

## **U.S. Immigration Options for Hiring and Transferring Foreign Personnel**

by H. Ronald Klasko \*

One of the critical concerns of foreign-owned companies establishing U.S. operations and of U.S. businesses with operations overseas is the speed and certainty with which the U.S. immigration process can be facilitated for executives, managers and key employees. This concern is shared by domestic companies hiring foreign nationals. With advance planning, companies should find U.S. immigration laws flexible enough to meet their needs in most cases. This outline will summarize the available visa options that allow employment of foreign nationals in the United States.

Each of the visa options discussed will be analyzed keeping in mind several key issues, including:

- Whether overseas operations are required
- Importance of ownership of the company
- Type of position offered
- Employee background required
- Salary offered
- Length of need of employee in the United States
- Timing of obtaining visa.

It is prudent for employers to utilize the services of U.S. immigration lawyers experienced in dealing with business immigration issues to navigate through this process and to provide advice

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regarding the best options for particular needs, possible hurdles, risks, timing and other issues beyond the scope of this article.

### **L-1 (Intracompany Transferee) Visa**

The L-1 visa enables overseas companies with parents, subsidiaries, affiliates or branch offices in the United States to transfer managers, executives, and “specialized knowledge” employees to the United States. The employee must have been employed abroad in a managerial, executive or specialized knowledge capacity during one of the last three years prior to transfer in an office of the foreign company, and must be employed by the same company, or a parent, subsidiary or affiliate, as a manager, executive or specialized knowledge employee in the United States. In most (but not all) cases, there must be at least a 50% common equity interest between the foreign and U.S. companies (exceptions may exist where there is a minority equity relationship but common control). No particular salary payment is required. The company can be foreign owned or U.S. owned. No particular education background of the employee is required.

The petition is filed by the U.S. company with U.S. Citizenship and Immigration Services (USCIS); and, upon approval, is forwarded to the U.S. Consulate where an L-1 visa can be issued to the employee. Some companies with large multinational operations may qualify for blanket L-1 status, which enables the petition to be filed directly with the U.S. Consulate thereby bypassing the petition with USCIS. L-1 visas usually allow a three year initial entry. One extension of stay of two years is possible for a specialized knowledge employee, while managerial and executive employees may be entitled to two separate two-year extensions. In the case of a start-up business or a company doing business for less than one year in the U.S., the initial approval is limited to one year, with extensions to a total of five years (specialized knowledge) or seven years (managers and executives) possible.

USCIS is required by law to adjudicate L-1 petitions within 30 days. Employers can pay an additional \$1000 premium processing fee to be guaranteed a review of the petition within 15 days or less.

### **E-1 and E-2 Visas**

The E-1 treaty trader visa and the E-2 treaty investor visa are only available to employees of companies owned at least 50% by nationals of a country that has a special treaty relationship with

the United States or to individuals who are nationals of the treaty country. The E-1 visa is an option for companies or individuals engaged in substantial import or export, a majority of which is between the United States and the country of nationality of at least 50% of the owners of the company. The E-2 visa is available to companies which have invested a substantial amount of capital in U.S. operations. Such companies are allowed to transfer executives, supervisors, and “essential skill” employees to U.S. operations if such employees are of the same nationality. The E-2 visa is also available to individual nationals of a treaty country who make a substantial active investment in an enterprise which creates job opportunities if they come to the U.S. to direct the investment.

Neither substantial trade nor substantial investment is subject to exact definition. Substantial trade takes into account both volume and dollar value of the transactions, and substantial investment looks at the amount necessary to create a viable enterprise in the United States and the percentage of the investment by the foreign entity compared to the total investment in the U.S. entity.

The employee to be transferred does not have to have worked for the company overseas. No particular education or experience is required of the employee. There is also no salary test.

Applications can be made directly to the U.S. Consulate without any pre-approval by USCIS. Where a company is making the investment, as a general rule, the Consulate will first approve the company as a treaty company, and then review the application of the individual employee seeking transfer. Once the company is certified, individual employees can apply directly at the U.S. Consulate. Visas are usually issued for five years, although shorter periods may be dictated by reciprocity limitations with certain countries or at the discretion of the U.S. Consulate. Each single admission to the United States is limited to two years, with an indefinite number of two year extensions possible.

