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EMPLOYMENT & IMMIGRATION LAW

Innovation Through Immigration

Creative solutions to the challenges of recruitment, hiring and retention of foreign-born talent

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Despite its drawbacks, the H-1B visa is, by far, the most sought-after temporary work visa in the United States for foreign-born, professional workers. The H-1B category requires sponsorship by a U.S. employer and is limited to specialty positions which generally require candidates to hold at least a bachelor's degree or the equivalent in a relevant discipline.

A major limitation of the H-1B visa category is the aggregate six-year period of stay placed on H-1B status, which can only be extended beyond six years if a permanent resident ("green card") application has been commenced on behalf of the H-1B employee prior to the start of his/her sixth year.

Perhaps a more critical limitation of the H-1B visa category is the annual cap or quota for new H-1B visas, which cap is rather arbitrarily set by Congress. Indeed, every year on October 1, the U.S. government makes available a quota of 85,000 new H-1B visas, with 20,000 of those set aside for advanced degree graduates of U.S. colleges and universities. The filing period for these new H-1B visas opens on the first day of the preceding April.

In recent years, when the economy was more robust, employers filed so many H-1B petitions during the first days of the filing period that the United States Citizenship and Immigration Services ("USCIS") was forced to create a "random lottery selection" system to establish some fairness among applicants. By contrast, this past year, the H-1B quota was not reached until December 21, 2009, more than eight months after the opening of the filing period last April. Notwithstanding such a protracted period of H-1B availability under the cap, at the time of this publication, employers are still left with a six-month gap (until October 1) for new H-1B visas to become available for FY 2011.

So what is your business to do if an H-1B visa is not a possibility? While there are a limited number of options presented by the "alphabet soup" of temporary visa categories currently available under the law, there are, indeed, viable alternatives for potential hires for whom you cannot (or will not) wait until October 1 to employ, as well as creative solutions for existing H-1B workers who are approaching their six-year aggregate limit.

A Temporary Work Assignment in the United States

While the B-1 visa not a traditional work visa, one who otherwise qualifies as an H-1B professional worker may qualify for a B-1 visa in lieu of an H-1B visa. If applied for properly, the B-1 visa will permit the foreign national to engage in professional-level employment in the United States for a temporary period *provided* the individual does not receive a salary from the U.S. source. This option generally involves employees of multinational companies who seek to enter the United States for short-term assignments, but remain on the payroll of the foreign entity.

While a B-1 visa in lieu of an H-1B is typically only granted for a period of three to six months, in limited circumstances, one may be permitted to work in such a temporary capacity for up to one year.

Hiring the "Extraordinary Ability" Businessperson

While the O-1 visa category is commonly associated with nationally or internationally acclaimed scientists, researchers, athletes or artists, this category can be successfully utilized for business personnel who can demonstrate they have risen to the top of their respective fields. Despite what the regulations suggest, one does not need to be a Nobel Laureate to qualify for an O-1 visa. To the contrary, a businessperson can qualify for an O-1 visa by satisfying three out of eight threshold criteria provided in the regulations. See 8 C.F.R. § 214.2(o) (3)(iii)(B). Such criteria may include, but is not limited to, membership in an organization that requires outstanding achievement; published materials about the applicant; business-related contributions of major significance in the field; authorship of scholarly articles in the

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field in professional journals; or employment in a critical or essential capacity for organization(s) with a distinguished reputation. Moreover, the regulations permit "comparable evidence" if the listed criteria "do not readily apply to the beneficiary's occupation" to establish a foreign national's eligibility for O-1 status. 8 C.F.R Section 214.2(o)(3)(iii)(C). As such, employers are afforded a rare opportunity to be creative in illustrating the "extraordinary ability" standard has been met for the O-1 visa. Clearly not every skilled professional will be a successful candidate for an O-1 visa, but for some key individuals, this is a viable option.

