

H-visas

This article is the third in a series that addresses some practical matters regarding the criteria for various U.S. visa categories.

by
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The author is Hans A. van Velzen, a consultant with Van Velzen C.S. Belgium B.V.B.A., a company that assists European companies with their business establishments and activities in the United States. The subject of this article will be employment of non-American specialist and temporary workers in the United States and the qualifications for and advantages of H-visas. Please note that the U.S. Government does not officially endorse this article.

Under U.S. immigration law, nonimmigrants, unlike immigrants, enter the U.S. for a temporary period of time and are restricted to the activity consistent with their visa category. The H-visa category is important for U.S. companies wanting to hire foreign employees. The H-category is to be divided into a number of subcategories, H-1A, H-1B, H-2A, H-2B, H-3 and H-4. The H-1A subcategory is applicable to hiring registered nurses and physical therapists, whereas the H-1B subcategory is applicable to hiring specialist employees, especially consultants and engineers. The H-2A subcategory is applicable to hiring temporary agricultural workers, whereas the H-2B subcategory is applicable to hiring temporary workers in general, which means employment that is not considered H-1A, H-1B or H-2A employment. The H-3 subcategory applies to aliens who come to the United States to receive training or who participate in a special education exchange visitor program, whereas the H-4 subcategory is for dependents of H-1/3 visa holders. All subcategories are subject to extensive rules and regulations.

H-visa issuance - except for dependent visas - is subject to a three-step process; it requires Department of Labor (DOL) and Immigration and Naturalization Service (INS) processing, prior to visa adjudication. Before an H-visa can be issued by a Consular Officer at a U.S. Embassy or a U.S. Consulate General, the employer must start the process by filing a labor condition application and or a labor certification. The H-work permit petition needs to be adjudicated and approved by a competent Immigration and Naturalization Service (INS) Center in the United States.

This article gives an example of how a fictitious United States company hired Belgian employees. For practical reasons, this article focuses on aspects regarding the hiring of H-1B and H-2A employees.

H-1B: A U.S. company hiring a Belgian IT consultant

SoDaX Incorporated, a South Dakota based U.S. company, specialized in implementing Internet firewall software, is operating throughout the United States. The

company recently introduced a revolutionary maintenance tool, the 'Arm'. A Belgian company, named At Arms Length (AAL) developed the tool. End user rights were transferred to a newly established joint venture, Arms4Web Incorporated. Both companies have equal rights in profit (and loss) and share control. For the introduction, both companies decide to introduce the tool on a national scale.

It is decided that Mr. Armand B. Vanaerde, a Belgian AAL specialist, will be hired by the newly established venture. The IT specialist will train U.S. - yet to be hired - employees and will be responsible for the initial 'pipeline', lifting U.S. sales.

It is planned that Mr. Vanaerde will leave for the U.S. in fall 2000. He intends to stay in the United States for 2 to 3 years. Mr. Vanaerde is aware of the fact that his tour of duty might be extended twice, for a maximum of 5 years. It is February 2000 now. The company's legal advisors are contacted to assist on work permit and visa matters.

Conclusion

Before the specialist may start working with the U.S. company, he needs to apply, and qualify, for a U.S. visa. SoDaX Incorporated's legal advisors recommend that the company submit an H-1B visa application for the Belgian specialist. The legal advisors' recommendation is based on the fact that this class of visa may be issued for up to 3 years, and it can be renewed once for up to 3 years, a time frame which will cover the intended period of the specialist's stay. DOL, INS and Embassy processing is estimated to take 5 to 7 months, which is within the timeframe set by the company's management.

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In order to qualify for the H-1B visa, the specialist must meet all of the following conditions. The prospective employment involves a specialty occupation, which means an occupation that requires:

- Theoretical and practical application of a body of highly specialized knowledge; and
- 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 United States; or
- Experience in the specialty equivalent to the completion of such degree (to be determined by the INS) and recognition and expertise in the specialty through progressively responsible positions relating to the specialty.

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11 *An H-1B visa applicant must intend to leave the United States when the business is completed. Immigrant intent will lead to ineligibility for this class of visa. The specialist intends to stay for a 2-3 year period, after which he will return to Belgium. Another 2-3 year period is subject to discussion. He has no immigrant intent. This general condition is met.*

Before the specialist can apply for an H-1B visa, the U.S. employer must file a labor condition application with the Department of Labor (DOL).

The H-1B labor condition application must state that:

- The employer is offering and will pay the prospective alien employee the greater of the actual or prevailing wage paid to all other workers with similar experience and qualifications for the specified employment in the United States; and that
- The employer will provide working conditions for the prospective alien employee that will not adversely affect the working conditions of workers similarly employed; and that
- There is no current strike or lockout as a result of a labor dispute in the occupational classification at the place of employment.

DOL officers determine whether these conditions are met. If said conditions are met in the negative sense, the labor condition application will be validated. Subsequently, a work permit petition must be adjudicated by the Immigration and Naturalization Service in the United States. Here, SoDaX Incorporated files a petition with the competent INS regional Service Center in the U.S., demonstrating that Arms4Web Incorporated requires the services of Mr. Vanaerde to fill the specialist position.

An INS adjudicator approves the petition. In this fictional case, INS processing took seven weeks. The INS Service Center cables the approval to the Embassy's Consular Section in Brussels, Belgium. The Consular Section subsequently informs the beneficiary in writing regarding the visa procedure to be followed.

Thereafter, Mr. Vanaerde submits a visa application either in person, Monday through Friday from 9:30 to 12:00, or by mail to the U.S. Embassy Consular Section, 25 Blvd. du Regent, 1000 Brussels, along with his passport, a postal receipt evidencing payment of 1,800 BF for the visa application, the applicant's photo, a letter of explanation and other documents concerning the business enterprise, and the specialist's qualifications for the position. After a review of the file, which normally takes two days, an H-1B visa may be issued.

