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U.S. Immigration
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Immigration Dashboard for HR Professionals
U.S. Work Visa 101

This provides information concerning basic understanding of the U.S. immigration system and principles of work-related immigration law in assisting U.S. employers and foreign workers to navigate visa options and maintain lawful immigration or non-immigrant status throughout the employment relationship.

GOVERNING AUTHORITIES

The U.S. immigration law is intricate, complex, and overlapping in regulating and restricting the employment of foreign workers to provide labor protections for American workers. Several government agencies regulate immigration laws:

- Department of Homeland Security (DHS) – three primary agencies exercise jurisdiction over immigration matters: U.S. Citizenship and Immigration Services (USCIS), U.S. Customs & Border Protection (CBP), and U.S. Customs & Immigration Enforcement (ICE).
- Department of State (DOS) – the Visa Office and U.S. consular officers at American embassies and consular posts abroad.
- Department of Labor (DOL) – the Employment and Training Administration (ETA) and the Employment Standards Administration (ESA) Wage and Hour Division (WHD)
- Department of Justice (DOJ) – the Executive Office of Immigration Review (EOIR), Office of the Chief Administrative Hearing Officer (OCAHO) and Office of Special Counsel (OSC) for Unfair, Immigration-Related Employment Practices play important roles in the immigration system.

NONIMMIGRANT VISAS

There are various forms of non-immigration visas available to accommodate U.S. employers and foreign nationals who want to come to the U.S. on a *temporary basis.*

The most common non-immigrant visa categories used by U.S. businesses to hire foreign nationals include the H-1B (specialty occupation), L-1 (intracompany transferee), and E-1 and E-2 (treaty trader and investor) classifications.

Other useful categories authorizing employment for foreign nationals include: TN professional-worker classification for Mexican and Canadian citizens under the North American Free Trade Agreement; O-1 visa for “Extraordinary Ability Aliens” in Business, Science and Arts; P categories for Professional Athletes, support personal and certain artists; and a sub-category of F-1and J-1 academic students, scholars who are issued an EAD.

- **LCA**

A prospective U.S. employer must submit a labor condition application (LCA) to the Department of Labor (DOL) before filing a petition with the United States Citizenship and Immigration Services (USCIS) to classify the foreign employee as a temporary worker.

By submitting a completed LCA, the employer attests to the following:

1. Employment of the noncitizen will not adversely affect the wages and working conditions of workers similarly employed in the area of intended employment.
2. The employer will pay the noncitizen the higher of the actual wage or the prevailing wage for the occupational classification in the area of intended employment.
3. The employer will notify employees that an LCA is being filed.
4. At the time the application is signed, there is no strike, lockout, or work stoppage related to a labor dispute in the occupation.

Some of the supporting documentation which is sufficient to prove the validity of the attestation made in the LCA filed with the DOL must be included in a "Public Examination File" kept at the employer's principal place of business or the location at which the nonimmigrant worker will be employed. The LCA is valid for the period of employment up to a maximum of three years.

Note that the DOL do not accept the LCA more than 6 months before the beginning date of employment. In case, the employer obtains a prevailing wage determination from the State Employment Security Agency, the employer should submit the LCA within 90 days.

If the DOL certifies the LCA, the U.S. employer then submits the Petition for a Nonimmigrant Worker with USCIS along with the LCA certified by the DOL and other supporting documentation to USCIS.

- **H-1B Specialty Occupation**

The H-1B visa is a temporary non-immigrant employment visa for highly educated foreign professionals in "specialty occupations" that requires at least a bachelor's degree or the equivalent. The visa is valid for three years with the option to renew for an additional three years for a total of six years. H-1B employers may sponsor H-1B workers for immigrant visas (green cards). The H-1B visa is currently capped at 65,000 per year, with 20,000 additional visas for foreign professionals who graduate with a Master's or Doctorate from a U.S. university. In recent years, the limit has been reached days after the visas are made available (April 1 of each year) as the number of U.S. employers seeking highly skilled foreign professionals has drastically increased and far outstripped the limited pool of H-1B visas available.

