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The Legal Ease of Hiring Through the H-1B Visa
A step-by-step guide to employing foreign nationals as professionals

By Mark J. Newman

At first glance, the practice of employing foreign nationals at your company appears quite arduous and possibly controversial. Nevertheless, many companies nationwide have concluded that seeking such workers is a reasonable business decision, given the significant shortage of skilled workers available domestically, particularly in science and technology.

In 1990, Congress imposed a 65,000 annual limit on H-1B visas. That number was first reached in 1997, but a year later the cap was hit in May, due to increased competition for international workers. Although the number of H-1B visas was nearly doubled to 115,000 each of the next two years, the limit was again reached in June, 1999 and March, 2000. Congress enacted legislation that raised the visa limit to 195,000 through 2003. Only half of those visas were used in fiscal 2002, and Congress returned to the 65,000 limit for fiscal 2003. A certain number of these visas are reserved for Chileans and Singaporeans per treaty. Congress has now added 20,000 visas for individuals with at least a Master's degree from a U.S. university. In most years, H-1 visas are still needed but raising the H-1B cap is not without controversy. Labor organizations will likely oppose such legislation, claiming H-1B visas take high-paying jobs from Americans.

Accordingly, if you are considering the pursuit of international workers to fill jobs in your organization, it is important to proceed efficiently and with due haste in order to be competitive. Although this white paper does not seek to convince you that hiring foreign nationals will resolve your professional staffing problems, it intends to provide you with step-by-step guidelines that will help make this process manageable if you do decide to pursue this course of action.

H-1B Defined

The primary non-immigrant visa used by companies to hire foreign nationals is the H-1B. This visa category covers individuals in specialty occupations, defined as *"an occupation that requires (a) theoretical and practical application of a body of highly specialized knowledge, and (b) attainment of a bachelor's or higher degree in this specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States."*

There are two essential requirements for a successful H-1B filing. First, the job itself must be professional, requiring at least a bachelor's degree in a particular field(s). If a company requires that all of its employees have college degrees, but does not particularize those degrees in relation to the subject position, that is not sufficient for specialty occupation eligibility. The second requirement is that the individual candidate must have a bachelor degree, foreign degree equivalent, or the equivalent based on experience or a combination of academics and experience.

For example, technician positions do not qualify for H-1B eligibility, since they do not require a bachelor degree in engineering or engineering technology. A higher level position, such as engineer, does require specialized professional degree. Similar cases exist for mechanics vs. mechanical or automotive engineers, draftsmen vs. architects, and bookkeepers vs. accountants. As the economy develops new professions, including formerly non-professional positions, e.g., graphic designers, you will need to look to the industry and your company to determine if the position qualifies as "professional." Particularly in the area of information technology, this determination is critical, as is the evidence provided to convince the United States Citizenship and Immigration Services (USCIS) that the position is indeed professional.

Evaluating Credentials
In most cases, the candidate will have a bachelor degree from a U.S. university. However, when they present a degree from outside the United States, the degree should be evaluated by a professional credentials expert to provide the U.S. equivalent. Situations exist where a degree from another country indicates a bachelor degree on its face, when in fact it is only equivalent to three years of U.S. university study. Some of the bachelor degree programs in India require four years of study while others only require three.

USCIS regulations also permit the substitution of real world experience for university credits. The regulatory formula allows three years or work experience to be substituted for one year of academics. In these instances, the experience is to be progressive and the objective is to establish that, through industry experience, the individual has gathered the knowledge/information base and theoretical understanding equivalent to that gained in a university setting. In the example above, the Indian national possessing a bachelor degree based on a three-year program would have to establish at least three years of progressive experience in the industry for a U.S. bachelor degree equivalence. There are instances where a candidate will have no university or college credits but can establish the equivalence of a bachelor degree through a minimum of 12 years of progressive work experience. There are professional evaluators, many of whom are college professors, who will review the academic and/or experiential background of the candidate and provide an analysis.

