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HIRING FOREIGN NATIONALS

REPATRIATION TIPS FOR RE-ENTERING U.S. SCHOOLS
HIRING A FOREIGN NATIONAL WORKER
WHAT U.S. EMPLOYERS NEED TO KNOW
By Joshua S. Mirer and Jennifer L. Shanley
The talent pool from which U.S. employers hire is not limited to U.S. citizens, nor should it be. Foreign nationals bring unique perspectives and backgrounds to significant educational fields, and many possess experience gained abroad that makes them uniquely qualified for a particular position. With that said, the hiring process for a foreign national, as opposed to a U.S. citizen, is very different. Hiring a foreign national requires company sponsorship in a related work-authorized category and an understanding of various factors that impact the category chosen. A brief overview of some of the most widely used categories as well as the timing and other implications of those categories are discussed in this article. Actions that must be taken by the U.S. employer when hiring a foreign national worker are also addressed.

**FOREIGN NATIONALS ENTERING THE U.S. FOR BUSINESS ACTIVITIES**

TEMPORARY WORK AUTHORIZATION FOR FOREIGN NATIONALS IN THE U.S.

There are many work-authorized visa categories for foreign nationals. This article will focus only on some of the most widely used categories by companies in the U.S. These include the following categories: H-1B, TN, L-1, and O-1.

An H-1B (or H-1B1 for nationals of Chile and Singapore) is one of the most popular work-authorized categories for employers sponsoring foreign nationals for work authorization. A majority of these petitions are filed by a U.S. employer on behalf of a foreign national whose job normally requires a minimum of a bachelor’s degree in a specific occupational specialty. To qualify for H-1B status, the foreign national must possess either a university degree or a combination of education and experience equivalent to a U.S. degree in a field related to the offered job. While a position may qualify for H-1B status upon proof that the specific duties are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor’s degree or higher, it is a more difficult standard to prove, and not always successful.

The North American Free Trade Agreement (NAFTA) created special economic and trade relationships for the U.S., Canada, and Mexico. The TN nonimmigrant classification permits qualified Canadian and Mexican citizens to seek temporary entry into the U.S. to engage in business activities at a professional level. To qualify for TN status, the Canadian or Mexican national must be employed in certain specified TN occupational categories and possess the minimum qualifications for that position or occupation (generally, a relevant bachelor’s degree). The NAFTA categories include professions such as computer systems analysts, economists, engineers, biologists, and chemists.

The L-1 category is for intracompany transferees. There are two distinct L-1 categories: the L-1A, for managers and executives, and the L-1B, for individuals with specialized knowledge. To qualify for an L-1B, an individual, within the three years preceding the date of entry into the U.S., must have worked at a company related to the U.S. employer abroad—for example, a parent company—for at least one year in a managerial or executive position and must be coming to work in the U.S. in a managerial or executive position. To qualify for an L-1B, an individual, within

**REQUIREMENTS FOR THE B-1 IN LIEU OF H-1B VISA**

There is an additional category, the B-1 in lieu of H-1B, which is a specialty occupation category for short-term assignments of six months or less. To qualify for a B-1 in lieu of H-1B visa, the foreign national must:

- Hold the equivalent of a U.S. bachelor’s degree.
- Perform H-1B-caliber work, i.e., the work in the U.S. must meet the definition of “specialty occupation.”
- Be paid only by a foreign employer/company, except reimbursement for travel costs, such as housing. The employee must not receive any salary from a U.S. source.
- Perform work in the U.S. that can be accomplished in a short period of time.
the three years preceding the date of entry into the U.S., must have worked for a related company abroad for at least one year in a position where he or she gained specialized knowledge about the company’s processes, methods, and procedures, and must be coming to the U.S. to utilize the specialized knowledge gained abroad to perform work in the U.S. The O-1 nonimmigrant visa applies when an individual possesses extraordinary ability in the sciences, arts, education, business, or athletics. To qualify for an O-1 visa in the sciences, education, or business, the individual must demonstrate extraordinary ability by sustained national or international acclaim. To do so, the individual must demonstrate that he or she meets at least three of eight stated criteria—a which include receipt of national or international awards and authorship of scholarly articles—to demonstrate that the individual is within the small percentage of those who have risen to the very top of their field of endeavor. The individual must also demonstrate that he or she will remain temporarily in the U.S. to continue work in the area of extraordinary ability.