H-1B employee may be admitted for a period of up to three years. The time period may be extended, but generally cannot go beyond a total of six years. The H-1B visa holders' spouse and unmarried children under 21 years of age may seek admission in the H-4 classification. Family members with the H-4 visa may not engage in employment in the U.S.

- **E-2 Treaty Investor**

The E-2 visas allow the U.S. business to hire foreign nationals of a treaty country, with which the U.S. maintains a treaty of commerce and navigation if foreign nationals are investing a substantial amount of capital in a U.S. business. Certain employees of such a foreign investor or of a qualifying organization may also be eligible for this classification.

To be eligible for an E-2 visa, foreign entrepreneurs/investors must prove their direct investment in a bona fide U.S. enterprise and be from a country that has a treaty of commerce and navigation with the U.S. The initial period of stay in the U.S. is up to 2 years and the visa can be extended or renewed the period of stay in 2 years increments. Family members of the E-2 visa holders may seek E-2 nonimmigrant classification and they may apply for work authorization in order to work.

- **L-1A/B Intracompany Transferee**

L-1 work visas are available for foreign nationals transferring from a company abroad to work in the U.S. for a related company. To be eligible, the foreign national must hold an executive or managerial position, or be a professional employee with specialized knowledge about company products or processes. The L-1B classification allows a U.S. employer to transfer a professional employee with specialized knowledge relating to the organization's interests from one of its affiliated foreign offices to one of its offices in the U.S. It also allows a foreign company, which does not have an affiliated U.S. office, to send a specialized knowledge employee to the U.S. to establish one.

The initial period of stay in the U.S. is up to 3 years (1 year when it is for a new office petition). The visa can be extended in up to 2-year increments. However, the maximum period of stay is 7 years for managers and executives and 5 years for specialized knowledge employees. The L-1 visa holder's spouse and unmarried children who are under 21 years of age may seek admission in L-2 nonimmigrant classification and they may apply for work authorization in order to work.

- **Change of Status**

If nonimmigrant foreign employees need to change the purpose of their visit while in the United States, they must file a request with USCIS before their authorized stay expires and before they lawfully begin to engage in the activities they want to pursue. Foreign nationals should apply as soon as they determine the needs of changing their nonimmigrant category to a different one. Note that until the request is approved, they cannot change their activity under the nonimmigrant category in which they were admitted into the United States.

- **I-94 (arrival/departure record)**

Nonimmigrant foreign employees and their employer must pay heed to Expiration Dates of their I-94. When they enter into the U.S, the inspecting immigration CBP officer confers the nonimmigrant foreign individual's' admission to the U.S. and "status" on an entry card (Form I-

94) at the U.S. port of entry. The expiration date on Form I-94, not the visa expiration date, governs the duration of foreign individual's stay in the United States

It is important to make sure that the proper period of authorized admission for the particular visa category is granted and that an improperly shorter period is not noted as the foreign individuals may confront adverse consequences as a result.

Non-immigrant foreign employee's authorized status and the date their status expires can be found in the lower right-hand corner of their Form I-94 (Arrival-Departure Record). Lawful nonimmigrant status ends and you are out of status when your Form I-94 expires, even if you have timely applied to change your nonimmigrant status.

IMMIGRANT VISAS

Current immigration policy has a cap of 140,000 employment-based (EB) immigrant visas, which are divided into five preference categories (EB-1, EB-2, EB-3, EB-4, and EB-5). EB Visas are for priority workers, professionals holding advanced degrees or persons of exceptional ability, skilled workers, special immigrants, and employment creating investors. Spouses and children accompanying the workers count toward the cap.

Some immigrant visa categories require a foreign national to be sponsored by a prospective employer and the employer must obtain an approved labor certification from the U.S. Department of Labor..

- **EB-1 Extraordinary Ability**

Foreign entrepreneurs or employees may be eligible for the EB-1 extraordinary ability immigrant classification if they have extraordinary ability in the sciences, arts, education, business, or athletics (as demonstrated by sustained national or international acclaim and recognized achievements in the field of expertise); outstanding professors or researchers; and multinational executives and managers.

For the EB-1 category, a job offer or employer-employee relationship is not required and foreign applicants may self-petition for this immigrant classification.

