



KEEPING FOREIGN PROFESSIONALS IN THE FOLD

More options available for retaining 'highly qualified' workers

By ERIC FLEISCHMANN

Over the last few years, employers have increasingly found highly qualified workers within the pool of professionals already in the U.S. on H-1B visa status. While these foreign professionals were once limited to six years on H-1B status, there are currently a number of ways for employers to extend or change the status to permit the workers to continue to work well beyond that point, and even to remain here on permanent resident (or green card) status.

When hiring an H-1B worker, the new employer first needs to file an I-129 petition with U.S. Citizenship and Immigration Services (USCIS), an agency within the Department of Homeland Security. If the worker has not had any unauthorized employment since his or her last admission to the U.S., he or she is considered "portable," and can start work upon the proper filing of the new petition. For I-9 purposes, a good document to establish proof of filing is the I-797 Receipt Notice issued by USCIS. The employee can begin to work with this document, and can continue to work for the weeks or months it may take USCIS to approve the petition for up to three years of H-1B authorization.

Extensions Of Status

The work authorization term can be extended beyond the exact sixth year anniversary of initial entry to the U.S. on a number of grounds. USCIS now recognizes the right of the worker to "recapture" any time spent outside the U.S. during the six-year



U.S. CITIZENSHIP

AND IMMIGRATION SERVICES NOW RECOGNIZES THE RIGHT OF THE WORKER TO 'RECAPTURE' ANY TIME SPENT OUTSIDE THE U.S. DURING THE SIX-YEAR PERIOD AS PART OF A PETITION TO EXTEND STATUS.

period as part of a petition to extend status. Also, if an employer has filed a labor certification application with Department of Labor more than 365 days before the end of the sixth year, the worker can obtain extensions beyond the six year mark in one-year increments.

Finally, if an employer has filed and obtained approval of an I-140 immigrant visa petition, the beneficiary can be granted extensions in three-year increments. To permit employers to obtain timely approval of the I-140 petition, USCIS recently issued a new online advisory that authorizes a request for 15-day premium processing if the beneficiary is within 60 days of the end of the sixth year and needs the approved I-140 to be able to extend H-1B status.

Changing Visa Status

Another strategy for obtaining work authorization beyond the sixth year is to change the employee's status from H-1B to

another employment-based classification. For example, the law does not impose a cap on the O-1 category for individuals who have extraordinary ability in a particular field. The same is true for the TN category, authorized under the North American Free Trade Agreement, which permits citizens of Canada or Mexico who are members of certain professions to work in the United States. The E visa categories are also options for employees of foreign-owned companies that either invest a substantial amount in their American operations or have a substantial volume of trade between their own countries and the U.S.

Any employer with affiliates or subsidiaries abroad should also consider the L-1 classification. This category is appropriate for workers who have spent one of the last three years working outside the U.S. for a foreign parent, affiliate or branch of the employer who will come to here to serve as managers or to apply their specialized

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knowledge of the employer's business operations. The L-1 visa is also a good option for companies that decide to transfer an H-1B employee to foreign operations before the end of the sixth year of H-1B status. If the transferee then spends a full year with the foreign operation, he or she can then return to the U.S. on an L-1 visa for a three-year period, which is extendable (to a maximum of seven years for managers, and five years for specialized knowledge workers). Both managers and specialized knowledge workers can be extended in L-1 status indefinitely if their work in the U.S. is of an intermittent nature.

Work Authorization Documents

In some cases, employers of H-1B workers who have applied for permanent resident status have stopped extending the H-1B visa, and instead allowed the workers to use temporary work cards and travel documents issued by USCIS during the adjustment process. If the green card is not approved, USCIS considers an employee in this situation to have no status at all, and to

be subject to immediate removal from the U.S. For this reason, employers should generally keep these employees in H-1B status, and treat the temporary work and travel documents as optional applications.

Plan Ahead

For employers with H-1B workers, it's a good idea to plan ahead as the end of the sixth year approaches. To prepare for this deadline, it is best to review the full roster of H-1B workers, and ask the following questions:

- Does the employer have any foreign workers in H-1B visa status? Have they reached the end of the fifth year of H-1B status, and are there plans to start the Labor Certification application process at least six months in advance of that date?
- Did the employer recently hire any new H-1B professionals? If so, has the employer checked their backgrounds to see if prior employers have filed labor certification applications, and obtained approved I-140 petitions, which may be used to obtain extensions of status

beyond the sixth year from the date of initial H-1B entry?

- Does the employer have any plans that could include sending its H-1B workers abroad to work with a foreign affiliate for a year, which would permit them to be brought back as intracompany transferees on L-1 visas?
- Does the employer have any H-1B workers who are extraordinary in their field – as evidenced by awards, publications, patents or other accomplishments – and who might qualify for O-1 status?

Conclusion

Employers of foreign professionals have found that H-1B workers, who often must wait for years to obtain the green card, are an excellent source of talent. While the H-1B visa still has a baseline six year limit, there are a number of ways for employers to help staff to extend beyond that point. The key is to track the six year limit, and plan the best strategy to help each employee continue to work in the United States. ■

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