Individuals entering the U.S. in B status can be granted up to a one-year stay, with the possibility of securing a six-month extension. Generally, however, B status will be issued for just enough time for the visitor to engage in his or her stated business in the U.S. For B-1 “business visitors,” the applicant could be given less than three months. Citizens of Visa Waiver Program countries can travel to the U.S. for tourism or business visits without a visa. However, the maximum period of stay in the U.S. under the Visa Waiver Program is 90 days and, once the individual is in the U.S., he or she cannot extend or change status. B-1 business visitors and individuals entering under the Visa Waiver Program should check their document online after entering the U.S. to determine how long they have been authorized to stay in the U.S.

ASSESSING WHETHER THE FOREIGN NATIONAL QUALIFIES FOR A PARTICULAR WORK-AUTHORIZED CATEGORY
Understanding the different work-authorized categories is simply the first step in determining whether a particular category will allow a U.S. employer to sponsor a foreign national in one of the aforementioned work-authorized categories. The next step is reviewing the proposed U.S. job description to determine whether the job actually qualifies for one of the work-authorized categories. For instance, if Company XYZ has an opening for a mechanical engineer job that requires a bachelor’s degree or its equivalent in engineering, mechanical
engineers, or a related field and three years of experience, then the company could potentially file an H-1B, O-1, TN, or L-1 petition—depending on the foreign national’s qualifications.

After determining what work-authorized categories are applicable to the U.S. position, the next step is to determine whether the individual is (1) qualified for the position per the job requirements and (2) qualified for the work-authorized category.

With the example above, if foreign national candidate Smith possesses the equivalent of a bachelor’s degree in mechanical engineering and five years of experience, she would qualify for the mechanical engineer position with Company XYZ.

Smith would also qualify for the H-1B category, as she possesses a bachelor’s degree as well as the three years of experience required for the position. In addition, Smith may qualify for a TN petition if she is a Mexican or Canadian national, as an engineering position is one of the qualifying NAFTA categories.

If Smith can demonstrate she is an individual with extraordinary ability, an O-1 petition may also be an option for Company XYZ to sponsor her for the mechanical engineer position. Further, if Smith worked for a company related to Company XYZ abroad for at least one continuous year within the three years preceding her entry into the U.S. in a managerial/executive or specialized knowledge position and the mechanical engineering position requires an individual with specialized knowledge to perform such duties, she may qualify for an L-1.

If a U.S. company has multiple options for sponsoring a foreign national, the company should consider the availability of those work-authorized categories and the U.S. Citizenship and Immigration Services’ (USCIS) and/or the U.S. embassy/consulate’s processing times for the applicable categories along with the company’s need for the individual—i.e., whether the company needs the foreign national to begin work

**IDENTITY AND QUALIFICATION DOCUMENTS**

To demonstrate a foreign national’s identity and qualification for a particular work-authorized category, the individual will generally have to provide the following documents:

- **Background documents** — Copy of the biographical page of the foreign national’s passport, I-94 document.

- **Educational documents** — Educational degree and translation/evaluation (if required), Form I-20, license/certificate (if required; for instance, in the medical field, the foreign national must provide a copy of their license/certificate in a particular state).

**SPOUSE WORK AUTHORIZATION**

A spouse who enters the U.S. as a dependent of a foreign national in certain work-authorized categories may also be authorized to apply for work authorization in the U.S.

