

EMPLOYING THE FOREIGN PROFESSIONAL: THE H AND L VISA CLASSIFICATIONS

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This is the first of a four-part series addressing various immigration related topics affecting employers in the U.S. The use of H and L visas to employ foreign professionals is discussed below, while subsequent articles will explain the use of the E investment visa, a review of various less frequently used visa categories (such as for the athlete, entertainer/model, or perhaps the internationally acclaimed scientist), and lastly an explanation of

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the “green card” process. The order of presentation of these topics may change, given enactment of pending regulations.

THE PURPOSE OF THE H AND L VISA CLASSIFICATIONS

The tragic event and fallout of September 11, 2001 have not changed the procedures, regulations or costs for a U.S. employer to petition for and secure employment authorization for a foreign professional. The foreign professional who is outside the U.S. at the time the Immigration and Naturalization Service (INS) approves an employer’s Petition for a Non-immigrant Worker may experience a slightly longer processing time at a U.S. Consulate abroad, but generally this has been nominal. Actually, the processing time of H and L petitions with the INS seem to be smoother and more efficient over the last several months than at any time in the last several years.

Both the H and L nonimmigrant (temporary) visa classifications were created to assist U.S.

employers by providing a mechanism to efficiently employ foreign professionals. These visas are employer oriented, meaning that only the employer is involved in the application process, and the named foreign employee really has no input. The foreign employee must meet certain requirements, as discussed below, but this is where the foreign professional’s involvement ends. The H and L visas were created for the benefit of the U.S. employer, and not the foreign employee. A U.S. employer may hire a foreign professional in either visa category, regardless of the availability of U.S. workers. An important benefit of both visa categories is that foreigners, with the assistance of a U.S. employer, are allowed to maintain their respective visa categories while concurrently attempting to secure lawful permanent residence (LPR) status, commonly referred to as a “green card”. Such “dual intent” is not allowed in many other temporary visa categories, such as the work authorization granted under the NAFTA treaty.

THE H-1B CLASSIFICATION

The H-1B classification is widely used by U.S. employers throughout the United States. For fiscal years 2000-2003, there is an annual limitation of 195,000 foreigners who can be issued these visas or given this status. During the first three quarters of fiscal 2002, 60,500 H-1B numbers were used. This compares to 130,700 H-1B cases approved during the same time frame in the prior fiscal year. Similarly, it is not anticipated that the visa cap will be reached this year. Following fiscal year 2003, the actual number of visas available will decrease to its original limit of 65,000, unless extended by Congress. U.S. employers should not be concerned about exceeding these numerical limitations during calendar year 2003.

The threshold requirement for the H-1B classification, and the one most often misunderstood, is that the foreign professional must have attained a Bachelor's degree, or its equivalent, in a field of study that relates to the offered employment. Equivalency, for INS purposes, is most often interpreted to mean that for each three years of progressively more difficult and related work experience, credit will be given for one year of college, assuming the foreign national has a high school diploma. Theoretically, a foreign national may achieve the equivalent of a Bachelor's degree, for INS purposes only, if twelve years of appropriate work experience have been completed. The equivalency evaluation is secured by an independent credential evaluation company completing a full review of the foreign professional's academic and work history. This evaluation

procedure may also be helpful with, for example, a foreign employee that has a Bachelor's degree in Biology, but six years of work experience in the IT industry. A combination evaluation may be completed and may support that this person has the equivalent of a Bachelor's degree in Computer Information Science, which may be a necessity for a computer programmer/software engineer. Regardless of whether a foreign employee has the requisite degree or the equivalent of the requisite degree, this threshold question must be answered before considering the H classification. Too often an employer will spend considerable time and money filing an application for an H visa, only to receive a denial for lack of education requirements. As with the Bachelor's Degree requirement, the foreign national must possess any license necessary to work, such as a license to practice nursing.

