

I N S I D E   T H E   M I N D S

# Employing Highly Skilled Foreign Nationals

*Leading Lawyers on Counseling Clients,  
Obtaining H-1B Visas, and Developing a Successful  
Immigration Strategy*



ASPATORE

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# Guiding Clients through the Employment Process When Hiring Foreign Nationals

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## **Client Counseling before the Employment Offer**

U.S. employers seeking to employ foreign professionals temporarily in the United States may choose from several visa categories. Before an employer makes an employment offer, it should determine if the highly skilled foreign national is eligible for an employment visa. The employer should review the position being offered, the minimum education and experience requirements, and the current immigration status of the individual if they are present in the United States (i.e., student, tourist, under the B-1 or B-2 status, as a visa waiver under the Visa Waiver Program, or under a current employment visa).

To make the process easier, prior to drafting any employment petition, the attorney or person filing the petition should know the employer, as well as some aspects of the position and the foreign national. Relevant considerations include:

1. Company job description
2. Recruiting, hiring, and firing policies
3. Job description and requirement, formal or informal (including the minimum education and experience requirements of the position, as well as job dynamics), distinguishing between job description and job requirements (important also for wage description)
4. Do job descriptions change often?
5. Do employees move from job to job? If so, how is the staff used on the different positions?
6. Proposed U.S. salary to be paid to the employee
7. U.S. location of the position
8. What is the company practice for hiring?
9. What are the elements of the profile of the company?
10. What are the elements of their particular job profile, and are they practiced or changed regularly?
11. The employer's I-9 practice
12. Organize information on a companywide basis. Think beyond the petition so you can be consistent while maintaining flexibility.

13. Be flexible, to limit the need for numerous amendments down the road, and have the green card in mind when drafting.
14. The more information you provide, the more you will have to amend in the future.
15. Different locations?
16. Different assignments?
17. Company policy regarding green card sponsorship. Is this an established policy, and does the employer know that the employee is likely to ask for sponsorship as soon as they get their visa?
18. Provide specifically for the position in question:
  - a. Hours (part-time or full time)
  - b. Salary (hourly, monthly, yearly)
  - c. Employing entity (legal name, employer identification number of legal entity, what is reflected on paycheck). Who has authority to control these employees? Which entity needs to be the employer for H1 or L purposes?
  - d. Geography. Are there different locations? Do you need several labor conditions applications for each? Is there a distinction between work site and work location? Will the employee travel occasionally or permanently?
19. Copy of the foreign national's résumé or curriculum vitae
20. Copy of the foreign national's education diploma or degree and the transcript
21. Copy of the foreign national's U.S. immigration documents—any in their possession, including their F-1 student documents
22. Copy of their passport—all pages in the passport
23. Copy of the foreign national's I-94 white arrival and departure record
24. Copy of the passports and I-94 cards of any family members
25. Copy of a marriage certificate, if applicable, and the birth certificates of any children

If the conclusion is that the employer and the foreign national are a good match, the next step is to determine the best course of action and the best employment visa. Hence, an H-1B visa (reserved for individuals with at least a bachelor's degree or equivalent working experience) or an L visa

(reserved for individuals with at least one year in the managerial or executive position or with “specialized knowledge” within a U.S. company subsidiary or affiliate abroad).

## **H-1B Visa**

The U.S. immigration laws have certain non-immigrant visa classifications for individuals to enter the United States to temporarily work in “specialty occupations.” Historically, the H-1B visa characterizes these occupations, since such visas require a certain advanced body of knowledge and training, and most of the professions under this classification fall under the H-1B visa category. The H-1B visa is subject to a numerical cap of 65,000 visas per year, as will be discussed further.

### *Basic Requirements for the H-1B*

The H-1B visa is the most common temporary work visa for professionals entering the United States to work in a position requiring a specialty occupation, specifically an individual who holds at a minimum a university degree or equivalent experience as established by a professional evaluator.<sup>1</sup> “Specialty occupation” is defined in the statute 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 the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.” 8 C.F.R. § 214.2(h)(4)(ii) (2009), as amended, 55 Fed. Reg. 3497 (Jan. 26, 1990), renumbered, 55 Fed. Reg. 34895, 34897 (Aug. 27, 1990).<sup>2</sup> U.S. Citizenship and Immigration Services (USCIS) will not process any H-1B visa petition not requiring a bachelor’s degree or its equivalent.