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If a U.S. company has multiple options for sponsoring a foreign national, the company should consider whether it needs the foreign national to begin work immediately and how long the company will require the foreign national to work in the U.S.
AVAILABILITY LIMITATIONS

Some work-authorized categories are limited by the USCIS. The H-1B, one of the most popular categories used by U.S. employers, is one of those categories. Specifically, the current annual cap, as set by Congress, is 65,000. The first 20,000 petitions filed on behalf of foreign nationals with a U.S. master’s degree or higher are exempt from the cap. In addition, H-1B workers who are petitioned for or employed at an institution of higher education or its affiliated or related nonprofit entities, a nonprofit research organization, or a government research organization are not subject to this numerical cap. Further, up to 6,800 visas are set aside from the 65,000 each fiscal year for the H-1B1 program under the terms of the legislation implementing the U.S.-Chile and U.S.-Singapore free trade agreements.

The H-1B cap can be—and has been—used up extremely quickly. If more H-1B petitions are filed than visas allotted, the USCIS uses a computer-generated random selection process, or lottery, to select enough petitions to meet the 65,000 general-category cap and the 20,000 cap under the U.S. master’s degree or higher exemption.

Based on the limited availability of H-1B petitions, U.S. companies should prepare these petitions in advance. Specifically, because the U.S. government’s fiscal year starts on October 1 and H-1B petitions can be filed up to six months prior to an employee’s start date, H-1B cap petitions should be filed on April 1 or within the first few days of April for an October 1 start date.

For the other work-authorized categories previously discussed—the L-1, O-1, and TN—there is no limit on the number of petitions that can be filed and/or approved each year.

OTHER LIMITATIONS TO CONSIDER WHEN SPONSORING A FOREIGN NATIONAL FOR WORK AUTHORIZATION IN THE U.S.: DEEMED EXPORT CONTROL

The deemed export rules are administered by the U.S. Department of Commerce (DOC). The Export Administration Regulations (EAR) are administered by the Bureau of Industry and Security (BIS). An export is...
defined as a transmission of items subject to the EAR out of the U.S., or release of technology or software subject to the EAR to a foreign national in the U.S.

According to the BIS, the EARs are “designed to restrict access to dual-use items by countries or persons that might apply such items to uses inimical to U.S. interests. The EAR also includes some export controls to protect the U.S. from the adverse impact of the unrestricted export of commodities in short supply.” Discussion with a foreign national in the U.S. is deemed to constitute an “export” if it reveals technical information regarding export-controlled technology.

For purposes of EAR, U.S. citizens, green card holders, and asylum-seekers/refugees are U.S. persons not subject to controls. However, if the technology is classified as well as controlled, permanent residents are deemed foreign nationals and are subject to controls. Foreign nationals in the U.S. on nonimmigrant visas are generally covered by the rules.

To make a determination regarding export control, the company will have to answer various questions, including what form of access a worker will have to controlled technology, whether the worker will be exposed to internal company research materials, and whether the worker will participate in meetings and conference calls regarding such technology. If an export license is required, the U.S. company can still hire the foreign national, but it will need to prevent access to the controlled technology or technical data by the foreign national until the company has received the required license or other authorization.

**IF A NONIMMIGRANT PETITION IS APPROVED, A FOREIGN NATIONAL MUST SECURE A VISA AT A U.S. EMBASSY/CONSULATE ABROAD BEFORE ENTERING THE U.S.**

In order to enter the U.S. in a work-authorized category, a foreign national must obtain a visa at a U.S. consulate or embassy outside the U.S.—unless the individual is a Canadian national, in which case he or she is not required to secure a visa before entering the U.S.

To obtain a visa, a foreign national will need to present the approval notice (Form I-797) if the petition was filed with the USCIS, a letter from the U.S. employer confirming employment, a copy of the nonimmigrant petition filed by the U.S. employer, and any other documentation specified by the U.S. Department of State and/or its consular posts. Alternatively, if the foreign national is applying for L-1 status and the company has a Blanket L petition, he or she may apply and secure a visa at a U.S. consulate or embassy abroad.

**THE FOREIGN NATIONAL HAS ENTERED THE U.S. IN VALID NONIMMIGRANT STATUS—NOW WHAT?**

**FOR THE FOREIGN NATIONAL:**

**OBTAIN A SOCIAL SECURITY NUMBER**

An individual needs a Social Security number to work, collect Social Security benefits, and receive some other government services in the U.S.

