

AN EMPLOYER'S



GUIDE



TO THE IMMIGRATION PROCESS



PRESENTED BY:

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Wouldn't it be nice to recruit and retain talented, dedicated recent graduates who have a vested interest in their continued employment by your company? This is the reality of the employment based immigration system. Many companies have utilized this fact for years to secure a stable and highly motivated work force. The information below is an outline of the major issues which should be considered in recruiting foreign students. As you can see, the commitment to your company by qualified foreign students is measured in years, almost always at least four years, with virtually no legal liability on the part of the company.

I. THE F-1 STUDENT AND OPTIONAL PRACTICAL TRAINING (OPT)

In most cases, the recent graduate who is an F-1 foreign student will have one year of optional practical training (OPT) available for use with any employment which is related to the degree. This employment is "open market" which means that the F-1 student is free to work for any employer during this one-year period without any further proceedings with the Immigration Service. However, it is limited to one year and in some cases less if the student has used any portion of the OPT previously.

Advantages: OPT is granted by the Immigration Service without any filing or involvement of the employer. The employment is authorized with a small card called an EAD, which is normally valid for one year.

Disadvantages: The foreign student is allowed to use OPT with any employer without any prior approval. Therefore, this student is free to change employers at will.

II. WHAT TO DO AFTER THE FIRST YEAR: THE H-1 CLASSIFICATION

Most students are ultimately interested in obtaining permanent residence (the



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"green card") and will need a sponsoring employer to obtain it. However, as is discussed here, the process to obtain the green card will take many years and in most cases more than four years. Therefore, the H-1 classification serves as a "bridge" between the OPT and the green card. The H-1 classification is available basically for any position which requires at least a bachelor's degree in a professional or technical field and the employee has obtained that specific degree. The availability of qualified U.S. workers is irrelevant to this category. This classification is limited to a total of six years and is employment-specific. The employee must file a new H-1 petition if a substantial change is made in the employment even with the same company. Obviously, this means the employee must repeat the H-1 process if he or she changes jobs.

Advantages: The H-1 category is limited to a specific position with the company. Once in this category, the six-year clock begins ticking and the employee must obtain permanent residence within that period of time. This forces the recent graduate to commit to a company for at least five years in order to complete the green card process. There is no obligation on behalf of the employer to continue the H-1 employment. Subject to other employment law requirements, the H-1 employee can be dismissed at any time as with any other employee.

Disadvantages: Unless the employer has in-house staff familiar with this process, outside counsel will be necessary to process the H-1. Therefore, either the employee or the employer (or both) will be responsible for attorney's fees, expenses such as filing fees and the employer is required to pay a nonreimbursable fee of \$1000 to INS (this requirement is scheduled to sunset on September 30, 2003). The maximum time which can be requested is three years for each application with a maximum of six years for each individual regardless of the number of jobs and H-1 petitions. The employer is required to pay

the “prevailing wage” for that particular position in that industry at that location. This is determined during the H-1 processing and is established before the H-1 petition and application is actually filed with the Immigration Service.

III. OBTAINING THE GREEN CARD

As mentioned above, the employee, now an H-1 employee, is primarily interested in obtaining permanent residence. In order to obtain the green card, the employee must have a company which is willing to sponsor him or her throughout the process, which usually takes more than four years. This process consists of three steps. The first is a limited test of the U.S. labor market in a specific geographical area referred to as a labor certification. This process is successful over 95% of the time if it is carefully processed according to the legal requirements established by the U.S. Department of Labor. Currently, labor certification applications take well over two years to be approved. The second step is referred to as a petition and it is filed with the Immigration Service. This step in the process essentially establishes the qualifications of the H-1 employee and the employer’s ability to pay the salary. This step normally takes six to twelve months and in some cases may take longer depending on backlogs at the Immigration Service. The third and final step is referred to as adjustment of status and it is this step which will provide the employee with permanent residence and the green card. Currently, adjustment of status proceedings take at least two years to complete.

The permanent residence process normally takes more than four years to complete. The employee must remain with the company throughout the process and generally must remain in the same position. Since the H-1 is limited to a maximum of six years, the employee generally will have only one opportunity to pursue permanent residence with one company.



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Advantages: By far the most important advantage of this process is the fact that the employee is tied to a particular position with one company and must remain with the company in most cases for more than four years. On the other hand, the employer has no legal responsibility or obligation to continue the processing and may discontinue the case and/or terminate the employment relationship at any time.

Disadvantages: The permanent residence process is very complicated and an experienced immigration practitioner will be required to pursue this type of case. Therefore, there will be attorney’s fees as well as other expenses such as advertising costs and filing fees, although all of these fees often are paid by the employee. The process requires the employer to provide at least basic information about the company and the position to a qualified attorney. The employer’s participation also involves reviewing documents which have been prepared, signing documents and in some cases telephone interviews with job applicants. All of these steps can be minimized from the employer’s perspective by the use of experienced immigration counsel.

CONCLUSION

Based on the foregoing it is clear that recruiting and retaining foreign students carries very little liability and creates a tremendous opportunity for a long term employment relationship with a highly motivated employee. Many of the problems which arise with some foreign students can be traced to a lack of experience or knowledge on behalf of the employer or even the attorney representing the company and its employees. It is imperative that the process be handled by an experienced immigration attorney and the risks and rewards of each case carefully outlined in the beginning.



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