

The HR Manager's Guide to Immigration Law

James A. Bach
Attorney at Law

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Introduction

Foreign workers are a vast resource that American companies can tap to increase productivity and profits. That is especially true in the case of professionals such as engineers and scientists, whose education at foreign and U.S. universities is easily applied to U.S. operations, and whose talent, knowledge, and work ethic may contribute significantly to your company's bottom line. Also, immigrant employees are familiar with the language and customs of other countries, and can help expand markets abroad, coordinate the operations of subsidiaries, and streamline the integration of foreign production facilities and sales offices.

Albert Einstein, Ming Pei, **and** John Muir, and are just part of a long list of immigrants to the U.S. who have significantly contributed to the science and business of the United States, and who have helped increase the profitability of U.S. companies. Employment-based immigration enables U.S. employers to hire the best and the brightest in a worldwide talent pool of 6 billion people.

Most immigrants buy into the American Dream wholeheartedly, and work very hard to absorb American culture and values. Foreign workers often work harder, smarter, and longer than their American counterparts. The children of legal immigrants are usually exemplary Americans who love the United States, contribute to its advance, and become as American as your own children in this great melting pot. The result is a win-win-win scenario for the employer, the immigrant, and our wonderful country.

There are two broad categories of visas that concern human resources professionals. The first is the "nonimmigrant" working visa that enables the foreign national to work in the

U.S. for a temporary period. Nonimmigrant visas usually can be obtained relatively quickly, and are usually specific to the employer (that is, the status ends when the employment ends). I will devote the most time to the most common and useful working visa, the H-1B visa, but will also provide a summary of the other types of employment-based visas that you should consider.

The second type of visa is the “immigrant” visa (also called “permanent residence status”, “lawful permanent residence [LPR] status” and “green card”). The green card provides a permanent right to live and work in the U.S. and often takes many years to obtain. Most employment-based green cards start with a “labor certification,” a determination that there is a shortage of U.S. workers for the job. There may be ways to avoid labor certification for special immigrants, such as the world’s best athletes and scientists.

This book is designed to be an easy-to-read summary of thousands of pages of government memos, regulations, administrative and court decisions, and statutes. Its purpose is to provide human resources professionals with a working knowledge of the means to hire and employ the best workers in the world. It is not intended to be a scholarly treatise, but a blueprint for a plan of action, a summary of what is feasible and what is not, and a guide for making it happen. We will explore the various types of employment-based visas, and the requirements for each. You will also learn how to work with and evaluate immigration attorneys to achieve results without spending too much money or wasting too much time. Finally, we will explore ways to avoid liability when dealing with foreign workers and those you suspect may not be authorized to work.

Working Visas for Professionals – H-1B

Introduction

H-1B visas are the most popular and useful type of employer-sponsored work visa. They enable “professionals” (usually “white collar” workers with college degrees) to work in the U.S. for six years or more. Preparing and filing an H-1B petition for a new employee can be done quickly, and often the new employee can go onto the payroll in just a few weeks.

There are two basic requirements for H-1B eligibility. First, the worker must have a Bachelor’s degree in a specialty field (*or equivalent training and experience*). Second, the job normally must require that degree. Most H-1B workers are engineers, IT workers, scientists, and teachers, but anyone with a Bachelor’s degree, or equivalent education and experience, may be eligible for H-1B status. H-1B visas have been granted to a wide range of professionals, including accountants, medical technologists, chemists, database administrators, business managers, statisticians, nurses, and marketing professionals.

In addition to these basic eligibility requirements, there are several employer obligations and liabilities that Congress has added over the years in response to political concerns. These additional employer

obligations may seem daunting at first, but usually can be fulfilled with a minimum of time, effort and expense. It is important that the HR manager understands the extent of the employer's obligations in an H-1B case, and closely follows the instructions of the immigration attorney in complying with them. Failure to comply with the regulations can lead to penalties, including payment of back wages to H-1B employees who were underpaid.

Overview of the H-1B petition procedure

The H-1B petition can be prepared as soon as the prospective employee has accepted a job offer. The process essentially involves five steps, as follows:

1. Prepare a "Labor Condition Application" (LCA).¹
2. Post LCA legal notices at the location where the employee will work.
3. File the LCA with the U.S. Department of Labor (DOL).
4. Comply with LCA requirements, designed to make sure that the foreign employee is paid a salary that is comparable to that of a U.S. worker doing the same job.
5. Submit the H-1B petition to the U.S. Citizenship and Immigration Services (USCIS). This submission will normally consist of the approved LCA, petition forms, a supporting letter, documents that reflect the employee's educational background, and documents that describe the nature of the employer and its ability to hire the employee.

The LCA must be certified by the DOL before the H-1B petition can be filed with the USCIS. Until recently that certification process was instantaneous, but 2009 modifications to the LCA online registration system have resulted in delays of several days or even weeks.

¹ Not to be confused with a "Labor Certification Application", used to obtain a green card.

