Nonimmigrant Visa Options after Practical Training

Presentation By Bennett Savitz
Nonimmigrant Categories

- Specialty Occupations: H-1B
- Canadians and Mexicans: TN
- The Business as a Tool: L and E
- Australia, Chile, and Singapore: E-3 and H-1B1
- Extraordinary Ability: O
H-1B: Professionals

- Temporary Professional Workers
- Numerical Limitations
- Must be a Specialty Occupation
- Must have a Bachelor’s Degree or equivalent
- Filed with the Service Center in Vermont or California
- Apply for three-year increments, with a total limit of six years (one major exception!)
- Labor Condition Application through the Department of Labor
Two-step process:

- Labor Condition Application (LCA) to the Department of Labor (DOL).
- H-1B Petition to United States Citizenship and Immigration Services (USCIS).
Step One: The Labor Condition Application

• Employer must pay the higher of what it pays its own similarly employed workers or what similarly employed workers in the area are paid.
• The working conditions of its U.S. workers must not be adversely affected.
• There must be no strike/lockout at the work site in the occupation for which a worker is sought.
• Notice must be given to current employees that employer intends to hire an H-1B worker.

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The DOL does not “approve” these attestations; only certifies that they have been properly completed to create a public record of the employer’s attestations (new, slower system).

A strict set of requirements goes along with the LCA attestations; an employer must not only say it is going to comply with the above, it must follow through or it is violating the law.

If an employer does not comply, the DOL has a system in place to enforce and punish:
- Available to the public.
- Formal complaint and investigation mechanisms.
- The DOL gives itself the power to go after an employer even without a public complaint.
Specialty Occupation

- “Theoretical and practical application of a body of highly specialized knowledge”
- Bachelor’s degree or higher in a field related to the position to be performed
- Degree requirement common to position or complexity/uniqueness of position justifies degree requirement
- Employer normally requires degree or equivalent
Step Two: The USCIS Petition

- The employer submits a request to USCIS, proving that it has completed the LCA process and demonstrating that both the employer and the candidate qualify for the H-1B category.

- Employer must prove:
  - The need for someone who is a professional (i.e. the job requires someone with at least a bachelor’s degree in a field relating to the work to be performed).
  - The candidate it seeks to hire has the required degree and any other qualifications required.

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Dependents: (Spouses and Children Under 21)

- Can obtain H-4 status for same period principal holds H-1B
- No work authorization, but can attend school
WARNING!

- The approval of the H-1B Petition does not necessarily qualify the candidate to commence employment. The employer must verify whether the candidate has been granted a change to or an extension of H-1B status, or whether the candidate needs to obtain an H-1B Visa.

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H-1B “Portability” Law (AC21)

Portability of H-1B Status:

* Someone in H-1B status may change jobs upon the filing of a new petition by a new employer if the individual is in lawful status at the time of filing and has not engaged in any unauthorized employment since his or her last lawful admission.

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CAP ISSUES

- 65,000 new, non-exempt H-1Bs per year
  - 6,800 reserved for Chile/Singapore
- 20,000 more for U.S. Advanced Degree holders
- Non-exempt v. exempt employer
  - Exempt: Institutions of higher education and affiliated/related non-profit organizations; nonprofit research or government research organization
- Exempt v. non-exempt employees
  - Exempt: Already counted w/in last six years and not left for one year or more
THE CAP IS BACK!

- For the fifth year in a row, the 65,000 and 20,000 caps on H-1Bs available during the Fiscal Year (October 1, 2017 to September 30, 2018) was reached during the April 1st filing window!
- An H-1B petition can be filed up to six months prior to the intended start date (April 1st for an October 1st start date).
- On April 11, 2017, USCIS conducted a "lottery" to select a sufficient number of petitions needed to meet the caps of 65,000 for the general category and 20,000 under the advanced degree exemption limit (out of approximately 199,000 petitions filed).
H-1B Visa Reform Act of 2004

- Exempts from the H-1B cap the first 20,000 beneficiaries who have earned a Master’s or higher degree from a U.S. institution of higher education. After those 20,000 slots are filled, USCIS is required to count those cases against the 65,000 cap for the remainder of the fiscal year.

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H-1B Visa Reform Act of 2004

- Implements two additional filing fees:
  - ACWIA Fee: Petitioners who employ more than 25 full-time employees must pay a fee of $1,500; petitioners who employ 25 or fewer full-time employees may submit a reduced fee of $750. Certain types of petitions are exempt from the new $1,500 or $750 fee.
  - Fraud Prevention and Detection Fee: All petitioners seeking a beneficiary’s initial grant of H-1B or L nonimmigrant classification, or those petitioners seeking to change a beneficiary’s employer within those classifications must pay a fee of $500. Other than petitions to amend or extend status filed by an existing H-1B or L employer, there are no exemptions from the $500 fee.

