

HIRING FOREIGN NATIONALS ON AN H-1B VISA

BY NINA FANTL

Every company is interested in hiring the best person, and in a global economy, where U.S. businesses no longer have only domestic competitors, finding the best person becomes even more critical. In some cases, this person may not be a resident of the United States. The most attractive candidates for a job may have acquired special skills in their home countries or cutting-edge training at universities in the United States and abroad. Typically, these professionals are brought to the United States on six-year H-1B visas. Some of these employees have worked at overseas corporate headquarters of a parent corporation and are now coming to work for U.S.-based subsidiaries or affiliates.

Hiring a foreign citizen is not as simple as hiring a U.S. citizen, but in many cases it can be the best solution for a specific employment need. In fact, today's most successful companies often find that a non-resident is the most cost-efficient way to accelerate their development or increase their market share.

Take, for example, a Texas entrepreneur who is in the process of starting up a new software company. This business owner is interested in hiring a South African computer scientist who is perfectly suited for the task of leading the development of the company's software products. Obviously, having the South African computer scientist with his experience and credentials would attract customers and set the company apart from its competitors. But the foreign employee needs a work permit to enter the United States in order to assume his duties.

The first step in the process of getting legal permission for a foreign national to work in the United States is to establish whether the individual meets the required conditions to obtain a temporary work permit. In the case of the South African computer scientist, he can qualify for an H-1B work visa by demonstrating that he has the proper baccalaureate degree and will be coming temporarily to the United States to continue work in the area of his degree or expertise. Showing that there are no qualified and willing U.S. workers for that position would not be required.

Tightened restrictions by the U.S. Citizen and Immigration Services (USCIS) and Congress further have complicated the process of bringing in foreign workers. For example, in January 2010, the USCIS issued a guidance memorandum that barred the use of H-1B visas for information technology (IT) consulting and staffing companies that hire foreign nationals who will work at a third-party client site instead of their own company's premises — this move was aimed at outsourcing companies, many of them based in India. This change involving the definition of employer-employee relationship increased the complexity of gaining H-1B petition approval for IT companies that

place workers at third-party locations. However, it has not resulted in across-the-board denials of all H-1B petitions filed on behalf of IT consultants.

In any event, any company that wishes to hire foreign workers using an H-1B visa has tremendous responsibilities. An employer must take a number of steps including determining the actual and prevailing wage for the position, informing workers or their representatives of the intent to hire a foreign worker, submitting a Labor Condition Application with the Department of Labor (DOL), and filing with the USCIS upon DOL certification of the wage. Once approved by the USCIS, the employee then applies for the H-1B visa if he or she is overseas. The foreign employee cannot begin employment until the H-1B visa is granted at his or her consulate and he and she is admitted to this country.

Currently, the number of new H-1B work visas that can be issued is capped at 65,000 during a fiscal year. An additional 20,000 are available to those individuals who received a master's degree or higher from a U.S. institution of higher education. Additional rules apply to employers who are dependent upon H-1B workers or are willful violators of the H-1B rules. An H-1B dependent employer is one whose H-1B workers comprise 15 percent or more of the employer's total workforce. Different thresholds apply to smaller employers. H-1B dependent employers and willful violator employers must attest to the following three elements addressing non-displacement and recruitment of U.S. workers:

- The employer will not displace any similarly employed U.S. worker within 90 days before or after applying for H-1B status or an extension of status for any H-1B worker;
- The employer will not place any H-1B worker employed at the worksite of another employer unless the employer first makes a bona fide inquiry as to whether the other employer has displaced or intends to displace a similarly employed U.S. worker within 90 days before or after the placement of the H-1B worker; and
- The employer, before applying for H-1B status for any foreign citizen, took documentable good faith steps to recruit U.S. workers for the job at wages at least equal to those offered to the H-1B worker. Also, the employer will offer the job to any U.S. worker who applies and is equally or better qualified than the H-1B worker.

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