Intracompany Transferees (L-1 visas)

Multi-national corporations should consider L-1 visas before all other temporary working visas. Advantages of L-1 status over H-1B status include the following:

1. A Labor Condition Application (LCA) is not required, so the employee does not have to be paid a “prevailing wage”.
2. There is no potential liability for LCA violations (for example, back wages and fines for failing to pay a prevailing wage, or for not properly terminating the employee).
3. There is no legal requirement to pay for return transportation.
4. The L-1 employee can work anywhere in the U.S., without the necessity of an LCA for each location.
5. *Spouses of L-1 employees are eligible to work!*

Like the H-1B visa, the L-1 visa begins with a petition to the USCIS. Once the petition is approved, the employee will present the petition approval to a U.S. Consulate or Embassy abroad, and obtain a the L-1 visa (a stamp in the passport that will be used to gain entry into the U.S.).

Taxation of Temporary Foreign Workers

Students and Exchange Visitors

One of the advantages of Practical Training (OPT or CPT) status for students and trainees in F-1, J-1, and M-1 status is that they are usually not subject to withholding for social security and Medicare (“FICA”). (Cultural workers in Q status may also be exempt). That is a savings of 6.2%¹⁴ of salary for employees, and another 6.2% for employers (a total of 12.4% of salary!). These workers are exempt from FUTA taxes as well.

There is no requirement to apply to the IRS for this exemption (as there is for religious workers); it is simply available to workers in F-1, J, M-1 and Q status by operation of law (**if you know about it!**). If your company erroneously withholds FICA for these employees when it is not required, you can later adjust your payroll to reverse the company payment, and the employee can claim a refund on IRS form 8316.

Understanding the FICA exemption for these workers can be tricky. The starting point is Section 3121(b)(19) of the Internal Revenue Code (IRC), which provides for the FICA exemption for “a **nonresident alien** individual for the period he is temporarily

¹⁴ Temporarily 4.2% in 2011.

Mergers, Acquisitions and Other Corporate Restructuring

Most employment-based immigration petitions are specific to the employer, and are automatically revoked when the employment ends or the employer ceases to exist. A corporate restructuring or merger often results in a new corporate entity. Because the employee works for a new company, he or she may no longer have the legal right to work, and his or her green card case may become derailed. This chapter will explore the effect of a corporate restructuring on employment-based nonimmigrant visas such as H-1B and L-1, as well as its effect on pending employment-based green card cases.

The effect of a corporate restructuring depends on the employee's visa status, and the type of company change. Action should be taken before the merger to maintain the legal status of employees in H-1B (professionals), L-1A (transferring managers), L-1B (transferring workers with specialized knowledge), and TN (Canadian or Mexican professionals) status. Other visa categories that include the right to work – such as F-1 (student status), L-2 (spouse of L-1), J-2 (spouse of J-1), and E-2 (spouse of E-2 principal) – are not based on a specific employer and are not affected by a corporate restructuring.

Dual Representation and Other Attorney Issues

Although jokes are often made about the scruples of attorneys, the legal profession is in fact highly regulated and attorneys are subject to extensive ethical rules and guidelines. These ethical constraints are the subject of entire courses in law schools, and are part of every bar examination. Understanding some of those rules can help you deal with your attorney and avoid awkward situations that could arise in connection with the immigration cases.

Most importantly, attorneys have obligations to their clients. Those obligations include at a minimum 1) strict confidentiality, 2) diligence, 3) keeping you informed, 4) competence, and 5) avoiding conflicts of interest that might jeopardize those obligations. As a client in an immigration case, you should expect that those obligations are fulfilled, and should get a new attorney if they are not.

Normally the immigration attorney will represent both the interests of the employer and of the employee. Even if the attorney sets out to represent only the employer (and not the employee), the law will infer an attorney / client relationship if the attorney gives the employee any advice or the employee reasonably believes that the attorney is representing his or her interests. Also, the attorney cannot file any application

Conclusion

Immigration laws, and the ways government agencies interpret those laws, are complex and constantly changing. Immigration legal issues can be challenging and it is important to obtain competent legal advice and assistance before hiring foreign workers or applying for their working visas or green cards.

However, there are several reasons why the HR manager should have a working knowledge of the immigration topics summarized in this book. First, the HR manager has an extremely important role in working with the immigration attorney to prepare visa applications, labor certifications, and green card petitions. Second, the HR manager must implement the company's hiring plans to hire foreign workers, and be prepared to hire a foreign worker who is the best applicant for the job. For that, it is helpful to have a working knowledge of the different types of nonimmigrant visas and the eligibility requirements for each. Third, the HR manager must be able to evaluate the immigration attorney, be able to question advice and strategies that may not seem quite right, and perhaps suggest alternatives that the immigration attorney has not proposed. Fourth, the HR manager is responsible for making sure the company does not hire people who are not authorized to work, for properly checking immigration status, and for maintaining proper records such as I-9s and LCA audit files.

Although those responsibilities may at first seem challenging, the reality is that most immigration cases can be handled quickly and efficiently, with a minimal administrative burden and the lowest legal bills your company will ever get. The reward for this extra effort and expense is a competitive workforce, and the ability to expand your hiring pool to include some of the best and the brightest workers in the world.