## IV. H-1B Temporary Worker

### *A. Description of Category*

**What is an H1-B visa, and what kind of expertise must a potential candidate have to qualify?**

The H-1B classification applies to an alien candidate, who is coming temporarily to the United States in order to perform services in a specialty occupation. What is a specialty occupation? Is is an occupation that requires theoretical and practical application of a body of highly specialized knowledge. Candidates must have attained a baccalaureate or higher degree or its equivalent as a minimum requirement to work in a specialty occupation in the United States.

### *B. Conditions for H-1B Classification*

1. Alien must be in a specialty occupation;
2. The U.S. employer needs the alien's services for a temporary period of time. But the position may be a permanent position in the company.

**As an employer, how do I know if the position I need to fill, fits the guidelines for an H1-B?**

### *C. Criteria to Determine Specialty Occupation or Profession*

Specialty occupation includes professional occupations that meet the following criteria:

1. Completion of the degree required for the occupation; or
2. Experience in the specialty occupation that is equivalent to the completion of the degree required in the profession; or
3. Expertise in the specialty occupation as demonstrated by progressive experience in the specialty field; and
4. Full state licensure to practice in the occupation if licensure is required for the occupation.

**As a potential employer of an Alien Candidate, what do I have to do to sponsor an H1-B?**

### *D. Employer's Responsibilities*

In order to comply with the requirements under the H-1B program, the employer has the following responsibilities:

1. The employer is required to file a **Labor Condition Application (LCA)** with the Department of Labor (DOL) prior to the filing of the petition to classify an alien as an H-1B temporary worker. **What is a Labor Condition application?** The LCA includes a statement from the employer that it will comply with the terms of the LCA for the duration of the alien's stay in the U.S. in H-1B status;
2. The employer must keep the filed LCA and supporting documentation available for public examination at its principal place of business or

employment in the U.S. within one working day of filing the *LCA (Such as in the Break room, or public bulletin board*);

3. Even if the LCA is certified by the DOL, the employer should not allow the alien to begin work prior to receiving approval of the petition and change of status;
4. The employer must maintain at the place of employment sufficient documentation to support the statements made in the filed LCA in the event that the DOL challenges the information contained therein and requests inspection of the documentation;
5. The employer is liable for reasonable costs of return transportation of the H-1B temporary worker if the employer dismisses him/her, with or without cause, before the end of the period of authorized stay. The only instance in which the employer is not liable for reasonable costs of return transportation is when the H-1B temporary worker voluntarily terminates his/her employment.

**If I sponsor an Alien on an H1-B, how long will it be good for?**

### *E. Validity of Approved H-1B Petition and Period of Authorized Stay in the U.S.*

An individual who is classified as an H-1B temporary worker will be admitted to the U.S. for an initial period of three years. The H-1B temporary worker may be admitted to the U.S. for the validity period of the H-1B petition, with a period of up to 10 days before the validity period begins and 10 days after the validity period ends. However, the alien is not authorized to work for the employer except during the validity period of the H-1B petition. If the alien's services are required for an additional period, the employer must file for extension of the alien's stay in the U.S. An extension of stay may be authorized for a period of up to 3 years. The total period of stay for an H-1B worker may not exceed 6 years. A new LCA or a photocopy of the prior LCA certified by the DOL if its validity period has not expired must accompany each application for extension of stay. An individual who has spent six years in the U.S. in H-1B status may not seek another extension of stay or change of status to L-1 unless the person has resided and been physically present outside the U.S. for a cumulative period of one year.

**What kinds of information will I have to fill out to file and obtain a visa for a candidate?**

### *F. Information Required for the H-1B Petition and LCA*

1. Name of U.S. employer;
2. Description of U.S. employer's business, date established, product or service, number of employees, and gross and net annual income;
3. Detailed description of the job including job title and duties;
4. Number of employees that the individual will supervise or direct, if applicable;
5. Gross wage rate offered to the H-1B worker on a weekly, bi-weekly, monthly or annual basis;
6. Starting and ending dates of employment for the H-1B worker;
7. Address(es) and place(s) of intended employment.