The second consideration is whether the offered job actually requires a Bachelor's Degree. This requirement has also caused immense consternation for U.S. employers. The U.S. employer must show that a Bachelor's or higher degree, or its equivalent, is required for the position, that the requirement of a Bachelor's Degree is common throughout the given industry and, finally, that the employer would normally require a Bachelor's Degree or the specific job is so complex that the type of employment is normally associated with achieving a Bachelor's Degree. An excellent example is illustrated with the attempt by hospitals and other health care providers to utilize the H classification in filing applications to hire foreign

Registered Nurses. Many health care providers have filed applications in an attempt to secure H classification for foreign RNs, only to have them rejected as the minimum requirement for an RN in the U.S. is an Associates degree, not a Bachelor's degree. Of course, there are exceptions with the RN, such as a Nurse Coordinator or Department Head, but generally the RN position does not require a Bachelor's degree in the U.S., and thus the employer will not be successful in utilizing the H classification to hire foreign RNs. Generally, if a U.S. employer, or the industry as a whole, does not almost unanimously require that all employees for a given position have a Bachelor's degree, the INS will probably deny the application.

A third requirement is that the U.S. employer must pay a "prevailing wage" or higher wage for the position. Occasionally, the employer may be allowed to pay five percent less than the prevailing wage. The prevailing wage is based upon government wage surveys, or a private survey accepted as a reliable source. On January 2, 2003, new prevailing wages were issued. These wages were based, in large part, on 2001 earnings. In many categories, U.S. employers will now find that the prevailing wage for a given position is out of step with the present economic recession. For example, a computer software engineer in 2001 may have earned \$75,000 per year, but presently is only being paid \$60,000. The U.S. employer must still pay the prevailing wage of \$75,000, or be unable to hire the foreign professional in H classification. There are some limited exceptions, and a careful analysis on a

case-by-case basis must be done, but there is little leeway for discussion. Some U.S. employers may consider "being creative" with a job description/title in an effort to categorize a given position to secure a lesser prevailing wage. Any HR professional that knowingly does this has crossed the line. Those HR personnel responsible for the H petition being filed properly should inquire of their counsel whether the offered wage clearly meets the prevailing wage without modification of the job description. If the incorrect prevailing wage/job description is utilized, and the INS discovers this, the employer is open to sanctions, a full DOL audit, and a limitation of the use of this visa classification in the future. Moreover, the foreign employee, along with any spouse and children, will be homeward bound.

The U.S. employer must also establish a financial ability and need to employ the foreign professional. For large corporations, this is normally not an issue. For small companies or start-ups, greater documentation must be provided to the INS. For a company that employs more than 100 individuals, the INS will usually accept a letter from the CFO attesting to the current financial viability. For smaller or newer companies, most recent tax returns and/or audited financials, copies of current and future contracts or other similar documentation must be provided.

The U.S. employer is required to complete a Labor Condition Application (LCA) and submit this with the H application to the INS. This application may be filed electronically (referred to as Form 9035), but before doing so, the

employer must make certain attestations. The employer must certify that it is, basically, paying a fair wage for the position, that employing someone in H-1B classification will not adversely affect the conditions of other workers similarly employed, and that there is no strike or labor dispute at the place of employment. The U.S. employer must also, if there is a bargaining representative, provide a copy of the LCA to the bargaining representative, or, alternatively, if there is no bargaining representative, the employer must post a Notice of Filing of the LCA in two conspicuous places for a period of at least ten business days. Remember, the U.S. employer must pay either the amount paid to other employees similarly employed who possess similar experience and qualifications, or the prevailing wage, whichever is greater.

FILING PROCEDURES FOR THE H-1B

The procedure is to file the application with the INS Service Center having jurisdiction over the State where the employee will be employed. There are five service centers throughout the United States covering different geographic regions. The application is sent directly to the Service Center (recommended by overnight service), followed by the INS issuing a Receipt Notice. The Receipt Notice will provide an estimate of processing time, which is normally inaccurate. Current processing times of all application types may be checked online at the INS. Once approved, assuming the foreign professional is outside the U.S., the INS will cable the appropriate U.S. Consulate, and will also issue an original Approval No-

tice, which will be sent to the U.S. employer or its counsel. This original Approval Notice, along with a certified copy of the entire application process, needs to be delivered to the foreign professional abroad. The foreign professional will then make arrangements with the U.S. Consulate to secure the H-1B visa for purposes of entering the U.S. Any spouse or minor children are also eligible to receive an H-4 visa, allowing the spouse and minor children to enter the U.S., but not authorizing employment. Minor children may attend public school without charge. The H-1B visa (and any concurrent H-4 visas) will be issued for the term specified in the application, but not to exceed three years. A person is allowed up to six years in H classification, counting all extensions. If a person were to leave the U.S. for a period of one year, this resets the time period, thus allowing another six years. Children who turn twenty-one years of age immediately lose their H-4 status, and must secure their own visa classification. In some limited situations, an H-1B employee may secure, in one-year increments, extensions beyond six years, assuming the labor certification/green card process has been in effect for at least one year. This will be discussed in a subsequent article.

