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Nutshell Guide for U.S. Businesses Hiring Temporary Employees from Outside the U.S.

General

Employers may encounter two types of alien workers: (1) noncitizen immigrants living permanently in the United States whose lawful status entitles them to work and (2) foreign nationals who travel to the U.S. for temporary employment or who are entitled to work during temporary approved stays in the U.S. The latter are called nonimmigrant employees.

Status

United States. Immigrants are lawful permanent residents, including refugees and asylees. Nonimmigrants are granted permission for temporary stays, which may include permission to engage in temporary employment. This permission is manifested by the status granted by the Immigration and Naturalization Service (INS) and the visa issued by a U.S. consulate, both of which are represented by a letter symbol. Persons The principal distinction between an immigrant and a nonimmigrant is the intention to remain permanently in the who seek permanent residence in the U.S. or seek U.S. employment are subject to the jurisdiction of the INS, which may deport aliens who violate the conditions of their approved status. The two principal conditions relate to eligibility for employment in the U.S. and departure from the U.S. following the authorized period of stay. The terms of these conditions vary among nonimmigrant categories.
Status Categories of Aliens Working Temporarily in the United States

B-1	Visitors for Business (special restrictions apply)
E-1 and E-2	International Traders and Investors
F-1	Foreign Students (special restrictions apply)
G	International Organization Employees (different restrictions for G-4 spouses)
H-1, H-2 and H-3	Temporary Workers (H-1A category for nurses expired 8/31/95)
J	Exchange Visitors, as noted on IAP-66 (different restrictions for J-2 spouses)
L-1	Intracompany Transferees
O-1 and O-2	Aliens of Extraordinary Ability
P-1, P-2 and P-3	Entertainers and Athletes
R-1	Religious Workers
TN-1 and TN-2	Canadian or Mexican Professionals Under NAFTA

Understanding Visas

Both immigrants and nonimmigrants that travel to the United States require authorization from U.S. Consulates abroad (division of State Department) in the form of visas. Since the law presumes that most aliens who enter the U.S. intend to be immigrants and remain in the United States, nonimmigrants in most status categories must prove to consular officials that they maintain permanent residences

outside the United States, which they do not intend to abandon, in order to qualify for visas. Since the law also requires common carriers to ensure the lawful status of their passengers, persons who use publicly available transportation (such as airlines) to reach the U.S. will not be allowed to board without visas. However, since the INS and State Department have concurrent jurisdiction over noncitizens entering the United States, possession of a visa will not gain admission into the U.S. without INS approval of status at the port of entry.

Nonimmigrant Visas

INS will typically stamp the I-94 Arrival-Departure Records of nonimmigrant individuals who possess proper visas, indicating the visa category and duration of approved status. Conversely, although a foreign national may have been granted status by INS, the same person will not necessarily be granted a nonimmigrant visa to travel to the U.S. if the consular official is not convinced that the traveler intends to leave the United States following the approved activity. The type of visa required varies with the purpose of admission to the U.S. Since immigration status for INS purposes is indicated by symbols (letters) that correspond to visa categories, admission for INS and State Department purposes may be easily confused. Employers and nonimmigrants should be aware that the duration of a visa (i.e., permission to re-enter the United States if the visa-holder leaves the country) does not necessarily coincide with the duration of nonimmigrant status (i.e., permission to remain in the United States while engaged in certain activities or related to principals authorized to engage in given activities).

Employing Nonimmigrants

The 1986 Immigration and Reform Act (IRCA) (Act of 1986) sought to control the problem of illegal migration by eliminating a key incentive for unauthorized persons to come into the United States: employment. To accomplish this, IRCA held all American employers responsible for ensuring that both citizen and non-citizen employees hired after November 6, 1986 produce documentation to prove their identities and eligibility to work in the United States. To implement this, employers were required to complete the Form I-9, the Employment Eligibility Verification Form. However, while the law seeks to protect American jobs for American workers, it also seeks to support American business and global trade via procedures that allow employers, under certain circumstances, to obtain foreign workers on a temporary basis. These procedures vary depending upon the demonstrated business need and the circumstances of the alien worker.

