

“H-1B Professional Work Visas and Spousal Work Authorization through Executive Action” by Adam Edward Rothwell, Esq.

The H-1B Visa is the traditional visa for professional workers in the United States. Foreign citizens who qualify for H-1B Visas must have at least a 4 year university degree from the US or a foreign equivalent university degree. The H-1B Visa is a very popular visa program, as it enables US employers to fill professional positions. Still the H-1B program is definitely not perfect, and a complaint has been raised for many years by H-1B Visa holders, corporations sponsoring H-1B Visa workers and immigration attorneys like myself that the H-1B Visa does not but should authorize spousal work authorization. However, this issue will likely be eliminated as a concern in the near future, as all information points towards that President Barack Obama will likely enable spousal work authorization soon for H-1B Visa holders through executive action. This article examines the rationale and questions surrounding this likely change in policy.

Basic Background on the H1-B Visa Application Requirements

To receive an H-1B Visa, among other requirements a foreign professional worker must have a valid job offer from a US business. And to commence the application process, the first step of the H-1B Petition paperwork involves filing with the US Department of Labor.

An H-1B Petition is for a specific job offer at a specific employer with specific job duties at a specific work location at a specific salary. The salary must be at least 100% of the average wage for a similar position in the same county. In other words, an H-1B position for an engineer would need to pay a foreign professional engineer more money in New York City than Albany, NY. Additionally, in theory at least the US employer sponsoring the foreign citizen must have actively tried to first fill the offered position with a US Citizen or permanent resident.

Spouses and children of H-1B Visa holders are allowed to join H-1B Visa holders in the US on H-4 Visas. There is no general work visa in the US that allows for work authorization for accompanying relative children. Yet, several relatively popular US employment based visas allow spouses to apply for work authorization, which once again the H-1B Visa does not allow.

The argument for spousal work authorization and why this is such an important issue for interested parties.

The E-2 Visa, L-1 Visa and J-1 Visa all allow for spouses of the primary visa holder to apply for work authorization. The E-2 Visa is for foreign investors in the US, the L-1 Visa is for foreign multi-national managers as well as executives transferred to the US and the J-1 Visa is for exchange workers or exchange trainees to the US. Each of these three visa categories allow for accompanying relative spouses of the primary visa holder to work.

There are many headaches, issues and inconveniences that exist when the spouse of a primary US work visa holder is unable to receive work authorization. Foreign spouses regularly want and need to work. It's often financially difficult for a foreign family to move overseas to the US, which means two incomes may be required. Additionally, based on current practices, the Social Security Administration seldom provides Social Security Numbers to spouses of work visa holders who lack work authorization. And a foreign citizen without a social security number in the US cannot establish credit, has difficulty opening a bank account, may not be able to receive insurance and may even run into difficulty procuring a state driver's license. Moreover, it has been my experience that many foreign citizen spouses without work authorization eventually just get really bored.

For all the above reasons, foreign professional workers on H-1B Visas, their employers and advocates all strongly assert the H-1B Visa Program needs to include work authorization for spouses. And in my opinion, while I do not entirely understand why the US allows work authorization for spouses in any work visa category, it is nonsensical to allow accompanying relative spouses of certain US work Visa category and not others.

The argument against allowing accompanying relative spouses of H-B Visa holders to receive work authorization.

An H-1B Visa enables a foreign citizen to work at specific position in a specific location doing a specific set of job duties at a specific salary. In this way substantial annual controls are put on the number of jobs that may be held by foreign professional workers. Also site visits and audits are performed by US government employees and / or contractors to ensure H-1B Visa holders really are performing the work at their sponsoring employer at the salary authorized by their H-1B Visas. Additionally, the number of new H-1B Visas each fiscal year is limited by a maximum annual cap (quota) number, and this number is highly regulated by Congress to protect US jobs and workers. In essence very strong controls and limits exist on the employment of professionals on H-1B Visas, but there are practically no limitations on work authorization.

On some level, this is a fairly vexing concept, as the spouse who receives work authorization in many ways ends up being in a much better position than the spouse primarily sponsored for the H-1B Visa. The H-1B Visa holder who is both sponsored and needed by a US business must work under tight job controls. Yet, after receiving work authorization, the spouse of that sponsored foreign professional may work at any position or number of positions in the US (with the exception of jobs at the US Department of Justice for example that fully require US Citizenship). Similarly while H-1B Visa holders may not open up their own businesses in the US, spouses with work authorization may open and work for their own businesses.

Another argument for extending work authorization to spouses of H-1B Visa holders is that the US loses out on valuable foreign talent turned away from the H-1B Program. This argument is based on the theory that many more esteemed professional would pursue sponsorship by US employers for H-1B Visas if their spouses could also receive work authorization. Yet, the issue with this logic is that, while likely true, the H-1B Visa cap (quota) number is grossly over-subscribed, which means tens of thousands of more foreign professional workers already want H-1B Visas than are available.

Work authorization should be available to accompanying relative foreign spouses of H-1B Visa holders in the US.

Providing work authorization to accompanying relative spouses of primary visa holders in the US generally confuses me. I have never fully understood why the spouse of a sponsored foreign citizen in the US should have many more opportunities potentially available to him/her than the opportunities available to the sponsored spouse. Yet, there is absolutely no reason why accompanying relative spouses of E-2 Visa holders, L1 Visa holders and J Visa holders in the US should be able to receive work authorization in the US but that accompanying relative spouses H-1B Visa holders (or O Visa holders for that matter) should not be able to receive work authorization.

Adam Edward Rothwell is a US Immigration lawyer based in Baltimore, Maryland. He may be followed on Twitter at: USAImmigration