United States of America

Executive Summary

United States law provides many solutions to help employers of foreign nationals. These range from temporary, nonimmigrant visas to permanent, immigrant visas. Often more than one solution is worth consideration. Requirements, processing times, employment eligibility, and benefits for accompanying family members vary by visa classification.

Key Government Agencies

The Department of State ("DOS") is responsible for visa processing at American consular posts abroad.

Many visa applications first require the approval of a visa petition by the prospective US employer filed with the Citizenship and Immigration Services ("CIS").

The Department of Labor, with the purpose of protecting American workers, is sometimes involved in the process – either before the visa petition is granted or during subsequent employer audits to audit compliance.

Inspection and admission of travelers is conducted by the Customs and Border Protection agency ("CBP") at American ports of entry and pre-flight inspection posts.

Investigations and enforcement actions involving employers and foreign nationals is the focus of the Immigration and Customs Enforcement agency ("ICE").

The CIS, CBP and ICE agencies are all part of the Department of Homeland Security ("DHS").

Current Trends

Border protection activity by the CBP and enforcement of immigration-related laws that impact employers and foreign nationals by ICE increased significantly after September 11, 2001. Employers of foreign nationals unauthorized for such employment are increasingly subjected to civil and criminal penalties at both the federal and state level. The global economic downturn only heightened concerns about the impact of foreign workers on the American labor market and identity theft, precipitating greater enforcement directives by DHS. Employers should not rely on past practices for continued success.

Worksite enforcement remains a top priority for the current administration. Enforcement is not limited to ICE audits. CIS has demonstrated a pattern of increased scrutiny in its adjudication of L-1 petitions and H-1B petitions for third-party site placement. CIS has also conducted unannounced on-site visits to employers with the purpose of confirming the validity of the H-1B or L-1 work authorization. DOS has commenced verification of information contained in nonimmigrant visa petitions received from CIS. In the current environment, a company-wide immigration compliance program should be a top priority.

The heightened scrutiny of nonimmigrant visas, as well as the limited supply of immigrant visas for professionals (especially those born in India and China), makes it increasingly important for employers to consider alternative strategies.

Employers involved in mergers, acquisitions, reorganizations, etc., must also evaluate the impact on the employment eligibility of foreign nationals when structuring transactions. Due diligence to evaluate the immigration-related liabilities associated with an acquisition is especially significant as enforcement activity increases.

Although comprehensive immigration reform remains at a standstill, the immigration debate carries on throughout the country, with the business and human resource community on the watch for significant changes– both positive and negative – to affect employee mobility to the United States in the coming years.

Business Travel

B-1 Business Visitor Visa

Foreign nationals coming to the US on short-term business trips may use the B-1 business visitor visa. The B-1 authorizes a broad range of commercial and professional activity in the US, including consultations, negotiations, business meetings, conferences, and taking orders for goods made abroad. Employment in the US is not authorized.

B-1 visa applications are processed at US consular posts abroad. They are valid for a fixed amount of time – generally ten years – and may be valid for multiple or a specified number of entries. The CBP officer at the port of entry makes the determination of whether to admit and for how long.

The permitted length of stay is up to 6 months, with the possibility of stay extension applications for up to 6 months – although not generally granted – or a change to another visa status. An accompanying spouse and unmarried, minor children can be admitted under the B-2 tourist visa.

This visa requires proof of the applicant's nonimmigrant intention to depart the US, financial ability to stay in the US without seeking unauthorized employment, and the business purpose of the trip. A departure ticket is recommended.

Visa Waiver

The normal requirement of first applying to a consular post for the B-1 and B-2 visas is waived for foreign nationals of certain countries. The permitted scope of activity is the same as the B-1 and B-2 visas. The length of stay is up to ninety days only, without the possibility of a stay extension or status change. A departure ticket is required.

The following countries are presently qualified under this program: Andorra, Australia, Austria, Belgium, Brunei, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal,San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, and the United Kingdom.

The list of qualified countries changes regularly and the regularly updated list can be found at travel.state.gov/visa/temp/without/without_1990.html#countries.

Foreign national travelers coming to the United States under the Visa Waiver Program must first register on the Electronic System for Travel Authorization ("ESTA"). The electronic system determines a foreign national's eligibility to travel to the United States under the Visa Waiver Program. If ESTA authorization is not granted, the foreign national must obtain a nonimmigrant visa from a U.S. Embassy or Consulate before traveling to the United States. As of September 8, 2010, travelers from Visa Waiver Program countries must pay operational and travel promotion fees in the amount of USD $14 when applying for a new or renewed ESTA.

