Employer Information Bulletin 96-15: Procedures and Alternatives to Sponsoring an H-1B Specialty Worker (revised 12/14/98)

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Procedures and Alternatives to Sponsoring an H-1B Specialty Worker*

*Specialty Occupations require theoretical and practical application of highly specialized knowledge and attainment of at least a bachelor's degree (or foreign equivalent) and state licensure if required to practice

PROCEDURES FOR SPONSORING AN H-1B WORKER

A 3-Step Process Requiring Sequential Approvals from 3 Federal Agencies

Step 1: Labor Condition Attestation (LCA) Deciding Agency: Labor Department (DOL)

Attestation:

Employer applicants must list number of workers sought as well as their occupational classifications, wage rates, and the working conditions. Employers must attest that:

- prevailing wage rate for area of employment will be paid
- working conditions of position will not adversely affect conditions of similarly employed American workers
- place of employment not experiencing labor dispute involving a strike or lockout
- notice of the filing of LCA is posted in place of employment or has been given to employee bargaining representative (if applicable)

Procedures/conditions:

- Employer applicants file LCA on Form ETA 9035 with appropriate DOL regional office
- DOL reviews LCAs for completeness and certifies within statutory 7 day period
- LCA valid for 3 years as long as there are no material changes in position and H-1B employee remains with original
- employer
- LCA must be used by employer within 6 months of intended employment date
- LCA may cover multiple workers in same occupation
- Special restrictions apply for positions that change locations; notice must be posted for 10 days before H-1B arrives to work in area covered by LCA; if in new area, new LCA is necessary unless employment < 90 days (cumulative over life of LCA)

Step 2: Petition to INS Deciding Agency: Immigration and Naturalization Service

Petition:

- Employer petitioner (including job contractor) files Form I-129 plus H Supplement at INS Service Center nearest to place of employment; approved LCA approval and letter of support from employer petitioner must be included
- Approval mailed to employer petitioner on I-797B (tear-off consular notification card for nonimmigrant to use in obtaining visa from consulate)
- Visa allows foreign worker to be admitted to U.S.
- Denial appealable to Administrative Appeals Office

Terms and conditions:

- H-1B employment is temporary
- H-1B foreign specialty workers are not presumed to be intending immigrants; they are not required to maintain foreign residence and may seek permanent residence in U.S. there is an annual cap on H-1B admissions of 65,000 workers
- Work authorization for H-1B foreign specialty workers is strictly limited to employment by sponsoring employer
- Change of employer requires new H-1B petition; new employment cannot begin until INS approval is received
- Multiple employers require multiple H-1B petitions
- Employer must pay return transportation costs for employee terminated prior to end of approved period of employment (unless initiated by employee)
- Foreign specialty workers subject to 1 year foreign residency requirement prior to readmission
- Dependents (spouse and unmarried children under 21) may undertake full-time study in

Duration of stay: 3 years, extendible to 6 (include time in L status) via Form I-129 and current LCA extensions approved on Form I-797A, with tear-off portion that serves as replacement I-94.

Step 3: Visa to Enter U.S. Deciding agency: U.S. Consulate (State Department)

Procedure:

- Employee files Form OF-156 plus I-797B tear-off at U.S. Consulate (except Canadians).
- Visa allows employee to apply for INS admission to U.S.

Terms and conditions:

Standards of approval are subject to consular discretion and may differ from INS admission or petition approval standards

- Duration of visa depends upon reciprocity with home country
- New visas needed if INS extensions of status are granted in order to re-enter U.S.

Alternatives to Sponsoring H-1B Workers

(in alphabetical order by status category)

E-1 Treaty Trader

Employer must be involved in substantial exchange, purchase, or sale of goods and/or services between the U.S. and Argentina, Austria, Belgium, Bolivia, Bosnia, Brunei, Canada, Columbia, Costa Rica, Croatia, Denmark, Estonia, Ethiopia, Finland, France, Germany, Greece, Honduras, Iceland, Iran, Ireland, Israel, Italy, Japan, Korea, Latvia, Liberia, Luxembourg, Macedonia, Monaco, Netherlands,

Norway, Oman, Pakistan, Paraguay, Philippines, Spain, Surinam, Sweden, Switzerland, Taiwan, Thailand, Togo, Turkey and United Kingdom (subject to changes).

- Employing company must be greater than 50% owned by interests in treaty country.
- Employees must come from treaty country, "have special qualifications that make the services to be rendered essential to the efficient operation of the enterprise," and be paid from the proceeds of treaty trade.

Duration of Stay: admitted for one year; two-year extensions possible; no maximum limit.