Before a Social Security number can be issued, all documents relied upon for issuance of the Social Security number must be verified with the Systematic Alien Verification for Entitlements (SAVE) system. SAVE is a web-based service administered by the Verification Division of the USCIS. As a result, it is recommended that foreign
nationals wait at least 10 days from the date of entry into the U.S. to apply for a Social Security number, in order to allow time for USCIS data to enter the Social Security database. To prove identity and work-authorized immigration status, the foreign national must present his or her current U.S. immigration documents and unexpired foreign passport.

FOR THE FOREIGN NATIONAL: SECURE A DRIVER’S LICENSE AT A LOCAL DMV

To secure a driver’s license, a foreign national should contact his or her local Department of Motor Vehicles office, as each state requires an individual to present varying levels of evidence to demonstrate identity and work-authorized status. In general, the DMV will require some or all of the following:

- License fee.
- Proof of age: Two forms of ID, such as passport and official USCIS approval documents (often excluding the I-94).
- Social Security card.
- Proof of domicile, including utility bills, vehicle registration, or a lease agreement.
- Proof of liability insurance.

Acceptable Immigration Documents for Presentation to the Social Security Office Include:

- Form I-94 (Arrival/Departure Record).
- Passport admission stamp showing a class of admission permitting work.

ensure proper completion of Form I-9 for each individual they hire for employment in the U.S. This includes U.S. citizens and noncitizens. Both employees and employers, or authorized representatives of the employer, must complete the form.

On the form, an employee must attest to his or her employment authorization. The employee must also present his or her employer with original documents evidencing identity and employment authorization. The employer must examine the employment eligibility and identity document(s) an employee presents to determine whether the document(s) reasonably appear to be genuine and to relate to the employee and record the document information on Form I-9. The list of acceptable documents can be found on the last page of Form I-9. By way of example, suppose an Indian national enters the U.S. to work for a company in L-1B status. He or she can present a valid passport and I-94 document, evidencing his or her L-1B status.

Form I-9 must be retained for three years after the date the U.S. company hires an employee or one year after the date employment terminates, whichever is later.

FOR THE EMPLOYER: E-VERIFY

E-Verify, a voluntary program, electronically verifies the employment eligibility of newly hired employees and existing employees assigned to work on a qualifying federal contract. E-Verify is administered by the U.S. Department of Homeland Security, USCIS, Verification Division, and the Social Security Administration.

E-Verify compares information from an employee’s Form I-9, Employment Eligibility Verification, against data in the files of the U.S. Department of Homeland Security (DHS) and the Social Security Administration in order to check whether the employee is eligible to work in the U.S.

If the government was not able to confirm that the employee is authorized to work based on the information submitted, it will issue a tentative nonconfirmation (TNC). This does not necessarily mean that the employee lacks work authorization, but only that the government needs more information to make a final determination. In fact, we have seen U.S. employers have issues with E-Verify with individuals who have changed their name as well as with individuals who have multiple surnames.
When a TNC is issued, the U.S. employer should first check to confirm that all of the employee’s data was entered correctly. If the query contains mistakes, it can be terminated as invalid, so that the mistakes can be corrected and the query can be resubmitted. If the E-Verify query was done properly, the employer should print the TNC notice from the E-Verify system and provide the employee with the option to contest the TNC.

If the employee contests the TNC, he or she is given an opportunity to contact the government to answer its questions and, depending on the facts of the situation, to provide additional documentation. The employer should indicate in the E-Verify system that the employee chose to contest. At that point, a referral letter will be generated, which must be provided to the employee. The referral letter gives the employee instructions for how to contact the government to resolve the discrepancy. It provides contact information and a deadline. The employee must contact the government within eight government work days.

