

Welcome to America:

An Overview of Immigration Options for the New Employer

Stacy Bradbury & Alan Pampanin of Pampanin Law Offices, 2002

We are pleased to provide you with information about the most important and most-utilized immigration options for your business and foreign employees. This article reviews nonimmigrant visas available for the temporary employment of foreign workers and options available to the worker wishing to become a U.S. permanent resident. Other issues discussed include the I-9 procedure required of all employers for all employees regardless of status, social security numbers, and the affect of post September 11 security measures on processing timeframes.

New agency: Department of Homeland Security

The Immigration and Naturalization Service became part of the new Department of Homeland Security (DHS) on March 1, 2003. This very significant change resulted in the division of INS into new agencies designed to separately administer functions previously within the INS. The term 'INS' no longer exists. The function of administering citizenship and immigration services is now within the new Bureau of Citizenship and Immigration Services (BCIS). The function of border control and immigration inspections is now within the new Bureau of Customs and Border Protection (BCBP). The function of immigration investigations and intelligence, as well as detention and removal, is now within the new Bureau of Immigration and Customs Enforcement (BICE), which falls under DHS's Directorate of Border and Transportation Security.

A citizen of the U.K., wishing or needing to come to the U.S. will now deal with the Department of State (DOS) if applying for a visa at the London (or any foreign) post. Upon arriving at Logan Airport, she will be inspected by BCBP. Once admitted into the U.S. the person's stay will be the province of BCIS.

Non Immigrant Visas for the Temporary Employment of Foreign Workers The Mechanics of Obtaining a Nonimmigrant Visa in London

Processing nonimmigrant visas at the post in London is usually done through a mail drop at the post. The post will mail the passports to the applicants with the visa stamped into the passport or with notice of denial of the application. Security concerns have resulted in a change mandating personal interviews for many if not all visa applications.

Applicants must submit Forms DS-156, and DS-157, a color photograph meeting Department of State specifications, the relevant BCIS approval notice, and a stamped, self-addressed special delivery envelope for return of the applicant's passport.. In addition a fee must be paid at a London bank on an embassy-supplied "paying-in slip". For more detailed information, the post has a very useful website at http://www.usembassy.org.uk/cons_web/visa/visaindex.htm.

A cottage industry of visa agents has sprung up in London who will handle the processing of the application for a fee.

Visa Waiver Program

Foreign nationals from certain countries where experience demonstrates low rates of fraud in entering the United States are allowed to enter without visas. These people merely need to show a passport from an eligible country of origin. They are issued a special green I-94 card at the port of entry and they are restricted to an absolute limit of 90 days in the United States. Failure to abide by the 90 day restriction can lead to serious consequences from which there is no appeal. This is an ideal way to enter if a person is certain that the visit will not exceed 90 days; if the length of stay is uncertain, it is not an advisable mode of entry. The 90 days cannot be renewed by traveling to a contiguous country, such as Canada, and re-entering. Current visa waived countries: Andorra, Australia, Austria, Belgium Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.

B-1 Visa – Business Visitors

The B Visa applies to visitors for pleasure (B-2) and business visitors (B-1). Individuals planning to come to the U.S. for short business visits and employees of foreign companies coming to the U.S. on company business intending to return to the home country after a short business visit often use this visa. B-1 status encompasses a variety of business purposes including attending board meetings, trainings, seminars, negotiating contracts, setting up U.S. subsidiaries and investigating business opportunities among many others. However, all these purposes are limited by certain requirements: the visit must be of a defined duration and purpose – the longer the stay and less defined the purpose, the more likely BCIS and Border control will question the validity of the B-1 admission; all salary and remuneration must be paid by the foreign company, not by the U.S. affiliate; the visitor must not engage in “productive employment” in the United States, that is, work that could otherwise be performed by a U.S. worker. This last provision is often the cause of dispute and inquiry. Companies requesting individuals and employees to apply for entry in this status must be prepared to convince consular officials and border control agents at the port of entry that the person will not be performing productive employment while in the U.S.

The B-1 visa is obtained through application at the U.S. consular post abroad. At busy posts such as London, processing may take up to 10 days or more.

B-1 admissions are often of short duration and thus can be accomplished just as well under the visa waived program discussed above, thereby avoiding the need to apply for a visa at the consulate.

E Visa – Treaty Traders and Treaty Investors

The E visa can be very useful to the company starting up in America as its purpose is to foster trade and growth of business between the U.S. and countries with which the U.S. has treaties, including the United Kingdom.