For positions requiring licensure, the H-1B beneficiary must possess a license or, at least, an interim permit. A license may or may not be required. For example, a law firm may have the need for an expert legal specialist on international tax law to serve as a consultant/researcher, but not to be engaged in the actual practice of law. A pharmacist working in a pharmacy or hospital will require a license, but if the pharmacist is working in a research laboratory, a license is not likely required.

The other major H-1B consideration is that the salary must satisfy the prevailing wage in that market. Historically, labor unions have battled against the granting of H-1B visas on the grounds that employers would pay lower wages to foreign nationals and, consequently, bring down the wage scale for similarly situated American workers. In order to avoid such a result, the employer must pay 100% of the prevailing wage to the H-1B beneficiary.

The Department of Labor can determine the prevailing wage, or the employer may use an independent wage survey or other published source. It is critical to properly classify the position, based upon the duties and not the title, in order to insure an accurate prevailing wage analysis.

The H1B Process, Step by Step

Step One: Obtaining the prevailing wage
These wages are now available online for each state and metropolitan statistical area (MSA) for the subject position. Previously, the Department of Labor used a system that included many more job titles and, therefore, you may find that your particular position does not have its own prevailing wage. Instead, you will have to look to a more generalized position most closely related to the subject position to identify the prevailing wage. There are four categories of prevailing wages. The first is for entry-level positions requiring little or no experience and generally requiring a great deal of supervision. The fourth category is for the most highly seasoned veterans. The second and third categories require an increasing amount of experience (expertise and the exercise of independent judgment). As the position requires a greater skill set, one moves to a higher level category.

If your wage offer is below the DOL's prevailing wage, it is recommended that an independent wage survey or other published source be utilized, which provides a more realistic figure. Resources for wage surveys are numerous. A visit to your local library or an Internet search will get you heading in the right direction.

Step Two: The Labor Condition Application

Next, the employer must file a Labor Condition Application (LCA) with the U.S. Department of Labor. The LCA (ETA 9035) must be certified by the DOL before the H-1B petition may be filed with the USCIS. The DOL reviews the application for completeness and accuracy. Certifications are currently done through an electronic system and commonly will be adjudicated within one week.

A single LCA may be filed for multiple positions. For a position that requires work at various locations, one LCA must be filed for each location. The LCA requires the employer to attest that it is offering the H-1B worker the higher of (a) the actual wage the employer pays to other individuals similarly employed and with similar backgrounds, or (b) the prevailing wage in the geographical area of employment.

The employer must also confirm that the working conditions for the H-1B employee will not adversely affect other similarly employed workers and that there is no strike, lockout, or work stoppage. Moreover, the employer must give notice to its employees of the filing of the LCA through a posting or notice to a bargaining representative, e.g. a labor union.

The notice, which must be posted for 10 continuous business days, must contain the wage offered, the prevailing wage, and the source of that wage. Postings must be placed in two conspicuous locations at each place of employment where the individual will be employed. The notice must also include information where complaints can be filed with the Wage & Hour Division of the U.S. Department of Labor. In addition, the employer must provide a copy of the certified LCA to the H-1B nonimmigrant.

Step Three: Prepare the I-129H petition for the USCIS

This petition is to be filed in duplicate and must include the following:
A) Certified LCA.
B) Written job offer letter or employment contract.
C) Detailed job description, including academic and experiential requirements.
D) Beneficiary's resume.
E) Academic documentation (plus credentials evaluation, if necessary).
F) Industry-relevant employment reference letters.
G) Materials that describe the petitioning entity (business, organization, etc.).
H) Beneficiary's complete passport.
I) I-94 entry document (and I-20 and the employment authorization document, if applicable).

Filing Instruction

The I-129 petition is filed generally with a $3,220 filing fee, of which $1,500 is a training fee paid by the employer. The training fee is reduced to $750 if your company has less than 25 FTE's. The $500 anti-fraud fee took effect on March 8, 2005 and the $1,000 expedite fee has become a necessity with the constant exhaustion of H-1 visas. If any immediate family members are to be included, then an I-539 application is filed for H-4 status with a filing fee of $300. For derivative applicants, file a copy of their complete passports and I-94 entry documents and proof of the familial relationship, e.g., marriage certificate/birth certificate.

