Employing an Alien Worker

Introduction

Global hiring has been commonplace in the 90's and continues unabated as the decade comes to a close. Pressure from the Immigration and Control Act of 1990 has caused most employers to refrain from hiring "illegal" aliens. However, for a variety of reasons, U.S. employers continue to have to look outside the United States, or to pools of aliens in the United States, to meet their employment needs. Multinational companies find that they must be able to transfer personnel quickly and easily to ensure sustained international competitiveness. Other employers have labor needs that cannot be met by the U.S. labor force, requiring the use of foreign workers.

Immigration Law has been characterized as the second most complex area of United States Law, second only to Tax Law. It is little wonder that it has so frequently been given only cursory attention or ignored completely by employers. Many employers feel that the law is too complicated to understand and hope that they will be able to "just blunder through successfully" or, if they do not do anything, "it will go away." Unfortunately, it will not go away. This article will acquaint you with the various visa categories which may be used in order to legally employ aliens.

Nonimmigrant Visa Categories Which Allow "Work" in the U.S.

Contrary to a belief held by many, there is no such thing as a "work visa," that is, a visa which will allow a person to come to the United States, seek employment and begin working here. There are, however, certain visa categories which allow aliens who fit within these categories to work in the United States. Each of these categories has very definite limitations. It is, therefore, important to know the requirements of each category and the attendant limitations to determine whether the category will be of benefit to you.

There are twenty nonimmigrant visa classifications but only six normally allow persons to work in the United States:

- B-1 Visitors for Business
- E-1/E-2 (Treaty Traders or Treaty Investors
- F-1 (Students with work authorization
- H-1, 2, and 3 Temporary Workers and Trainees
- J-1 Practical Trainees/Exchange Visitor
- L-1Intracompany Transferees

Other classifications, O-1 (Extraordinary Ability), P-1 (Performers), and R (Religious Worker) are available as well. However, due to the very limited use of these classifications, they will be mentioned but not discussed.

B Visas (Visitors)

There are two types of B visas: B-1 (visitors for business) and B-2 (visitors for pleasure). While neither type allows for employment in the United States, under certain limited circumstances, a visitor for business (B-1) may be able to provide services while in the United States.

A visitor for business (B-1) is generally a person coming to the United States who is

employed abroad or self-employed and who will be performing activities on behalf of his employer or himself. This visa does not allow the person to actually perform local employment or labor in the United States and, thereby, compete with U.S. workers. For that reason, the alien may not be paid compensation by any U.S. source but may, in some cases, have expenses reimbursed.

The B-1 visa has its greatest usefulness by providing a way for persons to come to the U.S. who will attend business meetings, meet with clients or customers, attend seminars or conferences, receive training, consult with the home office, etc.

The primary advantage of a B-1 visa is its simplicity and ease in obtaining. Generally, a letter from the employer in the foreign country to the local American Embassy verifying the business purpose of a trip to the United States is sufficient in order to have the B-1 visa issued

The primary disadvantage is the fact that a B-1 visa is a relatively short-term visa. Also, the alien may not be paid a salary by a United States employer nor perform any work which is in competition with U.S. workers.

A visitor for pleasure (B-2) is generally a person who is coming to the United States on holiday or vacation. Such a person is not supposed to be in the United States to perform any work or business, even on behalf of a foreign company. To do so would be in violation of this nonimmigrant status. However, due to the ease in obtaining a B-2 visa, some employers look at this visa as a quick way to get the services of a new employee: get them here on a B-2 and then change them to the proper status. For a variety of reasons, this should not be considered the best use of the visa.

Some multinational companies encourage their overseas employees to obtain a B-1 or B-2 visas in order to enter the United States and perform the tasks which are needed. Keeping the employee on an overseas payroll is a tactic used to make it appear that the alien is coming to the United States legally, but the employer actually has the alien performing work which directly benefits the U.S. company. This is illegal and, while most companies do not intentionally try to break the law, many companies are unaware of the potential problem this can cause to the alien as well as to their own credibility.

E Visas (Treaty Traders and Investors)

There are two types of E visas that are applicable to employees: E-1 (treaty traders) and E-2 (treaty investors). Both of these visas require that the United States and the alien's country of nationality have an appropriate treaty and that the employing company is itself classified as a treaty trader or treaty investor company.

A treaty trader (E-1) is a person or company carrying on substantial trade, principally between the United States and the country of which the person or owners of the company are nationals. Substantial has been defined not so much in terms of the amount of money involved but in terms of the number of transactions involved. Principally means that more than 50% of the trade must be made between the United States and the country of nationality.