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<sup>1</sup> USCIS will allow foreign degrees as long as they are accompanied by a formal education evaluation issued by one of the USCIS-recognized education evaluators who can detail the coursework of the foreign degree program and issue a report stating that the foreign degree is the equivalent of a four-year university degree from an accredited U.S. education institution.

<sup>2</sup> See *Matter of Shin*, 11 I&N Dec. 686, 687 (U.S. B.I.A. 1996); *Matter of Essex Cryogenics Industries Inc.*, 14 I&N Dec. 196,197 (U.S. B.I.A. 1972); *Matter of General Atomic Company*, 17 I&N Dec. 532, 533 (U.S. B.I.A. 1980).

If the position requires that highly complex documents be reviewed or the duties require a body of technology, like engineering or mathematics, to be applied, then the position can be found to be a specialty occupation. For the most part, the complexity of the duties trigger the requirement for a university degree, and it is a good idea for the U.S. employer to provide hard evidence of the requirement (i.e., copies of corporate documents establishing the complexity of the operations, previous or current similar positions of the U.S. employer that document the need for the university degree).

After the position is defined to be a specialty occupation and one requiring a university degree or equivalent, the next stage of the analysis is to review the person's qualifications. It is for this reason that we ask all U.S. employers to share the job description of the position being offered to process an H-1B. We want to see what the day-to-day responsibilities will be and what minimum education and experiences are required to perform the position's duties.

It is equally important to always ask for a detailed, full description of the person's employment history, and it is ideal to receive a résumé or curriculum vitae listing all education with dates and places of attendance for the university studies, if applicable. The résumé should also list the dates of employment, the name of the employer, and the city and state/country of the employer. The detailed résumé will assist in the analysis for the H-1B petition to be prepared and submitted to the USCIS offices. The résumé must be detailed and not circumvent the details of the duties at each position held.

It is also essential to ask for copies of all of the foreign national's education documents and transcripts, if they exist, for the university studies. This is especially important in cases where there is a foreign national who has a foreign education degree or diploma. In such instances, we will need to have the education and transcripts evaluated to see if they are the equivalent of a four-year U.S. university degree, and thus one we can use for the H-1B petition.

In summary, to accurately assess the potential for a successful H-1B petition, it is essential for the employer to have:

1. Title and position description, with a listing of the education and experience requirements
2. Copy of the résumé for the foreign national
3. Copy of the degree/diploma and transcripts with translations
4. A professional evaluation of the professional experience of the foreign national (if there is no bachelor's degree)

### *The Petition and the Department of Labor*

Although the USCIS processing of an H petition begins when an employer files a petition for a non-immigrant worker and an H classification supplement, there are a number of U.S. Department of Labor considerations and clearances that must be obtained prior to the filing.

Specifically, the first prerequisite to the H-1B approval is submitting a labor conditions application, using FORM ETA 9035, to the Department of Labor, which is easily done online through the department's iCert portal. The ETA 9035 form contains basic information about the proposed employment, and some considerations include whether the salary to be paid meets the requisite Department of Labor prevailing wage, the work location, and whether the working conditions of the H-1B employee are the same as other workers at the U.S. employer.

There will be an attestation the U.S. employer will need to file online via the iCert portal. Thus, we always review the Department of Labor's online wage survey prior to processing of an H-1B, and discuss the wage requirement associated with the H-1B petition filing. The U.S. employer must pay the requisite wage to meet the Department of Labor requirements and to be able to proceed with the filing of an H-1B petition once the department's attestation, Form ETA 9035, has been certified.

Form ETA 9035 contains standard attestations the employer must make. It is important that employers familiarize themselves with the statements they agree to, to avoid future inadvertent non-compliance and possible penalties.

There are four attestations an employer makes by signing and filing the labor conditions application. The employer attests:

1. It is paying (and will continue to pay) the H-1B employee wages that are at least the “actual wages” paid to others with similar experience and qualifications, or the “prevailing wage” for the occupational classification in the area.
2. It will provide working conditions for the H-1B employee that will not adversely affect the working conditions of workers similarly employed in the area.
3. There is no strike or labor dispute at the place of employment.
4. It has provided notice of this filing to the bargaining representative (if any), or if there is no bargaining representative, it has posted notice of filing in at least two conspicuous locations at the place of employment for a period of ten days.<sup>3</sup>

A clear understanding and compliance with the attestations ensures that the employer will be permitted to petition for future H-1B workers and minimize civil penalties, in case of an audit.