Eligibility for Employment

Since very few nonimmigrants, even if residing in the United States legally, are eligible for unrestricted employment, employers should be aware of work restrictions on status:

Authorized for Unrestricted Employment	Employment Prohibited	Authorized for Restricted Employment	
K-1 and K-2	B-1 and B-2 visitors	A-1 and A-2	(for foreign government entities only)
N-8 and N-9	C aliens in transit	A-3	(for A-1 foreign government official only)
	D crewmembers	C-2 and C-3	(for foreign government entity only)
	E-1 and E-2 principals' family members	E-1 and E-2	(for treaty-qualifying company through which status was obtained only)
	F-2 and M-2 family members of students	F-1	(on campus only, 20 hours during school session and full-time otherwise)
	G-2 principals' and G-5 employees' family members		part-time off campus in curricular practical training)
	H-4 family members of H principals	G-1, G-2, G-3	(for foreign government entity or international organization only)
	I principals' family members	G-4	(for employer through which work authorization was obtained)
	L-2 family members of L-1 principals	G-5	(for G principal only)
	O-3 family members of O principals	H-1, H-2, H-3	(for employer through which status was obtained only)
	P-4 family members of P principals	I	(for sponsoring foreign news agency or bureau only)
	R-2 family members of R principals	J-1	(for exchange visitor program sponsor only, subject to USIA guidelines)
		L-1	(for employer through which status was obtained only)
		O-1 and O-2	(for employer through which status was obtained only)
		P-1, P-2 or P-3	(for employer through which status was obtained only)
		Q	(for petitioner through which status was obtained only)
		R-1	(for religious organization through which status was obtained only)
		TN	(restricted to Canadian and Mexican nationals engaged in qualifying business activities)

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Verifying Employment Eligibility ("I-9 Process)

The three lists of documents that may be submitted to employers to demonstrate authorization to work in the U. S. can be found on the reverse side of any original Employment Eligibility Verification Form I-9 or on pp.20-21 of the Handbook for Employers (form M-274, 11/21/91 edition). List A documents, such as U.S. passports, "Green Cards," or Employment Authorization Documents (EAD's) issued by the INS, demonstrate both the identity of the person who submits them and the eligibility of that person to work in the United States. List B documents, such as state driver's permits or U.S. military I.D.'s, demonstrate identity only—in other words, prove that List C documents submitted to prove work authorization, such as U.S. Social Security cards or certified U.S. birth certificates, relate to the person who presents them. Accordingly, a single List A document may be submitted to satisfy the I-9 requirement, whereas a List B document must be submitted with a List C document and vice versa.

NOTE: **For further information on the procedure for verifying eligibility for employment, see Employer Information Bulletin 96-03, "The I-9 Process in a Nutshell."**

Employment Eligibility of Nonimmigrants

Most nonimmigrants, excluding Canadian and Mexican nationals in TN status, will submit unexpired foreign passports, together with stamped I-94 arrival/departure records, as proof to employers of employment eligibility. Although this combination qualifies as a List A document for I-9 purposes, employers may have to inquire further. Employability of a nonimmigrant varies according to status granted by INS. Since the stamped visa symbol appears alone on an I-94 Form with the approved admission period, an employer who is unfamiliar with restriction inherent in that status will not be able to determine restrictions upon a nonimmigrant's employment during this period. The reverse side of the I-94 record should list details of a nonimmigrant's work authorization. Otherwise, employers should be aware that nonimmigrant work authorization, particularly where an I-94 with an admission stamp indicating admission in nonimmigrant status is submitted with a passport as a List A document for I-9 purposes, is usually employer-specific. Employers who do not have an approved petition for a given nonimmigrant worker may not be able to hire that worker without submitting a separate I-129 petition for the services of that worker.

