Get Hiring the Best from Around the Globe Isn't Just for the Playing Field

BY JOHN F. KORYTO AND MICHAEL E. STROSTER

Talented players from around the globe can be found on nearly all team rosters across the sporting world. To beat the competition, the best teams seek talent without regard to borders. Taking a page from the playbook of the sports world, a growing number of U.S. companies are hiring foreign-born talent to gain a competitive edge. The best candidates for executive, managerial, and professional jobs are not always U.S. citizens or permanent residents. So how do employers secure long-term employment authorization when they find a talented, skilled, foreign-born candidate? This article will address one of the more popular options: the H-1B visa.

into the Game

H-1B Visa: The Basic Game Plan

In the game of business immigration, the H-1B visa is the utility in-fielder—one with power, speed, and the flexibility to handle many positions. It can sometimes be obtained in less than 15 days, and allows U.S. employers to hire skilled, professional-level foreign nationals for a wide variety of jobs. Though it is primarily used for engineers and computer professionals, it can also be used for teachers, professors, researchers, and social workers.

Because of its versatility, the H-1B visa program is among the most heavily used. It is so popular, in fact, that the United States Citizenship and Immigration Services (USCIS, formerly known as the INS) announced that all 65,000 available H-1B visas for fiscal year 2005 were spoken for *on their first day of availability.* Needless to say, this left a number of employers and prospective employees "on the disabled list"—talent on the roster, but not in the game. Thus, advance planning is critical to avoid the visa quota problem.

The H-1B visa, which is named after the sub-section of the Immigration and Nationality Act that describes it, authorizes qualified foreign nationals to work in temporary professional employment in the United States.[1] Using this visa, eligible employers can recruit and hire foreign nationals to perform work in "specialty occupations."

To obtain an H-1B visa, the U.S. employer (the petitioner), the prospective employee (the beneficiary), and the offered job must all qualify for eligibility. Qualifications for each of these players must be evaluated prior to making a petition for the visa. Fortunately, the rules and regulations on qualifying employers, employees, and jobs are well written, offering a clear playbook on what is needed to gain visa issuance.

Qualified Employers

Only "United States employers" or their agents are eligible to petition for an H-1B visa.[2] A U.S. employer is a person, firm, or other entity in the United States that:

- engages a person to work in the United States;
- has or will have an employer-employee relationship with the foreign national for whom it files the petition; and
- has an Internal Revenue Service tax identification number.[3]

This definition is very broad and has been interpreted to include everything from non-profit organizations to government agencies to sole proprietorships. Foreign-based companies can also qualify as a "United States employer," but only if they have an established office in the United States *and* a tax identification number.

The employer-employee relationship requirement will be a questionable call when the potential employee also owns a significant interest in the employing entity. In such cases, the petitioning employer must take steps to establish a bona fide job opportunity, which generally means that the employer retains the authority to hire, fire, supervise, or otherwise control the work of the employee.

Qualified Positions

H-1B visas allow employers to fill jobs that are considered "specialty occupations" with foreign nationals. A specialty occupation "requires the theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor," and ordinarily "requires the attainment of a bachelor's degree or higher in the specific

specialty, or its equivalent," as a minimum for entry into the occupation in the United States.[4] At least one of the following types of evidence must be offered that the job qualifies as a specialty occupation:

- A bachelor's or higher degree, or its equivalent, is ordinarily the minimum requirement for entry into the job
- The degree requirement is common in the industry in similar jobs
- The position is so complex or unique that it can be performed only by an individual with a degree
- The employer requires a degree or its equivalent for the job
- The nature of the specific job duties are so specialized and complex that knowledge required to perform the duties is usually associated with an advanced degree[5]

USCIS's regulations list several occupations that meet this definition, including those in the fields of architecture, engineering, mathematics, physical sciences, social sciences, and more.[6]

It is essential that the complex nature of the job be described in the visa petition and supporting documents. The positions listed in the USCIS's regulations allow for relatively easy scoring opportunities, but careful preparation and execution of the game plan is still required. For all other jobs, a greater effort must be made to demonstrate to the USCIS the complex nature of the job.