## What kinds of documents are required?

### *G. Documents Required*

1. Alien's academic credentials including copies of diploma, degree, school transcript and state or local license (if required for the profession). All foreign documents must be accompanied by translations;
2. Evaluation of foreign educational credentials;
3. Alien's curriculum vitae or resume;
4. Letters from present or former employers or other recognized authorities attesting to the alien's experience, expertise, and/or ability to perform the job offered; and
5. Documentation of employer's business, including company brochure and annual report.

### *H. Labor Condition Application (LCA)*

A U.S. employer may not file a petition to classify a foreign national as an H-1B temporary worker until the employer has filed a Labor Condition Application (LCA) with the Department of Labor (DOL). The LCA must include the following attestations by the employer:

1. The employer is offering or will offer during the period of authorized employment, to foreign nationals admitted as H-1B nonimmigrants, wages that are at least the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available at the time the LCA is filed;
2. The employer will provide working conditions for the H-1B workers that will not adversely affect the working conditions of other workers similarly employed;
3. There is no strike or lockout in the course of a labor dispute in the occupational classification at the place of employment; and
4. At the time of filing the LCA, the employer has either provided notice of the filing to the bargaining representative, if any, of the individuals employed by the employer in the occupational classification and area for which the foreign workers are sought; or if there is no bargaining representative, the employer has posted notice of the filing in conspicuous locations at the place of employment.

Once the LCA is "certified" by the DOL and returned to the U.S. employer, the petition to classify a foreign national as an H-1B temporary worker may be filed with the INS. DOL usually returns the LCA within 7 to 10 working days after its receipt and INS takes approximately 30 days to approve the petition. If the petition is approved, the foreign national will be classified as an H-1B temporary worker and may apply for admission in such status after obtaining a visa at a U.S. consulate abroad, or may change from another nonimmigrant classification to H-1B status in the U.S., if eligible.

### *I. Amended Labor Condition Application and H-1B Petition*

The Department of Labor requires the filing of a new Labor Condition Application when a change in ownership or corporate structure of the company occurs that results in a new employer tax identification number. A new or amended LCA, is

also needed in the event of a long-term transfer of the foreign worker to another worksite not indicated in the original LCA. Recently, the INS has indicated that they will defer to the Department of Labor and will also require that an amended H-1B petition be filed if there is a change in corporate ownership or structure. Changes to the foreign worker's job duties, job title, and salary that represent a new job or promotion will also require the filing of an amended H-1B petition. An incremental increase in salary does not necessarily trigger this requirement unless the job duties and job title are also changed so that the foreign worker is basically working in a position different from that described in the original H-1B petition. The amended LCA and H-1B should be filed prior to the long-term transfer or promotion of the temporary worker or as soon as the company learns of the change in corporate ownership/structure.

**What is NAFTA?**

## VII. Admission of Canadian and Mexican Nationals under the North American Free Trade Agreement (NAFTA)

On December 8, 1993, President Clinton signed the North American Free Trade Agreement (NAFTA). Since January 1, 1994, NAFTA has been in effect and supersedes the U.S.-Canada Free Trade Agreement. As in the U.S.-Canada Free Trade Agreement, NAFTA covers four nonimmigrant classifications:

- B-1 Temporary Visitors for Business
- TN Business Professionals in Certain Occupations
- L-1 Intracompany Transferees
- E-1/E-2 Traders and Investors

**What do I have to do as an employer to hire someone under NAFTA?**

The requirements for admission under the four nonimmigrant categories of NAFTA are similar to the requirements under the corresponding categories pursuant the Immigration and Nationality Act (the Act), with certain exceptions. This section will focus on the nonimmigrant classifications for visitors for business, TN professionals and intracompany transferees in order to illustrate the differences in requirements between NAFTA and the Act. The requirements and procedures to obtain E-1/E-2 visa status under NAFTA are similar to those established in the Act and will not be restated here.

INS has determined that TN nonimmigrants are not allowed to have immigrant intent and pursue permanent residence in the U.S. while in TN classification. A TN nonimmigrant who has an approved immigrant petition may be denied admission or extension of TN status by the INS because the filing of the immigrant petition is considered an indication of immigrant intent. Therefore, it is advisable that TN professionals who are pursuing permanent residence obtain H-1B visa status prior to the filing of a labor certification application or immigrant petition.