F-1 Foreign Student (Practical Training)

- Employment of foreign students, in all but exceptional cases, is considered practical training (1990 Act provisions expire 9-30-96); cannot be used to train foreign students for permanent U.S. employment.
- Practical training permissible after minimum of 9 months in F-1 status in good academic standing with approval of foreign student advisor
- Employment must be in field of study and appropriate to level of study.

Duration of Stay: work authorization available for maximum of 12 months; practical training must be completed within 14 months of graduation.

H-3 Trainee

- Reserved for temporary placement of foreign employees in bona fide established U.S. company training programs (graduate medical training excluded). If trainee performs necessary services that the employer would have to fill a position to otherwise provide, H-3 status may not apply. Training must not be available in home country and must prepare employee for employment in home country (or outside U.S.).

Duration of Stay: 2 years.

J-1 Exchange Visitor

- Programs run by educational institutions, businesses, and organizations approved by US Government; some allow employment
- Permissible activities: teaching, lecturing, research, training, consulting, etc.
- Approved sponsors issue J aliens IAP-66 certificates of eligibility specifying period of approved stay
- Exchange students eligible for 18 months of post-degree practical training
- Foreign medical graduates, US Government-funded visitors and, in general, exchange visitors whose skills are needed in their home countries (USIA skills list) may not adjust or change status until two-year foreign residence requirement is satisfied after completion of exchange visit (regardless of duration)

Exceptions: (1) waiver request from US Government agency (2) exceptional hardship on US citizen/LPR spouse or children (3) threat of persecution in home country (4) "no objection" determination from home country government (except physicians).

L-1 Intracompany Transferee

- Must have worked abroad for foreign affiliate of "qualifying organization" (operating in US and minimum 1 other country) for 1 of preceding 3 years in managerial/executive role or position involving specialized knowledge
- US position must be managerial/executive in nature or require specialized knowledge

- INS action required within 30 days of receipt of petitioner's Form I-129; blanket petitions may be made

Duration of Stay: 5 year maximum for specialized knowledge personnel,

O-1 Alien of Extraordinary Ability

- Eligible aliens have received (inter)national acclaim and/or recognition (awards, publications, memberships, contributions, distinguished employment, high salary, etc.)
- I-129 petition by US or foreign employer or US agent; event(s) and itinerary must be specified and advisory opinion from peer group, management or labor organization provided

Duration of Stay: admitted to US to work in field of distinction for period of time to cover event or activity for which admitted (lecture series, scientific project, etc.).

TN-1/2 Mexican or Canadian Professional Under NAFTA

- Available to Canadians in professions listed on NAFTA schedule. Canadians with offers of qualifying
- employment do not need prior INS approval; may be admitted by U.S. border officials in TN-1 status
- for periods of one year every time they re-enter the U.S.

Duration of Stay: no maximum as long as eligibility criteria continue to apply.
Mexicans in professions listed on NAFTA schedule must follow H-1B procedures to be admitted in TN-2 status.

Contract worker

Contract for services of an H-1B foreign specialty worker sponsored by a labor contractor.

Change and Adjustment of Status

Change of Status to H-1B:

An alien already in the United States in another nonimmigrant status may qualify for conversion to H-1B status under certain circumstances. The procedures are similar to filing of a standard petition. Common examples:

From F-1:	foreign student, following practical training
From J-1:	exchange visitor, if waiver of two-year foreign residency requirement is granted
From B-1/2:	visitor for business

Changes of Status from H-1B:

An eligible alien already in H-1B status who finds another nonimmigrant category more appropriate may qualify for change of status. Specific requirements apply and must be met. Common examples:

To E-1:	Treaty trader, due to lack of limit on duration of stay
To L-1:	Intracompany transferee, due to lack of limit on duration of stay
To TN-1:	Canadian NAFTA professional, due to lack of limit on duration of stay

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Adjustment of Status:

Filing for permanent residence may be an option for some nonimmigrants who are already in the United States. Some common circumstances bar or delay adjustment:

- Unauthorized employment in the U.S. at any time since admission (includes expired authorization)
- Failure to maintain status at any time since admission to U.S. for J nonimmigrants, failure to fulfill two-year foreign residency requirement (unless waiver granted)
- Failure to meet requirements of an immigration preference category
- Non-availability of immigration visa
- Excludability from U.S.

Alternative for Aliens Who Do Not Meet Standard Adjustment Criteria: INA Section 245i generally permits otherwise ineligible aliens (including those who entered without inspection) to adjust status upon payment of 5 times the normal filing fee.

For more information about many of the matters referenced above, call the Office of Business Liaison and inquire about other topics covered in our list of Employer Bulletins. For example, employers and individuals interested in procedures for employing nonimmigrants may find the bulletins containing INS Service Center Guidelines very useful.

Guide For Congressional Staff

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