

Hiring employee requiring immigration sponsorship

Luba I. Seliavski
Willcox Savage

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Because an open position with your company may attract an applicant who requires immigration sponsorship, it is prudent to identify the need for immigration sponsorship at the earliest stage of the recruitment process and include the following questions in the company's employment application:

1. Are you authorized to work in the U.S. for any employer?
2. Will you now, or in the future, require immigration sponsorship from our company to obtain work authorization in the U.S.?

If you decide to extend a job offer to an applicant who requires immigration sponsorship, gather the following information:

- The applicant's nationality (be aware of laws prohibiting national origin discrimination - treat all nationalities equally).
- The applicant's current nonimmigrant status in the U.S.
- The length of the applicant's presence in the U.S. in his/her current nonimmigrant status and information about any prior nonimmigrant status.

Special nonimmigrant visa/status categories are available for nationals of certain countries. A foreign student present in the U.S. in F-1 status may be eligible to work in the U.S. pursuant to optional practical training, or OPT. OPT authorizes an F-1 student to work in the U.S. in a position related to the student's course of study. An F-1 student can be authorized to receive up to 12 months of practical training. F-1 students who have graduated from qualified U.S. academic programs in STEM fields are eligible to extend their OPT for an additional 17 months.

An F-1 student in OPT should have an Employment Authorization Document, or EAD, with an expiration date. To continue employing an F-1 student following the expiration of the EAD, the company will need to sponsor the student for another immigration status. You may want to consider an H-1B petition, if the offered position and the individual qualify for H-1B classification and H-1B visas are available for the fiscal year when the individual's OPT is scheduled to expire.

To employ an F-1 student pursuant to STEM OPT extension, the employer must participate in E-Verify and agree to report the student's departure within 48 hours.

An individual who is already working in the U.S. pursuant to H-1B status may be eligible to change employers pursuant to the H-1B portability rule. If H-1B portability is applicable, the new employment can begin as soon as the H-1B portability petition is filed with the U.S. Citizenship and Immigration Services. Not everyone working in the U.S. in H-1B status is eligible for H-1B portability.

Each visa/status category has its own set of eligibility requirements for the foreign national and the sponsoring employer. Therefore, a change of employer may not be possible even if the position with your company is very similar to the individual's current position.

Even if the individual is in nonimmigrant status other than H-1B, it is important to find out if the person has ever held H-1B status in the past. A prior grant of H-1B status may allow you to sponsor the person for H-1B status despite unavailability of H-1B visas.

Many nonimmigrant status categories have limits on their maximum duration. For example, H-1B status is limited to six years. At the end of the six-year period, the individual has to leave the U.S. and remain outside for one year, before being eligible to apply for H-1B status again. If your company intends to employ an H-1B employee continuously beyond the expiration of the maximum period of stay in H-1B status, you should consider sponsoring this employee for a green card.

If the individual is working in the U.S. in L-1 status for another employer, not related to your company, you may be able to file an H-1B petition, providing H-1B visas are available and the offered position and the individual's credentials qualify for H-1B. Keep in mind that time spent in the U.S. in L-1 status counts toward the six-year maximum period of stay in the U.S. in H-1B status. Therefore, it is important to determine how long the applicant has been present in the U.S. in L-1 status and how much time the person has spent outside the U.S. since first receiving that status.

Be aware of prior employment gaps in the employment application. An H-1B portability petition or a change-of-status petition will require a showing that the beneficiary continues to work in the U.S. in accordance with the previous employment authorization from CIS. Individuals working in the U.S. pursuant to OPT are allowed to have a gap in their OPT employment for up to 90 days.

Last but not least, make sure your job offer is contingent upon the U.S. government's approval of your proposed employment of the individual in the U.S.

Luba I. Seliavski practices business immigration law with Willcox Savage. Reach her at lseliavski@wilsav.com or 628-5624.