Qualified Foreign Nationals

The foreign national for whom H-1B status is requested must be "qualified to perform services in the specialty occupation because he or she has attained a baccalaureate or higher degree or its equivalent in the specialty occupation."[7] Foreign nationals will be found qualified when they hold:

- a bachelor's or higher degree from an accredited U.S. college or university;
- a foreign degree determined to be the academic equivalent of a U.S. degree;
- an unrestricted state license, registration, or certification to practice the specialty occupation in the state of intended employment; or
- education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. bachelor's or higher degree, with recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.[8]

Essentially, the prospective employee must have at least a bachelor's degree or the equivalent. If the foreign national obtained his or her degree abroad, the degree should be evaluated by an established foreign education credential evaluation service prior to submission.[9]

For those who must rely on work-related experience, the play can be tougher to execute. An evaluation, similar to that for a foreign degree, must be provided with the petition. In general, the USCIS uses a three-for-one rule. This means that three years of specialized training or experience can qualify as one year of college-level training. For example, a person who has three years of work experience and three years of college courses can qualify as having the equivalent of a four-year degree.

Fast Facts:

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Getting the Visa: A Three-Step Process

The visa process has three distinct steps: 1) the employer must apply to the Department of Labor for approval of a Labor Condition Application (LCA); 2) the employer files a petition with the USCIS requesting H-1B classification for the employee; and 3) the employee must apply at a U.S. Consulate to obtain a visa stamp for admission into the United States.

The Department of Labor's Certification

The employer must file the LCA with the U.S. Department of Labor (DOL) for certification. The purpose of the LCA is to protect U.S workers by allowing the DOL to evaluate whether the hiring of a foreign national will have an adverse impact on wages or working conditions. Through LCA certification, the employer attests that the following conditions will be met:

- Wages: The employer will pay the local "prevailing wage" rate to the foreign worker. The prevailing wage is the greater of:
  - actual wage rate paid to other individuals with similar experience and/or qualifications performing similar duties for the employer; or
  - the prevailing wage rate for the job in the geographic area that considers the wages of other area workers.
- Working Conditions: The foreign worker will not adversely affect the working conditions of similarly employed workers in the geographic area.
- Strike, Lockout, or Work Stoppage: At the date of the filing there is no strike, lockout, or work stoppage applicable to the foreign worker's job classification.
- Notice: The employer will provide notice of LCA filing to its employees or the union representative at the place of employment.

At each location where services will be performed, the employer must post two notices that include a statement about how to file a complaint with the DOL regarding LCA violations.[10] The required posting time is 10 consecutive days.[11] The employer must post one notice next to the required government wage and hour postings, and one in an area of general circulation, accessible to all employees. Employers must note the dates the notices were posted and removed, and sign both postings.

Employers must also maintain a file, commonly known as the "public access" file,

that is available to any interested party upon written request.[12] The file must contain the following:

- Certified LCA and documents concerning the actual wage offered to the foreign worker
- Notices of LCA filing
- Prevailing wage information describing the source of the wage determination, including a copy of the documentation the employer used to establish the "prevailing wage"
- A summary of the benefits offered to U.S. workers in the same job classification as the foreign worker[13]

Additional documentation must also be made available to the DOL upon request. This can include payroll records and other information related to the prevailing wage. All of this documentation must be maintained by the employer for the life of the LCA and one year thereafter.[14]

In the event the employer fails to satisfy the required obligations, or in the event intentionally false information is provided to the DOL, the following penalties may be imposed:

- Criminal prosecution for knowing and willful submission of false statements, with exposure for up to $10,000 in fines and up to five years of imprisonment.
- Civil penalties, which may include:
  - back wages for failure to pay the prevailing wage or afford equal benefits;
  - civil fines up to $35,000 per violation;
  - debarment from receiving approval of non-immigrant petitions and employment-based immigrant petitions for up to a three-year period, and from filing any permanent labor certification application for the same period; and
  - additional penalties, which the DOL deems appropriate, such as a signed public agreement to comply with the LCA requirements in the future.