The petitions are filed with the applicable USCIS Service Center based on geographic jurisdiction. There are four centers (See *Quick Guide* on page five for details): Eastern Service Center in Vermont, Southern Service Center in Texas, Northern Service Center in Nebraska, and Western Service Center in California.

The time in which USCIS adjudicates these petitions varies by regional service center but can take upwards of six months. Since there is an annual cap, it is advisable that H-1B petitions be filed as soon as possible. The fiscal year begins October 1, and an application may be filed up to six months before the requested start date. Where an expedite fee is paid, an adjudication will be made within 15 calendar days.

H-1B in Action

The beneficiary does not need to leave the United States in order to commence H-1B employment. The only exception is where the individual is out of status and therefore must proceed abroad to a U.S. Consulate to obtain an H-1B visa. Also, if the individual must travel abroad for personal or business reasons, they must have an H-1B visa in order to re-enter the country, unless the trip is to Canada or Mexico for less than 30 days.

Visa processing at a U.S. Consulate requires advance planning, in some instances requiring weeks or months, and the individual's presence in the country where the U.S. Consulate is located. The individual must present the original H-1B approval; their passport; completed and executed nonimmigrant visa application forms; a photograph; and a visa fee of at least $131, plus any reciprocity fee.

Initially, H-1B approvals may be issued for a period of up to three years. Although there are some exceptions, generally, an individual may hold H-1B status for up to a maximum period of six years. H-1B employees also may recapture unused time, e.g., time spent outside the United States.

H-1B approvals may be issued for part-time positions and individuals may hold multiple H-1B approvals simultaneously, enabling them to work for more than one employer. The H-1B approval is employer specific, geographically specific, and job specific. If a material change occurs in any of those areas, a new or amended petition must be filed. It is now permitted for individuals to apply to transfer to a new company and begin working upon USCIS receipt of the H-1B transfer filing.

In the event that the H-1B individual is dismissed before the end of their authorized stay, the employer is liable for reasonable costs related to return transportation of the beneficiary to their last place of foreign residence. This includes dismissals for cause but does not cover the return tickets for family members. However, if the beneficiary voluntarily terminates employment, the employer is excused from this requirement. Please see attached H-1 update for the latest changes to H-1 visas.

Alternatives to H-1B

For Canadian and Mexican citizens, the Treaty National (TN) visa, provided under NAFTA, serves as an alternative to H-1B. The NAFTA agreement covers many of the same categories as an H-1B, and actually adds several categories that would not qualify as H-1B professionals. TNs are issued in three-year increments and, for Canadians, can be issued on the spot at the Port of Entry. Mexicans obtain a TN visa at a U.S. Consulate in Mexico. TNs can be a very useful alternative, particularly where time is of the essence or if the H-1B cap has been reached for that fiscal year. The filing fee is $50 compared to the $3,220 fee for an expedited H-1. There is no annual TN cap. E-3 visas are now available for Australian professionals. Once an LCA is certified, the visa is applied for at the U.S. Consulate.

Supplementing Your Workforce

Skilled international workers can be viable additions to your staff and well worth the extra effort and paperwork involved in sourcing and bringing them into the country. It's a process, not a mystery. However, just as with American workers, there is tremendous competition for H-1B visas. Should you choose to go this route, the key to being competitive is to move quickly, since there is no guarantee that the number of visas will outlast the demand.

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Quick Guide

Step 1: Determine the prevailing wage.

- **Sources -**
- Bureau of Labor Statistics Web site: www.Bls.Gov/bshome.htm
- Web search for *independent wage survey*

Step 2: File the Labor Condition Application (LCA)

- **Requirements -**

A) Verifies that employer is offering highest of a) actual wage paid to similarly employed, with similar backgrounds or b) prevailing wage.

B) Confirms that working conditions for H-1B employee will not adversely affect other similarly employed workers and that there is no strike, lockout or work stoppage.

