

Advance Planning Required to Hire Temporary Foreign Workers

The law governing the hiring of foreign workers is complex, and harbors numerous hidden deadlines and conditions. For instance, our immigration law generally favors the highly trained, skilled worker for both the permanent immigration, as well as for temporary visas. There is an annual quota of only about 140,000 slots for permanent immigration, and approximately 65,000 openings nationwide for H-1B status as professional temporary workers in “specialty occupations.” There are other non-immigrant (temporary) visas which may serve the needs of employers in the business environment but this article will discuss the H-1B and H-2B visa status used to fill temporary jobs.

H-1B Visa

The H-1B status is issued to a worker whose job requires a minimum of a baccalaureate degree and the use of abstract reasoning to solve practical problems. Essentially, the H-1B is for a job in which the worker uses independent judgment in the fulfillment of his/her duties. An easy example of a specialty occupation is an engineer or accountant or any number of information technology jobs.

The adjudicatory process of the U.S. Bureau of Citizenship and Immigration Services (“USCIS”) for H-1B status requires advance planning at least six months before the worker will be able to enter or to remain in the U.S. or start work. This would be the case even if the employer seeks to hire a foreign born person who has graduated from a U.S. college. The earliest start date for the job for a new hire almost always will be October 1, the first day of the Federal fiscal year.

The petition for first time H-1B candidates cannot be filed earlier than April 1 for the next fiscal year and since most of the 65,000 visa slots are exhausted by the end of the first or second day (yes, all are gone by April 3rd), a petition for a company’s prospective new hires must be completed and ready for filing at least a week before April 1 to provide for the vagaries of mailing. In fact, the employer must usually start the petition preparation late in February or early March to ensure timely completion for filing on exactly April 1.

If the prospective H-1B hire is a graduate of a foreign university or does not have a formal baccalaureate degree but has accumulated the equivalent of a university degree as a result of years of progressive experience, then more preparation time may be required.

The H-1B visa is issued for a maximum of six years, generally in two 3-year periods of eligibility. If the employer is pleased with the foreign worker, it is possible to retain the worker in H-1B status beyond the 6-year limitation by filing either an application for labor certification or the petition for permanent residency, on behalf of the worker, at least 365 days before the expiration of the worker’s eligibility for H-1B. This additional extension of time in H-1B status is euphemistically referred to as the “7th year” even though there may be more than a single year of extension. As an example, if the worker’s last day of eligibility

for H-1B status were October 1, 2007, then in order to obtain the “7th year” extension of the H-1B status, the employer must have filed its application for labor certification or petition for immigrant status on behalf of the worker, not later than September 30 of 2006.

Because of the annual quota of 140,000 employment-based permanent residency slots, and as a result of increased worldwide demand, there is currently a backlog in the availability of immigrant numbers of approximately three years for most professional workers. In practical terms this means that today the government is issuing immigrant visa numbers to foreign workers whose employment sponsors filed applications for them in January of 2005. In the case of persons born in India, China and the Philippines the delay may be seven years or more. Note: If the job for which the foreign worker is being sponsored requires an advanced degree as a minimum level of preparation then there currently is no backlog – except again for workers born in India or China. The availability of permanent residency slots varies month by month.

In order to obtain these additional years of H-1B, an employer must undertake the immigrant petition process even though it may be impractical to determine if the job will exist or the employer will need the foreign worker three to seven years hence.

During the planning process, the employer must recognize that the “7th year” H-1B eligibility is vested to the employee. Thus, the employee who has been the beneficiary of a labor certification or immigrant petition by the employer is now eligible to “port” to a different employer and retain continuing eligibility for the “7th year.” A contract of employment between the employer and foreign born employee is certainly recommended under these circumstances.

The above example assumes the foreign worker is a recent graduate and is being sponsored by his/her first employer in the U.S. In the event the employer wishes to hire a foreign worker who is already in H-1B status as a result of prior U.S. employment, it would be good practice to obtain copies of all of the foreign worker’s prior H-1B approval notices so the employer can record the critical dates.

Additionally, a worker already in H-1B status can start to work for a subsequent employer as soon as the new employer files a petition (Form I-129H) on behalf of its new worker. The USCIS, however, will require documentation by the H-1B employee of visa compliance up to the start date with the new employer. Thus, even though the ability to “port” to a new employer seems convenient and simple on its face, the government is unforgiving as to any violation of status, e.g., unauthorized employment or a long period of unemployment by the H-1B employee. If the employee were to be deemed to be “out of status” then the subsequent employer’s petition for H-1B status on behalf of its new worker could be denied, even though the worker has already started working.

H-2B Visa

The situation for H-2B workers (which includes non-professional jobs) is perhaps even more frustrating. There are 66,000 H-2B visa numbers set aside nationwide for temporary non-agricultural workers. These are not to be confused with the annual quota or “cap” for the H-1B occupations.

The H-2B status requires that both the employer’s need for the worker and the job itself be temporary. A good way of understanding this double temporariness requirement is to determine whether the job expires upon its successful performance. If the employer’s need for the job continues even after its successful performance by the worker, then it is probably not a temporary job as defined by the immigration regulations and thus will not qualify for H-2B status.

One half of the 66,000 H-2B slots are available on the 1st of October and the second half of the allotment on the following 1st of April. This non-immigrant status requires as a pre-condition the filing of an application for a labor certification with the local office of the U.S. Department of Labor for the purpose of having that agency determine if there are U.S. workers who are willing and able to take the job.

Even if the application for labor certification is denied by the DOL, an employer may still file its petition (Form I-129H) with the USCIS since the adjudication of the petition lies solely within the jurisdiction of the USCIS. Nonetheless, it is much better to file an approved labor certification with the petition rather than with a Notice of Denial accompanied by an argument as to why the denial notice should be ignored.

Because of adjudicatory delays, the processing for H-2B workers should commence no later than 120 days before either the April 1st or October 1st start dates.

Currently, governmental filing fees alone can be between \$2,400 and \$3,400 for the H-1B and \$1,320 (plus the cost of required recruitment) for the H-2B. After adding these substantial fees, and the estimated attorney fees to the above processes, it is apparent that advance planning is highly recommended.

Participation in a global economy as well as the growing need for low-skilled workers makes it inevitable for many employers to recruit foreign-born workers. As is the case in so many enterprises in which government adjudication of some sort is required, advanced planning is essential to efficiency and to success.

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