If the H employee is in the U.S. in a different status, such as TN under the NAFTA treaty, F-1 as a foreign student, or perhaps B-2 as a visitor, the application is filed with the INS requesting a change of temporary status. If the application for H classification is filed while the potential foreign employee is currently and properly in temporary status, the foreign employee and any dependents do

not need to leave the U.S. while the application is pending, but may not start employment until the INS approves the work authorization. However, if the U.S. employer is employing a foreign professional in H-1B status, and files for an extension of this status while the employee is currently in H-1B status, the foreign professional's work authorization is automatically extended for a period of 240 days, thus allowing continued employment. If the foreign employee leaves the U.S. while the application is pending, frequently difficulties will arise in returning to the U.S., until such time as the INS approves the underlying application. There are exceptions to this, but as a practice pointer, it is better to have approval from the INS before the foreign national leaves the U.S.

The H classification has a "portability" provision meaning that if a foreign professional is in H-1B status with an employer, a second employer may file an application with the INS for H-1B classification, and upon the INS receiving the subsequent application, the foreign professional may immediately commence employment with the second employer, even though the INS has not approved the application. There is no requirement that the subsequent U.S. employer or foreign professional notify the first employer of any application being filed.

APPLICATION COSTS AND PREMIUM PROCESSING

The application fee is \$130, and there is an additional user fee of \$1,000. Some organizations, such as institutions of higher education, are exempt from this \$1,000 fee. The fee of \$1,000 is for the initial

H-1B petition and any possible first extension. The U.S. employer must pay this \$1,000 fee and cannot ask for any contribution from the foreign professional. The INS has instituted Premium Processing for an additional \$1,000 meaning that the application will be adjudicated within 15 calendar days of receipt by the INS. Many employers elect the Premium Processing or require foreign professionals to pay for the Premium Processing; to secure an immediate answer. This may be preferable to waiting the normal four to six months for processing of an application.

INTRA COMPANY TRANSFEREES — THE L CLASSIFICATION

As with the H classification, the L classification allows high-level foreign professionals to transfer from a related foreign company to one in the United States. There are essentially two categories to the L classification, those being the L-1A for executives and managers, and the L-1B for those with specialized knowledge. The L-2 is reserved for spouses and minor dependents. In order to qualify for either of these classifications, there must be a relationship between the foreign entity and the one in the United States. The U.S. entity will be considered a "qualifying organization" if the business is being carried out as a parent, branch, affiliate or subsidiary of the foreign corporation. The threshold question when determining the viability of an L classification is whether a qualifying relationship exists between the foreign and U.S. entities. Having only an office or a field agent in the U.S. is not enough; there must be ongoing work completed in the United

States. Moreover, with the exception of the "Blanket" L classification (discussed below), the INS requires that the foreign professional must have worked for one in the last three preceding years with the same company, whether it be a parent, branch, affiliate or subsidiary. This one year of employment must have been continuous within the preceding three years.

It is important to remember that the foreign entity must continue to do business while the L transferee is working in the United States. For example, the effective closing of a foreign entity will nullify the possibility of L classification. If an employer desires to extend the work authorization of an L employee, the employer will need to substantiate the ongoing relationship between the foreign and U.S. companies.

COMPARISON OF H AND L CLASSIFICATION

As with the H classification, the L classification allows "dual intent", meaning that a person in L status may also apply for green card status while continuing to work in L classification. There is a difference in the amount of time a person may work in H, as opposed to L-1A or L-1B: the foreign employee in H-1B classification may work for up to six years, while a person in L-1A has a limitation of seven years, and an L-1B employee has a limitation of five years. An important distinction between the H and L classifications is the ability of the spouse of an employee in L classification to have employment authorization. This was a major change in the L classification that occurred last January.