Transferring Key Personnel from an Affiliate Abroad

The L-1 visa is a highly favored vehicle used by multinational companies to transfer executive, managerial or "specialized knowledge" personnel to the United States from abroad. As a threshold requirement, the L-1 visa category requires at least 50 percent common ownership or control between the foreign entity and the U.S. employer by way of a parent, subsidiary, affiliate or branch relationship. Additionally, a qualifying candidate must have at least one year of continuous employment with the foreign entity during the previous three years. A foreign national that is a new hire, therefore, would be required to remain on the foreign payroll for at least one year before becoming eligible for L-1 status. In the interim, the U.S. employer may consider utilizing the B-1 in lieu of H-1B, allowing the foreign national to work in the United States on short-term assignments. While there is no annual quota for L-1 visas, there is a five-year limit for specialized knowledge personnel and a seven-year limitation for managers/executives.

Potential Hires From Canada, Mexico, Australia, Singapore or Chile

TN Visas (Canada and Mexico): The TN visa category is a temporary work visa available only to citizens of Canada and Mexico who are coming into the U.S. to engage in professional activities as defined by NAFTA. TN employment must fall within a designated NAFTA profession (e.g., Accountant, Computer Systems Analyst, Engineer, Architect) and the candidate must possess at least a baccalaureate degree or appropriate credentials demonstrating status as a professional. See 8 C.F.R. Section 214.6(b)(c). TN status may be granted up to three years at a time, but is extendible indefinitely as long as the temporary purpose of the foreign national's employment continues. There is no annual quota on TN admissions from Canada or Mexico.

H-1B1 (Singapore and Chile)/E-3 (Australia) Visas**:** Free trade agreements between the United States and Singapore, and the United States and Chile, established an annual carve out of H-1B visas available to qualifying Singaporean and Chilean nationals, known as the H-1B1 visa. The nature of the H-1B1 visa is very similar to that of the H-1B visa in that it is restricted to qualified professionals who possess a bachelor's degree or the equivalent and who have a sponsoring employer in the United States. The annual quotas for Chilean nationals (1,400/year) and Singaporean nationals (5,400/year) have never been reached since their introduction in 2004.

As a result of a separate free trade agreement between the United States and Australia, the E-3 visa allows temporary work permits for Australian professionals. The requirements for the E-3 visa are nearly identical to those of the H-1B. Two crucial advantages of the E-3 visa over the H-1B, however, are that the E-3 visa is renewable indefinitely in two-year increments and spouses of E-3 visa holders are permitted to work in the U.S. without restriction. While there is a quota of 10,500 E-3 visas per year, such quota has never been reached since its introduction in 2005.

Does Your Business Offer an Established Training Program?

The H-3 visa is available to a U.S. business or individual seeking to bring foreign nationals into the United States to engage them in an established training program for up to two years. The training program may consist of a combination of classroom and on-the-job training. The employer must demonstrate that the proposed training program is not available in the foreign national's home country; any productive employment is "incidental" to the training; and completion of the training will benefit the foreign national in a career abroad. 8 C.F.R. Section 214.2(h)(7)(ii)(A).

While the H-3 visa should not be used as a "stop-gap" measure in the absence of H-1B visa availability, there is no express prohibition in the regulations for an H-3 trainee, upon completion of his/her training program, to apply for a change of status to that of an H-1B worker if the employer can properly demonstrate a change in circumstances. To do so successfully, it is incumbent upon the employer to persuade USCIS that the employer had no such intention from the outset.

There is little doubt that the unavailability of a sufficient number of H-1B visas is a detriment to the ability of U.S. employers to remain competitive in today's global economy. However, as set forth above, the H-1B program, in its current form, is not without its flaws and drawbacks. Until such time that Congress realizes that the arbitrary quota on H-1B visas serves no useful purpose, U.S. employers, including in-house counsel and human resources departments, should consider more creative, perhaps less conventional alternatives to attract and employ a more diverse, intelligent and energetic workforce, which includes hiring foreign nationals graduating from some of our finest institutions in the United States. ■