

Rose Carson Kaplan Choi & White LLP

ATTORNEYS AT LAW

The H-1B visa status is one of the most flexible and useful temporary working visas for foreign national employees. It has become an invaluable "arrow" in the quiver of Human Resources professionals, particularly at high technology companies. Below are some answers to some frequently asked questions regarding this nonimmigrant visa status.

WHAT IS THE H-1B VISA?

The H-1B is a temporary working visa for foreign nationals who are members of a "specialty occupation". The Citizenship and Immigration Service (CIS) basically defines a "specialty occupation" as an occupation where: 1) the prospective employee has at least a Bachelors degree or equivalent; and, 2) is working in a field that requires that type of degree.

ARE THERE ANY OTHER REQUIREMENTS?

Before filing an H-1B petition the employer must obtain an approved Labor Condition Application (LCA) from the United States Department of Labor (DOL). The LCA requires the employer to certify that it will pay the H-1B employee the "required wage rate", which is either the greater of the "prevailing wage" or the employer's "actual wage" for the position. A prevailing wage figure can be obtained by sending a request to the applicable State Workforce Agency (SWA), such as the Employment Development Department (EDD) in California. The employer can also document that it is paying the prevailing wage through an independent salary survey. Federal law also requires an employer who files an LCA to comply with complex posting and record keeping requirements.

FOR HOW LONG CAN AN H-1B VISA BE OBTAINED?

The H-1B can be approved for an initial period of three years, and can be extended for an additional three years, for a general maximum of six years. There are however circumstances where an H-1B visa can be extended beyond six years if the foreign national has had a Labor Certification application pending for at least one year. In those circumstances, the H-1B visa is extended in one year increments until he or she obtains U.S. permanent residency.

WHY IS IT CALLED AN H-1B VISA?

This designation comes from the section of law in the Immigration and Nationality Act that covers this type of visa. It was originally called an H-1 visa. It was changed to H-1B when Congress created a special work visa category for foreign nurses, H-1A. When the H-1A category came into being the government changed the standard H-1 visa to an H-1B designation. Subsequently the H-1A visa category has been eliminated, so we are left with the H-1B classification.

WHAT IF THE H-1B VISA HOLDER IS MARRIED?

Spouses and unmarried children (under age 21) of H-1B visa holders are given H-4 status, which is valid for the same amount of time as that given to the H-1B visa holder. The H-4 is a non-work status.

WE HAVE FOUND A CANDIDATE WHO HAS AN H-1B VISA ALREADY WITH ANOTHER COMPANY, CAN SHE/HE COME TO WORK FOR US?

Yes, in a relatively short time frame. H-1B work authorization is company-specific. The foreign national candidate can however start work with your company once you have proof that you filed your own H-1B visa petition for them with the CIS. This is called the "portable" H-1B provision. This is only available if they are on H-1B status for another company and will be getting an H-1B to work for your company. If they are on another visa status, e.g. F-1 student visa, or L-1 company transfer with another company, or are currently outside the USA, they cannot work for your company until your H-1B petition on their behalf is approved by the CIS.

WHAT DOCUMENTS MUST WE HAVE FROM THE CANDIDATE TO LEGALLY EMPLOY HIM?

In order to begin work with a company, an employee must have authorization to work for that company in the United States. The employee must complete Form I-9, the Employment Eligibility Verification Form, within three days of initially reporting to work. An H-1B employee's proof of work authorization for a given employer is normally the H-1B approval notice and accompanying Form I-94 that is issued by the CIS. In "portable H-1B" cases, your company can complete the I-9, and accordingly employ the candidate, with evidence that your H-1B petition for them has been filed, such as the CIS fee receipt.

WE HAVE FOUND A CANDIDATE WHO RECENTLY GRADUATED FROM A U.S. SCHOOL WITH A BACHELORS DEGREE, AND WHO WAS GIVEN "PRACTICAL TRAINING" BY THE CIS. CAN HE/SHE COME TO WORK FOR US?

In contrast to the above example, post-completion practical training given to F-1 students is not employer-specific. In this case the employee could come to work for your company immediately provided that he/she has an Employment Authorization Document evidencing his/her right to accept employment in the United States.

Practice Tip 1: H-1B Status Must be Approved before Practical Training Expires

In order to continue to employ an individual who is currently in practical training, your company would need to obtain an H-1B visa approval for her/him *before* the practical training work authorization expires.

WE FOUND A POTENTIAL CANDIDATE FOR WHOM WE WANT TO GET AN H-1B, BUT HE/SHE DOES NOT HAVE A DEGREE. CAN WE GET HER/HIM AN H-1B DESPITE THE LACK OF A DEGREE?