### *A. Visitor for Business*

To qualify for entry as a visitor for business under NAFTA, the Canadian or Mexican national must be entering to engage in business activities in an

occupation or profession set forth in Appendix 1603.A.1 to Annex 1603 of NAFTA. These occupations and professions include:

1. Research and design;
2. Growth, manufacture and production;
3. Marketing and Sales;
4. Distribution;
5. After-Sales Services (Installation, repair and maintenance personnel); and
6. General services (which include professionals engaging in business activities at a professional level in a profession as set out in Appendix 1603.D.1 to Annex 1603 of NAFTA).

The permissible business activities for professionals as provided in Appendix 1603.D.1 of the NAFTA are not exclusive. Mexican and Canadian nationals must also meet the general requirements under Section 101(a)(15)(B) of the Immigration and Nationality Act including the restriction on remuneration from a U.S. source. Mexican nationals are required to obtain valid B-1 visitor visas at a U.S. consulate abroad prior to admission as business visitors while Canadian nationals are exempt from the visa requirements under NAFTA and the Act.

## What is a TN Professional Classification?

### *B. TN Professional*

Mexican and Canadian professionals may seek temporary entry into the U.S. to engage in business activities at a professional level pursuant to NAFTA under the TN classification. The following are the criteria for classification as a TN professional:

1. Basic Requirements
   a. The foreign national must be coming to the U.S. to engage in business activities at a professional level in one of the professions set forth in Appendix 1603.D.1 to Annex 1603 of NAFTA;
   b. The foreign national must have at least a baccalaureate degree or appropriate credentials demonstrating status as a professional. If a state or local license is required to practice in the profession, the individual must possess the license prior to approval of the application to be classified as a TN professional; and
   c. The foreign national must be entering to perform pre-arranged business activities for a U.S. entity or individual. However, the person cannot enter in TN status to establish a business or practice in the U.S. in which he or she will be self-employed.

**Do employers have to fill out different forms and provide different information for Mexican candidates?**

2. TN Classification for Mexican Professionals

   A U.S. employer seeking to classify a Mexican national as a TN professional temporary worker is required to file a Form I-129 petition for nonimmigrant worker with the INS Nebraska Service Center in Lincoln, Nebraska, even in emergent circumstances. Prior to filing the petition, the employer is also required to file with the Secretary of Labor a Labor Condition Application attesting to prevailing wage information for the position being offered to the Mexican national. **The LCA requirements are the same as the LCA requirements under the H-1B program.**

**How long will an approved petition for a Mexican national under NAFTA be valid?**

An approved petition classifying a Mexican citizen as a TN nonimmigrant is valid for a period of up to one year. A Mexican citizen beneficiary of an approved petition is required to obtain a valid TN visa from a U.S. consulate prior to being admitted to the U.S. for the validity period of the petition. No more than 5,500 nationals of Mexico may be classified as TN nonimmigrants annually. Dependent family members accompanying TN nonimmigrants, requests for petition extension and submissions of amended petitions do not count against this annual cap.

**Do employers have to fill out different forms and provide different information for Canadian candidates?**

3. TN Classification for Canadian Professionals

A U.S. employer seeking to classify a Canadian national as a TN professional temporary worker must file an application with an immigration officer at a United States Class A port of entry, at a United States airport handling international traffic, or at a U.S. pre-clearance/pre-flight inspection station. No prior petition, labor condition application or labor certification is required. Canadian nationals are not required to obtain TN visas and may be admitted under TN status at a port of entry.

**How long will an approved petition for a Canadian national under NAFTA be valid?**

4. Validity Period of TN Status

Mexican and Canadian nationals will be admitted under TN status for periods of up to one year.

5. Extension of Stay of TN Professionals

In order to extend the temporary stay of a Mexican citizen TN nonimmigrant, the U.S. employer may apply for an extension of the petition and the beneficiary's stay with the INS Nebraska Service Center. A new labor condition application or a photocopy of the previous labor condition application, provided its period of validity has not expired must accompany the request for extension. The procedure for extension of TN status for Canadian nationals is similar with the exception that the employer of the Canadian national may file a request for extension of stay with the INS Nebraska Service Center without the need for a labor condition application.

