The H-1B Specialty Occupation Visa

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This article will give an overview of the H-1B Specialty Occupation Visa as well as recent changes that have taken place with this visa.

The H-1B visa is commonly used by United States Employers (must have a U.S. Taxpayer Identification Number) who seek employees for specialty occupation positions where the employers cannot find these types of employees within the U.S. job market. The employers are obliged to look offshore in order to fill these specialty occupations.

This is where the H-1B visa comes in. In this modern day of advance computer programming and technology, finding employees of high caliber for certain specialty occupations is of the utmost importance for many U.S. Employers.

I. CRITERIA FOR THE H-1B.

In order to qualify for the H-1B visa, several criteria must be met. First the position for which an H-1B Visa is being sought must be within a specialty occupation. The position must be one which would normally require at least a United States bachelors degree or higher. The foreign national (nonimmigrant) being sought for the position should hold a U.S. Bachelor's degree or higher (or its foreign equivalent) in the specific specialty of the position being hired for. It should be noted that professional licenses as well as experience within the specialty occupation being hired for can qualify as studies towards a bachelor's degree or higher.

II. STEPS IN SEEKING AN H-1B VISA.

The necessary steps in seeking an H-1B Visa are as follows:

The employer first obtains a prevailing wage from the department of labor of the state in which the employer is domiciled or from an independent survey. The employer then files a labor condition application ("LCA") with the United States Department of Labor ("DOL"). The LCA must be certified by the DOL before the employer can file the H-1B Petition with the United States Citizenship & Immigration Service ("USCIS") with the Department of Homeland Security. The primary purpose of the LCA is to prevent the undercutting of the U.S. employment market through the hiring of less expensive foreign professional workers.

The employer must attest that the H-1B nonimmigrant will be paid at least the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question or the prevailing wage level for the occupation in the area of employment, whichever is higher. The employer must attest that employing the H-1B nonimmigrant will not adversely affect the working conditions of workers similarly employed in the intended area of employment. The employer must attest that there is no strike or lockout at the time of filing the LCA and that if a strike or lockout occurs subsequent to the filing of the LCA, the employer will notify the DOL within 3 days of the event and the subject LCA will not be used until the strike or lockout has ceased. If the H-1B worker's employment is terminated prior to the expiration of the authorized period of H-1B status for that worker, the employer must pay the return transportation, even when the cause of termination is beyond the employer's control, unless the alien terminates the employment relationship in which case the employer may be released from said obligation.

The employer must attest that notice of filing the LCA has been provided to the bargaining representative or, if there is no bargaining representative, a notice of the filing has been posted or will remain posted for 10 days in at least two conspicuous locations where H-1B nonimmigrants will be employed. In addition to completing the LCA, the employer must also maintain wage and

hour records, as well as information concerning work conditions for all similarly situated employees to be provided, upon request, to the DOL.

Sanctions for failure to follow DOL and LCA procedures and rules can include back pay, civil fines and disqualification of USCIS approval of employment based immigration petitions such as H-1B non-immigrant petitions. Once the LCA is approved by the DOL, the employer can then file an H-1B Petition with USCIS.

The H-1B petition package includes various USCIS forms that must be accurately completed to USCIS specifications. Furthermore, a great deal of supporting letters, documentation, and other materials are necessary in order to have the petition approved. If USCIS is not satisfied with the petition, it may request more information, issue a notice of intent to deny, or deny the petition. Appeals of denied petitions are available but the appeals process can be painstakingly difficult. That is why it is essential to submit a proper, thorough and complete petition package to USCIS that will avoid any of the above mentioned hitches. Upon approval of the H-1B Petition by USCIS, the employer can either have the approved petition sent to the foreign consulate where the foreign national is located for the foreign national to have his or her visa processed. If the foreign national is lawfully within the United States under a visa which would allow him or her to change status to the H-1B Visa, the foreign national may do so in the United States. However, once he or she leaves the United States, he or she will have to go to a U.S. consulate abroad to obtain an H-1B visa in order to re-enter the United States. This is called consular processing and while it can be a straightforward process, it can become complex and serious. Therefore, H-1B employers and employees should not take consular processing lightly as it can be as difficult, if not more, than USCIS processing.

III. TERMS OF STAY IN THE U.S. UNDER H-1B STATUS

An alien may be permitted to be in the United States in H-1B status for a total of six (6) years. Initial admission may be for a maximum of three (3) years, with an extension of up to three (3) years. An additional year beyond the 6 years may be granted by the Immigration Service if the employer has initiated the permanent residence process for the employee and the process is far enough along. An alien is eligible for a new six (6) year period on an H-1B status after living outside of the United States for at least one (1) year. A proposed change in employers or a material change in employment necessitates the filing of a new or amended H-1B Petition. If the employer terminates the services of the employee prior to the expiration of the H-1B visa, the employer is responsible for paying for the employee's return transportation to his or her last foreign residence.

The H-1B employee's spouse and unmarried children under the age of twenty-one (21) may be granted H-4 status within the United States. An H-4 visa holder is not permitted to work in the United States, however, he/she may attend school.

IV. H-1B QUOTA .

For Fiscal Year 2004 (October 2003 to September 2004), there were 65,000 new H-1B visas available. This 65,000 quota was reached by February 2004. For Fiscal Year 2005, there are slated to be 65,000 new H-1B visas available under the quota, and the Immigration Service has permitted employers to file new H-1B petitions as of April 1, 2004, however the start date for these H-1B employees (assuming their H-1B petitions are approved) will not be until October 1, 2004 (the first day of FY2005). Therefore, it is important for employers to file for new H-1B employees as soon as possible to avoid being locked out of the FY2005 quota (and thus having to wait until 2006 to apply).

V. CONCLUSION

In conclusion it is of the utmost importance that both the H-1B employer as well as the H-1B

employee strictly follow the rules of law and regulations as well as the procedures for H-1B status. Doing so will provide a benefit not only to the U.S. company but to the foreign employee as well as to the U.S. economy.