After the labor conditions application is submitted, the Department of Labor will review the application “only for completeness and obvious inaccuracies” and, where sufficient, shall provide the certification within seven working days of the filing of the application. Immigration and Nationality Act (INA), Pub. L. No. 82-414, § 212(n)(1), 66 Stat. 163 (1952) (codified as amended in at 8 U.S.C. § 1182); 20 C.F.R. § 655.740(a)(1) (2008).

Once certified, the labor conditions application is filed before USCIS together with Form I-129 Petition for a Nonimmigrant Worker, Form I-129 Supplement H, and Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement. The filing should also include supporting documents, such as the foreign national’s college diplomas and transcript, résumé, passport, and I-94, as well as a company support letter, to name a few. The forms and supporting documents are filed with the USCIS service center having jurisdiction over their place of residence.

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<sup>3</sup> 20 CFR § 655-791 et seq.

Processing times vary depending upon the service center, but the regular waiting period is between three and four months. However, an employer may choose “Premium Processing” for the H-1B petition, to expedite the response from USCIS, by paying an additional \$1,000, which ensures a decision on the petition within fifteen calendar days. Employment cannot begin until the H-1B visa has been issued, or until October 1 of the calendar year for which the visa was initially granted, whichever is first.

### *Family of the H-1B Visa Beneficiary*

An H-1B visa holder’s spouse and children (under the age of twenty-one) can temporarily immigrate to the United States with the H-1B holder. However, they cannot work unless they obtain their own work visa. Dependents of H-1Bs are entitled to obtain H-4 dependent visas, and can study in the United States under the classification, if accepted at the school of their choice.

It is important to understand the H-4 dependant rules, because should a spouse or child under the age of twenty-one work in the United States, they would violate the terms of their non-immigrant status and have serious consequences, including removal from the United States.

### *H-1B Visa Availability*

Lastly, when considering the H-1B petition as the avenue by which the U.S. employer will hire and retain a foreign national employee, it is imperative that an H-1B visa number be available. The law imposes an annual limit on the number of non-immigrant visas for H-1B classifications, and the annual supply of H-1B numbers is limited by a statutory cap of 65,000 H-1B “specialty occupation” visas for the positions requiring a U.S. degree or the equivalent. An additional 20,000 H-1B visas exist for those foreign nationals who hold U.S. advanced degrees.

Once the H-1B cap is reached, no H-1B petitions will be approved until the next fiscal year’s filing season begins, unless the H-1B petition is filed by a cap-exempt employer, or unless the H-1B beneficiary is otherwise exempt from being counted against the cap for that fiscal year.

Since the earliest a petitioner can file an H-1B petition is six months before the requested start date, April 1 begins this filing season each year. Most U.S. employers will submit their H-1B petitions in April of the year when the H-1B visa numbers become available, and the H-1B petitions will have effective start dates of October 1 of that year.

Given the demand and the historical shortage of H-1B visa availability, it is usually recommended for U.S. employers to review their staff needs and openings early during the calendar year, so they can plan the submission of the H-1B petitions in the timeframe noted above. It is also important for U.S. employers to identify their H-1B candidates from their employee pool with F-1 students so the students can file the H-1B petitions on a timely fashion.

In prior years, the H-1B cap was reached within the first few days of the filing season. As of September 2009, USCIS continued to accept cap-subject H-1B petitions because the cap had not been reached for fiscal year 2010.

#### *Prior Immigration History of the Foreigner*

Other considerations to be taken into account before the filing of the H-1B petition concern the immigration history of the foreign national applicant. Employers want to review all U.S. immigration documents before proceeding with the H-1B petition to ensure that the foreign national applicants can enter or remain in the United States past their current status, and whether they will be able to seek a green card in the future, in the event that the U.S. employer is seeking to have the foreign national past the permissible six years of the H-1B visa.

#### *Offers to Students in the United States*

When planning an employment offer to a highly skilled foreign national who is already in the United States on a student visa, it is best to determine the full U.S. immigration history and the coursework taken, as well as the degree obtained to then determine if they meet the U.S. employer's need for the study program and the skill sets acquired in the study program. Please note that it is at this time that the position being offered is critical in assessing the appropriateness of the H-1B filing.