An approved H-1B petition for an alien in a specialty occupation may be valid for a period of up to 3 years, H-1B status may be extended for a period of up to 3 years. However the initial and extended period may not exceed 6 years. Important is that an approved H-1B petition may not exceed the validity period of the labor condition application.

H-2A: A U.S. company requiring temporary workers

SoyCrush Association, an Iowa based company is in the business of crushing soybeans. SoyCrush Association is formed as a cooperative. They employ a substantial number of workers, mainly on a temporary or seasonal basis.

Business is going great. There is a problem, however, in finding and keeping people wanting to work in the crushing plant. A number of 'outside' positions are open. SoyCrush Association is in need of people who work with cooperative owners on harvesting soybeans and subsequently qualifying the products in certain categories. The State and local employment agencies have tried to recruit workers, but without too much success.

SoyCrush Association has contacted their advisor and asked them to look for possibilities in attracting out-of-state labor. As a result, a number of positions have been filled by workers from surrounding states. However, a number of positions remain open. The advisor is already looking for out-of-country labor. They place ads in agricultural newspapers in The Netherlands and Belgium.

A Belgian national has replied to one of the ads. He is willing to come to the United States and work on a temporary basis, for 7 months in total, after which he will return to Belgium. This Belgian person, Fons Delauwe, recently finished agricultural school and is looking to gain international experience.

SoyCrush Association and Mr. Delauwe come to an agreement by which SoyCrush Association will pay for Mr. Delauwe's airline ticket and will arrange for accommodation during employment. He will be paid a salary that is equivalent to U.S. workers in his position.

Conclusion

Before the agricultural worker may start working with the U.S. company, he needs to apply, and qualify, for a U.S. visa. SoyCrush Association's legal advisors recommend that the company submit an H-2A visa application for Mr. Delauwe. The advisor's recommendation is based on the prospective employment involved. DOL, INS and Embassy processing is estimated to take 4 to 6 months. The company's legal advisors are contacted to take this matter further.

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In order to qualify for the H-2A visa as an agricultural worker, the petitioner must establish that the employment proposed in the certification is of a seasonal or temporary nature. Employment is considered of a temporary nature where the employer's need to fill the position with a temporary alien worker will, except in extraordinary circumstances, last no longer than one year. Mr. Delauwe will be employed for a period of less than a year, here 7 months.

Like the H-1B visa applicant, H-2A visa applicants must intend to leave the United States when the temporary or seasonal work is completed. Immigrant intent will lead to ineligibility for this class of visa. Mr. Delauwe has declared that he has no immigrant intent.

The prospective U.S. employer must first obtain labor certification from DOL. The U.S. employer must establish that:

- There are not sufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition; and
- The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The employer needs to pay the foreign worker in accordance with the regulations of DOL and the United States Department of Agriculture.

The prospective U.S. employer is a cooperative, which is treated as an associated employer. The certification granted to the cooperative may be used for certified job opportunities of any of its producer members.

After obtaining labor certification from DOL, the prospective employer files a petition for a work permit with the INS. The petition is filed together with the valid temporary agricultural labor certification.

An INS adjudicator approves the petition. The INS Service Center accordingly cables the approval to the Embassy's Consular Section in Brussels, Belgium. The Consular Section subsequently informs the beneficiary regarding the visa procedure to be followed.

Here, the foreign (Belgian) worker applies for an H-2A non-immigrant visa at the consular section in Belgium. He applies, in person, Monday through Friday from 9:30 to 12:00 or by mail, to the Embassy Consular Section, 25 Blvd. du Regent, 1000 Brussels, along with his passport, a postal receipt evidencing payment of 1,800 BF for the visa application, the applicant's photo, a letter of explanation concerning the business enterprise, and the documentation that shows affiliation between the Belgian and the

U.S. company, and the specialist's qualifications for the position. After a review of the file, which normally takes two days, an H-2A visa may be issued.

An approved H-2A petition for an alien in a temporary or seasonal occupation may be valid for a period of up to 1 year, H-2A status may be extended for a period of up to 1 year at a time, for a maximum of 3 years. It is important that an approved H-2A petition may not exceed the validity period of the labor condition application.

Summary

As the foregoing examples illustrate, the requirements for qualifying for an H visa are complex, especially with regard to the three-step-process.

In summary, the following distinction in roles can be made:

- The Department of Labor determines whether wages and labor conditions are U.S. market compliant, and, in the case of an H-2A application, whether U.S. labor is available.
- Next, the Immigration and Naturalization Service determines whether the beneficiary of the work permit petition is eligible for employment in the specific (specialty) occupation in the United States.
- Finally, a U.S. consular post determines whether the visa applicant is eligible for temporary residence in the United States. Even after approval in the foregoing phases, it is the INS, however, that determines at a port-of-entry whether a foreigner is admissible for entry in the United States. Having fulfilled all conditions for residence and employment does not in itself imply admissibility to the United States.

For further information on how to structure your business enterprise to qualify for a visa, you may wish to secure the services of a competent business consultant or immigration attorney. For specific questions, you may refer to VVCS Belgium's website at: <http://vviworld.net/vvcs.be> or send an e-mail to vvcs.be@vviworld.net. For specific questions regarding the filing of an application at the U.S. Embassy in Brussels, you may refer to the Embassy's website at <http://www.usinfo.be>. For specific questions regarding the filing of an application at a competent INS Service Center, you may refer to the INS' website at <http://www.ins.usdoj.gov>. ❖

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