Also, the education requirements for the H and L are differ-

Document Checklist for Filing H-1B Application

1. Form I-129 with H Supplement
2. Form I-129W
3. Certified Form 9035, LCA
4. Employer's letter of support
5. Employee's educational credentials
6. Copy of Employee's passport and nonimmigrant status, if applicable
7. Employer's background information
8. \$130.00 application fee plus \$1,000.00 training fee, if applicable
9. Optional \$1,000.00 premium processing fee with additional application
10. Application for spouse/children, if applicable, with additional filing fees

Document Checklist for Filing L-1A or L-1B

1. Form I-129 with L Supplement
2. Evidence of qualifying relationship
3. Evidence of foreigner being employed in a qualifying capacity
4. Evidence that foreigner has been employed for one year (six months for Blanket L) in the last three years with a qualifying entity
5. Evidence of employee's education and/or work experience
6. Letter from U.S. employer describing the employment
7. \$130.00 application fee
8. Optional \$1,000.00 premium processing fee with additional application
9. Application for spouse/children, if applicable, with additional filing fees

ent. The H-1B requires a Bachelor's degree (or equivalent), while the L classifications do not have a minimum threshold education requirement. Rather, with the L classification, the INS determines whether the transferring employee actually has the executive/managerial or specialized knowledge required for the position. The H visa has a portability provision discussed above, but the L does not.

Finally, there is a cost difference. The standard application fee of \$130 remains the same, but the L classification does not require the additional \$1,000 expenditure. The ability to utilize Premium Processing with a 15-day turnaround from the INS is also available with the L classification. The application procedure for filing is the same for the H and L classifications, except that a separate appli-

cation must be filed for the spouse of an L employee for purposes of employment.

THE L-1A: EXECUTIVE OR MANAGERIAL CAPACITY

Executive capacity refers to an employee who has managed an organization or major component; exercises authority to establish goals or policy; has discretionary decision-making authority; and receives only general supervision from higher-level executives, such as a Board of Directors or stockholders. To enjoy managerial capacity, which is considered a "step down" from executive, the employee would supervise and control other supervisory, managerial or related personnel; has the ability to make personnel changes; and would exercise discretion in performing operations, functions, or other daily activities. Generally speaking, first line supervisors who do not have such authority cannot be included in this category.

To substantiate the L-1A executive/managerial position, documentation is needed to establish what the foreign employee has done for the foreign company, as well as a complete review of the foreign employee's education and work history. In most instances, the L-1A executive/manager will have years of documented experience and/or education, and the financial remuneration to support such a position. The petition submitted to the INS for an L-1A Beneficiary should explain the Beneficiary's history in explicit detail.

THE L-1B: SPECIALIZED KNOWLEDGE

The L-1B "specialized-knowledge" is defined to include special knowledge of the company prod-

uct and its application or an advanced level of knowledge regarding the organization's processes and procedures. This, of course, is open to interpretation. Again, the petitioning employer should provide explicit documentation substantiating the foreign employee's specialized knowledge, with a complete description of the person's work and education.

THE BLANKET L CLASSIFICATION

A special provision exists for multi-national companies with a large number of employees to secure a "streamlined" process to transfer foreign employees to the U.S. To qualify for blanket eligibility, the general requirements regarding the relationship between the entities as noted above must be followed, and in addition, the INS requires that the office in the U.S. has been doing

business for at least one year; the Petitioner has three or more domestic and foreign entities; and that either the Petitioner has obtained approval for at least ten L-1A or L-1B beneficiaries or the combined U.S. companies have annual sales of at least \$25 million dollars or have a U.S. work force of at least 1,000 employees. If the U.S. company secures approval of an L-1 blanket petition, the future potential foreign employee simply produces appropriate documents to the U.S. Consulate abroad, establishes being qualified for the position, and the U.S. Consulate will issue the appropriate visa. No further applications would need to be filed with the INS, thus saving substantial time and money. Citizens of Canada would make application at a border crossing as opposed to a U.S. Consulate. An important distinction with the blanket L provision

is that the foreign employee would only need to have worked for a six-month continuous period in the preceding three years to be eligible.

CONCLUSION

The H and L classification remain excellent choices when considering the employment of foreign professionals. Both offer efficient processing, especially with premium processing. Additional consideration must be made for start-up companies, which is beyond the scope of this article. Subsequent articles will address the process of converting an H or L classification to a green card, as well as other H classifications, such as: the H-2A (agricultural worker), H-2B (e.g., seasonal worker for resorts), and the H-3 (trainee).