The H-1B Petition

The employer must file a "Petition for a Nonimmigrant Worker" with one of the USCIS' four regional service centers. The service center in Lincoln, Nebraska is responsible for applications regarding work performed in Michigan. The petition, and detailed instructions on filing it, is available at www.uscis.gov. The following is a full list of documents that must be filed:

- Form G-28, Notice of Entry of Appearance of Attorney, if any
- Form I-129, Petition for Nonimmigrant Worker, plus the H visa supplement
- Form I-129W
- The certified LCA
- Filing fee for the H-1B visa petition
- Foreign national's passport (which must be valid for at least six months)
- Diploma or transcript demonstrating attainment of bachelor's-level degree in a field that requires specialized knowledge (along with a translation if necessary)
- Documentation of prior experience in a field requiring specialized knowledge
- Documentation of lawful status during all prior periods of stay in the U.S. (petition will be denied if employee cannot show all prior periods of U.S. stay were legal—the employer should verify such grounds for denial do not exist)
- Documentation of employer's viability as a continuing business and ability to pay the prevailing wage rate (both gross and net income figures may be required)

Clearly, considerable information about the employer is required to gain H-1B visa approval. The USCIS has shown an increased tendency to require detailed employer information, including financial information, and information on similarly employed workers to verify minimum qualifications for the position offered.

Upon receiving all of this information, the USCIS generally takes 90 to 120 days to fully process an H-1B petition. This time frame can change depending on the particular circumstances of the petition. For example, if all of the necessary documentation was not submitted, or if something is not clear in the petition, the USCIS will issue a request for further evidence. Processing will then be put on hold until the employer provides the missing information or clarification.

In some situations, waiting three to four months is not feasible. In those cases, premium processing is available. Payment to the USCIS of an additional $1,000 filing fee will facilitate expedited review within 15 days of receipt of the visa petition. Premium processing *does not* guarantee that an H-1B visa will be granted within 15 days. However, the USCIS will refund the premium processing fee if it does not initially review the petition within 15 days of receipt.

Approval and What Comes Next

After all this work, and if everything was in order, the petition will be approved. Normally, an H-1B visa is issued for an initial three-year period. At the end of that period, another three-year stay is normally available, with a maximum of six consecutive years in H-1B visa status.

However, getting USCIS approval is not the end of the game. Having the petition approved merely makes the beneficiary *eligible* to obtain the visa; it is *not* a visa itself. If the foreign national is outside the United States when the petition is approved, an in-person application for a visa stamp at a U.S. embassy or consulate abroad is required. This normally involves submitting the passport, visa application forms, original approval notice, and copies of the supporting documentation. The consulate generally will not question USCIS approval of the visa classification, but the consular official has the authority to refuse to issue the passport visa stamp for a number of reasons.[15]

If the foreign national is already in the U.S., but in a different status (i.e., student), he or she must apply for and be granted a change to H-1B status. So long as the person has maintained lawful visa status in the U.S. and never worked in the U.S. without authorization, a change of status to the H-1B visa should be granted.

Whatever the particular circumstances, it is critical to note that an approved petition is

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not a visa and does not authorize a person to enter the United States.

Clients Shouldn't be Standing on the Sidelines

Not knowing how to play the immigration game can be costly to U.S. companies. For example, in 2000 the National Science Board found that the foreign-born comprised 38 percent of all scientists and engineers in the U.S. with a doctorate degree and 29 percent of those holding a master's degree. Similar significant numbers of foreign-born are found in other professional and technical fields. Help your clients get into the game—standing on the sidelines is no way to play! ◆

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Footnotes

1. 8 USC 1101(a)(15)(H)(i)(b).
2. 8 CFR 214.2(h)(2)(i)(F).
3. 8 CFR 214.2(h)(2)(i)(A).
4. 8 USC 1101(a)(15)(H)(i)(b).
5. 8 CFR 214.2(h)(4)(iii)(A).
6. 8CFR 214.2(h)(4)(ii).
7. 8 CFR 214.2(h)(4)(i)(A).
8. 8 USC 1184(i)(2); 8 CFR 214.2(h)(4)(iii)(C).
9. Id.
10. 20 CFR 655.734(a)(1)(ii)(C).
11. 20 CFR 655.734(a)(1)(ii)(B).
12. 20 CFR 655.760(a).
13. 20 CFR 655.760(a)(1) through (8).
14. 20 CFR 655.760(c).
15. 8 UCS 1201(g).