The TN professional is required to be present in the U.S. at the time the extension of stay application is filed. If it is necessary for the individual to leave the U.S. for business or personal reasons during the pendency of the extension application, the employer may request the INS to cable notification of approval of the extension to the consular office abroad (in the case of a Mexican national who must apply for a visa) or to the port of entry where the Canadian citizen will apply for admission to the U.S.

An extension of stay may be authorized for up to one year and there is no limit to the total number of extensions that a Mexican or Canadian national may obtain to remain in TN status.

## What should I do as an employer to bring Mexican or Canadian nationals working FOR my company, to the US to work?

### *C. Intracompany Transferees*

The criteria for classification of Mexican and Canadian nationals as intracompany transferees is the same as under the Immigration and Nationality Act with few modifications. To be eligible for classification as an intracompany transferee under NAFTA, a Mexican or Canadian national must have been employed for one year abroad, during the preceding three years, for the same employer or its subsidiary or affiliate, in a managerial, executive or specialized knowledge capacity. For Canadian nationals, the employer may file an individual petition on behalf of a Canadian intracompany transferee at a Class A port of entry located on the United States-Canada land border or at a U.S. pre-clearance/pre-flight station in Canada. For Mexican nationals, the employer must file the intracompany transferee petition with the Immigration and Naturalization Service in the U.S. The INS may deny intracompany transferee status to Mexican or Canadian nationals in the event that:

1. The Secretary of Labor certifies to the INS that a strike or other labor dispute involving work stoppage exists where the beneficiary is to be employed; and
2. The temporary entry of the beneficiary may adversely affect the settlement of such labor dispute or the employment of any person who is involved in such dispute.

Furthermore, approval of a petition may be suspended if the strike or other labor dispute involving work stoppage occurs after its filing but before the alien applies for admission to the U.S. If the strike or other labor dispute occurs after the alien's entry into the U.S. and commencement of employment with the petitioner, the alien will not be deemed to have failed to maintain lawful nonimmigrant status solely on account of past, future or present participation in the strike or other labor dispute.

## IX. Accompanying Family Members of Nonimmigrants

Dependent spouses and unmarried minor children of H-1B, L-1, J-1, and TN nonimmigrants (referred to as the "principal alien") are given the following nonimmigrant classifications:

| Principal Alien's Classification | Spouses and Minor Children |
|---|---|
| **B-1** | **B-2** |
| **E-1/E-2** | **E-1/E-2** |
| **H-1B** | **H-4** |
| **J-1** | **J-2** |
| **L-1** | **L-2** |
| **TN** | **TD** |

### *A. Basic Restrictions*

The dependent spouses and unmarried minor children of the principal alien who are accompanying or following to join him/her must meet the following requirements:

1. They must establish that they are in fact the spouse and/or unmarried children of the principal alien and are accompanying or following to join him/her ("child" is defined under the statute as an unmarried person who is under 21 years of age);
2. In the case of B-1, B-2, J-1 or J-2's, they must also demonstrate that they have a residence in a foreign country which they have no intention of abandoning, if this is required of the principal; and
3. The dependent spouses and unmarried minor children are subject to the same period of admission and limitations as the principal alien;
4. Spouses and unmarried minor children in B-2, E-1/E-2, H-4, L-2, and TD status are *not* allowed to accept employment. The J-2 nonimmigrant spouse and/or unmarried minor child of a J-1 exchange visitor may apply for employment authorization only if the need for employment is not for the support of the principal J-1 nonimmigrant. The J-2 dependent spouse or child may be authorized for employment for the length of the J-1 principal alien's stay in the U.S. or 4 years, whichever is shorter.
5. Although dependent family members in E-1/E-2, H-4, L-2, and TD status are not authorized for employment, they and the J-2 dependents may attend school without having to change to F-1 nonimmigrant classification as foreign students.

