



June 10, 2004

## **Our Short Outline to Employers Seeking to Hire Aliens**

### **H-1B – Temporary Professionals**

The H1B visa enables US employers to hire foreign professionals for a specified period of time on a nonimmigrant basis in a specialty occupation. A specialty occupation is defined as one that requires the theoretical and practical application of a body of specialized knowledge and which also requires the attainment of a bachelor's or higher degree in the specific specialty or its equivalent as a minimum for entry into the occupation in the U.S. (e.g., engineering, mathematics, physical sciences, computer sciences, medicine and health care, education, biotechnology, and business specialties, etc.). Foreign degrees must be the equivalent of a US bachelor's degree or higher.

This program allows workers in specialty occupations to work in the US for up to a total of six years. Status may be granted initially for 3 years and an application for extension must then be filed. After six years in H-1B status, the individual must depart the U.S. for at least one year before qualifying again for H-1B status. However, under Section 106 of the American Competitiveness in the 21<sup>st</sup> Century Act, H-1B holders are allowed one year increments of H-1B status beyond the statutory 6 year limit where either a labor certification I-140 or I-485 application has been filed if at least 365 days have elapsed from the date of I-140 or labor certification filing.

### **The Number of H1B visas issued - the H1B Cap**

The number of H1B visas issued each year is subject to a cap that is determined by US Congress. The cap for fiscal year 2004 is set at 65,000. Once the number of available H-1B visas for a given year has been used, no new H-1B visas will be granted until the beginning of the next fiscal year. H-1B extension, transfer & amendment applications are not counted toward the cap. The fiscal year runs from October 1 until September 30 of the following year. For FY 2004, which began on October 1, 2003, the H-1B cap has already been met. The USCIS has announced that it will not accept any new H-1B petitions for first-time employment subject to the FY 2004 annual cap. The earliest date a petitioner may file a petition requesting FY 2005 H-1B employment with an employment start date of October 1, 2004, would be April 1, 2004.

Anyone who seeks H-1B status & is cap-subject at a time when the H-1B quota cap has been met must consider carefully how and when he/she can obtain H-1B status. If your candidate's current status is about to expire and you would like to apply for an H-1B for him/her to legally remain in the U.S., you may have to deal with gap issues where the candidate's current status will not stretch to October 1, 2004. The USCIS is still in the process of deciding whether F-1s & J-1s (not subject to the 2 year foreign residency requirement) will be allowed to stay if their status runs out before October 1<sup>st</sup>. They would of course not have the right to work in any instance.

Everyone applying for the H-1B status for the first time will be subject to the cap, unless they seek H-1B status to do cap-exempt work. **The following types of work are H-1B cap exempt:**

1. *Work for an institution of higher education or a related or affiliated nonprofit entity;*
2. *Work for a government research organization or a nonprofit research organization; and*
3. *Work as a physician relevant to a J waiver on the basis of agreeing to serve as a primary care physician in a Health Professional Shortage Area (Conrad State 30 Program).*

That is, an application for H-1B status filed by an employer seeking to hire an alien in one of the types of work described above, would not be subject to the cap. However, if a cap-exempt H-1B wishes to transfer to another employment not in the above cap-exempt categories, it appears to be USCIS's current position that such could not be allowed as the proposed new employment would be subject to the cap. For instance, if a researcher from a cap exempt organization seeks an H-1B transfer to work in a private (for-profit) company, this would be considered as being counted toward the cap for the first time. Therefore, this person's H-1B transfer might be denied if it sought a transfer to begin before the next fiscal year.

*However, USCIS will still continue to process H-1B petitions for workers from Singapore and Chile consistent with Public Laws 108-77 and 108-78.*

## **F-1 Student Visas**

An F-1 visa is a non-immigrant visa issued for an alien who is coming into the United States to pursue full-time studies in a US academic institution.

### **What is Optional Practical Training?**

Optional Practical Training (OPT) work authorization is designed to provide opportunities for employment to international students with F-1 status who wish to work in their field of study. During the period of OPT, a student will maintain F-1 visa status since it is considered to be part of the program of study.

