

OFFICE OF BUSINESS LIAISON

U.S. DEPARTMENT OF HOMELAND SECURITY U.S. CITIZENSHIP AND IMMIGRATION SERVICES

Employer Information Bulletin 2

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

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The following is not intended to be legal advice pertaining to your situation and should not be construed as such. The information provided is intended merely as a general overview with regard to the subject matter covered.

NUTSHELL GUIDE FOR U.S. BUSINESSES EMPLOYING FOREIGN NATIONALS

Immigration status¹ summary

- ◆ A ***national of the United States*** means a citizen of the United States, or a person who, though not a citizen of the United States owes permanent allegiance to the United States.
- ◆ An ***immigrant*** is a foreign-born person who has been approved for lawful permanent residence in the US. Immigrants have permanent, unrestricted eligibility for employment authorization. Evidence of immigrant status includes, but is not limited to, a Permanent Resident Card (Form I-551, Resident Alien Card, Permanent Resident Card, Alien Registration Receipt Card and/or “Green Card”).
- ◆ A ***nonimmigrant*** is an alien who seeks temporary entry to the US for a specific purpose. There are approximately thirty types of nonimmigrant classifications. A nonimmigrant alien typically must maintain a permanent residence abroad and must qualify for the requested visa classification. Furthermore, a nonimmigrant status *may or may not permit employment*. See discussion below in section titled *Eligibility for Employment*.
- ◆ A ***refugee*** is an alien who has been granted admission to the US following an official determination that (s)he is unable or unwilling to return to the home country because of actual or well-founded fear of persecution on account of race, religion, nationality, and membership in a particular group, or political opinion.
- ◆ An ***asylee*** is an alien who was granted political asylum after entering the US following an official determination that (s)he is unable or unwilling to return to the home country because of actual or well-founded fear of persecution on account of race, religion, nationality, membership in a particular group, or political opinion.

Understanding Visas

Visa is a term that is often used loosely as to be confusing to those who are not familiar with immigration law. Technically, a visa is a travel document issued by a US consulate abroad that allows the alien to whom it is issued to travel to the US (e.g. to board plane, train or ship) to apply for admission at a US port of entry. If an alien who should, but does not, have a visa arrives at a US port of entry, the alien may be returned at the carrier’s expense to the home country or to the port of departure. Except for Canadian citizens who are visa exempt (with some exceptions), aliens with Border Crossing Cards, and aliens traveling on the Visa Waiver Program (see below), all aliens are expected to present valid visas not only for purposes of travel to the US, but which comport with the classifications under which they seek admission to the US for purposes of inspection by the Department of Homeland Security.

US consular officers interview visa applicants to determine whether the alien is eligible for the particular classification and whether the alien is admissible. A key issue in visa issuance is whether the alien has established that he or she will comply with the terms of his or her admission. As stated earlier, most nonimmigrant aliens must establish that they intend to remain temporarily in the United States and will return abroad prior the expiration of their period of authorized admission. However, because the law distinguishes among nonimmigrant aliens who may have *immigrant intent* (i.e. to remain in the US permanently), those who **must** have *nonimmigrant intent* (i.e. to remain in the US temporarily for the purposes permitted under the admission classification), and those who may have *dual intent* (i.e. may seek admission for a temporary purpose while independently pursuing a related or unrelated purpose to remain in the US permanently), determination of the *intent* of an alien seeking travel or admission to the US is an important issue.

¹ In general, a person’s immigration “status” is determined at time of entry and reflected on the alien’s Form I-94, but an alien may change his or her status subsequent to his or her entry into the United States.

An alien in possession of a current, valid visa is not guaranteed admission to the US by virtue of having been issued that visa. At a US port of entry, the Department of Homeland Security will inspect the alien to determine admissibility² and, if appropriate, admit the alien in a particular nonimmigrant category. The inspecting officer will also determine the period of authorized admission of the alien.

Visas v. Status

The relationship between the visa's period of validity and the alien's status in the US must be clearly understood. First, the visa serves as a travel document to allow the alien to whom it was issued to travel to the US and apply for admission into the US. The alien must apply for admission to the US during the validity period of the visa. The visa alone does not, however, confer any immigration status or employment authorization, and the validity of the visa does not relate whatsoever to the period of time the alien is authorized to remain in the US. The expiration of the visa following the alien's entry into the United States does not necessarily affect the alien's authorized stay in the United States.

The period of authorized stay is indicated on the Form I-94 issued to the alien and is unrelated to the period during which a consular officer has authorized an alien to apply for admission to the US under the classification indicated on the visa. The I-94 is issued at a US port of entry following an interview by an immigration officer to determine whether the alien is eligible for admission in that particular nonimmigrant category.

The Form I-94 indicates the classification under which the alien is admitted and the period of authorized stay in the US under that classification. Although the period of authorized stay is usually expressed with a beginning and ending date, for some nonimmigrants classifications the authorized period of stay may be expressed as "D/S," meaning for duration of status.