Recent changes to the immigration law now prohibit F-1 students from attending public elementary or secondary school or publicly funded adult education programs. However, the new law only applies to students in F-1 status and not to students attending public elementary/secondary schools or

publicly funded adult education programs in another nonimmigrant status such as E-1/E-2, H-4, J-2, L-2, and TD status.

2. Dependent family members in E-1/E-2, H-4, J-2 L-2, and TD status may elect to change status to F-1 students to attend school, other than public elementary or secondary schools or publicly funded adult education programs. Under certain circumstances, F-1 students may work on campus or obtain employment authorization to work off-campus. Likewise, the dependent family member may obtain employment authorization if he/she qualifies in his/her own right as an E-1/E-2 treaty trader or investor, H-1B worker in a specialty occupation, J-1 exchange visitor, L-1 intracompany transferee, or TN professional from Canada or Mexico.

### *B. Following to Join*

If the status of the principal alien has been changed in the U.S. and if so requested, INS will notify the appropriate American consulate abroad of the change of status of the principal alien in order for the spouse and minor children to apply for the appropriate visa or admission to the U.S. following to join the principal alien.

**What happens after the Petition has been approved?**

## X. Obligations of the Nonimmigrant Employee

### *A. After Approval of the Petition*

1. Obligation Prior to Admission

A petition to classify a foreign national as an H-1B or L-1 nonimmigrant must be approved before the foreign national may apply for a visa and admission to the United States. The prior petition approval and visa requirement also apply to Mexican nationals seeking TN classification under NAFTA. Certain visa classifications do not require prior petition approval by INS, namely, the E-1/E-2, J-1 and TN for Canadians under NAFTA. The application for classification as an E-1 Treaty Trader or E-2 Treaty Investor is adjudicated directly by the U.S. Consulate and must be approved before the foreign national can be granted the visa to enter the U.S. Similarly, J-1 exchange visitors may apply for the J-1 nonimmigrant visa at a consulate upon issuance of the Form IAP-66 Certificate of Eligibility for Exchange Visitor (J-1) Status by the program sponsor without the need to obtain prior petition approval by the INS. The foreign national who requires a visa must apply for the appropriate nonimmigrant category on Form OF-156 at the U.S. Consulate. Canadian nationals are exempt from the visa requirement in the case of B-1, H-1B, L-1, and TN classifications, and may apply for admission directly at a U.S.-Canada Class A land border port of entry, United States international airport (except for NAFTA Canadian L-1 applicants), or at a designated U.S. pre-flight inspection station in Canada. However, they must apply for a visa if seeking entry in E-1 Treaty Trader or E-2 Treaty Investor classification.

The foreign national must demonstrate to the satisfaction of the American Consulate, or INS inspector at the land border port of entry or pre-flight inspection post for Canadians, that he or she intends to comply with all requirements of the U.S. immigration laws, including the conditions of the applicable nonimmigrant classification that the nonimmigrant has a residence abroad which s/he does not

intend to abandon (for B-1, TN and J-1 nonimmigrants), will reside in the U.S. only as long as legally permitted to do so and return abroad at the expiration of the nonimmigrant status (for all nonimmigrants). If the nonimmigrant visa application is approved, the consulate will endorse the appropriate visa in the foreign national's passport. *It is important that the foreign employee check each visa issued to ensure that it has been issued for the correct classification and for the correct validity period. The U.S. State Department Visa Office cannot correct an incorrect visa issued by a U.S. Consulate abroad in the United States; only the issuing consulate can rectify the error.*

Possession of a valid visa in the passport is not a guarantee of admission to the United States. INS must admit the foreign employee to the U.S. in valid, lawful status. The burden of proof is upon the applicant for admission to satisfy the INS Inspector of his/her admissibility. If the INS Inspector is satisfied of beneficiary's intent to comply with the terms and conditions of his/her temporary nonimmigrant classification, the employee will be issued a Form I-94 endorsed with the appropriate nonimmigrant classification valid to the expiration date of the petition or authorized period of admission pursuant to applicable regulations.

