

YOUR BEST EMPLOYEE HAS ONLY TWO YEARS LEFT IN H-1B STATUS. WHAT ARE YOUR OPTIONS?

By Andrew S. Koerner



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One of your best employees is nearing the expiration of his eligibility to work in the United States in H-1B¹ status. How do you protect both your company and your investment in this employee?

First, you should begin planning for this day in your foreign national employee's career as early as possible. An employer may petition for an employee in H-1B status for three years. In most instances, only a second three-year petition may be filed. If, for example, you hire a recent college graduate, employ him for three years, and subsequently renew his visa, you should start the process of determining whether this is someone you would like to retain permanently immediately after the renewal. If you decide that you would like to retain him, you then have two or three years to start the employment-based immigrant petition before his H-1B visa expires. That kind of lead time enables you to navigate the complex, and, in many cases, unfriendly system for obtaining permanent residency for an employee.

If it is not possible to begin the process early, either because your foreign national H-1B employee joined you well into his fourth or fifth year or because it was not possible to assess earlier whether your company would require his or her services on a permanent basis, there are both immigrant and non-immigrant (temporary) options available.

One of the few ways that the United States Citizenship and Immigration Services (USCIS) allows for H-1B visas to be extended for a seventh year, and beyond, is if the employee has had either a PERM labor certification application or an I-140 employment-based immigrant petition pending at the Department of Labor for more than 365 days. Due to backlogs, the Department of Labor regularly takes over 12 months to adjudicate a labor certification application. When this occurs, you are permitted to file for a one-year extension.

Other issues to consider are the requirements for the job itself. Depending on the level of education and experience required for the position for which you are retaining this individual, it is possible that the employee may fall into a preference category for which there are no immigrant visas available. While the employee waits for an immigrant visa number to become available, you are permitted to extend the H-1B visa for consecutive three-year periods.

There are more immediate options for those rare employees who have risen to a level that is far above others in their field, who qualify as individuals in the "National Interest," as "Exceptional" or as "Extraordinary." Such individuals may bypass the labor certification process altogether, and in many cases become permanent residents in a matter of months. If your employee is an individual of extraordinary ability, in accordance with USCIS regulations, it would be a good idea for you to explore an O-1 visa as a way to gain some time before you file for the employee's

¹ H-1B refers to a non-immigrant visa program that allows U.S. employers to employ foreign workers in specialty occupations on a temporary basis.

permanent residence. It may also lead to a more direct route to permanent residency.

If your company is not ready or willing to file for permanent residency status on behalf of the employee, there may be other non-immigrant visa options that can extend the amount of time your employee is authorized to work in the U.S. If your company is owned by a majority of individuals from a country that is a signatory to a treaty with the U.S. and the employee whose H-1B visa is about to expire is a national of that country, the employee may be eligible for an E-1 treaty trader visa or an E-2 treaty investor visa, to name some examples. The E-1 and E-2 visas do not have any time limits and may be continually extended in two-to-five year increments as long as the underlying requirements for the visa are met.

If none of the above options are appropriate for your employee, and you have an office abroad, there is another option. If you transfer the individual to an office overseas where he remains in your or your affiliate's employ, and stays out of the U.S. for one year, you may subsequently transfer that individual back to the U.S. as an executive, manager or employee of specialized knowledge in L-1 visa status. This intra-company transfer visa also offers, for some, an expedited route to permanent residence.

As a last resort, having exhausted other options, you may want to recommend that your employee leave the U.S. and remain abroad for one year. After one year abroad, he will be eligible for six additional years in H-1B status.

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