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PERSPECTIVE

Professional visas: An overview of H-1Bs and alternatives

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Every year, companies of all industries and sizes, including tech, aerospace, pharmaceutical, entertainment, and academia vie to attract the most qualified talent from around the world. It is no surprise that the H-1B visa remains the hottest, most sought-after ticket for companies to employ these highly skilled foreign national professionals. For the hundreds of thousands of professionals who apply each year, winning the H-1B golden ticket is a dream — the H-1B may provide their only opportunity to live and work in the U.S. It remains the most highly sought-after work visa by highly skilled professionals and recent graduates around the world.

The process of obtaining H-1B visa status can be long and arduous with a heavy hand of luck involved. The U.S. Citizenship and Immigration Services sets a numerical cap of 65,000 H-1B visas for individuals with a four-year bachelor's degree or equivalent and an additional 20,000 for those with U.S. advanced degrees. For foreign nationals who were never selected and counted against this H-1B numerical cap, they must first register to be selected in the H-1B lottery. In 2020, USCIS received approximately 275,000 registrations during the registration period. Since there were more registrations

than the number of visas available, the government ran a lottery, and the chance of being selected was less than 30%.

A company can proceed with an H-1B visa petition after the foreign national has been selected in the H-1B lottery. While the lottery is a major hurdle that many are unable to overcome, the more difficult challenge is getting the case approved by USCIS. To qualify for an H-1B, the job position must be a “specialty occupation” which is defined as a job requiring the “theoretical and practical application of highly specialized knowledge; and the position normally requires at least a bachelor’s degree or the equivalent in a specific specialty.”

Over the last several years, the U.S. has taken a more restrictive, and often questionable, approach in adjudicating H-1B petitions regardless of whether it is for a new petition or an extension of a prior approved petition. The most common challenge raised by USCIS is whether a position qualifies as a “specialty occupation.” Even occupations that were once regarded as straightforward qualifying positions (e.g., software developers, lawyers, data scientists and electrical engineers) have been met with increased scrutiny. In fact, USCIS data for the first quarter of FY2020 show continued high rates of requests for evidence and denials. In this regard, it is important to

understand the company, preferred position, and present the strongest possible case to USCIS by correctly identifying the government occupational classification that the position falls under.

In addition to providing a strong job description, the employer must also pay a “required wage.” The H-1B program requires employers to attest to the U.S. Department of Labor that the company will pay the greater of either: (1) wages to the H-1B nonimmigrant workers that are at least equal to the actual wage paid by the employer to other workers with similar experience and qualifications for the job in question; or (2) the prevailing wage for the occupation in the area of intended employment. In preparing the H-1B, it is important to understand the position’s requirements to ensure that the company is selecting the correct wage level. Amidst the current economic downturn, it is also important for companies to understand that a change in the job, reduction in hours, or reduction in wages may require filing an H-1B amendment to ensure compliance with both the DOL’s and USCIS’s requirements.

As the most popular and sought-after work visa, the H-1B will continue to remain a topic of discussion and focus for the administration. It is important for immigration practitioners and companies to understand the H-1B category

and consider these factors when preparing the petition. Moreover, it is important for immigration practitioners to counsel and educate employers and raise potential issues from the outset, in order to optimize each applicant’s chances for approval.

H-1B Alternatives

Faced with little hope of being selected in the H-1B registration lottery, it is important to consider work visa alternatives for foreign nationals who may be eligible based on their nationality. The following work visas are similar to the H-1B and should be considered for foreign nationals from Singapore, Chile, Australia, Mexico or Canada.

H-1B1 for Singaporeans and Chileans

The H-1B1 visa is reserved for Singaporean and Chilean nationals. Like the H-1B, the position must qualify as a specialty occupation. As indicated above, USCIS has set a numerical cap of 65,000 for H-1B visa petitions per fiscal year. From that cap, 6,800 visas are set aside for the H-1B1 program. The H-1B1 is a single intent visa with a one-year initial period of stay. Thereafter, it may be indefinitely renewed in one-year increments.

Unlike the H-1B, the H-1B1 allows a foreign national to apply directly with the U.S. consular post abroad. This is a preferred option for many foreign

nationals because it permits them to avoid the unpredictable USCIS adjudication process. In addition, on July 8, 2020 the U.S. consular post in Singapore stated that H-1B1 visas are not impacted by the presidential proclamation restricting travel. This effectively means that Singaporean and Chilean applicants may apply for visas at their respective U.S. consulates and not be subject to the U.S.'s travel restriction.

E-3 for Australians

The E-3 visa category is reserved for Australian nationals who wish to enter the U.S. to perform in a specialty occupation. There are 10,500 E-3 visas reserved for Australian nationals per year. Like the H-1B1 visa, applicants can apply directly at the consulate without having to first apply with USCIS. The initial period of stay is two years and is renewable indefinitely. Another benefit of the E-3 is that spouses can apply for work authorization.

TN for Mexicans and Canadians

The TN visa permits Canadian and Mexican citizens to enter the U.S. to work in a qualifying profession. Unlike the H-1B, H-1B1 and E-3 visas, the TN profession is more limited because the position must fall under a list established under the North American Free Trade

Agreement. Canadian citizens do not need a visa to seek admission to the United States as a TN nonimmigrant. Mexican citizens, however, are required to have a TN visa prior to seeking admission. The TN visa allows entry for up to three years, and extensions can be applied for either at a U.S. Custom and Border Protection-designated U.S. port of entry or at a designated pre-clearance/ pre-flight inspection station. (Although the United State-Mexico-Canada Agreement took effect July 1, replacing NAFTA, not much has changed regarding TN visas under the USMCA.)

Conclusion

The H-1B visa is the most highly sought-after visa and remains a focus of this administration. Over the past few months, the U.S. has issued travel bans and restrictions that impact the H-1B program. For instance, on June 22, President Donald Trump issued a proclamation which restricts entry into the U.S. for foreign nationals outside the U.S. and without a valid visa, including H-1B holders. On July 31, USCIS announced filing fee increases, including a 21% filing fee increase for H-1B petitions. With the increased scrutiny on this visa category, it is essential for employers to engage immigration counsel that understand the complexities of the H-1B

program and remain current with the constantly changing legal and political landscape. It takes only one error for USCIS to deny an H-1B petition, which can lead to economic loss, interruptions to client operations and plans, and may possibly leave a foreign national employee with no option but to depart the U.S.

While the H-1B may be the only option for many, it is important to consider and not overlook alternative visa categories when a foreign national worker holds Singaporean, Chilean, Australian, Mexican or Canadian citizenship. In

addition to these alternatives, immigration counsel should also consider and present other possible visa options such as the E-1/E-2 (Treaty Trader/Investor) and O-1 (Extraordinary Ability) visa categories. These visa options may present a quicker and less stressful path for a foreign national to begin working in the U.S., especially because employers can continue to hire foreign nationals under these categories. ■

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