For a student to become an employee, the U.S. employer must make an offer of employment that the foreign national student will accept. Once the offer is accepted, the employer can use the checklist provided above to commence the preparation and submission of the necessary USCIS forms, fees, supporting documentation, and a statement from the U.S. employer explaining the need for the foreign national employee.

After the H-1B petition is filed with the appropriate USCIS office, the student and the employer must wait for the processing. If the H-1B petition is approved, the foreign national employee can commence working as an H-1B employee on the effective start date of the H-1B petition approval notice.

### *Possible Issues with the Filing*

Some difficulties that may arise during the process include whether there are any H-1B numbers left if the H-1B petition is filed late, or the foreign national employee's educational credentials are not the equivalent of the U.S. degree, or the position may not be a specialty occupation as defined by the USCIS rules.

In cases where USCIS may find the position to not meet the definition of "specialty occupation," the employer may need to have professional opinions from recognized professors in the area of discipline discussing the "professional" duties of the position and the complexity of the role. Such offers of evidence will typically result in USCIS reversing their finding and approving the H-1B petition.

If the H-1B numbers are depleted, the employer may have to hire the foreign national overseas and wait for new H-1B numbers to be released the following year. Or if the prospective employee is a student with an F-1 visa, the student can enroll in another full-time study program in the United States (usually a master's degree), and remain in the United States with valid student status. The student can then apply for an H-1B visa when the new H-1B numbers are released the following year. The key issue is having the H1 visa available, and if the person is in the United States and reticent to return to their home country only for visa purposes, an effort can be made to keep them in valid immigration status, extend

their status, and then change their status (i.e., from a student with an F-1 visa to an employee with an H-1B).

### *Internships versus Employment*

In the matter of internships versus employment, internships usually do not exceed a year, while employment under an H-1B visa may last up to six years with the same employer.

Note that any foreign national in the United States who is going to be servicing a U.S. employer, and providing a benefit to a U.S. employer, may be found to be “working” or “training” in the United States, and as such would need to have the appropriate non-immigrant visa classification to work in the United States—an H-1B (see discussion above), TN (visas for Canadians or Mexicans under the North American Free Trade Agreement provisions), H-1B1 (temporary work visas for Singaporeans or Chileans), or an E-3 (temporary work visas for Australians)—or to train in the United States—a J-1 trainee visa or an H-3 temporary training visa.

Each visa classification, whether a training visa or a work visa, has a set of forms to be completed with supporting documentation, as discussed in the USCIS regulations. The type of program in which the foreign national will participate while in the United States will dictate the forms necessary, the fees to be paid, and the time to be given to remain in the United States to perform the work and/or training.

### **Client Counseling after the Employment Offer**

When hiring a foreign national, the offer of employment must indicate that the foreign national must secure employment authorization before commencing employment with the company. The I-9 component must be indicated in the offer letter, and the start date may need to be flexible, dependent on the approval of the temporary work visa by USCIS. Employment lawyers are best to draft the text, but the general language consists of “obtaining USCIS employment authorization before commencement of work at the U.S. employer.”

## **Dispute Resolution**

The question of how to handle dispute resolution in the employment contract for a foreign national is similar to any U.S. employment contract. An arbitration clause in any employment contract is an option often suggested for all employers. Usually the employment contract is done in English if the contract and work to be performed are in the United States.

Where there is a dispute between the U.S. employer and the foreign national employee over the employment contract, the resolution does not differ because the employee is a foreign national in the United States on an H-1B. However, where there is a difference between the treatment of a U.S. employee and a foreign national H-1B employee is when there is a termination of the individual for no cause (e.g., a reduction in the work force). In this instance, the U.S. employer must pay the H-1B employee the “reasonable costs of transportation of the alien abroad,” as per the USCIS H-1B regulations and the Immigration and Nationality Act.

In the same way, company issues such as trade secrets, non-compete clauses, and confidentiality for foreign national new hires are approached in the same way as all other new employees of the company, and neither the nationality of the employee nor the U.S. immigration status in the United States impact the treatment of the employee in the employment contract. Terms that must be included in the contract are the same ones used for all other new hires, and they should be used in the context of H-1B/foreign national employees. In the case of non-compete agreements, the specific terms of the agreement will rule the relationship between the foreign national and the employer. Unless there are specific circumstances, broad non-compete agreements with unlimited years and covering all countries are likely not to be enforceable.

