- Not sufficient to show a shortage of qualified workers in a particular area
- Must also show a record of alien's achievements/ skills
- May be self petitioned
- Portable to new employer or self-employment if still in national interest
- Better chance of success with support from interested government agency
- USCIS will balance contribution of alien against protection of U.S. workforce
- *Obama Administration policy intends to liberalize where job creation is involved*

## EB5 Alien Entrepreneurs

- Investment in a business which creates or saves at least 10 jobs for US workers
- \$1,000,000 investment or \$500,000 in an impacted geographic area with higher unemployment or rural area
- Regional Centers created to permit pooling of investor funds with \$500,000 minimum
  - Permits indirect job creation
- 2 year conditional resident status requiring petition at end to demonstrate funds remain invested and jobs created
- Investment funds must be “at risk” so no guarantee of return of investment permitted
- Investment must be made and business plan must convince USCIS that jobs are likely to be created

# Where to Look for Info

Many sites exist – law firms, AILA, and others:

- [www.uscis.gov](http://www.uscis.gov)
- [www.travel.state.gov](http://www.travel.state.gov)
- [www.aila.org](http://www.aila.org)
- <http://oiss.isp.msu.edu/>