2. Primary Documents Required to Apply for a Nonimmigrant Visa

- Form OF-156 to apply for a nonimmigrant visa (separate applications are required for the principal alien and each family member);
- Form I-797 Notice of Approval of the Petition (for categories that require prior INS approval); or
- Form IAP-66 Certificate of Eligibility for J-1 Exchange Visitor Status;
- Valid passport;
- 2 passport-size photographs of each applicant;
- Application fee (if applicable under the Reciprocity Schedule);
- Machine Readable Visa (MRV) Fee of US$20.00;
- Letter from the U.S. employer, or program sponsor in the case of a J-1 exchange visitor, explaining the purpose of the employee's trip to the U.S., the duties to be performed by the employee, anticipated length of stay, source of remuneration (for B-1 visitors), the employee's qualifications and experience.

## ***B. At Time of Admission***

1. Check the I-94 Arrival/Departure Record

At the time of admission to the U.S. at the port of entry (or pre-flight inspection station), a foreign national is interviewed by an INS inspector and issued Form I-94 which is the Arrival/Departure Record. This Form I-94 reflects the lawful period that nonimmigrants in the various visa classifications are allowed to remain in the U.S. in the requested status. The individual should have in his/her possession the Form I-797 Notice of Approval of the Petition. (Exchange visitors should have the Form IAP-66 as proof of classification as J-1 nonimmigrants). In those cases in which there is a notice of approval of a petition, the individual must ensure that the period of authorized stay endorsed on the I-94 is for the duration of the period of validity of the petition as noted on the approval notice. For example, if the petition to classify an employee as an L-1 is approved for a period of three years, the employee should be admitted to the U.S. for the full three year period and not any less, *even if the visa issued to the employee by the consulate was for less time than the validity period of the petition based upon principles of reciprocity between the U.S. and the employee's country of nationality*.

Therefore, the date of expiration of authorized stay as endorsed on the I-94 should be equal to the validity period of the petition or as allowed by regulations for the particular classification. If the employee's dependent spouse and/or unmarried minor children are accompanying or following to join him or her in the U.S., their I-94's should also reflect the correct period of admission as noted in the approved petition or as allowed by regulations and they should be granted admission as B-2, E-1/E-2, H-4, J-2, L-2, or TD , as appropriate.

**What if there is a problem when the immigrant is trying to enter the country?**

2. Deferred Inspection If Problems Occur

If the INS inspector questions the employee's eligibility for admission and/or nonimmigrant classification, the individual should ask the officer to allow him or her to enter the U.S. in order to be further interviewed in the United States at the local INS district office where the employee will reside. This procedure is called "deferred inspection" and is a form of "parole" whereby the INS inspector grants the employee permission to be in the U.S. without formal admission so that the employee may be further inspected by the INS and additional documentation and information presented to prove his or her eligibility for admission. If the INS Officer finds that the applicant is able to overcome the initial objection and to demonstrate eligibility for the status requested, the officer will endorse on the I-94 the nonimmigrant visa classification and period of stay allowed.

## *C. Immediately Upon Admission*

If the INS inspector does not question admissibility, the employee will be allowed to travel to or enter the United States. The employee must complete the Form I-9 Verification of Employment Eligibility within three days of commencement of employment. If the employee was admitted for less than the requested period of stay, the employer's human resource department or attorney must be advised so that remedial action can be requested from at the local INS District Office.

Children of E-1/E-2, H-1B, J-1, L-1, or TN nonimmigrants, who are admitted as dependents who marry or who reach the age of 21, are no longer qualified for classification as E-1/E-2, H-4, J-2, L-2, or TD dependents. Therefore, the individual should contact the Human Resources Department or counsel in advance to determine whether the child can qualify for another nonimmigrant classification such as the F-1 student classification.

## *D. Maintenance of Status During Temporary Stay in the U.S.*

Nonimmigrant aliens are considered to be maintaining lawful nonimmigrant status for the duration of the validity period indicated on the I-94, as long as they meet the conditions of admission under their applicable nonimmigrant classifications. In order to ensure that the individual and his/her dependent spouse and/or minor children maintain lawful status during their stay in the U.S., the individual must contact the Human Resources Department at least 120 days *prior to the expiration date of authorized stay as endorsed on the I-94* for the purpose of filing extensions of stay or change of nonimmigrant status.