C) Notify employees of LCA filing through postings (for 10 continuous business days) in two conspicuous locations.

D) Employer must provide notice of LCA filing to employees by posting or via notice to bargaining representative, such as a labor union.

E) Provide copy of certified LCA to the H-1B nonimmigrant.

Step 3: Prepare I-129H Petition

- **Requirements -**

A) Certified LCA.
B) Written job offer letter or employment contract.
C) Detailed job description, including academic and experiential requirements.
D) Beneficiary's resume.
E) Academic documentation (plus credentials evaluation, if necessary).
F) Industry-relevant employment reference letters.
G) Materials that describe the petitioning entity (business, organization, etc.).
H) Beneficiary's complete passport.
I) I-94 entry document (and I-20 and the employment authorization document, if applicable).

Filing Locations:

Eastern Service Center - Vermont
Service area includes CT, DE, ME, MD, MA, NH, NJ, NY, PA, RI, VT, VA, WV, Washington D.C., Puerto Rico, and Virgin Islands

U.S. Department of Homeland Security
CIS
Vermont Service Center
75 Lower Welden Street
Saint Albans, VT 05479
802-527-4913

Northern Service Center - Nebraska
Service area includes AK, CO, ID, IL, IN, IA, KS, MI, MN, MO, MT., NE, ND, OH, OR, SD, UT, WA, WI, WY

U.S. Department of Homeland Security
CIS
Nebraska Service Center
P.O. Box 87129
Lincoln, NE 68501-7129

Southern Service Center - Texas
Service area includes AL, AR, FL, GA, KY, LA, MS, NM, NC, SC, OK, TN, TX

CIS TSC
P.O. Box 852211
Mesquite, TX 75185-2211
214-381-1423

Western Service Center - California
Service area includes CA, NV, AZ, HI, Guam

U.S. Department of Homeland Security
CIS
California Service Center
P.O. Box 10129
Laguna Niguel, CA 92607-0129
949-831-8427

H-1B Update

By Mark J. Newman

The American Competitiveness in the 21st Century Act (AC 21) became law on October 17, 2000. It exempts certain H-1 workers from the cap, specifically persons employed at higher educational institutions and their related non-profits, as well as those employed at non-profit research organizations or governmental research entities.

Probably the most awaited change was the new portability of H-1B status. While it can take up to six months to obtain an H-1B approval, previously an individual could not join the new employer until the approval had been issued. However, AC 21 authorizes such individuals to begin employment upon the filing of the H-1B petition. While the individual must be certain that they have maintained proper H-1B status with the current employer, such individuals and their prospective employers can now take advantage of this earlier start date.

AC 21 also contains another portability provision for individuals whose employment-based applications for adjustment of status to permanent residency have been pending for more than 180 days. They may change employers without affecting the validity of their I-140 petition and labor certification approvals. Now, an individual can leave the employer during this last stage of the residency process and not return to fill the permanent position that formed the basis for the residency application. It is recommended that great care be exercised in this area particularly in light of the lack of any regulations.

AC 21 also deals with the six year maximum stay for an H-1B individual. For those whose I-140 petition was filed at least one year ago or those whose labor certification was filed at least one year ago, the six year maximum stay is not applicable, and such individuals may receive extensions in one year increments. Moreover, for beneficiaries of I-140 petitions whose priority dates have not yet been reached, three year H-1 extensions may be granted.

Finally, another law, HR 3767, provides relief in situations where companies merge, acquire, or reorganize themselves. In the past, in many such situations, because of the existence of a new federal employer identification number, an amended H-1 petition was required. Under the new law, amended filings are no longer required, and the individual continues in valid H-1 status. This is based on the proposition that the remaining entity stands in the shoes of the prior H-1 employer, and as a successor-in-interest, the surviving entity takes over all H-1 employer obligations. This is welcome relief, particularly for very large merger situations involving hundreds or thousands of H-1B professionals who in the past were required to go through what appeared to be a process of form over substance. This law applies only where the terms and conditions of employment of the individual employee(s) remain the same.