PROFESSIONALS WORKING IN THE UNITED STATES

H-1B Temporary Worker 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 businesses 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 describe the position and the 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 the Immigration and Naturalization 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.

What Are the Employer's Liabilities?

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 of up to $1,000. The employer could even lose the right to 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 Does the Employee Do?

The employee 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 credentials evaluation of his or her education.

If the worker is in the U.S. and currently holds a valid nonimmigrant visa status, he or she may apply in the U.S. for the H-1B visa. 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. Workers not in lawful status in the U.S. or those residing abroad, apply for an H-1B visa at a U.S. Consulate.

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 period, three more years are available.

The employer must update or refile the LCA and must file H-1B petition extensions. After six years, the worker must spend one year outside the United States before he or she is entitled to have another H-1B visa. Many workers on H-1B visas obtain permanent resident visas (the "Green Card") during their initial stay in the U.S.

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