The Job Application Process

Although many employers have legitimate business needs for long-term or permanent employees that may not be served by temporary nonimmigrant workers (immigrant workers are presumed to be permanently authorized to work in the United States even if their immigration documents bear expiration dates), an employer may not be aware of the immigration status of a job applicant or new employee. In general, employers of four or more employees are not entitled to consider national origin in the evaluation of job candidates. However, the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) has permitted employers, provided there is no disparate treatment of applicants or intent to discriminate on the basis of national origin, to question candidates in the application process as to whether they are presently authorized to work in the United States on a full-time basis (or current employer only) and/or possesses F-1 student or H-1 visas and/or have work authorization that is limited to practical training (school placement offices, unless they qualify as referrers for a fee, are not prohibited from verifying a student's authorization to work prior to referring them to employers). Alternatively, OSC has ruled that employers may request applicants to complete Forms I-9 at the time of interview.

NOTE: **Employers who solicit such information in the application process have been advised to apply these procedures on all applicants uniformly, without regard to citizenship or national origin.**

Change of Status

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General

In general, nonimmigrants are required to return to their countries of origin upon termination of the admission period. However, in cases where alien individuals are eligible for more than one nonimmigrant category, or become so during the course of a nonimmigrant stay in the United States, they may be entitled to switch from one nonimmigrant category to another without leaving the United States.

Legal Standard

To obtain a change in nonimmigrant status, an alien applicant must prove that he did not intend to make the change prior to entering the United States in the current nonimmigrant status and that he has respected the requirements and restrictions of that status during his stay in the United States. This means, among other things, that the alien must apply for the new status before the current status has expired and that the alien must not have been employed in the United States except as allowed under the authorized nonimmigrant category. Employment that may be authorized if a change in status is granted may not begin until INS approval is received. Premature employment may result in denial of a status change application. Example: A B-1 visitor learns of opportunities that may not be undertaken in B status while engaged in permissible business visitor activities in the United States. If such opportunities were unanticipated but a natural and immediate outgrowth of business visitor activities, changes of status to the E (treaty trader/investor), L (intracompany transferee), TN, H, J, or O category may be permissible.

Special situations

1. Switching between H categories does not require formal change of status.
2. Changes of status from any category (typically, B, H-1, or L-1) to TN are often advantageous for Canadian and Mexican nationals because there is no limitation on the duration of TN status. In fact, eligible applicants can usually convert to TN status at any time during their eligible period in the original status and can even "piggy-back" TN status following the expiration of B, H, or L status

NOTE: **For more information on effects of NAFTA on immigration procedures, see Employer Information Bulletin 96-02 "Employing Canadian and Mexican Professionals After NAFTA."**

Adjustment of Status Process

In general, aliens who seek permanent residence in the United States make applications at U.S. consulates abroad. Under certain circumstances, however, aliens who are present in the United States in nonimmigrant status may become permanent residents without having to leave the country to apply. This process, which is administered at the discretion of the INS, is called "adjustment of status." It differs from the "change of status" process where an alien present in the United States changes from one nonimmigrant category to another.

Qualifying for Adjustment of Status

In order to qualify, eligible nonimmigrants must be in legal immigration status on the date of filing the permanent resident application and must have maintained lawful status since admission into the United States (unauthorized employment prior to an application for adjustment would be an example of a serious violation of status). In general, eligibility for adjustment is determined according to a preference system based upon the nature of family relationships in the United States or a 5-tier employment-based schedule (see Employment-based Immigration, below). Even if a preference petition is approved, however, an applicant may not adjust status if the annual immigration cap has been reached in the

applicable preference category.

Ineligibility

Certain aliens are statutorily ineligible for adjustment of status: aliens in the Visa Waiver Pilot Program (VWPP), persons in E status, and J exchange visitors who have not met the foreign residence requirement or been granted a waiver.

Exception

Provisions of P.L. 103-317 (August 1994) removed the automatic bar to adjustment for business visitors, VWPP participants, treaty-traders, and any alien who is ineligible for having failed to maintain lawful status (including unauthorized employment) until September 30, 1997, for aliens who otherwise meet immigration eligibility and visa availability requirements. However, those eligible by virtue of this law are subject to a filing cost equal to five times the standard fee

Guide For Congressional Staff

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