## *E. Employment in the U.S.*

Nonimmigrants are only permitted to work for the employer who filed the petition to classify them as H-1B or L-1 nonimmigrants, who sponsored them for J-1

classification, or who brought them to the U.S. as TN nonimmigrants. The E-1 Treaty Trader and E-2 Treaty Investor are only permitted, respectively, to carry on trading activities in the U.S. or develop and direct the operations of an enterprise in which the E-2 nonimmigrant has invested, but they are not permitted to accept employment with any other employer in the U.S. The E-1/E-2 essential skills employee is permitted to work for the E-1 trader or E-2 investor but is not authorized to accept employment with any other employer in the U.S. without prior approval from INS. In the case of an L-1 nonimmigrant transferred to the U.S. pursuant to an individual L-1 petition, a change of employer will result in violation of status unless the transfer is to a branch office of the same employer or, in the case of an H-1B or an L-1, the new employer files another petition or an amended petition, respectively, on behalf of the individual prior to the change of employment. The nonimmigrant alien is not authorized to work for the new employer until the new petition is approved. Generally, once the nonimmigrant alien stops working for the employer who filed the original petition, he or she is considered to have failed to maintain lawful nonimmigrant status unless the new petition has already been filed with the INS.

Under the L-1 blanket petition program, L-1 nonimmigrants transferred to the U.S. pursuant to an approved L-1 blanket petition may work for another office or firm of the same qualifying organization who filed the blanket petition provided the new office or firm was included in the original L-1 blanket petition.

The employee may still be considered to be in lawful status even if the employee's duties change subsequent to entry as an L-1 intracompany transferee, provided the employee is still qualified under the original classification. However, changes in employment which do not qualify the employee under the original classification (executive, managerial or specialized knowledge capacity) and changes in ownership of the petitioning organization require an amended L-1 petition (or blanket) in order for the employee to continue working in and maintaining L-1 status.

*Dependent spouses and unmarried minor children who accompanied or followed to join the principal alien in the U.S. are not allowed to work for any employer in the U.S.* They may do volunteer work such as for charitable organizations but they cannot receive any remuneration in the U.S. If they qualify in their own right for another nonimmigrant classification that permits employment, they may be able to work in the U.S. For example, the spouse may qualify for H-1B classification or the unmarried minor children may qualify for F-1 student status and apply for employment authorization under certain limited circumstances.

Spouses and/or unmarried minor children in J-2 status may apply for employment authorization provided it is not to support the J-1 principal alien.

***Can the individual travel outside the US while their application is being processed?***

## *F. Travel Outside the U.S. and Pending Applications*

If an individual is in valid H-1B, L-1, J-1 or TN nonimmigrant status, he or she may have to travel outside the U.S. for reasons related to employment with the petitioning employer. In order to re-enter the U.S. after a brief trip abroad, the nonimmigrant alien should have the approval notice of the original petition (if a petition had to be filed) and a valid H-1B, L-1, or TN visa stamped in the passport in order to be re-admitted. (Canadians are exempt from the visa requirements). J-1/J-2 nonimmigrants need to have in their possession Form IAP-66.

If plans for travel for business or personal reasons are being made close to the time of expiration of the employee's nonimmigrant status, preparation should be made to file the application for extension of status at least four months in advance.

## *G. Visa Reissuance*

If an individual is in H-1B or L-1 status in the U.S. and his/her visa expires, he or she may apply directly to the Department of State in Washington, D.C. for visa reissuance without the need of going to a U.S. embassy abroad. The following conditions must be met:

1. The individual's nationality must be the same as it was when the previous visa was issued;
2. The previous visa must have expired or will expire within 60 days after being submitted to the Visa Office of the State Department; If the previous visa has expired, the application for issuance of a new visa must be submitted to the Visa Office within 1 year after the expiration date of the visa;
3. The Visa Office will not replace or reissue mutilated or lost visas; and
4. The application for issuance of a new visa must be submitted along with:
   a. Original I-94;
   b. Valid passport;
   c. Copy of the I-797 reflecting approval of the petition and status extension; and
   d. Comprehensive letter from the employer identifying the visa applicant and describing the nature and function of his/her position in the company.