## **Experience and Reference from Attorney**

When clients are concerned or uncertain about these issues, it generally helps to assure them of the many years of employment immigration experience the attorney has, and give them some client references to make them feel more comfortable. If representing a foreign national employee seeking the H-1B,

we would offer them some names of other H-1B employees we have represented, allowing the prospective H-1B employee to speak to prior clients in confidence and ask questions regarding the H-1B processing.

When questions arise from the new hires on benefits such as relocation costs, tuition/education reimbursement, and family-related costs, most foreign national employees are referred to the company's relocation policy or program, if one is in existence. Typically, where there is no policy, the foreign national who is a new hire from overseas may request a relocation expense account and other benefits to accommodate their needs or their family's needs.

It is a good idea to review the policies on relocation of other companies in the same industry, who may have U.S. operations in the area of the U.S. employer, to compare the costs associated in accommodating the foreign national's request, and then to determine if any other benefits, other than those given to all other new hires, will be given.

### **Convenience of the Immigration Attorney**

An immigration attorney adds value in the drafting of the appropriate and compliant text for the USCIS forms and the U.S. employer's letter of support that will be submitted along with the necessary USCIS forms and supporting documentation. Additionally, an attorney is best suited to guide on the required supporting documentation and where to send the forms and fees to ensure the quickest and most efficient processing of the petition. Furthermore, the attorney is best qualified to submit any responses to any USCIS questions that may be issued in connection with the H-1B. Lastly, the attorney can follow up with the relevant U.S. government agencies controlling the processing of any H-1B petition.

Attorneys can also work closely with the corresponding U.S. consulate overseas that has jurisdiction over the issuance of the H-1B/H-4 (dependent family member's) visa stamps. USCIS approves the H-1B visa petitions, and thereafter the foreign national will need to seek the corresponding H-1B and H-4 visa stamps in their passports to be able to travel into the United States to work pursuant to the H-1B visa stamp.

The best strategy for successfully obtaining an H-1B visa for a foreign national is to ensure that the petition is filed by April 1 and that all forms and supporting documents clearly demonstrate the foreign national's education and experience in the related field.

Employers must understand that “business as usual” has changed with respect to what is acceptable in an H-1B filing. The laws have not changed, but the application and enforcement of those laws has become much stricter. Many employers who filed cases using strategies that may have worked in past years now face the problem of difficult questioning by USCIS. They need to engage in damage control, and therefore should use the services of an experienced immigration attorney to handle requests in reference to the foreign national's qualifications.

### **Problems and Creative Solutions**

An example of where creative lawyering and knowledge is required is when there is a foreign national who has already been in the United States working under an H-1B and the sixth year of their H-1B time is coming to an end. At that time, the attorney should call on the USCIS's policy and practice memoranda and use the H-1B “recapture time,” enabling the foreign national employee to remain in the United States past the permissible six years.

Additionally, an experienced immigration attorney will rely on the use of certain green card provisions that allow longer stays in H-1B status while the green card processing is occurring at the USCIS offices. Specifically, the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Pub. L. No.106-313, 114 Stat. 1251, 1251-62 (2000) allows for a three-year extension of an H-1B visa if the candidate's I-140 has been approved and there is no visa number available immediately, according to Section 104(c) (codified as amended at 8 U.S.C. § 1184 (2009) and Section 106.

Furthermore, an experienced attorney in the immigration arena will be able to use numerous USCIS decisions and memoranda to submit difficult H-1B petitions where the position may not be one that is typically found to be a specialty occupation, including certain marketing roles or where the U.S. employer is a small startup company in the United States and USCIS may

have a difficult time accepting the need for a “professional” to work in such a small company.

Use an experienced attorney who knows how to file, what to file, when to file, and where to file. U.S. employers need to identify their new hires or those who are working for them as F-1 students pursuant to optional practical training with an employment authorization document, and then send the requisite documents as listed in the above checklist to the attorney early in the year. We recommend that the identification be done in the first two months of each year, and that the documents and information be sent to the attorney by the first week of March, to allow for ample time for review, evaluation, drafting, review, and signature by the U.S. employer, and submission by the attorney on April 1.