Treaty Trader (E-1) Requirements:

1. Purpose of Entry

The applicant must be entering the U.S. solely to carry on trade on her own behalf or as an employee of an alien or organization engaged in trade principally between the U.S. and treaty country.

2. Substantial Trade

Trade must be substantial, that is, 51% of total volume of company or individual's business must be between the U.S. and the treaty country.

3. Nationality

The individual and/or business must possess the nationality of the treaty country. The nationality of a company is determined by who owns it. To be eligible, at least 50% of stock must be owned by nationals of the treaty country.

4. Employee Applicants

If the applicant is an employee of a treaty trader person or organization, she must be destined for a supervisory or executive position, or, if in a lesser capacity, the employee must have essential skills.

Treaty Investor (E-2) Requirements:

1. Purpose of Entry

The applicant must be entering solely to develop and direct a bona fide enterprise in the U.S.

2. Investment

The applicant must have invested or be actively in the process of investing a substantial amount of capital in the bona fide enterprise, as distinct from a relatively small amount of capital in a marginal enterprise solely for the purpose of earning a living. Investment connotes risk, therefore, a potential risk of partial or total loss if business fortunes reverse, must exist.

3. The Enterprise

The enterprise must be a real and operating commercial enterprise.

4. Nationality

The individual and/or business must possess the nationality of the treaty country. The nationality of a company is determined by who owns it. To be eligible, at least 50% of stock must be owned by nationals of the treaty country.

5. Employee Applicants

If the applicant is an employee of a treaty investor person or organization, she must be destined for a supervisory or executive position, or, if in a lesser capacity, the employee must have essential skills.

H-1B Visa – Workers in Specialty Occupations

The British company setting up its business in the United States will utilize the B-1, E-1, H-1B and L-1A and B visas. In spite of the many requirements tacked onto the H-1B visa process which bring into play numerous provisions governed by the US. Department of Labor (DOL), the H-1B remains a versatile visa and status when companies or individuals need to hire professionals from other countries.

Employer Requirements:

1. Specialty Occupation

The position offered must be a “specialty occupation.” Generally, a “specialty occupation” is a professional position. Regulations define a profession as a position requiring at least a bachelor’s degree in order to be performed.

2. Salary

The salary offered must be the appropriate salary for the position in the region where the job is located. Known as the Prevailing Wage, this must be established through an independent source. The employer must pay the actual wage it normally offers for the job or the prevailing wage, whichever is higher. If the employee will be placed in more than one location, the employer must comply with Prevailing Wage conditions in each location.

3. Posting

The employer must post notices of its intention to hire an H-1B worker and must keep a Public Access File for each H-1B employee.

4. Fees

In December 1998 the provisions of The American Competitiveness and Workforce Improvement Act [ACWIA] went into effect. Included in the requirements are provisions mandating that each new petition and first renewal of a petition include an additional \$500 charge, thus making the filing fee \$610. Effective December 17, 2000, Congress increased the “training” fee another \$500. The ‘training’ fee is now \$1,000. Congress has mandated the employer/petitioner pay this fee. It cannot be passed on to the employee.

5. No Benching Rule

ACWIA also specifies that the employer cannot “bench” or lay off the H-1B beneficiary during periods where there is no work for the beneficiary.

6. Dependency

ACWIA creates a host of requirements for employers deemed “dependent” upon H-1B workers. Please see the extensive Labor Condition Application outline available through this office.

Employee Requirements:

1. Education or Education Alternative

The candidate must have a minimum of a Bachelor’s Degree in his/her field, i.e. a ‘specialty’ skill. If the candidate possesses a foreign degree, she must demonstrate that it is equivalent to a U.S. Bachelor’s Degree.

Acquiring specialty skills through experience without education, or less than a Bachelor’s Degree, is governed by regulations setting out a complicated scheme under which a person who is a professional by years of experience can meet the requirements of being a “professional.”

2. Status

The candidate, if in the U.S., must be in a lawful status.

3. H-1B Status is tied to the Employer Petitioner

H-1B status applies to the foreign national through the petition of the employer. It is not general work authorization. A new or second job with another entity requires a new H-1B visa.

4. Time Limitations

Six years under the H-1B is the maximum period of stay permitted. One cannot renew H-1B until physically out of the U.S. for one year. The six year limit also includes time spent in L status. Thus, the combination of H-1B and L status cannot exceed six years. Under certain circumstances the six year limit can be extended for those seeking permanent residency.