While the employee works to resolve the matter, he or she must be allowed to continue to work. No adverse action may be taken against an employee based on the E-Verify TNC. Ultimately, the E-Verify query’s status will change to one of the following:

- Employment-authorized (meaning that the company can close the query and continue to employ the individual).
- No-show (meaning that the employee failed to contact the government within the provided time frame—equivalent to a final nonconfirmation).
- Final nonconfirmation (meaning that the government holds that the individual is not authorized to work).
- Review and update data/resubmit (meaning that the company must meet with the employee to update the I-9, then submit a new E-Verify query).

If the employee does not contest the TNC, or if the query ultimately results in a final nonconfirmation, the employer must terminate the worker’s employment or face possible fines and penalties for knowingly continuing to employ an unauthorized worker.

**FOR THE EMPLOYER: CONSIDER SPONSORING THE FOREIGN NATIONAL FOR A GREEN CARD**

U.S. employers may wish to sponsor a foreign national to work for the company on a permanent basis, as there are many benefits in doing so. The most traditional employment-sponsored route is the Labor Certification–based green card, which requires the company to recruit for the position to determine whether there are any minimally qualified/willing/able U.S. workers. There are some instances in which a Labor Certification is not needed to move forward with a green card: outstanding researchers, individuals of extraordinary ability, managers or executives who worked for a related company abroad, and National Interest Waivers.

Despite the many benefits, there are a few drawbacks, which include tax consequences. We would recommend that a foreign national speak with a tax adviser before starting the green card process.

**ENDNOTES**

1. The authors of this article do not purport to provide any legal advice. The article merely focuses on a simplistic overview of issues that U.S. employers may face when hiring foreign national workers. Readers are cautioned not to attempt to resolve issues on the basis of information contained herein and are strongly advised to seek advice from an experienced immigration attorney regarding specific case situations.

2. Similarly, there is an E-3 category for nationals of Australia based on the U.S.-Australia Free Trade Agreement. The requirements for this category are similar to those of the H-1B.

3. On Friday, March 31, 2017, the USCIS issued a policy that clarifies the USCIS’ approach to determining whether the position of “computer programmer” is deemed a “specialty occupation” that would be eligible for H-1B status. Under the new memo, the USCIS has indicated that computer programming positions are not automatically specialty occupations, despite their technical nature (and, in fact, level 1 computer programming positions are not generally considered specialty occupations, as required for H-1B status).

4. As of the date of this writing, the NAFTA agreement is still in effect and has not been changed by the current U.S. administration.

5. A company related to the U.S. entity means the company is one of the following: (1) parent—a firm, corporation, or other legal entity that has subsidiaries; (2) branch—an operating division or office of the same organization housed in a
different location; (3) affiliate—one of at least two subsidiaries that are both owned and controlled by the same parent; or (4) subsidiary—a firm, corporation, or other legal entity in which (a) a parent owns (directly or indirectly) more than half of the entity and controls the entity, or owns half of the entity and controls the entity; (b) owns 50 percent of a 50–50 joint venture and has equal control and veto power over the entity; or (c) owns less than half of the entity but controls the entity.

6 The USCIS requires that an individual demonstrate evidence of at least three of the following criteria: receipt of nationally or internationally recognized prizes/awards; membership in associations that require outstanding achievements; published material in professional or major trade publications, newspapers, or other major media about the individual; original scientific, scholarly, or business-related contributions of major significance; authorship of scholarly articles in professional journals or other major media; a high salary or other remuneration for services; service as a judge of the work of others in the field; employment in a critical or essential capacity for organizations that have a distinguished reputation.

7 Please see travel.state.gov/content/visas/en/visit/visa-waiver-program.html for a list of countries that participate in the Visa Waiver Program.

8 Please visit https://i94.cbp.dhs.gov/I94/ to retrieve an I-94 document.

9 As of the date of this writing, this rule is still in effect and has not been changed by the current administration.

10 As of the date of this writing, there has been no change setting a limitation to these categories by the current U.S. administration.

11 Please see dmvw.com/50_state_dmv_list.html for a list of all states’ DMV websites.

12 Employers may not tell employees which documents they may or may not present; the decision must be left to the employee.

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