- **EB-2 Advanced Degree Professional and Exceptional Ability**

Foreign nationals who hold advanced degrees or with exceptional ability in the arts, sciences, or business may be eligible for EB-2 category,

For the EB-1 category, a job offer or employer-employee relationship is required and the employer must obtain a labor certification issued by the Department of Labor. To be exempted from the job offer and labor certification requirements, foreign entrepreneurs seeking EB-2 classification may request a National Interest Waiver (NIW)

- **EB-5 Immigrant investor Program**

Foreign entrepreneurs may be eligible for the EB-5 immigrant investor immigrant classification if they invest $1,000,000 in a qualified U.S. business and create 10 new full-time jobs as a direct result of the investment. The minimum investment is lowered from $1 million to $500,000if a business is located in a designated Targeted Employment Area (TEA).

For EB-1 category, a job offer or employer-employee relationship is not required.

VIGILANT ABOUT IMMIGRATION COMPLIANCE

- **Government Audit**

Employers of foreign workers are required to complete and maintain a variety of immigration paperwork and to present it upon request from the government. Thus it is important to prepare and retain the required business records, and periodically engage with a competent immigration attorney to review the employer's immigration compliance practices.

The documents or electronic records required to be maintained include the Forms I-9, Employment Eligibility Verification Form confirming that a U.S. employer has confirmed the eligibility of each and every U.S. and foreign worker to work under an authorized status. In the case of an H-1B employer, the employer must maintain a "Public Examination File" at the employer's principal place of business or the location at which the nonimmigrant worker will be employed.

- **I-9 Employment Eligibility Verification Form**

The Federal law requires Employers to verify the identity and work authorization of their employees and to maintain Forms I-9, Employment Eligibility Verification Form, for as long as an individual works for the employer and for the required retention period for the termination of an individual's employment, either 3 years after the date of hire or 1 year after the date employment ended, whichever is later. Completing accurately the Form I-9 is as much about the process as it is about the substance.

The form is usually one of many forms included in an employee's new- hire packet that are completed in the first day of an employee's work; the form is generally completed by entry-level human resources staff; and the form must be completed within certain challenging timeframes (Section 1 must be completed by the end of the first day of work and Section 2 by the end of the third business day following the start of employment).

PRESERVING AND MAINTAINING STATUS

Any changes in wages, working conditions, or characteristics of the employment position, or if the nonimmigrant changes jobs may affect both the LCA and the Petition for a Nonimmigrant

Worker as both refer to a specific job and to a specific foreign individual. Any changes in the corporate structure or ownership of the employer can also affect both the LCA and the Petition.

Employment-based non-immigrant and immigrant work visas are linked to the original visa petitioner or sponsor. Any material changes in the employing entity, job duties, job location and other eligibility criteria may require prior notice and approval of the federal government before the change is allowed to occur.

Thus, it is a prudent practice to stay in touch with your immigration lawyer and inform the lawyer know in advance when changes to the terms and conditions of the initial visa petition and application are likely to arise.

Please review enclosed articles on "Set(s) of Immigration Rules to Which Foreign Nationals Might be Subject" and "Criminal Grounds of Inadmissibility/Deportability"

- **Set(s) of Immigration Rules to Which Foreign Nationals Might be Subject**

Immigrants and Non-immigrants might be subject to the following set(s) of Immigration rules: Inadmissibility Under INA §212, Deportability Under INA §237, and Good Moral Character Under INA §101(f). Read More....

- **Criminal Grounds of Inadmissibility/Deportability**

Grounds of deportation/removal from the United States are divided into two different categories under the U.S. Immigration and Nationality Act ("INA"): (1) Grounds of Inadmissibility under § 212(a); and (2) Grounds of Deportation under § 237(a)(1)(A). Grounds of Inadmissibility are applied to foreign individuals that are seeking admission (entry) to the United States and who have not yet been admitted. The grounds of deportation apply to individuals who have been admitted to the U.S. and who are physically located within the United States, but who became deportable/removable based upon certain violation of law. Certain grounds of inadmissibility and deportability are waivable under the INA. Read More....