Employers accept important responsibilities when choosing to sponsor a foreign national on an H-1B. Employers should be careful to be aware of the requirements imposed on them to ensure that they are in compliance. Doing so minimizes potential violations and ensures that the employer can continue participating in the H-1B visa program. The employer is responsible for the H-1B visa process. The foreign national needs to first find H-1B sponsorship employment with a U.S. sponsoring company. In addition, the foreign national needs to make sure they have the necessary education and experience for the offered position.

The most common obstacle when helping clients obtain visas for foreign nationals is the fact that U.S. employers do not always comprehend the H-1B attestation process or the salary or timing issues. As such, it is critical to educate the U.S. employer on the process of the H-1B petition and timing of same. The best way to overcome obstacles in the process is education and training sessions on the H-1B and all other possible non-immigrant visa petition processing.

To avoid pitfalls, clients need to have a strong and trusting relationship with the immigration attorney, be able to ask questions early in the process of identifying the H-1B candidates, and send as much of the requisite information and documents to the attorney early, so as to have an analysis early in the process to avoid overly ambitious deadlines.

Creative solutions developed in response to the limited availability of H-1B visas include the increase of an additional 20,000 H-1B visas for foreign nationals who have earned a master's degree or higher from a U.S. university. The USCIS rules allow U.S. employers to consider the following types of visas to work around the limited H-1B numbers:

1. The H-3 visa is available for foreign nationals who are going to participate in training programs available only in the United States.
2. The J-1 is a visa allowing foreign nationals to receive training for up to eighteen months in the United States, and they are not then allowed to change to H-1Bs.
3. Some foreign corporations with U.S. offices will hire the foreign national overseas to work overseas for a full year in a “specialized knowledge position,” and then they will transfer them to the United States on either an L-1A manager transferee visa or an L-1B specialized knowledge transferee visa.
4. The U.S. consulates may issue B-1s in lieu of H-1Bs if the stay in the United States is temporary and professional in nature.
5. Some foreign nationals have achieved a high degree of international fame and have published and/or been cited in their field such that they may qualify for an O-1 visa as a foreign national who has achieved “extraordinary ability” in their area of discipline, namely in the arts, business, athletics, or the arts.
6. Foreign nationals from Canada or Mexico can qualify for a TN visa under the North American Free Trade Agreement, if they are going to work in the United States in one of the TN professions listed in the agreement.
7. Foreign nationals from Australia can qualify for the E-3 visa for professionals.
8. Foreign nationals from Singapore or Chile can qualify for the H-1B1 visa for professionals.

There should be no impact on the employment relationship if any of the above non-immigrant visa classifications are sought and approved.

## **Overseeing the Employment of Foreign Nationals**

There are legal issues to consider from the employment of foreign nationals. In the H-1B context, the employer must pay for the reasonable costs home for any H-1B employee who is terminated for no cause. Additionally, H-1B employers have an affirmative duty to withdraw the H-1B petition and the certified labor conditions application for any terminated H-1B employee within a reasonable period from termination. There is also the need to understand that when a foreign national employee is terminated from employment, there are only a few days in which the foreign national employee can remain in the United States legally, unless they change their status to another non-immigrant visa or find new employment in the United States and transfer their work visa (i.e., their H-1B) to the new H-1B employer.

The Department of Labor and USCIS monitor the H-1B visa program. The Department of Labor ensures that U.S. workers are not being replaced with cheaper immigrant labor. In recent months, both USCIS and the Department of Labor have been visiting companies' sites, primarily manufacturing or construction sites, to review the I-9s on file and investigate complaints received from laid-off or disgruntled employees.

In cases where there is a new U.S. employer (usually in existence for under a one-year period), USCIS will issue a request for further evidence, and they will ask a series of questions to seek responses or documentation to evidence the corporate existence of the U.S. employer and its ability to pay the wage offered and support the U.S. employer's need for the prospective employee and their professional skills and experiences. USCIS will not typically "investigate" the visa petition, but rather they issue requests for further evidences to ensure that there is a viable U.S. employer with a bona fide position being offered.

## **Visa Violation**

Fraud is the most frequent violation (specifically, not working for the company sponsoring the foreign national). USCIS is responsible for the review and approval or denial of the petitions and applications submitted. In severe cases of questionable representation in these petitions or applications, they are referred to the investigative arm of the U.S.

