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H-1B STATUS FOR PROFESSIONALS

A TEMPORARY NON IMMIGRANT WORK VISA

The H-1B nonimmigrant visa may be used to bring a worker temporarily to the United States if the employee will work in a “specialty occupation” or a professional position. The Immigration Act of 1990 made significant changes in the employer’s obligations with respect to obtaining the H-1B visa: the forms used to apply for the visa: and the application procedures. Be sure to consult with an attorney experienced in immigration matters to be certain that this is the appropriate visa category for your purposes.

What Does the Employer Do?

Qualify as a U.S. Employer.

The employer must have a U.S. taxpayer identification number. Foreign business not established in the U.S. cannot use this visa to bring employees here.

Obtain an Approved Labor Condition Application.

The employer must prepare and file a Labor Condition Application (LCA) with the Regional Office of the Department of Labor (DOL). The LCA is a form which must be carefully prepared and posted in two conspicuous places at the work site. The form requires the employer to state the job title, location and offered salary. The LCA also requires the employer to attest to complex facts concerning the wage, working conditions, labor conditions and the giving of notice.

Once the LCA is approved, the employer files a petition with U.S. Citizenship & Immigration Service. The employer must document that the position requires the services of a person in a “specialty occupation.” This means a person who is working in a professional position and who has a minimum of a bachelor’s degree or its equivalent. Note that employees may show a combination of education and employment experience, or twelve years of employment experience alone to qualify for the H-1B. In such cases, an independent education and/or experience evaluation must be obtained prior to filing the petition.

What Are the Employer’s Obligations?

Completing the LCA is just the beginning. The employer must also maintain wage and hour records, as well as information concerning working conditions for all similarly situated employees. Upon request, these records must be provided to DOL’s Wage and Hour Division.

If an employer does not document the wage, pay the required wage or maintain the required records, the employer could be liable for substantial penalties including back pay and fines. The employer could even lose the right to apply for H-1B visas as well as all other immigrant and nonimmigrant visas for up to one year.

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.

What are the Employee's Obligations?

The employees must prove that he or she is qualified for the specialty occupation and the specific job offered by the employer. The employee must be able to show that his or her foreign university degree is the equivalent to a U.S. degree by obtaining a credential evaluation of his or her education or obtain an education and experience evaluation showing the equivalent to a U.S. Bachelor's degree.

If the worker is in the U.S. and currently holds a valid nonimmigrant status, he or she may, in some circumstances, may apply for a change of status to H-1B. For example, if he or she is in lawful student status (F-1), the worker may seek a change from F-1 to H-1B. This change only gives the person the ability to work in the U.S. for the sponsoring employer. If the worker needs to travel abroad, he or she will need to apply for an H-1B visa at a U.S. Consulate abroad in Canada, Mexico or their own home country. Workers not in lawful status in the U.S. or those residing abroad, apply for an H-1B visa at a U.S. Consulate prior to entering the U.S to begin work.

How Long Can the H-1B Employee Remain in the U.S.?

The H-1B is a temporary visa with specific limitations on periods of stay in the United States. The initial petition may be approved for up to three years. After the initial three year period, H-1B status may be extended for an additional three year period.

After six years, the worker must spend one year outside the United States before he or she is entitled to re enter in H-1B status. However, if the H-1B worker begins the Permanent Residence process prior to the fifth year anniversary in H-1B status, the H-1B status may be continuously extended in one year increments irrespective of the six year cap until a decision is made on the Application for Permanent Residence.

The H-1B employee's spouse and unmarried children under 21 years old may be granted H-4 status. An H-4 visa holder is not permitted to work in the United States. However, an individual in H-4 status may attend school.