

Disclaimer: this document should not be relied upon as specific legal advice. However, it is based on 35 years of experience in the field of U.S. immigration law.

Background on sponsoring scholars, researchers, journalists, and professors

Prepared by Professor Lenni B. Benson, New York Law School

Consultant to Immigrant Arc, www.immigrantarc.org

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Educated professionals are at great peril as the Taliban takes control of Afghanistan. As of this writing the U.S. Embassy staff have evacuated and it is unclear if commercial flights will resume. The main focus of this summary is meant to explore a possible alternative to evacuation and refugee processing for educated people who wish to leave Afghanistan and settle in the United States. Many creative options are possible. Please read on.

The Requirement of Temporary Intent

One of the key concepts in U.S. law is that an individual seeking to enter the United States must prove they have temporary intent if they are coming as an exchange scholar or student. These visa categories are usually referred to by the subsection of the statutory law. There are dozens of temporary categories and all have their own requirements and procedures. But only a few have a formal statutory waiver of the temporary intent requirement. For people who are afraid of remaining in Afghanistan, it may be wise to fully explore these categories and whether the person is eligible before relying on the traditional exchange scholar (J-1) or foreign student (J-1 or F-1).

An Exception—the H-1B Temporary Visa

One of the categories that allows this exception of the temporary intent requirement is called the H-1B or nonimmigrant visa for specialty occupations. A specialty occupation is a profession that requires at least a bachelor's degree. The government recognizes professors, academic researchers, writing instructions, and many other occupations as specialty occupations because the U.S. based employer requires formal education and training to perform the job.

You may have heard about H-1B petition caps for *new hires*, but happily, Congress made an exception for nonprofit institutions that offer post-secondary school education. There are several other exceptions: research institutions and governmental research sponsorship.

A four year college that is a nonprofit or state run institution is exempt from the limits on this visa category.

The Requirement of a Travel Document

For people who are outside of the United States, even when approved as a beneficiary of a nonimmigrant visa category, the individual must obtain a “visa stamp” at a U.S. consulate abroad. There

are exceptions. We are advocating for the Department of State to establish clear procedures to clear a path to visa waiver processing and to allow people to board commercial flights with an approval of the nonimmigrant sponsors petition. This is still unclear.

If an Afghan citizen has a passport and can enter a third country, it may be quite possible to apply for the H-1B visa stamp at the U.S. consulate in that third country. Afghan citizens have some options to travel to places such as India or Pakistan with electronic visa processing. As of this date, 8.31.21, the State Department has only announced that permanent visa processing will take place in Doha, Qatar.

Still, the situation may change and if the U.S. is able to return or arrange for other alternatives, pursuing the H-1B petition approval is a first, essential step.

The Employer's Sponsorship Process

Congress requires that employers offer the prevailing wage for the position but there is no requirement of proving a labor shortage. Obtaining the prevailing wage determination requires a filing with the Department of Labor. After that is secured the sponsor may file with the U.S. Citizenship and Immigration Service (USCIS). There are fees for the petition and adjudication can be slow. There are expedited fees to try to speed adjudication. This document is not the place to explain all the steps in the process. If your institution is interested and wants to learn more, we are happy to share more information.

Several universities offer helpful outlines of the H-1B process and I have put links here to those existing materials at excellent schools.

<https://oiss.yale.edu/immigration/h-1b-temporary-worker/scholar-overview> Yale University

<https://isso.columbia.edu/> Columbia—general section on foreign nationals studying or working

What about the J-1 Scholar option?

This is a very flexible program where an approved host institution can send documents allowing a scholar or professor to go to a U.S. consulate to get the J-1 Stamp. The burden will be on the applicant to say they will depart the United States at the end of the authorized exchange. These can vary in length and if your institution already uses the J-1 your international student and professor office likely has established guidelines.

If the State Department is generous, they may approve the visa stamps for new exchange scholars from Afghanistan and once the individual is here, he or she may want to explore longer term options. But at the time of application, the individual must understand that they will have to seek ways to extend their stay or switch to another visa category. People should be properly counseled and prepared for the visa stamp interview.