Department of Homeland Security, the U.S. Immigration and Customs Enforcement. They will, in turn, make visits to U.S. employers who submit such petitions forwarded to them by USCIS. In such visits, Immigration and Customs Enforcement will be allowed to request payroll records, H-1B petitions, labor conditions application files, I-9s, and any other files they deem necessary to investigate any immigration fraud. Civil fines can be imposed based on the resulting findings. Also, in the employer sanctions realm, Immigration and Customs Enforcement will visit employers that have been reported as hiring individuals without work authorization. Thus, there are going to be more workforce enforcement visits in the near future.

The H-1B employee and the family are usually the parties responsible for monitoring the expiration dates of their visa stamps, their I-94 cards, and their H-1B petition approval notices. As such, they are usually the first to notify their managers of the need to renew the H-1B. In turn, the managers will advise their human resources department or the legal department of the need to renew the H-1B. The U.S. employer will then either seek an attorney, or if there is an immigration attorney who works for the company, advise their immigration attorney of the need to renew the H-1B. In such instances, the same H-1B checklist provided earlier, with some minor revisions, will be used to commence the H-1B petition extension and the renewal of the H-1B visa stamp.

In most cases where an attorney is working with the U.S. employer on all of their immigration needs, they will advise the employer of the upcoming expirations (usually four to six months in advance) and request permission to proceed with the H-1B petition extension and the renewal of the H-1B visa stamps. Typically, the same USCIS forms will be used for the renewal of the H-1B, and where there is family in the United States, a set of forms will need to be filed on their behalf to renew the H-4 dependent visas. Renewal of the H-1B is usually recommended, unless the finances of the company or the working relationship with the foreign national are not in good terms.

### **Cultural Considerations**

Another area where employers would be advised to look out for the foreign national employee's interests is in the area of cultural challenges or adaptation, for both the new employee and the family. Employers have

offered courses on the “American culture” and how to adapt to a new environment when they are transferred to the United States. The employer will also offer English language lessons to the spouses and minor children of the principal employee at the U.S. employer. The U.S. employer will need to factor in the cost of English language courses and the cultural training provided by organizations in the relocation industry. Such services and offerings are important to the success of the employment relationship. Employees from overseas will feel welcome at the company in the United States, and will feel more comfortable if they understand the language and culture of the host country.

Some employers appoint U.S. “buddies” to accompany the foreign national H-1B employee while in the United States for the first six months. The “buddy” can show the foreign national H-1B employee the work habits at the company and take them to local restaurants, museums, sporting events, musical events, and so on to have the foreign national feel welcome in the new country and the new work environment.

## **Termination**

Because of the legalities of the visa, when a foreign national employee is terminated by the company, the employer should give written notice of termination to the employee and pay for the terminated H-1B employee’s return transportation to their home country (no payment for return of goods and furniture or other family member is required). There is no transportation obligation when the foreign employee resigns. However, there is always the obligation of the employer to notify USCIS of the termination of the employment.

It is recommended that the employer advise the immigration attorney if one was used to process the H-1B, so that the attorney can advise on the legal requirement of the withdrawal of the H-1B petition with the USCIS offices, and the labor conditions application with the Department of Labor offices. USCIS must be notified of the H-1B termination, and the employer must request the withdrawal of the H-1B petition from USCIS and the withdrawal of the labor conditions application from the Department of Labor.

## **Conclusion and Trends**

Because of the current economic climate, the employment of highly skilled foreign nationals is changing. There has been a sharp decline in H-1B petition filings this year. In the past two years, the H-1B visa numbers were all gone within one day of the filing date of April 1, and this year, as of August 20, there are still approximately 13,000 H-1B visas left. This trend will continue if the economy remains as slow as it is now.

Another recent trend is the fact that U.S. employers are less inclined to process a green card for their foreign national employee due to the costs involved and the timing of such a process (close to two years in some cases, and as much as five years in others).

For immigration lawyers counseling clients on this issue, this is a good time to become more efficient in the practice of law, to make the staff in the firm more productive, and to explore marketing opportunities to prepare for any U.S. immigration reform as predicted by the immigration bar. It is a good time to review the technology in place (i.e., immigration tracking systems with form functions, reporting functions), and to see how the system can help in generating data to use in marketing and in preparing a more streamlined process in the visa process. This is also a good time to publish, make presentations, and explore other areas of the law of interest to the practitioner.

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