5. Annual Limit on Visas

Congress limits the number of new H's that can be issued each year. The limit of 115,000 was raised by Congress to 195,000. This number does not apply to those extending H-1B visas they already have. Effective October 1, 2003, the annual limit drops to 65,000.

Processing Time and Portability:

These petitions are filed at the Service Center of BCIS, formerly INS, with jurisdiction over the place of employment. Processing times vary widely from center to center and from time to time. Currently, the Vermont Service Center is taking 4 to 5 months to process H-1B Petitions.

Premium Processing is a procedure by which processing may be accelerated to a matter of a few days, and is recommended in urgent circumstances. BCIS applies an additional fee of \$1000 to premium process a case.

Employers should note that when hiring someone who is already in the U.S. in H-1B status, premium processing may not be necessary as the employee already granted H-1B status can 'port' to the new employer upon the filing of the new petition. The parties need not wait for approval for the person to start working.

L-1 Visa – Multinational Executives, Managers, and Specialized Knowledge

The L-1A or L-1B visa holder is known as the Intracompany Transferee. The Intracompany Transferee (IT) must have been continuously employed abroad by a qualifying organization for one year out of the past three years preceding application for admission. The IT can either be a Manager or Executive, L-1A, or one with specialized knowledge, L-1B. One may move from one IT category abroad to a different IT category in the US.

A qualifying organization is a firm, corporation or entity which is a parent, branch, affiliate or subsidiary of a U.S. company with which it regularly conducts business. The size of the organization is irrelevant.

H-1B versus L-1:

In contrast to H-1B, the L-1 program does not have onerous Department of Labor baggage: prevailing wage restrictions, posting notices, or the public inspection file. It does not impose additional requirements on organizations deemed dependent upon foreign labor as does the H-1B program. Further, the L-1 program does not have the BCIS specialty occupation requirements in which the degree issue is pivotal in regardless of qualifications, nor does it set numerical limits on the number of visas issued each year.

L-1A Manager or Executive Requirements

1. Manager Qualifications

Manages organization, department, subdivision, essential function or component; supervises and controls work of other supervisory, professional, or managerial employees, or manages an essential function; has authority to hire and fire. First line supervisors are not considered managers.

2. Executive Qualifications

Directs management of the organization or a major component; establishes goals and policies; and receives only general supervision or direction from higher level executives, board of directors or stockholders.

3. Time Limitations

Managers and Executives are limited to 7 years in L-1A status. Time in H-1B status counts toward the limit.

4. Advantage

The L-1A program serves as an excellent platform to file for permanent residency under the first employment preference: Multinational Executives and Managers.

L-1B Specialized Knowledge Requirements:

1. Specialized Knowledge Worker Qualifications

The worker must possess proprietary knowledge of the employer organization's product, service, research; or possesses knowledge that is valuable to employer's competitiveness. She should have been utilized as a key employee abroad.

2. Time Limitations

Specialized knowledge workers are limited to 5 years in L-1B status. As mentioned above, time in H-1B status counts toward the limit.

O Visa – Aliens with Extraordinary Ability

The O-1 is an excellent visa for those few who are considered extraordinary in their field. The O-2 may be utilized to bring motion picture or television crews to the U.S.

The O-1 applies to aliens of extraordinary ability in the fields of science, education, business, or athletics. An alien of extraordinary ability in the fields of science, education, business, or athletics must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by documenting this in accordance with a strict regulatory scheme.

The O-1 creates an excellent platform for transition to permanent residency as an alien of extraordinary ability.

TN Visa – Citizens of Canada and Mexico

TN visas are issued to citizens of Canada under the North American Free Trade Agreement (NAFTA).

A TN visa is a non-immigrant visa, a visa issued to a person whose intention is to work in the US temporarily and who regards his/her permanent home as the country of citizenship. Spouses and children of TN holders are given TD (Trade Dependent) status. TD holders are not allowed to work.

TN visas are issued at Ports of Entry (POE) along the Canadian border, at pre-flight INS inspection, at Ports of Entry at US airports, for instance Boston. To utilize the Boston POE, for instance, the individual must be entering from Canada or abroad. He/she cannot drive to Logan to "pick up" the visa.

TN visas are issued for one year at a time. The visa can be renewed by traveling to the Canadian border before expiration to renew at a POE. It is always useful to advise this office as to where the individual intends to apply for entry or renewal because of significant differences in processing at the various ports of entry. Alternatively, a petition for extension can be filed with the INS Nebraska Service Center for one year extension without requiring departure.

