



WHEN TO START THE PERM PROCESS FOR H-1B AND L-1B FOREIGN NATIONAL WORKERS

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For any employer who employs or wants to employ a foreign national worker (H-1B or L-1 worker), at some point, you will need to determine when the “right” time is to sponsor the permanent residence (PR) process on your foreign national workers’ behalf.

When a U.S. employer makes the decision to sponsor a foreign national worker for the permanent residence process, there must be a multi-pronged analysis with immigration being a small part of the analysis. Specifically, there are 3 areas of consideration:

1. Determining if/when PR must be started to ensure the employee’s continued ability to remain work authorized in the United States
2. Permanent residence as a recruitment tool
3. Utilizing the PR process to retain the best talent

The goal of this article is to provide a general overview of the process and the related issues that need to be considered.

ENSURING THE EMPLOYEE’S ABILITY TO REMAIN WORK AUTHORIZED

By way of background, an employee in L-1B status is entitled to a total of five years of physical presence in that status without the ability to extend beyond the limit. In other words, an individual in L-1B status must have his or her Green Card issued by the time the five-year limit is reached. The PERM process alone currently takes approximately 18 months to complete, and individuals from countries such as China, India, Mexico and the Philippines are subject to additional backlogs (a topic for another article)—so sponsoring the PR process for an individual in L-1B status can be an uphill battle.

Keeping this in mind, the recommendation for those sponsoring employees in L-1B status is to first change their status to H-1B and then start the PR process on their behalf. H-1B status has a maximum of six years (L-1 time does count towards this six-year limit). However, unlike L-1 status, H-1B has options to extend beyond the six-year limit. Specifically, if PERM is filed one year prior to reaching the six-year limit, H-1B status can be extended beyond the six-year limit.

So, let’s do some immigration math: it could take three to five months for the initial preparation stages of PERM; and it can take at least 12-14 months once PERM is started to get it filed with the Department of Labor. Based on these timelines, my recommendation to employers is typically to start initiating PERM for those in H-1B status within 36 months of the six-year limit being reached. This allows for enough time to get the necessary internal cost approvals and then get the process started.

Even though initiating PERM within 36 months is ideal, it’s not always feasible. For example, an employer might decide to hire an individual in H-1B status who does not have 36 months left in H-1B status. This leads to the second level of analysis. How long do you want your employee to work with your organization before you sponsor the PR process on their behalf?



PERMANENT RESIDENCE AS A RECRUITMENT TOOL

While this is an immigration process we are discussing, it has far-reaching impact, including attracting potential talent to your organization. I hear it all the time: “I have another offer where they are saying they will sponsor the PR process on day one.” As a result, it is critical that you have a sound policy detailing the length of time required before your organization sponsors the PR process. For example, if you are considering allowing sponsorship on day one, you must consider the following:

PROS

- Great recruitment tool: You can persuade good talent to join your organization by offering immediate PR sponsorship.
- Makes the overall process easier on your HR organization: There is no need to track time spent with your company, or worry about internal ratings or internal approvals or other factors and allow for a consistent policy (which makes L&E attorneys happy).

CONS

- Risking PR sponsorship for individuals who end up not being a good fit for your organization. This means that you can invest time, money and resources into an individual who either decides to leave your organization or is terminated for bad performance.
- While it is enticing to sponsor from day one, there is a risk of “jumping the gun” on an individual who is not a good fit, which leads us to the final level of analysis.

RETAINING THE BEST TALENT

Each organization ultimately wants to keep good talent—retaining those who genuinely want to work for them and ensuring that there is a harmonious relationship between employer and employee.

While sponsoring right away may get someone in the door (an attractive notion, given the current challenges employers are facing in recruiting and retaining high-quality talent), it by no means keeps them there. It may, therefore, be a better decision in the long run to require that an employee demonstrate their capabilities during a set time period of strong performance before sponsorship.

CONCLUSION

The ultimate decision to sponsor an employee for the PERM process is a big one. The cost is high, it requires internal resources to complete, and the risk of sponsoring an individual who may turn out to be a poor fit is a concern. As a result, the decision should not be made lightly.

There is no true one-size-fits-all answer, and there is no right or wrong approach when it comes to this decision. The purpose of this article is to show the various angles that need to be considered before establishing your policy.