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THE LITTLE KNOWN WORK VISA AN ALTERNATIVE TO THE H-1B VISA

By Mark A. Ivener

What are the options for a company that would like to hire an individual who is not a US citizen or Permanent Resident? Generally speaking, the business world relies on the H-1B visa to employ foreign nationals in the United States. However it is often the case that obtaining an H-1B visa is impractical because of INS delays in visa processing for a new hire who is outside of the United States, because the potential foreign hire does not have a Bachelor's degree in the correct field or a variety of other reasons. When the H-1B fails, the little known J-1 visa is often a quick and effective vehicle to bring foreign workers to the United States. The J-1 visa may be issued for the period of employment (on the job training), not to exceed 18 months.

How to Obtain a J-1 Visa for an Employee

The Department of State rather than the Immigration and Naturalization Service ("INS") administers the J-1 visa program which was implemented in 1961 by the Fullbright-Hays Act to promote educational and cultural exchange. In order to obtain a J-1 visa for an employee, a company must either become designated by the Department of State as a J-1 visa program sponsor or initiate an application through an approved third party training sponsor organization.

Applying for Department of State authorization as a program sponsor may well be worthwhile for large publicly traded corporations, however as a practical matter it will not solve an immediate Human Resource need because it is a lengthy and complex process. On the other hand an application through an existing third party training sponsor organization will often allow a company to hire a foreign employee in as little as two weeks which is significantly quicker than if an H-1B application was made for a qualifying employee through the INS.

The first step is to find an appropriate third party training sponsor. There are dozens of organizations that are authorized by the Department of State to act as third party

sponsors of J-1 training programs. These organizations review and approve the application and training program of a proposed employer and issue Form IAP-66 which is a Certificate of Eligibility for J-1 training. Each of the third party program sponsors has different requirements, filing fees and procedures. Almost all third party sponsor applications require that the employer submit a detailed training program. The training program must spell out in explicit detail the type and chronology of training which will be accomplished, even if it will take place through on-the-job training.

Third party sponsors can take as little as 2 weeks to review and approve J-1 applications and training programs. Ultimately when the application is approved, the third party sponsor will send Form IAP-66 to the employee abroad. The employee then submits the Form IAP-66 to the US Consulate in his or her home country and obtains the J-1 Visa. Processing times are generally from 1 day to 1 week, depending on the US Consular post where the visa application is made. Canadians and Canadian landed immigrants who are nationals of British Commonwealth countries are visa exempt and are not required to obtain the visa at a US Consulate. These visa exempt individuals merely submit Form IAP-66 and proof of nonimmigrant intent to the INS officer at the time of admission to the United States.

Minimum Qualifications

Unlike the H-1B visa, wherein the basic minimum qualification is a Bachelor's Degree related to the area of employment, the minimum requirements for a J-1 training visa vary according to the requirements of the individual third party training sponsor organization. While some do require that applicants have at least a Bachelor's Degree, many require only a High School Diploma or a minimum amount of experience in the field. Most but not all third party sponsors have age guidelines. It is common to see age guidelines such as, "age 20 to age 35", however in most cases these age guidelines are somewhat flexible depending on the other factors involved in the application.

Nonimmigrant Intent

Since the J-1 visa is a nonimmigrant visa, applicants must demonstrate that they have a residence abroad which they do not intend to abandon. As is the case with the F-1



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student visa or the B-2 visitor visa, applicants for a J-1 visa must prove to the US Consulate that they have strong enough family, economic and social ties to their own country that they will not immigrate to the United States, but will depart the United States when the training program is completed. As a practical matter, nonimmigrant intent can generally be demonstrated by obtaining an offer of future employment from a company in the alien's home country abroad commencing at the time the US training is completed.

Benefits

The spouse and single children (under 21) of a J-1 principal applicant are also able to come to the United States on J-2 visas for the period of the J-1 training program. One benefit of the J-1 visa is that the spouse may obtain Employment Authorization through the INS by submitting Form I-765. However a J-2 alien spouse may only use his or her income to support the family's customary recreational and cultural activities and related travel among other things. The INS will not authorize employment for J-2 dependants if the income is needed to support the J-1 principal alien.

While the employment of the J-1 principal is limited to the employer as set forth in the application made through the third party sponsor, the employment authorization offered to a J-2 dependant permits employment in the open market. The J-1 visa is the only nonimmigrant visa which allows employment of dependants.

Another benefit of the J-1 visa is that J-1 employees are exempt from FICA withholdings. 7.65% of the earnings of US employees and holders of other nonimmigrant visas is withheld from all earnings for Social Security and

Medicare. In addition the employer pays another 7.65% for a total of 15.3% of the employees total wages. The withholdings drop to 1.45% from the employee and 1.45% paid by the employer after an employee has earned \$72,600.00 in any given year. Therefore, if a trainee is paid \$40,000 per year, the employer and the trainee would each save \$3,060.00 per year just because the trainee is in the US on a J-1 Visa rather than an H-1B visa or \$4,590.00 over the life of the 18 month training program, a total savings of \$9,180.00 through the use of the J-1 visa.

Something to Watch Out for—the Two Year Home Residence Requirement

Nationals of certain countries who will be obtaining training in areas listed on the Department of State's "skills list" are not allowed to change to any other nonimmigrant status in the US or immigrate to the United States until they have returned to their home country for two years. The skills list is organized by country and contains several skills groups, each of which contains numerous categories of skills. Because of the difficulty of obtaining a waiver of the two year home residence requirement, it is important to check the skills list before applying for the Certificate of Eligibility. Most European and Asian countries do not fall under the skills list.

While the J-1 visa is not well known, it should be considered in situations where it is not practical or possible to obtain an H-1B visa for a foreign hire. While the 18 month term is shorter than the 36 month term of the H-1B visa, the J-1 can be obtained relatively quickly and the requirements for obtaining a J-1 visa are less stringent than for an H-1B visa.