If the foreign national's spouse and/or unmarried minor children require visa reissuance, the same documentation must be provided to obtain a new visa from the State Department.

## *H. Visa Revalidation*

Nonimmigrants with H-1, L-1, and J-1 visas, including their dependent spouses and unmarried minor children, may obtain automatic revalidation of an expired visa under certain circumstances. A foreign national may re-enter the U.S. with an expired visa in his or her passport under the following conditions:

1. The foreign national has maintained lawful status in the U.S. during his or her stay, has a valid passport, and is in possession of an I-94 with an unexpired period of authorized stay (or new notice of approval of the petition if an extension was obtained); and

2. The foreign national is applying for readmission *from a contiguous territory* after an absence not exceeding 30 days solely in the contiguous territory.

**What happens if a non-immigrant loses their lawful status?**

## *I. Consequences of Violation of Status*

As discussed previously, a nonimmigrant alien must maintain lawful status during his/her stay in the United States. Applications for extension or change of status must be timely filed before the expiration of the nonimmigrant's authorized period of stay in the country. If the period of authorized stay has expired and no application for extension or change of status has been filed, the nonimmigrant is considered to be "out of status" and is in violation of the immigration statute.

If a new employer submits a new petition, extension or change of status application, the individual cannot start working with the new employer until the INS has adjudicated the new petition and extension or change of status. If an extension of status is timely submitted by the current employer, the individual is permitted to continue to work for the employer in the requested status.

Accepting employment without authorization is considered failure to maintain lawful status in the case of nonimmigrant classifications that do not authorize employment in the U.S. Commission of a crime in the U.S. may also result in violation of status if the crime is a ground of removal under the statute.

A nonimmigrant who has failed to maintain lawful status or worked without authorization may be subject to removal proceedings as an alien who has violated the conditions of his/her nonimmigrant status. The possible consequences of violation of status include:

- Removal from the United States based upon conduct that is equivalent to a ground of removal;
- Bar from admission to the U.S. for a period of 5 years after removal.

**Due to recent changes to the immigration law in September 1996, any nonimmigrant who has failed to maintain status by overstaying the period of admission authorized, even for one day, is required to return to his/her country of nationality to apply for a new nonimmigrant visa. An applicant who has overstayed can no longer apply for a nonimmigrant visa at the border consular posts in Mexico or Canada if he or she is not a national of Mexico or Canada. The new law also provides that the nonimmigrant visa is automatically void if the nonimmigrant remains in the U.S. beyond the period of admission authorized by INS on the form I-94 Arrival/Departure Record. For example, an H-1B nonimmigrant who failed to maintain status by overstaying in the U.S. even for one day, will be required to return to his/her country of nationality in order to apply for a new H-1B visa. This is required even if the individual already has an H-1B visa in his/her passport that has not expired because that visa is considered void as soon as the individual overstayed the authorized period of stay as reflected on the I-94.**

The U.S. Department of State has issued an advisory opinion to all consular posts that they may accept and issue visas to nonimmigrants who are not nationals of the country where the posts are located if “extraordinary circumstances” exist. The Department has determined that extraordinary circumstances exist when a

nonimmigrant has timely filed for "change of status" in the U.S. with the INS and technically fell "out of status" while waiting for the approval from INS.

Other consequences of failure to maintain nonimmigrant status in the U.S. include restrictions on the ability of the foreign national to immigrate in the future. Beginning April 1, 1997, a foreign national who fails to maintain lawful status and remains unlawfully in the U.S. for more than 180 days and less than one year, will be inadmissible to the U.S. in any status for a period of three years. Failure to maintain status and remaining in the U.S. unlawfully for one year or more will result in the individual being inadmissible to the U.S. in any status for a period of ten years.

**DISCLAIMER:**

**THIS INFORMATION IS INTENDED TO PROVIDE YOU WITH GENERAL IMMIGRATION INFORMATION AND IS NOT INTENDED TO BE LEGAL ADVICE.**

**FOR ANSWERS TO SPECIFIC LEGAL QUESTIONS, PLEASE CONTACT OUR IMMIGRATION ATTORNEY:**


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