Immigration’s Alphabet Soup

What You Need to Know About Visas

DECEMBER 2010

This publication is available online at
www.probonopartnership.org/publications.htm
INTRODUCTION

Even in this challenging economy, the current shortage of U.S. citizens graduating with degrees in math, science, technology and engineering forces many organizations to meet their staffing needs with foreign nationals. As a result, human resources professionals are encountering immigration-related issues more than ever before.

For many, however, as they try to decipher visa categories designated H-1B, TN, B-1 and so on, the complicated world of immigration starts to look like a bowl of alphabet soup. This guide will provide you with basic information about the temporary and permanent visa categories most likely to be encountered by nonprofit organizations.

TEMPORARY [NON-IMMIGRANT] VISAS

Non-immigrants usually enter the U.S. for a temporary period of time, and are restricted to activity consistent with their visa classification. Identifying which visa category is most appropriate for an employee’s visit to the U.S. can be challenging. The following is a rundown of the most common temporary visas.

Business Visitor (B-1)

This visa is intended for foreign nationals coming to the U.S. to participate in business-related activities associated with international trade or commerce. These activities include participating in business meetings, training, negotiating contracts or engaging in commercial transactions. While in the U.S., the individual cannot engage in gainful employment, defined as both salaried work for an employer and services for hire on an independent basis. He must remain on his foreign payroll, although he can receive payment for incidental expenses incurred while here.

To determine if a B-1 is the right visa, you need to ask three questions:

1. Will the individual be compensated (i.e., beyond reimbursement or expenses for per diem) from a U.S. source?

2. Will the individual, even if uncompensated, perform services for which a U.S. worker otherwise would have to be hired? (Or are the services inherently part of the U.S. labor market?)

3. Are the services primarily benefiting the U.S. entity as local work for hire?

An individual who cannot honestly answer “no” to all three questions runs the risk of being denied entry into the U.S. as a B-1 business visitor, and potentially of being denied a work authorized visa in the future. He should, therefore, obtain a more appropriate visa.

B-1s are granted entry for up to six months, and extensions are at the discretion of the Immigration Service.
Specialty Occupation (H-1B)

This category is reserved for foreign workers filling positions in “specialty occupations”. A “specialty occupation” position is one that requires at least a bachelor’s degree (or its equivalent) in the specialty, as a minimum requirement. For equivalency purposes, three years of professional experience equates to one year of college. The H-1B employer is required to file a Labor Condition Application with the Department of Labor affirming that it will pay the prevailing wage for the position. There is a 65,000 annual numerical limit on H-1B visas, and an additional 20,000 visa numbers available to foreign nationals holding a master’s degree or higher from a U.S. university.

However, certain organizations are exempt from the numerical cap: institutions of higher educations (or an affiliated or related nonprofit entity), nonprofit research organizations, and governmental research organizations. A nonprofit research organization or governmental research organization is defined as “a research organization that is either a nonprofit organization or entity primarily engaged in basic research and/or applied research, or a United States Government entity whose primary mission is the performance or promotion of basic research and/or applied research.”

Because of the limit on the number of H-1Bs available each year, if you are not an organization exempt from the H-1B limit, it is important to note that H-1B visa availability coincides with the government’s fiscal year, which begins on October 1. That means that in some cases, if you have a new hire and wish to sponsor them for H-1B status, if you are not an organization exempt from the numerical cap, or the individual does not have H-1B status currently, the H-1B you sponsor them for will not be effective until October 1. The earliest you can apply for the H-1B, if you are subject to the cap, is April of that year (i.e., six months before the effective date).

H-1Bs are granted entry for up to three years and can be extended for a total stay of up to 6 years.

Student/OPT (F-1)

Optional Practical Training (OPT) is granted to F-1 students who have completed at least one full academic year in the U.S. With a validity of up to 12 months (graduates with degrees in the sciences, technology, engineering and mathematics may be eligible for up to 29 months of OPT), OPT can be used during school on a part-time basis. The F-1 student is required to obtain authorization from the school and then apply for an Employment Authorization Document (EAD) from the U.S. Citizenship and Immigration Service (USCIS) before commencing employment. Although the student is not tied to a particular employer, the employment should be directly related to the student’s field of study.

Many employers hire students right out of universities on OPT. Employers must monitor the EAD expiration date to ensure that employment authorization is always current. Employers should begin the H-1B process for foreign nationals working on OPT as soon as possible, to ensure that an H-1B can be obtained, and there is no gap in employment authorization. For example, if a foreign national is hired while on OPT, and his EAD expires on 5/31/2011, but his H-1B will not become effective until 10/1/2011,
then he may need to be removed from the U.S. payroll or be sent abroad until his H-1B becomes effective. Accordingly, it is important to flag new hires or employees working on OPT, so that you can plan ahead and take the necessary steps to minimize or eliminate any interruption in work authorization.

**Exchange Visitor (J-1)**

This visa is utilized by foreign students, scholars, experts, medical interns, international visitors, and industrial and business trainees for the purpose of gaining experience, studying or conducting research in their respective fields. The goal is for foreign nationals to acquire knowledge in the U.S. that they will take back and apply in their home countries. Certain J-1 visa holders are subject to a two-year home residency requirement after completion of their program, unless a waiver is granted.

Depending on the J-1 classification, the duration of stay may vary (e.g., trainees are permitted up to 18 months, interns are permitted up to 12 months). Many companies run their own J-1 programs, while others utilize third party organizations which serve as “umbrella” sponsors for the various J-1 categories.