In some cases, even if the prospective employee lacks a Bachelors degree, he may be able to qualify for an H-1B on the basis of a degree evaluation based on a combination of professional experience and education. In this area, the CIS applies a "three-for-one" rule. For each year of college someone lacks, the CIS generally requires three years of "professional level" experience in order to qualify for an H-1B. Thus, someone with no university level education and 12 years of professional-level work experience could conceivably qualify for an H-1B visa.

Practice Tip 2: Documenting the Equivalent of a Bachelors Degree

This type of a case can take longer to document, as it may require extensive evidence of the candidates college-level education and professional work experience. Such evidence may include detailed experience verification letters from past and/or present employers, and transcripts, certificates and/or course descriptions for all college classes completed and professional courses attended. Professional credentials evaluators may also take longer to issue an opinion in this type of case and the fees for such a service may exceed the standard foreign degree equivalency fee.

WHO IS ELIGIBLE?

An H-1B visa is a temporary nonimmigrant visa available to foreign nationals who have been offered employment in the United States in a professional position. The two basic criteria necessary to qualify for an H-1B visa are:

- The professional position offered requires at least a bachelors degree in a specific field or fields (i.e., accounting); *and*
- The individual for whom the H-1B visa is sought holds at least the minimum degree required (bachelors or higher, or its equivalent) in the given field(s).

Practice Tip 3: What is meant by “nonimmigrant visa”?

A nonimmigrant visa entitles a foreign national to enter the United States for a limited duration pursuant to the terms of admission as defined by the given visa class. In the H-1B context, this means that the individual applicant should only evidence an intent to remain in the United States for limited duration and purpose as controlled by the terms of the H-1B visa application.

Practice Tip 4: Six Year Limit on H-1B Visa Status:

An individual can generally remain in the United States for a maximum of six consecutive years in H-1B visa status. In addition, any time spent in the United States in L-1 visa status counts against the six-year limit. Therefore, if you are looking to hire an individual who is employed in H-1B or L-1 status by another company, it is necessary to determine the individual's total time in the United States in H or L status in order to determine the total time that the employee can work for your company in H-1B nonimmigrant visa status. If however an individual has had a labor certification pending for more than one year, they may be able to extend their H-1B beyond the six year limit.

Another benefit of the H-1B visa category is that it also allows for what is referred to as “dual intent.” The dual intent doctrine allows for an individual to pursue permanent residency in the United States while in H-1B nonimmigrant visa status.

Practice Tip 5: “Dual Intent” allowed for H-1B visa holders:

An individual in H-1B visa status can have both nonimmigrant and immigrant intent. This allows an H-1B visa holder to lawfully pursue U.S. Permanent Residence while in the United States.

H-1B TIMING ISSUES:

It is important to consider timing issues when hiring an individual who requires an H-1B visa. The amount of time can increase where the individual does not hold a bachelors degree but can show the equivalent of a bachelors degree through education, training and experience and where a State Workforce Agency (SWA) must be consulted to determine the “prevailing wage” for the position in question.

Practice Tip 6: The H-1B Cap:

Under the federal immigration law, the CIS can issue 195,000 new H-1B visas per fiscal year for 2002 and 2003. In fiscal 2004 this number however reverted back to 65,000 per year. The U.S. Government's fiscal year is from October 1 through September 30. In recent years, this cap has been reached prior to the end of the fiscal year and no new H-1B visas were issued for several months during the year. This may again in the future be an important consideration for summer and fall hiring. In addition, it may be prudent to file H-1B petitions early for employees in F-1 practical training whose practical training ends in August, September, or October.

Practice Tip 7: Extensions of H-1B Stay

Where the H-1B petition is being filed to extend the stay of a current employee in H-1B status, the extension must be filed with the CIS prior to the expiration of the current approval. The employee is then granted an automatic 240 extension of work authorization while the petition is pending. The employee should not leave the United States, however, during the pendency of the H-1B extension petition.

Practice Tip 8: Export Control Laws

The Export Administration Regulations (EAR), as issued by the U.S. Department of Commerce, may require an employer to obtain an export license in order to employ certain foreign nationals, depending on the technology involved and the nationality of the prospective employee. Violations of the EAR may result in revocation, suspension or denial of a company's future export privileges as well as fines or possible criminal charges. In order to avoid such penalties it is prudent to consult with your corporate counsel and / or outside legal specialists regarding the technologies and countries covered by the EAR. Where an export license is necessary for the hiring of a foreign national, it is also prudent to condition employment on the receipt of an export license for the employee.

Please note that this memorandum provides general information and is not intended to be a substitute for specific legal advice regarding an individual matter. As the immigration laws are constantly changing, we strongly encourage you to work closely with legal counsel when pursuing any employment-based immigration benefits. If we can be of further assistance to you or your employees regarding this or any other area of Corporate Immigration Law, please contact our office directly at (650) 617-8888.