### **H-1B Visas**

The H-1B visa is available to an employee who is offered a position that requires a U.S. bachelors or higher degree as a minimum qualification. In addition, the employee must have a U.S. or foreign equivalent degree, or a combination of education and experience that is equivalent to the required degree. The H-1B visa is available to multinational companies and purely domestic U.S. companies irrespective of ownership.

The process is initiated by the company filing with the Department of Labor (DOL) a labor condition application attesting that the employee will be paid the higher of the actual wage paid to other similarly situated employees or the “prevailing wage”. The prevailing wage is determined by accessing government or private compensation surveys to determine the average wage paid to U.S. workers by other companies in the geographic area. The second step is the filing of a petition with USCIS. Upon approval, the employee may apply for the H-1B visa at the U.S. Consulate. The normal processing time is often four to five months, although companies can obtain approval within fifteen days or less by paying the premium processing fee. Initial entry is limited to three years, and one extension of stay for a maximum of three more years is possible.

The H-1B visa is subject to a more complex regulatory scheme, with more potential liabilities to employers, than with other visa categories. Employers must maintain a file available for public inspection containing certain information relating to the employment of the H-1B foreign national. Notice of the filing must be provided to the collective bargaining representative or, in the absence of a collective bargaining representative, notice must be posted in conspicuous locations where H-1B employees will be employed. The employer must agree to pay the return cost of transportation of the foreign national to his or her home country in the event that the foreign national is terminated prior to the conclusion of the approved H-1B period and assuming the foreign national opts to leave the United States.

Under a concept called H-1B portability, employers can commence the employment of applicants for H-1B status upon the filing of the H-1B petition if the employee was previously in H-1B status. In all other cases involving initial H-1Bs (or any other visas), the employment cannot commence until the petition is approved.

Unlike the other visa categories discussed above, there is an annual quota on H-1B visa issuance. Once the annual quota is reached, companies may not be able to obtain H-1B visas for employees who were not previously in H-1B status for many months until the new year’s quota becomes available on October 1.

### **B-1 Visa**

The B-1, or visitor for business, visa is a valuable option for short term transfers or where speed of transfer is of the essence. The employee must continue to be employed and paid by the

company outside of the United States during the employee's temporary assignment in the United States. Examples of appropriate B-1 visa usage are employees exploring the feasibility of U.S. operations, performing liaison functions, obtaining information, investigating investment opportunities, taking projects back to the home country, and the like. All remuneration (except for reimbursement of expenses) must be paid by the overseas company, and the foreign employee cannot be engaged in day-to-day employment responsibilities in the United States other than for the benefit of the overseas company.

The advantage of the B-1 visa is that it can generally be obtained very promptly at a U.S. Consulate. No petition filed with USCIS is required. Nationals of certain countries are exempt from the necessity of obtaining a B-1 visa, and can enter the United States without a visa for up to three months at a time.

Foreign nationals entering under B-1 visas or without a visa are often subject to greater scrutiny at the U.S. port of entry. It is prudent for such individuals to carry a letter from the company explaining the need for them to come to the United States and the fact that they will not be employed or paid in the United States. Foreign nationals entering without a visa cannot obtain an extension beyond ninety days. A foreign national entering with a B-1 visa is normally admitted for six months or less at a time and can apply for an extension in the United States if necessary.

### **Other Visas Allowing Employment in the United States**

#### **Practical Training**

Students in F-1 (student) or J-1 (exchange visitor) status may be entitled to practical training with the approval of the designated school official. Following completion of studies, F-1 students may obtain twelve months practical training; and J-1 exchange visitors may receive eighteen months of practical training. Practical training is approved by USCIS, which issues an employment authorization document. No action is required on the part of the employer. Since the practical training is not extendable, employers who wish to continue the employment of a student with practical training generally must initiate the H-1B process prior to the conclusion of the practical training.

### H-2B Temporary Workers

The H-2B visa is available for employees coming to undertake trainer or other positions in the United States which by their very nature are temporary. The company must first satisfy DOL that there are no qualified U.S. workers available and interested in the position by engaging in necessary advertising. The company must also satisfy DOL that the prevailing wage will be paid to the foreign worker. Upon certification by DOL, a petition may be filed with USCIS. Upon approval, the employee may apply for visa issuance at the U.S. Consulate. Initial entry is limited to one year, with two one year extensions possible, but difficult, to obtain. The H-2B visa is appropriate for seasonal employees, peak-load employees, and other employees who will not need to be replaced upon the conclusion of their temporary employment. There is an annual quota on H-2B visas, so that such visas may not be available during certain parts of the year.