Training

J-1 Exchange Visitor Visa

The J-1 exchange visitor visa is used for a number of different purposes, including on-the-job training. The purpose is to allow foreign nationals to receiving training that is not otherwise available in their home country and that will facilitate their career when they return abroad, while at the same time affording the opportunity for them to more generally exchange information with people in the US about the two countries. A detailed training program is required.

J-1 training must be administrated by a State Department authorized program, but all of the training itself is generally provided by the sponsoring US company. Compensation for training is not required, but is permitted. This visa requires proof of the applicant's nonimmigrant intention to depart the US, financial ability to stay without seeking unauthorized employment, and the business purpose of the trip.

The length of stay for such training assignments can be for up to eighteen months, including all possible extensions. The spouse and minor, unmarried children may be issued J-2 visas. The J-2 spouse may apply for employment authorization after arrival.

Some, but not all, J-1 and J-2 exchange visitors are subject to a requirement that they return to the home country for at least 2 years at the end of the J-1 training before being eligible to immigrate or return to work under certain nonimmigrant visas. The country of residence, field of training, and source of any government funding for the training can give rise to this requirement, which often can be waived.

H-3 Trainee Visa

The H-3 nonimmigrant visa is designed for foreign nationals coming for training that is not available in the trainee's own country and that will benefit the trainee's career abroad. H-3 trainees cannot engage in productive employment, unless merely incidental and necessary to the training. They cannot be placed in a position that is in the normal operation of the business and in which local workers are regularly employed.

In practice, H-3 visa requests are more readily granted for formal, classroom-type trainings and are more likely to be denied when an on-the-job training element is included, regardless of statements that such work may be incidental and necessary. A detailed training program is required.

The maximum duration of is 2 years. The spouse and unmarried children under the age of twenty one may be issued the H-4 visa.

Although the H-3 visa does not impose specific compensation requirements, low salaries are sometimes criticized for the possibility of exploiting foreign labor, while high salaries can be criticized for possibly indicating productive labor. This visa requires proof of the applicant's nonimmigrant intention to depart, financial ability to stay without seeking unauthorized employent, and the business purpose of the trip.

B-1 Visa in lieu of H-3

Foreign nationals may be admitted to participate in H-3 type training programs using the B-1 visa, provided that they have been customarily employed by and will continue to receive a salary from the foreign company. The requirements and permitted activities are unchanged, but the duration is reduced to visits of up to 6 months. Otherwise, the B-1 visa comments provided earlier apply equally here.

L-1 Intracompany Transfer Visa

Multinational companies seeking to temporarily transfer foreign employees for assignment to US operations most often rely on the L-1. This visa is initially valid for assignments of up to 3 years, and can be extended in 2-year increments for a total period of 5 or 7 years, depending upon the nature of the US job duties. Executive and managerial-level employees can hold L-1A status for up to 7 years, whereas employees working in a capacity involving specialized knowledge have a maximum stay of 5 years under L-1B status.

The spouse and unmarried children under the age of twenty one may be issued the L-2 for the same period. The L-2 spouse may apply for employment authorization after arrival.

Qualified foreign nationals must have been outside the US for at least twelve months during the 3 years immediately preceding the L-1 visa request and during that period employed by the US petitioning employer or a company with a qualifying intra-company relationship. There are a number of relationships that qualify, but all generally rely on common majority control (e.g., parent-subsidiary, subsidiaries of a common parent, branch or representative office). The intra-company relationship need not have existed throughout the period of required employment.

Executive and managerial-level employment is generally shown through the management of subordinate employees or through the management of an essential function within the organization. Employment in a specialized knowledge capacity requires proof that the employee holds knowledge of the organization’s products, services, research, equipment, techniques, management, etc., or an advanced level of expertise in the organization’s processes and procedures.

Additional rules apply to companies during the first year of business operations in the US and to those who intend to place the foreign employee at a job site not controlled by the sponsoring employer (e.g., outsourcing).

Large multinationals may take advantage of special “blanket” L-1 rules for faster government processing.

H-1B Specialty Occupation Visa

US employers of foreign professionals have long relied on the H-1B visa. Status is initially valid for up to 3 years, with extensions in 3 year increments available for up to 6 years total stay. A potentially unlimited number of extensions beyond the 6 years may also be available to qualified H-1B visa holders in the immigration process. The spouse and unmarried children under the age of twenty one may be issued the H-4 for the same period.