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TN (NAFTA)

- Created by NAFTA for Canadians or Mexicans engaged in activities at professional level
  - requires Bachelor’s or licenciatura degree for most occupations
- Must be one of 65 listed occupations in the NAFTA Treaty
- Self-employment prohibited
- Includes some positions that would not qualify for H-1B
- Apply for three-year increments, with no limit
**TNs for Mexicans vs. Canadians**

- **Mexicans:**
  - Must have U.S. employer
  - LCA no longer required
  - Apply at U.S. Consulate
  - No longer numerical limitations

- **Canadians:**
  - U.S. or foreign employer
  - LCA not required
  - Can apply at border
  - No numerical limitations
Benefits of the TN

- Benefits of TN over H-1B
  - no numerical limitations
  - TN still available after H-1B cap is reached
  - ability to extend stay beyond 6-year H-1B limit
  - no limits on number of years may hold TN status
  - TN may be possible for certain cases where an H-1B wouldn’t work
Dependents: (Spouses and Children Under 21)

- Can obtain TD status for same period principal holds TN
- No work authorization, but can attend school

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L-1: Intra-Company Transferees

- **L-1A**: International Managers/Executives (up to 7 years stay)
- **L-1B**: Specialized Knowledge Workers (up to 5 years stay)
- No numerical limitations
- Filed with Service Center in Vermont or California
**L Employers**

- Relationship between U.S. employer and employer abroad (active parent, affiliate or subsidiary in a country outside of the U.S.)
- Majority ownership or common control

**L Employees**

- At least one year (in past 3) working for foreign entity as manager, executive, or specialized knowledge employee
- Must be coming to work as manager, executive, or specialized knowledge employee
International Manager

- Manages a function or department of an organization, or
- Supervises other employees, or
- Hires and fires employees, or
- Functions at a senior level within the organizational hierarchy; and
- Exercises discretion over the day-to-day operations of the department or function managed
International Executive

• Has wide latitude in important decision-making within the company; and
• Establishes corporate goals and policies
Specialized Knowledge Workers

- Have specialized knowledge of company product, operations, equipment, or other element necessary for the company to function successfully in the international market; or
- Have advanced level of knowledge or expertise in the organization’s processes and procedures.
Dependents:
(Spouses and Children Under 21)

• Can obtain L-2 status for same period principal holds L-1
• Can now obtain work authorization

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E-1 and E-2: Treaty Traders and Treaty Investors

- National of treaty country coming to U.S. to carry on substantial trade or investment
- No time limits as long as holder stays in status
- Apply directly to U.S. Consulate where applicant lives
<table>
<thead>
<tr>
<th>Treaty Trader (E-1)</th>
<th>Treaty Investor (E-2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applicant and trading firm must be of treaty country</td>
<td>Investor must be of treaty country</td>
</tr>
<tr>
<td>International trade must be substantial and be principally between U.S. and treaty country</td>
<td>Investment must be substantial and be a real operating enterprise</td>
</tr>
<tr>
<td>Applicant must be in supervisory or executive capacity</td>
<td>Investor must have control of funds</td>
</tr>
<tr>
<td>At least 50% of stock must be owned by nationals of treaty country</td>
<td>Investor must be coming to develop and direct enterprise</td>
</tr>
<tr>
<td></td>
<td>Investment must create employment beyond just investor and family</td>
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</tbody>
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Dependents:
(Spouses and Children Under 21)

- Can obtain E-1/E-2 Dependent status for same period principal holds E-1/E-2
- Can now obtain work authorization

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E-3 and H-1B1

- Created by various Free Trade Agreements for citizens of Australia (E-3), and Chile and Singapore (H-1B1) engaged in activities at a professional level
- All require Bachelor’s degree or equivalent
- Requirements and procedures are a hybrid of the TN, H-1B, and E categories
- Spouses of E-3 (Australia) can obtain work authorization
O: “Outstanding”

- Defined as having “extraordinary ability” in sciences, arts, education, business or athletics
- Evidence of sustained national or international acclaim
- Requires extensive documentation
- File with Service Center in Vermont or California
- Apply for period of employment, up to three-year limit per application
Options and Challenges for Entrepreneurs

- E-1 or E-2 (Green Card Limitations)
- L-1A (Requirements for New Offices)
- H-1B (Bona Fide Company Requirements)
- Working Part-Time
- Ownership Interest Issues