### H-3 Visa

The H-3 visa is for employees being sent to the U.S. for training where any productive employment is incidental to such training. The training must equip the employee to work overseas and must generally be unavailable in the home country. The petition is filed directly with USCIS with no DOL involvement required. There is no prevailing wage requirement. Entry is limited to two years.

### J-1 Exchange Visitor visa

This visa must be sponsored by an entity approved by the U.S. Department of State. Universities, hospitals, and companies can obtain such approval after an often lengthy application process. Alternatively, U.S. companies can pay an application fee to companies who have already been approved by the Department of State and who are eligible to act as “third-party sponsors” for training programs conducted by non-approved companies. J-1 visas are issued to students, trainees, scholars, researchers, professors, and others for varying periods of stay. Trainees are generally limited to eighteen months, and researchers are generally limited to five years. The sponsoring entity issues a DS-2019 Form to the employee, who applies directly at the U.S. Consulate. Some employees who enter on J-1 visas are subject to a requirement that they return to their home country for two years.

### O-1 visa

Foreign nationals with “sustained national or international acclaim and recognition” may qualify for O-1 extraordinary ability classification. This visa requires proof that the foreign national has a reputation for being “one of a few at the top” of his or her specific field of expertise. This can be proven by a combination of documents and reference letters. The employer files with USCIS a petition, which is eligible for premium processing consideration. The O-1 visa can be issued for three years with unlimited numbers of one year extensions possible.

### TN-1

A Canadian or Mexican national may be able to obtain TN-1 status if his or her occupation appears on a schedule of occupations included in the North American Free Trade Agreement. Most of these occupations require an educational background of bachelor level or higher. TN-1 status can be granted at the port of entry without a pre-approved petition. If approved, TN-1 status is granted for one year. Unlimited numbers of extensions either at the port of entry, or at USCIS, are possible, although TN-1 status is considered temporary and can be denied if it appears that a foreign national employee has abandoned his intention to return to a foreign residence.

### Spouses

Each visa category allows spouses and children (under 21) to enter the U.S. for the same length of time as the principal. Spouses of L-1s, E-1s, E-2s and J-1s can obtain work documents. Other spouses cannot work unless they are sponsored by their own employers for one of the listed working visa statuses.

### Permanent Residence Status

Some employees transferred to the United States will wish to become U.S. permanent residents. The advantage of permanent residence status is that it enables the individual to remain permanently (or as long as he or she wishes) in the U.S. without having to apply for visas or extensions.

Most non-managerial employees are required to go through a process called a labor certification application as the first step in becoming a permanent resident. This process requires recruitment efforts on behalf of the employer and proof that no qualified U.S. worker is available to fill the position.

Two categories of employees are exempt from this “test of the labor market” requirement. Managerial and executive level transferees may obtain permanent resident status through a petition filed by the employer directly with USCIS. If the requisite corporate relationship exists, and the employee was employed as a manager or executive overseas and as a manager or executive with the related company in the U.S., the individual can be approved as a multinational manager or executive, and, based upon that classification, apply for permanent residence status.

Other employees who do not have to go through the labor certification process are “aliens of extraordinary ability” and aliens with advanced degrees or “exceptional ability” performing services in the national interest of the United States. In these instances, the company or the individual employee can file a petition with USCIS, and, upon approval, obtain permanent resident status.

All employees applying for permanent resident status are subject to immigrant quotas. These quotas vary by country, by type of application and by level of education required for the position. In some cases, the quota will be current, meaning there will be no delay. In other cases, the quota may result in multiple year delays in the permanent residence process.

### Travel Issues

A key concern for companies transferring personnel is assurance that their employees not encounter problems traveling in and out of the United States. Holders of H-1B, L-1, E-1, E-2 and O-1 visas are not subject to the requirement of proving that they have a residence overseas to which they intend to return. Other visa categories have this requirement.

Especially since September 11, 2001, security clearances may result in delays in the visa issuance process. Sometimes these delays are predictable, and sometimes they are unforeseen. In addition to security clearance delays, U.S. Consulates now require personal interviews of all applicants. This has resulted in lengthy delays in obtaining appointments for visa issuance at some U.S. Consulates.