Visa Exemption for Canadians and Mexicans

With limited exceptions, citizens of Canada are exempt from the requirement to obtain visas in order to travel to the US as nonimmigrants. Citizens of Mexico may obtain Border Crossing Cards in lieu of visitor visas. Border Crossing Cardholders are restricted to visits of 72 hours or less and within 25 miles of the border. Mexican visitors who wish to stay in the US for more than 72 hours and travel within any of the 50 states must obtain Form I-94, which is stamped at the US ports of entry.

Visa Waiver Program (VWP)

Aliens from certain countries may travel to the US without visas under the VWP, presenting only their unexpired foreign passports³ and proof such as a roundtrip ticket of intention to depart from the US within 90 days. Visa waiver travelers are issued green Forms I-94 marked WB (Waiver-Business) or WT (Waiver-Tourist), which correspond to B-1 and B-2 classification, respectively. Although travel without a visa represents a convenience, it has several limitations of which the travelers must be aware. See www.uscis.gov for detailed information on the Visa Waiver Program.

Extension of Stay and Change of Status

Certain nonimmigrant aliens who are present in the US may extend their nonimmigrant stay under the same classification or change their nonimmigrant status (from one nonimmigrant classification to another nonimmigrant classification). Aliens applying to extend or change their status must file the application before the expiration of current status and must establish that they have maintained their nonimmigrant status. This means that if an alien violated the terms of his or her admission (e.g. accepted unauthorized employment before change of status was approved), the change of status or extension of status petition will be denied. Applications for extension of stay and change of status are generally adjudicated at one of the Regional Service Centers of the Department of Homeland Security, US Citizenship and Immigration Services (USCIS). Notification that an alien has been granted extension of stay or change of status is provided on a Form I-797 Notice of Action that typically includes a tear-off replacement Form I-94 at the bottom of the Form I-797. This I-94 serves the same purpose as the original I-94. It indicates the alien's new period of authorized stay under the classification and, if appropriate, the new nonimmigrant status of the alien.

² Aliens may be inadmissible to the US based on grounds that include, but are not limited to: (1) health-related grounds, (2) crime-related grounds, (3) security and terrorist-related grounds, (4) public charge, and (5) previous immigration violations.

³ For admission purposes, most foreign passports must be valid for at least six months beyond the authorized period of stay.

Adjustment of Status

Aliens who are outside of the US and seek permanent residence in the US apply for an immigrant visa at US consulates abroad and are then admitted into the United States as lawful permanent residents. Under certain circumstances, aliens who are present in the US may become permanent residents without having to leave the US.⁴ This process, which is administered at the discretion of the USCIS, is called “adjustment of status.” It differs from the “change of status” process where an alien present in the US changes from one nonimmigrant classification to another. In order to qualify, eligible aliens generally 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.

Eligibility for Employment

Employers should be aware of the aliens who are authorized to work in the US and whether such employment is restricted in any way. USCIS regulations establish three classes of aliens who are allowed to work in the US: (1) aliens authorized to work incident to their immigration status, (2) aliens who are permitted to work for a specific employer incident to their status, and (3) aliens who must apply for and obtain permission from the USCIS in order to accept employment to the US.

“Sponsoring” An Alien for US Employment

Many people do not know how an alien may be “sponsored” for employment in the United States. They often do not realize that there are many different nonimmigrant classifications or that permanent residence based on US employment is possible. In some cases, more than one alternative may apply. In other cases, only one classification is possible. In addition, there may be no classification that fits the employer’s circumstances or only the more lengthy “sponsorship” process for permanent residence may be possible.

Typically, the employment “sponsorship” process involves petitioning the USCIS for a determination of whether the job requirements and alien’s credentials match the requirements of the classification requested. Some nonimmigrant classifications do not require approval of a petition by the USCIS, as an application is made directly at the U.S. Consulate abroad. Whether a petition is first filed with the USCIS, or an application is made directly at the U.S. Consulate, admission to the US in a particular nonimmigrant category is done at the U.S. port of entry.

Determining which classification(s) may be possible to use for “sponsorship” depends on the following⁵:

- a) Nature of and requirements for the position;
- b) The alien's credentials vis a vis the position requirements;
- c) The requirements of similar US employers for similar positions;
- d) The duration of the petitioning employer's need to have the position filled (this does not refer to the period of time desired by the employer for the alien to fill the position, but to the period of time during which the employer needs the position to be filled);
- e) Whether the alien is inside or outside of the US; if inside the US, the current status of the alien must be known (determinable from the Form I-94);
- f) Whether the US employer has a parent, affiliate, subsidiary branch or joint venture partner abroad at which the alien has been employed; and
- g) The alien’s country of citizenship.

For specific information on different nonimmigrant classifications see relevant Office of Business Liaison Bulletins.

⁴ Certain aliens are statutorily ineligible for adjustment of status.

⁵ This list is not exhaustive.