**Intracompany Transferee (L-1)**

This visa category can be very useful to international organizations needing to bring their foreign employees into the U.S. The L-1 classification requires that the foreign national has been employed with a parent, subsidiary, affiliate or branch of the U.S company for at least one year (in the last three years before entry). The L-1 is divided into two categories: (1) L-1A for executives and managers; and (2) L-1B for specialized knowledge personnel. The L-1A may remain in the U.S. for seven years, while the L-1B is granted a five-year maximum stay.

Spouses of L-1s are eligible to obtain employment authorization.

**NAFTA (TN)**

This category is reserved for Canadian and Mexican professionals performing certain occupations listed in the North American Free Trade Agreement (NAFTA). Most positions require a bachelor’s degree in the field. Canadians can apply for the TN at the port of entry, while Mexicans are required to apply at the U.S. Consulate. They are granted entry for up to three years, with renewals available indefinitely.

**Outstanding Professionals (O-1)**

This category is reserved for aliens “of extraordinary ability in the sciences, arts, business, or athletics, or who have a demonstrated record of extraordinary achievement in the motion picture or television industry.”

O-1s are granted entry for up to three years and can be renewed in one-year increments, indefinitely.
PERMANENT [IMMIGRANT] VISAS

Immigrant status confers on foreign nationals the right to live and work in the U.S. without time limitations. The two most common ways to become a permanent resident are through family or employment-based petitions. Of direct relevance here are the employment-based preferences available to foreign nationals.

In recent years, although we have seen a decline in the number of U.S companies sponsoring their foreign workforce for permanent residence (often called a “green card”), many companies do offer sponsorship as a recruitment tool in an effort to attract and retain qualified foreign applicants. Promising a foreign national sponsorship for permanent residence is an incentive for that person to accept employment with a particular company.

Sponsorship by an employer, while imposing certain requirements on the employer, does not require the employer to retain that employee. An employer wishing to terminate an employee is free to do so, subject to the company’s standard employment at-will policies.

The procedure to obtain employment-based permanent residence may involve three steps: (1) applying for labor certification from the U.S. Department of Labor; (2) petitioning the U.S. Citizenship & Immigration Services (USCIS); and (3) immigrant visa processing with a U.S consulate abroad or applying for adjustment of status to permanent resident in the U.S. As discussed below, certain immigrants are exempt from the labor certification requirements. Depending on the category, processing time ranges from several months to several years.

Third Preference (EB-3)

This category is designated for (1) professionals filling positions requiring at least a bachelor’s degree; (2) skilled workers filling positions requiring at least two years of training and experience; and (3) unskilled workers. A labor certification and offer of employment are required in this preference category.

PERM is the web-based system used to file applications for labor certification. Before submission of the PERM application, the employer is required to conduct an extensive recruitment campaign (6 different forms of recruitment) to demonstrate the unavailability of U.S. workers. All the recruitment steps must be completed no more than 180 days prior to the filing of the PERM application. Mandatory steps include placing a 30-day job order with the Department of Labor, and placement of two print ads, on two consecutive Sundays, in a newspaper with general circulation in the area of intended employment. Professional positions require additional recruitment steps, such as advertising at job fairs, job search websites, etc.
Second Preference (EB-3)

This category is designated for (1) persons of exceptional ability in science, art, or business, and (2) advanced degree professions. A labor certification and offer of employment are required here, too, unless the foreign national qualifies for a “national interest” waiver of the labor certification requirement.

First Preference (EB-1)

This category is designated for (1) managers and executives subject to international transfer to the U.S.; (2) outstanding researchers and professors who have at least three years of experience; and (3) persons of extraordinary ability in the sciences, arts, education, business, and athletics. In these cases, no labor certifications are required.

In order to qualify as a multinational manager, the person must have served in a managerial role abroad for at least one year, and continue to serve in a managerial/executive role in the U.S.

The categories for outstanding researcher or persons of extraordinary ability require a showing that the person has been recognized as being one of the top performers in the field. Evidence would include, but is not limited to, receipt of major awards and prizes, membership in associations which require outstanding achievements, original scientific, scholarly research or artistic contribution, and authorship of books or articles.

SUMMARY

Having a basic understanding of the nonimmigrant and immigrant visa options available will help the HR professional to determine the most appropriate classification for hiring a foreign national worker. We have been able to touch only the “tops of the mountains” here, and have not covered other visa classifications that may be options under certain circumstances (e.g., the Australian Special Occupation visa “E-3”, treaty-trader, and treaty-investor visas). We encourage those responsible for hiring foreign nationals to seek additional guidance from those with expertise in immigration practices.

Helpful Immigration Resources

U.S. Citizenship and Immigration Services: www.uscis.gov
U.S. Department of State: www.travel.state.gov
U.S. Customs & Border Protection: www.cbp.gov
U.S. Embassies, Consulates and Diplomatic Missions: http://usembassy.state.gov

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of
(i) avoiding penalties under the Internal Revenue Code or any other U.S. federal tax law
or (ii) promoting, marketing, or recommending to another party any transaction or matter
addressed herein.

This document is provided as a general informational service to volunteers, clients, and
friends of the Pro Bono Partnership. It should not be construed as, and does not
constitute, legal advice on any specific matter, nor does distribution of this document
create an attorney-client relationship.

Copyright 2010 Pro Bono Partnership. All rights reserved. No further use, copying,
dissemination, distribution, or publication is permitted without the express written
permission of the Pro Bono Partnership.

December 2010