

“You’re not from around here are you?”

Update on Immigration Law Changes and Other Issues Related to Hiring Foreign Workers.

by

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May 27, 2010

I. Introduction

Comprehensive immigration reform is at the forefront of the nation’s legislative agenda. It is a topic sparking heated debates and radical policy shifts across the country. In the midst of this political scene, U.S. employers continue to hire foreign workers, using many of the tools outlined below. The following provides a summary of the visa types and processes most commonly utilized by U.S. employers, as well as a brief discussion of the most recent immigration changes happening at the time of this writing.

II. H-1B Specialty Occupation Visas

The H-1B category is set aside for foreign workers in “specialty occupations” whose positions in the U.S. require at least a bachelor’s degree. This is a widely used category among many industries. The number of H-1B visas issued each fiscal year is limited to 65,000, plus an additional 20,000 allocated to foreign workers with a Master's or higher level degree from a U.S. academic institution. Each year, the first date for filing H-1B petitions is April 1, for positions

that will begin on or after October 1 (unless the petitioner is “cap-exempt,” in which case these deadlines do not apply). As of the date of this writing, the annual cap has not been reached and H-1B visas are still available. This is in stark contrast to the situation two years ago and for several years before that, where so many petitions were filed on that first day that the United States Citizenship and Immigration Services (“USCIS”) implemented a lottery system to determine which petitions would be considered for those 65,000 visas.

The H-1B visa is job and employer specific. This means that there must be a job offer, and the position must require specific qualifications and/or skills. An amended H-1B petition must be filed whenever there is a “material change in the terms and conditions of employment” which affects the H-1B alien’s eligibility for H-1B status. The initial period of stay is three years. The total stay in H-1B status is limited to six years (with some exceptions). After six years, H-1B alien must depart the U.S. for at least one year before re-entering the U.S. on another H-1B visa unless the person qualifies for some other immigration status.

If an H-1B visa holder transfers to a new employer, a new H-1B approval is required. However, under The American Competitiveness in the Twenty-First Century Act of 2000 (“AC21”), a current H-1B visa holder may change employers and begin working for the new employer upon the filing of a new H-1B petition with the USCIS. The H-1B holder does not have to wait until the petition has been approved. In order for an H-1B worker to be eligible to use this provision, the new petition must be nonfrivolous, and the worker must be a nonimmigrant admitted to the U.S, not have engaged in unauthorized employment before the petition was filed, and in an unexpired period of stay when the petition is filed.

III. L-1 Intracompany Transfer Visas

The L-1 visa category is a tool available to international companies who seek to temporarily transfer a foreign employee to their U.S. operations. The employee may be coming to work in one of two capacities: a manager or executive (L-1A) or an employee with “specialized knowledge” (L-1B). A specialized knowledge employee is someone who has special knowledge of the company product and its application in international markets, and advanced or proprietary knowledge of the company’s processes or procedures.

To qualify for an L-1 visa, the employee must have been continuously employed (full-time) by the foreign employer for at least one year of last three. The foreign entity and the U.S. entity must have a certain corporate relationship as set forth by the applicable regulations. In addition, both entities must continue to do business in the U.S. and in at least one other country during entire period of transfer.

L-1 visas are initially granted for three years. L-1A visas can be extended in two year increments for a total period of up to seven years, and L-1B visas can be extended for a total period of up to five years. After that, the worker must depart the U.S. for at least a year before becoming eligible for either H or L status again.

IV. TN Professional Status

TN (Trade NAFTA) status is available to certain professional Canadian and Mexican citizens who work in a profession covered by the North American Free Trade Agreement (NAFTA). Covered professions include, among others, accounting, architecture, engineering, forestry, graphic design, land surveying, management consulting, mathematics, social work, urban planning, medical professions, science and teaching.