TN visas do not include the legal concept of "dual intent." Dual intent is "immigrant" intent to stay in the US permanently, while working or studying here on a temporary non-immigrant visa. The Immigration Act allows dual intent for those with H-1B and L-1 visas, but for other non-immigrant visa holders, intent must be strictly of a temporary, "nonimmigrant" nature. Thus, a person with an H-1B visa is free to admit to an INS officer at an airport, for instance, that he/she is here legally as a non-immigrant and does indeed plan on applying to remain in the US permanently. A person with a B-1 or F-1 visa making the same representation at Logan would quickly find himself heading back to the country of origin. Conceptually, this same problem exists for TN visa holders though in practice I know of no person applying for permanent residency while in TN status who has been barred admission to the US upon returning from Canada or anywhere else.

For many reasons, including the dual intent issue discussed above, it is recommended to switch from TN to H-1B status if possible. H-1B visas allow dual intent and make world travel easier. Also, H-1B visas are issued in 3 year increments, eliminating the necessity of annual renewal. There are, however, circumstances necessitating holding onto TN status. Specifically, H-1B status is allowed for a maximum of 6 years; L-1A status for 7 years. Time in either status counts toward the total limit. Thus, a person in L-1A status for 4 years switching to H-1B status has 2 years of H-1B status available. Since there is no legal time limit to TN status, a person may have no option but to utilize TN status for as long as possible. Often there will come a point when border officers make it clear that TN status will not be renewed because of the obvious fact the individual is in the US full time and permanently.

If the employee anticipates staying in the US indefinitely, I advise beginning processing for permanent residency whether the status is H-1B, L-1, TN or anything else. Note that permanent residency procedures are complex and very, very long. It is wise to begin processing early in the individual's stay.

This overview is intended to give a sketch only. It is not intended to serve as a model for applying for TN status as there are many other procedures and regulations affecting the process.

Immigrant Visas/Permanent Residency through Employment Extraordinary Aliens

The advantage of this category is that an employer is not required. The disadvantage is that the level of achievement must be so great it is unlikely that recent graduates would be eligible. 8 CFR §204.5(h)(3) sets forth documentation requirements. Alien must produce evidence of one-time major international award or three of the following: (a) Receipt of lesser national or international prizes; (b) Membership in associations in a field which requires outstanding achievement as judged by recognized national or international experts; (c) Published material about alien on professional or major trade publications; (d) Participation individually or in a panel as judge of work of others; (e) Original scientific, scholarly, artistic, athletic, or business-related contributions of major significance; (f) Authorship of scholarly articles in field; (g) Display of alien's work in field at artistic exhibitions; (h) Performance of leading or critical role for organizations or establishments with distinguished reputations; (i) Commanding high salary or high remuneration for services; (j) Commercial success in performing arts.

Outstanding Professors or Researchers

This category has evidentiary requirements similar to those set forth above, although not as demanding. The significant difference is that an employer, usually a laboratory or university, is required to petition on the alien's behalf. Private companies may utilize this procedure but must demonstrate existence of research facilities with at least three full time researchers.

The individual must have at least three years experience in teaching or research in the academic field and the employer must intend to employ the person permanently.

INS, now BCIS, regulations set forth six categories of evidence which demonstrate a foreign national's eligibility for the status of "Outstanding Researcher." Any petition must demonstrate that the foreign national meets at least two out of these six criteria. The six categories are as follows: (a) Documentation of the alien's receipt of major prizes or awards for outstanding achievement in an academic field; (b) Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members; (c) Published material in professional publications written by others about the alien's work in the academic field; (d) Such material shall include the title, date, and author of the material and any necessary translation; (e) Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field; (f) Evidence of the alien's original scientific or scholarly research contributions to the academic field; or (g) Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.

National Interest Waivers

This category does not require a job offer, and the individual may petition for him/herself as in the Extraordinary Alien category without the extremely difficult criteria of the Extraordinary Alien.

The requirement of having an employer behind an application may be waived (thus eliminating the requirement of the Labor Certification process discussed below) if it is shown that the alien's services are in the national interest. The fields of national interest cited in the statute are: sciences, arts, professions, or business. The alien submitting such an application will have to demonstrate at the very least that he/she is critically and significantly benefiting the welfare of this country. This is an elastic procedure with applicability throughout the fields referenced above. Changes in

the interpretation of this law which in part lay significant stress upon the “national” part of the process has virtually eliminated this as a viable option for many.