The most common types of treaty traders are those companies or individuals who are involved in the import or export of goods. However, other treaty traders may be travel agencies, airlines, international banks, etc.

Employees of treaty trader companies may obtain E-1 visas as long as they are employed by businesses which are owned principally by persons of the same nationality. To be classified as an E-1, the employee must be in a managerial, supervisory or executive capacity, or have special qualifications which are essential to the employer. As long as a person continues to be the employee of a treaty trader company, an E-1 visa can continue to be extended. It is possible for persons in this category to remain in the United States for many years.

A treaty investor (E-2) is a person or company which has invested a substantial amount of capital into a business in the United States. As with treaty traders, employees of treaty investor firms may also obtain treaty investor status as long as they are in a managerial, supervisory, or executive capacity or have special qualifications which are essential to the employer.

F-1 Visas (Students)

Generally, students (F-1) cannot work in the United States. Under certain circumstances, however, students may apply for permission to work. Those who are given such permission, will generally have an "employment authorization" card issued by the Immigration Service. An employer is most likely to encounter a foreign student when that person, upon graduation with a Bachelor's or Master's degree, looks for a job pursuant to a grant of practical training from the Immigration Service. Most F-1 students are authorized to work for one year on practical training after graduation, although sometimes this practical training is used before graduation. Often, after a student has been hired, an employer who is pleased with his or her performance will file papers to keep that person's services longer, usually by filing for a change to H-1 status.

Students may also be eligible for hire when they have work authorization by showing economic hardship or being granted curricular practical training.

H Visas (Temporary Workers)

The H category of visas comes closest to a "working visa" under the Immigration and Nationality Act. However, the category has very narrow parameters and the rules must be understood and carefully followed. There are three types of H visas: H-1 (Temporary Professionals otherwise known as persons in specialty occupations), H-2 (Temporary Workers), and H-3 (Temporary Trainees). The H visas are "petition-type" visas. That means an employer must initially file a nonimmigrant visa petition (Form I-129) with the INS in the U.S. on behalf of the alien whom it wishes to employ.

Once the visa petition has been approved, if the alien is outside the United States, the approval notice is forwarded to the appropriate American Consulate in the alien's country of residence. The alien is then notified and applies to have that visa issued to him or her. Please note, however, just because a visa petition is approved in the United States does not mean that the alien will automatically be issued the visa. American Consulates can make their own determinations as to whether the alien qualifies for the visa.

If the alien is in the United States, he or she will be granted H-1 status concurrently with the Immigration and Naturalization Service's approval of the employer's petition. There will be no need to leave the United States, unless the person is out of status.

A person may qualify for an H-1 visa if he or she will work in a specialty occupation and the occupation requires the attainment of at least a Bachelor's degree. Experience may be substituted for education in some situations. Present regulations allow for three years of job

experience to be substituted for a year of education toward the completion of a degree.

Under present regulations, an alien may be issued an H-1 visa even if there are other U.S. workers available. Therefore, it is not necessary to establish that the company has tried to find or hire U.S. workers.

The Immigration Reform and Control Act of 1990 added the requirement of filing a Labor Condition Application with the Department of Labor for all new H-1B cases or extensions of stay filed after October 1, 1991. The application must include statements by the employer that it, among other things, is offering the prevailing wage and favorable working conditions, and has given notice to its employees of its intention to file an H-1 petition. Only after the Labor Condition Application has been approved by the Department of Labor can the employer file the H-1B visa petition with the Immigration Service.

An H-2 visa is issued to an alien who is coming to the United States not only temporarily, but to perform a job which itself is temporary. That is, when the alien is through working in the United States, the job will also cease to exist. If a person is not a "professional" and thereby not qualified for H-1 status, this is one of the only other visas available. Unfortunately, not only is it difficult, if not impossible, to prove that the job is temporary, but a temporary labor certification must also be obtained proving that there are no available Americans who can perform the job. As a result, this is an extremely cumbersome and complicated visa to try to obtain.

An alien may be brought to the United States for training which is not available in his or her country, by using an H-3 visa. As with all the other H categories, a visa petition must first be filed with the Immigration Service by the employer. Accompanying the petition must be an explanation as to why such training is not available in the alien's home country, the advantage of the training to the alien, the benefit to the U.S. company which will provide the training and a detailed statement of the training program. If the training program results in anything more than minor productivity, the visa petition may be denied due to the fact that the alien may be taking a job away from a United States worker.