The job offered must be in a specialty occupation, which are jobs that normally require at least a bachelor’s degree in a specific field. The foreign national must hold the required degree from an American university or the equivalent. Foreign degree, employment experience, or a combination may be considered equivalent.

Employers must promise to give H-1B professionals wages, working conditions and benefits equal to or greater than those normally offered to similar employed workers in the US. A strike or labor dispute at the place of employment may impact eligibility. Detailed recordkeeping requirements apply and government audits to ensure compliance are authorized.

Recipients of Troubled Assets Relief Program (“TARP”) funds seeking to hire H-1B employees are subject to additional recruitment and nondisplacement requirements. Theseprovisions, primarily

affecting institutions in the financial sector, will be in effect through February of 2011.

Only a limited number of new H-1B visa petitions can be granted each fiscal year. Historically, the limited supply has been quickly exhausted. In prior years, the annual quota has been reached within the first day of the filing period. Perhaps as a result of the more stringent requirements for TARP recipients and the current state of the economy, H-1B visas for FY2011 continue to be available as of September 1, 2010.

Given the limited number of H-1B visas available, the government uses random selection to determine which requests to process – making this visa often an unreliable choice when the demand for H-1Bs far exceeds the supply. This problem does not exist for foreign professionals granted H-1B status with other employers, which are generally exempt from limits, as are H-1B requests filed by qualified educational institutions, affiliated research organizations, nonprofits and government research organizations.

H-1B1 Free Trade Agreement Visa

Prospective employers of foreign professionals who are citizens of Singapore and Chile may take advantage of additional quota allocations and more streamlined processing rules. Although limited in number, the supply of these visas is consistently greater than demand making them more readily available. The scope of authorized work is essentially the same as the H-1B, but status is granted for up to eighteen months, with extensions in increments of up to twelve months available. The spouse and unmarried children under the age of twenty one may be issued the H-4 for the same period. This visa requires proof of the foreign national's nonimmigrant intention to depart the US.

E-3 Free Trade Agreement Visa

Prospective employers of foreign professionals who are citizens of Australia can take advantage of similar Free Trade Agreement benefits using the E-3 visa. Also limited in number, the supply of these visas too is consistently greater than demand. The scope of authorized work is similar to the H-1B, but status is granted for up to twenty four months, with extensions in increments of up to twenty four months available. The spouse and unmarried children under the age of twenty one may be issued the E-3 for the same period. The E-2 spouse may apply for employment authorization after arrival. This visa requires proof of the foreign national's nonimmigrant intention to depart the country.

TN North American Free Trade Agreement Visa

Employers of foreign professionals who are citizens of Canada and Mexico can take advantage of somewhat different Free Trade Agreement benefits using the TN visa. There are no numerical limits, so the supply of these visas is always available. The job offered must be in one of the professions covered by NAFTA, each of which has its own education or experience requirements. TN status is granted for up to thirty six months, with a potentially unlimited number of three-year extensions available. The spouse and unmarried children under the age of twenty one may be issued the TD for the same period. This visa requires proof of the foreign national's nonimmigrant intention to depart.

Some of the more commonly used professions covered by the TN include: computer systems analyst, engineer (all types), economist, lawyer, management consultant, biologist, chemist, industrial designer, accountant, and scientific technician. A complete list of the NAFTA professions can be found at www.amcits.com/nafta_professions.asp.

E-1 and E-2 Treaty Trader and Investor Visas

Foreign-owned companies doing business in the US may temporarily employ qualified foreign workers to facilitate international trade or investment activities. E visa status is granted for up to five years, with a potentially unlimited number of extensions in five-year increments. The spouse and unmarried children under the age of twenty one may be issued the E visa for the same period. The spouse may apply for employment authorization after arrival.

The list of countries with E-1 trade and E-2 investment treaties changes often and the government's regularly updated list can be found at travel.state.gov/visa/frv/reciprocity/reciprocity_3726.html. Qualifying companies must be at least 50% owned by citizens of the same treaty country. E visa status is only available to citizens of that same country. Not all countries hold treaties or agreements for both E-1 trade and E-2 investment visa status, and many countries hold neither, as can be seen on the following table:

Countries with E-1 Treaty Trader Visa Eligibility				
Argentina	Australia	Austria	Belgium	Bolivia
Bosnia & Herzegovina	Brunei	Canada	Chile	China, Republic of (Taiwan)
Colombia	Costa Rica	Croatia	Denmark	Estonia
Ethiopia	Finland	France	Germany	Greece
Honduras	Iran	Ireland	Israel	Italy
Japan	Jordan	Korea (South)	Kosovo	Latvia

