

# **Brazilian Employment Authorization**

## **Purpose**

Under Brazilian Law, there are several types of employment authorization for foreign workers, including temporary, permanent and pursuant to a technical services agreement. Recently, other statuses have become available, such as the 90-day Employment Authorization and the Emergency Vitem V.

## **Temporary Employment Authorization**

The first category is known as “temporary,” and is utilized to fill a position requiring specialized knowledge, using either an existing employee or a new hire. Traditionally, scientists, scholars, engineers and some other specialized workers have been eligible under this category. The applicant will be required to demonstrate that the position requires specialized knowledge and provide evidence of two years of experience in the relevant field, and their level of education. Normally, the applicant is expected to have a bachelor’s degree or the equivalent combination of training and experience.

Under the temporary category, the foreign worker is considered to be a foreign employee of the Brazilian company and receives at least part of the salary through the Brazilian entity. As such, the foreign worker is subject to Brazilian taxes and is counted towards the “2/3 Rule.” The 2/3 Rule attempts to limit the number of foreign employees that a Brazilian entity may employ, while at the same time, protecting the indigenous labor force by requiring the employment of a proportionate number of Brazilians. In order to satisfy the rule, the Brazilian entity must meet one of the following requirements:

1. The total number of Brazilian workers employed by the Brazilian company must be equal to twice the total number of foreign employees,  
  
or;
2. The aggregate salary paid to Brazilian employees must be equal to twice the aggregate salary paid to foreign workers.

The application and supporting documents are filed at the Ministry of Labor in Brasilia, either by mail or local courier. All documents must be translated into Portuguese.

## **Permanent Employment Authorization**

Another type of employment authorization is the Permanent application, which allows a foreign high

level employee to be employed in Brazil for a period of time equal to the duration that the applicant will be appointed to the position or up to 5 years, whichever is shorter. This category is utilized to secure the appropriate permanent status for an employee that will be exercising senior level duties as an administrator, manager or executive in Brazil.

In order to be eligible for the permanent visa category, the foreign worker must be either an intra-company transferee or be employed by a related Brazilian start-up company. There is no minimum amount of time that the foreign employee must be employed by the foreign entity. Additionally, the parent company will be required to invest through the Central Bank of Brazil a minimum of US\$200,000 in foreign capital in order for a foreigner to be eligible for permanent status in Brazil.

The adjudication timeline for permanent employment authorizations is approximately two months from the date of filing with the Brazilian Ministry of Labor. Prior to the issuance of a valid work authorization, an applicant cannot legally “work” in Brazil.

It is possible to travel to Brazil on business trips to familiarize oneself with the Brazilian business setup prior to the adjudication of the permanent application. Unless the visa requirement is waived for the applicant’s country, it will be necessary to apply for a Vitem II business visitor visa prior to departure.

Before petitioning for the permanent employment authorization, the Brazilian entity should amend its *Contrato Social* to note that the applicant will be filling the particular position upon approval of the permanent application. Additionally, the Brazilian entity must demonstrate to the Ministry of Labor that there are no qualified or willing Brazilian nationals that can exercise the duties for the position. The Ministry will require documentation to prove that the applicant is a qualified employee with experience in the relevant field and that the salary to be paid will be no less salary than a Brazilian national would receive for comparable work.

The benefit of a permanent employment authorization, as opposed to a temporary, is that it affords an indefinite period of employment. Rather, under the permanent status, the employee is considered to be an indigenous employee, meaning that the 2/3 Rule does not apply. As such, employees in permanent status do not count against the total number of foreign employees allowed per employer. Further, there is no requirement as to the total wage or that a percentage of the wage be paid by the Brazilian entity.

### **Technical Services Agreement**

An employment authorization based on a technical services agreement is viewed as a transfer of technology and/or skills that are not readily available in Brazil. In exchange for this transfer, the employee’s salary is not subject to Brazilian taxes. However, the structure of this category varies somewhat from the temporary and permanent statuses. Rather than being based on an intra-company transfer, the transferring foreign entity will require the sponsorship of a separate or independent Brazilian entity.

The underlying reasoning for this difference is the fact that the employment is based on a technical services agreement. Given the contractual nature of this relationship, it is the Brazilian company that

seeks the transfer of technology, so it must be willing to assure the Government that the employment is both temporary and that the services are unavailable locally.

A Brazilian company can demonstrate this by drafting a technical services agreement that demonstrates the need for a technology, how that technology is not available in Brazil, and that the employment will cease once the skills and technology are effectively transferred. This agreement should be submitted to the INPI for its review and approval prior to the contract being finalized. Such approvals can take several months, so it is wise to post-date the effective date of the contract. As such, the INPI will issue an approval for the amount of time needed to complete the transfer. As such, the period of validity of the employment authorization is dependent upon the determination made by the INPI. Normally, the INPI will approve the contract for up to five years, while the Ministry of Labor has discretion to issue the employment authorization for less time (it is usually approved for one year). As such, it may be necessary to apply for an extension, so long as the aggregate time does not exceed the INPI determination.

Practically speaking, however, extensions of employment authorizations based on technical services agreements are difficult to obtain, due to political and logistical considerations. Extension applications must be submitted prior to thirty days before the expiration of the employment authorization. However, the backlog for such applications can be as long as one to two years, making it necessary to obtain a series of protocol certificate extensions to maintain the employee's lawful status. Recently, however, the Ministry of Labor has unofficially taken the position that it will approve very few of these extensions.

Upon approval of the employment authorization, it will be necessary for the applicant to apply for a Vitem V entry visa. The requirements at this stage are identical to the temporary and permanent statuses.

### **90-day Employment Authorization**

The 90-day Employment Authorization is intended to assist companies needing to send workers to Brazil for a short period of time. This status entitles an applicant to 90 days of work authorization and takes about two to three weeks to adjudicate. However, the visa can only be issued once every 180 days from the last date of approval. The status, however, contemplates both offshore and onshore employment.

Although this application is also submitted to the Ministry of Labor, the benefit of this status is that it requires fewer documents than the permanent or temporary employment authorizations. For example, an employment contract is not required. This status, however, cannot be extended, but the holder's status can be changed to either permanent or temporary. Such a change of status application can be submitted before expiration of 90-day visa while the visa holder is still in Brazil. Once the visa is expired, the employee must be outside of Brazil to submit the change of status application.

## **Emergency Vitem V**

The Emergency Vitem V is a temporary employment authorization that contemplates both onshore and offshore employment on an emergency basis only. In recent months, the Brazilian Government has narrowed its definition of an emergency. As such, it is necessary to demonstrate a compelling need to travel to Brazil for work purposes on such short notice.

The Emergency Vitem V allows an employee of a foreign entity to enter Brazil to conduct activities normally considered to be “work” for a period of thirty days. The work can be done on behalf of a related company or a customer located in Brazil. The visa can be issued quickly, because the Ministry of Labor is bypassed and the Consulate issues the Vitem V visa without waiting for approval from the Ministry. Consulates, however, can only issue such visas every 90 days and the status of the holder cannot be changed from within Brazil.

Previously, the Emergency Vitem V could only be issued once every six months. With the recent addition of the 90-day Employment Authorization, however, the Brazilian Government amended the relevant regulation to allow issuance every three months. However, given the narrow interpretation of an emergency, the 90-day Employment Authorization has somewhat superceded the viability of the Emergency Vitem V.

## **For More Information**

For more information, please contact Lee Lane Smith LLP at [enquiry@leelanesmith.us](mailto:enquiry@leelanesmith.us) or toll free at (800) 513-5699.