Labor Certifications

An employer may file an Application for Alien Employment Certification with the United States Department of Labor (DOL) on behalf of an employee. The appropriate State Employment Security Agency (SESA), which is the Department of Employment and Training in Massachusetts, oversees the initial, recruitment stage during which time the employer must advertise for the position in order to demonstrate that there are no qualified U.S. workers meeting the job’s minimum requirements. The Chief Certifying Officer of the regional DOL office (Region I is based in Boston) will certify the foreign national for the position if the results of recruitment demonstrate that there are no qualified Americans or Legal Permanent Residents available. Certification is then the basis upon which further petitions and applications are submitted to the BCIS resulting in permanent residency to the alien and family members. The Labor Certification Application process is available to any employer and almost any employee. The USDOL has listed workers for whom the Labor Certification process will not be available due to sufficient numbers of available US workers. This list includes clerks, janitors, truck drivers, etc. It is codified as Schedule B at 20 CFR 656.11. Further, the law prioritizes the availability of visas to beneficiaries based upon level of education and skill. Generally, the procedure is viable for Skilled Workers (filling positions requiring at least two years experience and who have the requisite two years experience) and Professionals (Bachelor’s Degree or more). Only 10,000 visas are available on an annual basis for those falling under the Other Worker (Unskilled) category. Backlogs have built up to roughly ten years in this category making Applications for House Helpers, for example, virtually useless. Schedule A of the same regulations designates workers in short supply for whom the process can be shortened. Included in Schedule A are physical therapists, professional nurses, etc. Reduction in Recruitment This has the advantage of usually shaving significant time off the traditional Labor Certification process and eliminating the supervised market test. The employer must prove it has attempted to recruit for the given position over a six month period preceding the filing of the Application and that such efforts were unproductive, thus allowing an argument that persons in the occupational categories are unavailable. The DOL has the discretion to waive further recruitment.

Family-based Permanent Residency

Employers should not forget that many eligibility woes are resolved should a foreign employee marry a U.S. citizen. A bona fide marriage to a US citizen, under most circumstances, will result in approval of an application to adjust status to LPR. This procedure allows work authorization as soon as the application is filed.

Numerous other bases for permanent residency based upon family connections exist. The scope is far too broad for this overview. The primary family connections are limited to parents, spouses, and children. A category for brothers and sisters of US citizens also exists. The backlog is so great that this category is to be avoided if possible. Permanent residents can petition for spouses and unmarried children. Petitions for parents or unmarried children require that the petitioner be a USC. Annual limits cause long delays.

I-9 Procedure

The I-9 is a BCIS Form which must be completed by every person hired. Independent Contractors (IC) need not complete this form; however, it is not always clear whether one is an IC or an employee. The degree of control the employer exercises over the new hire, and whether the person is a 1099 as opposed to a W-2 employee in the eyes of the IRS are relevant to this determination. The 1099 approach must be moderated by the degree of control measure. Under some circumstances a 1099 employee will still be subject to I-9 requirements. The I-9 is not necessary for casual domestic work in a private home on sporadic, intermittent basis.

The employee must complete the I-9, Section 1 at the time of hire. "Hiring" is interpreted to mean when employment begins, not when a contract for employment is signed. The employee must submit necessary documentation to prove identity and employment eligibility within 3 business days of the date employment begins. The employer must complete Section 2 within 3 business days of hire upon reviewing the documents provided by the employee. Some documents prove both identity and employment eligibility. Some prove one but not the other. INS recently (Oct/Nov 2001) revised the acceptable documents for I-9 purposes. For part time work the third day of hire is the third day they work.

Issues Affecting Timeframes

Social Security Cards

All individuals who come to the U.S. to work must obtain a social security number. This should be considered when estimating timeframes for an employee abroad to enter and begin working. Processing times vary by locale, but one may expect the process to take from one week to two months.

Security Measures

An already overburdened INS was tasked with numerous additional duties after September 11, resulting in processing delays across the board. Post-September 11 changes include enhanced security checks, special registration of those from certain Middle Eastern countries, and the restructuring of the former INS. The delays resulting from these and other changes demand flexibility and patience by employers and employees as they plan in the months ahead.

For more information, please contact: Alan Pampanin, Tel: 617 876-2020 email: apampanin@pampaninlaw.com