L Visas (Intracompany Transferees)

The Intracompany Transferee (L-1) visa is probably one of the most appropriate and useful visas for multinational corporations wishing to transfer employees from abroad. For an alien to qualify, he or she must meet each of the following requirements:

- One year of employment within the three years immediately preceding the time of application in an executive, managerial or specialized knowledge capacity;
- Employment must have been abroad;
- Employment must have been with the same employer or an affiliate or subsidiary; and
- The alien must be coming to fill a position which is executive or managerial or involves specialized knowledge. (Regulations specifically define each of these terms.
- This category also requires that a petition (Form I-129) be initially filed with the Immigration Service by the employer. The petition procedure is similar to filing an H-1 classification.

TN Visas

Under the North American Free Trade Agreement, certain Canadian and Mexican professionals may enter the United States in TN status. In order to qualify, an alien must qualify for one of the occupations agreed to by Canada, Mexico, and the United States. Most

of the occupations require a minimum of at least a Bachelor's degree. (For a complete summary of the types of visa categories which allow a person to work, see "Employability of Persons in Commonly Encountered Visa Classifications" by Edward R. Litwin.)
Change Of Status

An alien in legal nonimmigrant status in the United States may be eligible to change to any other nonimmigrant status for which he or she is qualified, including a status that allows employment. The alien does not need to leave the United States to do so. However, once an alien changes his or her status, upon leaving the United States, it will be necessary to obtain a visa under the new status at an American Consulate in order to reenter the United States.

In employment situations, the application to change status is usually initiated by the employer. However, the alien will be heavily involved, providing necessary information and documentation since the employer normally must submit documentation concerning the alien's eligibility for the new status.

Extensions Of Stay

Any alien in legal nonimmigrant status in the United States is eligible to apply for an extension of temporary stay and work authorization. A legitimate reason must be given for requesting the additional time. An employer's desire for continuing the alien's employment is a sufficient reason. Persons in H-1 status may remain for up to six years. Persons who are executives and managers in L-1 status may remain up to seven years. An alien in L-1 status with specialized knowledge can remain for five years. An alien who has been in the United States for the maximum amount of time must leave and remain outside the United States for one year in order to be eligible to start the 5-7 year cycle all over again.

Permanent Residence Through Employment

Although there are some extraordinary procedures which a relatively minor number of people use every year in order to become permanent residents, the general procedure for obtaining permanent residence is based either on a close family relationship (relative visa petition) or on employment. A person who fails to qualify under one of these two categories will generally not be able to come to or remain in the United States on a permanent basis.

The Immigration Act of 1990 provides for three employment-based immigrant preferences relevant to the general work force:

- **First Preference:** Aliens of extraordinary ability, outstanding professors and researchers, and certain multinational executives and managers. No labor certification is needed for this preference.
- **Second Preference:** Members of the professions with advanced degrees and aliens of exceptional ability. A labor certification is usually required but can be waived if a "National Interest" is involved.

- **Third Preference:** Skilled workers, professionals (and other workers requiring less than 2 years of education, training or experience.) A labor certification is always required. There are two other less used employment preferences: religious workers and investors of $1,000,000 or more.

The labor certification process used in Second and Third preference cases tends to be extremely time consuming and detailed. Essentially, three things must be established in order to successfully obtain a labor certification:

- There are not "able, willing, qualified and available" U.S. workers who can perform the job in question. The foundation of this requirement is an advertising campaign as prescribed by Department of Labor regulations.

- The alien for whom a labor certification is being filed is receiving or will receive the "prevailing wage." The Department of Labor does not want any "cheap labor" undermining the marketplace for U.S. workers.

- All the regulations of the Department of Labor have been followed. It may be possible to establish that there are no U.S. workers available and that the alien is being paid the prevailing wage, however, if all of the proper steps are not followed correctly, a labor certification can be denied.

Numerical Limitations

Simply because a person has been issued a labor certification and classified under one of the appropriate immigrant preferences, does not mean that the person will be able to immigrate to the United States immediately. Since there are more people eligible to immigrate to the United States than there are numbers available in any given year, it may be necessary for the prospective immigrant to wait awhile before actually being able to apply for permanent residence. The alien cannot apply until reaching the "top of the visa waiting list." In other words, the alien is in a mythical queue and until he or she gets to the front of the line, he or she is not eligible to immigrate. Currently, every country is experiencing a backlog in the third preference - Other Worker - category. Only China and India are experiencing backlogs in any of the other employment categories.