The biggest advantage of this category is that the host school controls the issuance of who qualifies. If your institution does not have its own J-1 program it may be possible to use an umbrella organization or to design a joint appointment with a university or college that already has this program.

<https://www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors/exchange-visitors>

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Other Options

There are many creative options and I have quickly summarized some visa categories here. But the key point is that if an employer is willing to be a sponsor, there is likely a strong opportunity to aid an educated Afghan citizen.

Some business visa options

J-1 Exchange students or scholars (requires temporary intent); may be employed by sponsor and spouse can receive work authorization

F-1 and M-1 students, requires self-sufficiency or scholarship (requires temporary intent). Limited work options

H-1B capped and quota used for this year **unless** the job is with a post-secondary educational institution (other than a for profit college), an organization affiliated with an educational organization, research orgs and government research orgs. No temporary intent required. Sponsor must file a petition and prove ability to pay prevailing wage for a professional job requiring the equivalent of a bachelor's degree. Petitions have fees but can be expedited. Work authorization also for spouses.

L-1--intracompany transferees. Purchase of business in Afghanistan creates an affiliated company and the U.S. based firm can sponsor managers, executives and those with specialized knowledge. Some part of the business must continue to operate abroad. Also a path for some to permanent residence in highest priority. Worth exploring for those who were employed at high levels or in international businesses. No temporary intent required. Work authorization possible for spouses. Some large international corporations already have "blanket L-1" approvals that could be amended to include new affiliated entities that operated within Afghanistan.

Some additional categories.

The "I" visa for journalists. Must be employed or independent contractor for a foreign based news organization. Temporary intent required but perhaps not as strict.

O visa for extraordinary ability in arts, science or business. An entertainment or sports agent can be the sponsor. O-2's are those who support an artist. E.G., architect or artist can bring her studio team. Temporary intent technically required but not usually emphasized due to high skill levels.

Q visa, a short term visa for cultural exchange. Originally designed for Epcot Center. Pretty flexible. Temporary intent required.

There are dozens of temporary categories. Every person deserves an assessment.

Permanent Options

1. Employment Based categories are open for most occupations. Some require a test of the U.S. labor market but not all. No quota delay, but paperwork and processing delays can take time. Spouses and minor children come along.

- a. Here are a few examples of jobs that are regularly certified: financial analysts; stockroom clerks; specialty cook; live in nannies; math or science teachers.
- b. There are also really great open employment based categories for researchers. Just need a business that has 3 dedicated researchers offering a job to an outstanding researcher. Doesn't have to be a university. Example, a laboratory or market research firm. But the credentials of the beneficiary will be scrutinized.
- c. As mentioned, people who are transferring to an affiliated business who have at least one year of employment abroad as a manager or executive is labor market test exempt.

2. Family Based Categories for those who have a parent, spouse or brother or sister in the US but the delays for some categories are many years.

Spouse U.S. citizen, only paperwork delays

Parent is a U.S. citizen and the beneficiary is over 21, delays of 4 to 6 years.

Brother and sister sponsoring -- 14 to 18 years delay.

3. Parole and Adjustment: The U.S. government has a generous provision allowing some people to enter the U.S. without a visa. This is called "parole". For those who are paroled into the United States, so long as the conditions of parole are met and status of parole renewed, traditionally DHS allows a person to later adjust status. For those who enter with temporary visas, the timing needs to be more closely administered. As of this date, it is unclear how many people will be granted parole who don't have a pre-existing, direct tie to the U.S. government service.

4. Temporary Protected Status: It is very possible that for those Afghan nationals in the United States at the time of designation, a grant of work authorization and status will be given under the Temporary Protected Status (TPS). This can be comforting but is a dead end as it is not a parole and is in and of itself not a path to permanent residence. It would be wise to help Afghans have a long term plan even if TPS is authorized.

Conclusion:

This is a very brief introduction. Please feel free to email me at lenni.benson@nyls.edu. My cell is 917 596 3523. I am offering my aid pro bono. I am also working with Immigrant Arc to find other nonprofits and pro bono counsel who will aid in the process.

We can do this. We must try.