Canadian applicants may apply directly at the port of entry by presenting appropriate supporting documentation. Mexican applicants may apply at a U.S. consulate. As of October 14, 2008, USCIS implemented a rule increasing the maximum period of stay in TN status from one year to three years at a time. Thus, eligible applicants may now seek initial periods of entry and extensions of stay in three-year increments. Unlike many other nonimmigrant visa categories, there is no outside limit on the total period of stay TN professionals, meaning that so long as an individual continues to meet the TN criteria, he or she may continue to request extensions of his or her TN status indefinitely.

V. B-1 Business Visitor Visas

The B-1 business visitor visa is for temporary trips to the U.S. to conduct business on behalf of a foreign employer. The major restriction on this category is that it may not involve any productive employment in the U.S., including salaried employment or independent contractor arrangements. Legitimate activities in B-1 status include things such as negotiating contracts, soliciting sales, taking orders, procuring goods for use outside the U.S., meeting with business associates, attending conferences or seminars, and conducting independent research. As a general rule, the business activities must be associated with international trade or commerce.

To be eligible for a B-1 visa, an individual must intend to depart at the conclusion of his or her stated business, maintain foreign residence, make adequate financial arrangements to cover his or her trip, and only engage in permissible activities.

B-1 visas are normally granted a period of entry long enough to conduct the stated business. Nationals of certain countries do not need to obtain a B-1 visa for business visits of ninety days or less, under the Visa Waiver Program.

VI. Employment-Based Green Cards

Permanent resident status (also known as a “green card”) confers on foreign nationals the right to live and work in the United States without time limitations or many other restrictions. One way to obtain permanent resident status in the United States is through employment, usually based on a job offer from a U.S. employer. The sponsoring employer files a petition with the USCIS to have the alien, who is the “beneficiary” of the petition, classified as a person qualified to immigrate to the United States. Once the alien is approved to immigrate, the alien must then apply for permanent resident status at a U.S. consulate outside the U.S., or if the alien is in the U.S. and is eligible, by “adjusting status” to that of a permanent resident.

There are generally three steps to the permanent resident process in the employment context. In most cases, the first step is to obtain an approved labor certification from the U.S. Department of Labor. Next the employer files with the USCIS an immigrant visa petition in one of three employment-based categories, depending on the type of job and the type of worker. Finally (either upon approval of the visa petition or concurrently with its filing, depending on the circumstances of the individual case), the foreign worker applies for permanent resident status, either by adjusting status without leaving the U.S. (if the foreign worker is physically present in the U.S. and has remained in valid legal status since his/her entry) or by consular processing at a U.S. embassy or consulate abroad (if the foreign worker is not in the U.S., or is not in valid legal status).

VII. Changing Laws

Generally speaking, immigration rules, procedures and policies are constantly changing. However, comprehensive immigration reform may be in this country's near future, as demonstrated by several recent developments, two of which are discussed briefly below.

A. REPAIR Proposal for Comprehensive Immigration Reform

At the time of this writing, an immigration reform proposal has recently been introduced to the public. The proposal is known as the REPAIR Proposal for Comprehensive Immigration Reform. A brief summary of the contents of the proposal is attached to this article. The summary was prepared by the American Immigration lawyers Association and provides a detailed breakdown of each prong of the proposal.

B. Arizona's Senate Bill 1070

Another controversial immigration topic at the time of this writing is Arizona's new law aimed at enforcing federal immigration laws and deterring illegal entry and presence of undocumented aliens. Regardless of one's personal stance on this law, it is clear that it is a drastic measure, the ramifications of which are as yet unknown. This new law has gripped the nation's attention and has federal lawmakers debating over how to respond.

VIII. Conclusion

Immigration laws are complex and ever changing, but can provide useful mechanisms for U.S. employers seeking to employ foreign workers. The visa categories and processes identified above are those that are most useful in the majority of situations, but it is always wise to discuss your particular facts with an immigration attorney before proceeding with filing a visa petition with the USCIS.