Liberia	Luxembourg	Macedonia	Mexico	Montenegro
The Netherlands	Norway	Oman	Pakistan	Paraguay
The Philippines	Poland	Serbia	Singapore	Slovenia
Spain	Suriname	Sweden	Switzerland	Thailand
Togo	Turkey	The United Kingdom	Yugoslavia	

Countries with E-2 Treaty Investor Visa Eligibility				
Albania	Argentina	Armenia	Australia	Austria
Azerbaijan	Bahrain	Bangladesh	Belgium	Bolivia
Bosnia & Herzegovina	Bulgaria	Cameroon	Canada	Chile
China, Republic of (Taiwan)	Colombia	Congo	(Brazzaville)	Congo (Kinshasa)
Costa Rica	Croatia	Czech Republic	Denmark	Ecuador
Egypt	Estonia	Ethiopia	Finland	France
Georgia	Germany	Grenada	Honduras	Iran
Ireland	Italy	Jamaica	Japan	Jordan

Kazakhstan	Korea (South)	Kosovo	Kyrgyzstan	Latvia
Liberia	Lithuania	Luxembourg	Macedonia	Mexico
Moldova	Mongolia	Montenegro	Morocco	The Netherlands
Norway	Oman	Pakistan	Panama	Paraguay
The Philippines	Poland	Romania	Senegal	Serbia
Singapore	Slovak	Republic	Slovenia	Spain
Sri Lanka	Suriname	Sweden	Switzerland	Thailand
Togo	Trinidad & Tobago	Tunisia	Turkey	Ukraine
The United Kingdom	Yugoslavia			

The E-1 requires proof of substantial trading activity between the US and the treaty country. The level of trade can be measured by its value, frequency and volume. Only the trade between the US and treaty country is considered, and that must account for at least 50% of the trade of the sponsoring employer. Items of trade range from goods to services, transportation, communications, data processing, finance, etc.

The E-2 requires proof of substantial capital investment that has either already been made or that is in the process of being made when the visa is requested. No minimum value threshold is set for the investment. The amount is measured in relation to the total cost of the

US business. Only funds or the value of property committed to capital investments are considered, and not the cost of operating expenses. E visa status is available to individual investors with a majority ownership interest, as well as to employees coming to work in either a supervisory role or a position involving skills essential to the venture.

Other Comments

There are many additional nonimmigrant visas less frequently used for global mobility assignments worth a brief mention. Foreign students with the F-1 visa are often granted authorization for employment related to their studies before and after graduation. The O-1 visa authorizes the employment of foreign nationals of extraordinary ability. Foreign nationals with skills in short supply in the US may be able to obtain the H-2B visa.

Immigrant visas generally take longer to obtain, but in some situations compare favorably to nonimmigrant visas. Permanent resident status is often a goal for foreign nationals and US employers rely on immigrant visas to continue to have access to their work after the limited duration of nonimmigrant visas is exhausted. Selecting a nonimmigrant visa that is consistent with a long-term immigrant visa option can be crucial. US employers are well advised to develop policies and practices that recognize the value of the immigration process to recruit and retain skilled foreign professionals, while ensuring corporate compliance with US law.

In addition to employment-based immigrant visas, immigration to the US is possible through family-based immigrant visas by qualified US citizen or permanent resident relatives.

Immigrants are often interested to later become US citizens. Naturalization to citizenship generally requires 5 years of continuous residence after immigrating, during at least half of which time the

immigrant must be physically in the country. Lengthy travel abroad, therefore, can detrimentally impact eligibility.

Further, immigrant status itself can be lost through lengthy travel abroad. US residents may be reluctant to accept assignments outside the US for this reason. It is often possible to address these concerns. The CIS can issue reentry permits to help immigrants maintain status while abroad. Further, immigrants working abroad for US owned companies or their foreign subsidiaries may qualify to protect their eligibility for citizenship. Both requests are time sensitive and should be made before the assignment abroad begins.

Further, US law generally requires immigrants to continue to file federal income tax returns even when all income is earned abroad and immigrant status can be impacted if a nonresident tax return is filed or if no US return is filed.

In the wake of September 11, 2001, greater focus is placed on registration laws requiring all foreign nationals (*e.g.*, tourists, nonimmigrants, permanent residents) to submit the CIS Alien's Change of Address notice within ten days of changing the US residence address.

Further Information

Baker & McKenzie's ***United States Business Immigration Manual*** provides further information about American business visas, including a broader range of nonimmigrant visas, the immigration process, and immigration-related responsibilities for employers and foreign national employees.