

C H I N A

Changes in work and residence permits procedures

Effective this month - based on the amendments to the law of 01.10.2016 - , new rules on the procedure for work permit applications came effective in China. The six-month trial period ends in Beijing, Shanghai, Tianjin Hebei, Anhui, Shandong, Guangdong, the Sichuan Province and the autonomous Ningxia Hui region and turned into legislative power on the national level. Under the former system, foreign workers could apply either for a *employment license* to the Ministry of Social Affairs or a *work permit* for foreign experts (Foreign Expert Work Permit) to the State Administration of Foreign Experts Affairs(SAFEA). The Chinese State Council has decided to bundle various permits and related multi-part process - the Employment License, Employment Visa (Z-Visa), Employment Permit - into a adjudication procedure of a nation wide standardized **work permit**. The process will result in a new identification document (ID-document). The card will include the first and last name of the holder and contain the name of the employer and a photo. It shall serve not only as a evidence of legal employment but also as a multifunctional identification card e.g for travel purposes or to use banking services properly.

The entire administration of the new procedure is managed by the competent ministry, the State Administration of Foreign Experts Affairs (SAFEA).

With the new regulation, the law provides three categories of work permits:

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| A- Category: | Highly-talented foreigners |
| B- Category: | Specialists (professionals) |
| C- Category: | Temporary or seasonal employees in non-technical or service duties |

For the purpose of transferring foreign employees (assignment) from the Swiss company to the Chinese branch or affiliate most likely category B will be the option to choose. That category may also apply to disptach personell for long-term handling of customer contracts (at the customer's place), if the activity is not already covered by an M- Visa.

What is new is that a *point system* has been established to adjudicate the work permit application. *Note:* That point system should *not* be confused with an immigration visa system based on qualifying points to obtain permanent residency such as e.g being used for Canada or Australia.

In order to qualify what – inter alia - counts is:

- **The formal education;**
- **the professional experience;**
- **the place of employment.**

By means of *additional* qualifications (eg language skills, degree of academic qualifications, professional experience, place of work, etc.), the applicant may obtain additional points which may also result in a *faster* application process. Which category to choose for a potential candidat can only be examined on a individual basis. However it can be assumed that 95% of the applicants will fall into category B (regular application requirements). For this group, an academic degree and a professional experience of at least 2 years will be the qualifying criterias.

Processing steps:

- Initial online examination of the application documents by the Chinese authorities: The new regulation will result in longer processing times.

- Supporting documentation such as police certificate, diploma or, if appropriate, documents evidencing the formal education of the candidat, which are already compulsory, have now also to be legalized by the Chinese Embassy in the country of issuance. This means that longer preparation times should be taken into account.

Like before the amendment of the Act, the following conditions are essential to obtain a work and residence permit:

- A police certificate without police records;
- An academic degree (minimum Bachelor) or an equivalent of professional experience;
- At least 2 years of professional experience;
- A contract with an employer in the Peoples Republic of China , e.g a Chinese company or the foreign branch of a Swiss company in China.

Impacts on the transfer of personell of Swiss companies to China

Despite the above mentioned longer processing times and additional expenditure of time to prepare accompanying documents, such as legalization and the online examination of the application documents, the relevant revisions of the regulations have shown no considerable negative impacts.

Please note that all documents habe to be submitted in translated in Chinese. As soon as all documents may be presented in the appropriate way and translated, the entire application process will approximately last 60 working days. Preparation time for the supporting documentation (translations and formal preparation of the application documents) should be calculated for approximately 3-4 weeks.

Important note: It is therefore **urgently recommended** starting the application process for your employee already in Switzerland and **not** after already having entered China.

You need more information, need a consultation or an offer to handle the work and residence permit for your employee? Please send us an eMail including you full contact details to workpermit@allvisumservice.ch

U S A

US- Immigration Appeals Office decision: L-1B Visa applicants must receive U.S. Minimum Wage

On April 14, 2017, the Administrative Appeals Office (AAO) of US Citizenship and Immigration Services (USCIS) issued a memorandum providing guidance for USCIS officers adjudicating L-1B visa petitions. The new guidance was the result of an April 12, AAO decision in Matter of I- Corp. This case involved a semiconductor manufacturing company in Oregon seeking to transfer a Malaysian worker to the United States for two years on an L-1B visa. The petition stated that the beneficiary employee would remain on the Malaysian company's payroll, receiving a wage of 43,445 Malaysian ringgits (approximately \$13,468 per year, or \$6.47 per hour). The annual salary offered was below the federal minimum wage of \$7.25 per hour and the Oregon state minimum wage of \$8.95 per hour. In its decision, the AAO confirmed that:

USCIS cannot approve an L-1 visa petition that is based on an illegal or otherwise invalid employment agreement, and to prevent a potential conflict with the Fair Labor Standards Act (FLSA), USCIS must ensure that a beneficiary employee will not be paid a wage that is less than the minimum required wage under state or federal law, whichever is higher, before approving an employment-based visa petition.

The decision observes that "[t]he right to a minimum wage under the FLSA cannot be waived by agreement between an employee and his or her employer, [and] contractual understanding or agreements which effectively circumvent or evade the protection of the FLSA are invalid and unenforceable." In addition, the AAO decision appears to create another wage requirement by noting that the employee's compensation should not be "significantly lower than [that of] the beneficiary's peers or the particular industry."

How Does This Affect the Swiss Employers of L-1 Visa Holders?

This decision will have a significant impact on employers that transfer their employees to the United States either through the Blanket L-1 program or through an L-1B petition filed with USCIS.

Although this memorandum only affects those L-1 petitions filed at the USCIS Service Center after the guidance was issued, it is possible that Department of State consular posts such as the US Embassy in Bern may return petitions previously approved and not meeting these requirements to USCIS for re-adjudication. The AAO mentions that in this matter, the Department of State had twice refused to issue the beneficiary an L-1B visa, based in part on the low salary being offered by the petitioner.

Even though the L-1 category has never been subject to the statutory requirement that a beneficiary employee be paid the prevailing wage for his or her occupation, L-1 petitioners must now ensure that (i) the wage paid to the beneficiary meets the requirements of the FLSA, even if the beneficiary will remain on the foreign payroll, and (ii) the beneficiary is not paid a significantly lower wage than his or her peers. The beneficiary employee's "total compensation" may be considered in making these determinations. This may include travel expenses, housing, car allowances, and per diem payments. It is likely that the USCIS will begin requiring evidence of the salary being paid to L-1 employees to make sure that they meet the requirements.

You need more information, need a consultation or an offer to handle the work and residence permit for your employee? Please send us an eMail including your full contact details to workpermit@allvisumservice.ch