An individual in F-1 status (whose field of specialization is classifiable as a specialty occupation) is permitted, if certain conditions are met, to change his/her status to H-1B.

However, since the cap for FY 2004 has been reached, any new H-1B petitions filed after April 1, 2004 will have the October 1, 2004 start date. For example, if a person in F-1 status, whose duration of stay (including period of Optional Practical Training (OPT)) will expire after August 2, 2004 will still have another 60-day grace period, for which he/she will be in legal status. If an H-1B petition requesting a starting date of October 1, 2004 is filed before August 2, 2004, then it is clear that the candidate will not be able to work after August 2, 2004, and the question is whether he/she will be allowed to remain until October 1, 2004. The USCIS as aforesaid is still deciding this issue.

## **TN Visas**

A TN-Visa is a temporary work visa available only to citizens of Mexico and Canada. Under the North American Free Trade Agreement (NAFTA) a citizen of a NAFTA country may work in a professional occupation in another NAFTA country if the applicant meet certain requirements. The spouse and unmarried, minor children of the principal applicant are entitled to the derivative status, but they are unable to accept employment in the United States.

**Eligibility Requirements:** The category “Professionals Under The North American Free Trade Agreement” is available only to citizens of Mexico and Canada. Under NAFTA, TN status is available where the following conditions are met:

- The profession is on the NAFTA list
- The applicant possesses the specific criteria for that profession
- The prospective position requires someone in that professional capacity
- The applicant will work for a US employer

## **J-1 Visas**

A J-1 Visa is issued for an Exchange Visitor who is participating in an established J Exchange program pre-approved by the State Department. Exchange Visitors under J-1 visas include secondary school and college students, business trainees, trainees in flight aviation programs, primary and secondary school teachers, college professors, research scholars, medical residents or interns receiving medical training in the U.S., certain specialists, international visitors, and Government visitors.

**What is the two-year Foreign Residency Requirement for J visa holders?**

This rule requires some J visa holders to reside in their home country for **at least** two years before they may obtain an H, L or other immigrant visa to enter the U.S. or adjust their status within the U.S.

Not all J visa holders are required to return to his/her home country. To determine if a J visa holder is subject to the two-year residency requirement, you should first examine the Form DS-2019 or IAP-66 (Certificate of Eligibility) along with the J-1 visa. The two-year residency requirement applies if the form indicates that the phrase, “subject to the two year residency requirement” is checked off (located on the left corner of the form) or if the J-1 visa contains the notation “212(E) TWO YEAR RULE APPLIES.” (Please note that lack of notations does not necessarily mean that the individual is exempt from the 2 year requirement). If your candidate is NOT subject to the two-year home country residence restriction, he/she may change status to other status in the U.S. J visa holders may also apply for a waiver of the requirement under narrow circumstances.

Kindly note that J-1 visas have been deemed inappropriate for fully trained individuals, e.g. – research scientists. For lesser individuals, a J-1 may be appropriate provided there is an appropriate J-1 sponsoring organization & the company is willing to abide with J-1 conditions including provision of insurance.

## **O Visas**

The nonimmigrant O visa has three (3) distinct categories. The O-1 is for aliens of extraordinary ability in the sciences, arts, education, business, or athletics. The O-2 for certain aliens accompanying O-1 aliens in the arts or athletics. The O-3 for dependents of aliens in the foregoing categories.

To qualify for an O-1 visa in the sciences, arts, education, or athletics, the alien must have extraordinary ability demonstrated by sustained national or international acclaim. To document the extraordinary ability, the alien must present substantial evidence from a list of criteria mentioned in the US immigration regulations. In addition to establishing the alien's qualifications, the petitioner (the one asking for the alien's services) , must also establish that the position requires the services of an alien of extraordinary ability or achievement, whichever is applicable, and must submit evidence that the alien is coming to the United States to continue work in the area of extraordinary ability or achievement.

There are shifting standards of how extraordinary an individual must be to obtain O-1 classification, with lesser “extraordinariness” required for those qualifying in the arts. However, O-1’s for science must reach a high level of achievement & might only be appropriate for top level scientists in the company with impressive CVs.