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Options and Alternatives For Candidates Not Selected In The H-1B Lottery

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

Despite its demand, the H-1B visa category is not without its drawbacks. For one, new H-1B visas are subject to an annual quota of 85,000, with 20,000 of those set aside for advanced degree graduates with a U.S. Master's degree or higher.1 For fiscal year (FY) 2016, a record-breaking 233,000 H-1B cap petitions were filed with USCIS, representing a 35% increase from the prior fiscal year. Based on such an overwhelming increase in filings, H-1B candidates were faced with a 1 out of 3 chance of a petition being selected in the H-1B lottery. In other words, approximately 2/3 of all petitions submitted were summarily rejected for lack of quota numbers.

So what is a U.S. employer to do when a foreign national is not selected in the H-1B lottery? While there are a limited number of options presented by the "alphabet soup" of temporary visa categories, there are some viable alternatives for obtaining valid work

[1] The H-1B quota applies only to petitions for new employment and not to beneficiaries of H-1B extensions and transfers (from one U.S. employer to another). Nor does the quota apply to employees of qualified institutions of higher education and certain non-profit or government research organizations.

authorization for such foreign nationals. The following list includes some of those alternatives.

1. B-1 (in lieu of an H-1B): While the B-1 is not a traditional work visa, if applied for properly, this sub-classification is a viable alternative for multinational employers as it will allow foreign nationals to temporarily engage in professional-level employment in the U.S. for short-term periods (up to 6 months) *provided* the foreign national does not receive a salary or any other remuneration from the U.S. employer. Rather, the foreign national must be placed and remain on the payroll of a foreign entity;
2. O-1: This visa classification is generally associated with nationally or internationally acclaimed scientists, researchers, athletes or artists; however, this category can also be utilized for business personnel who can establish they have risen to the top of their respective fields by demonstrating he/she satisfies at least 3 out of 10 threshold criteria provided in the regulations. *See* 8 C.F.R. § 214.2(o)(3)(iii);
3. L-1: This visa classification is commonly used by multinational employers to transfer executive, managerial or "specialized knowledge" personnel to the U.S. from abroad. It requires a common ownership and control of the sending and receiving entities by way of a parent, subsidiary, affiliate or branch relationship. In addition, qualifying candidates must have been continuously employed for at least 1 year with the foreign affiliate within the preceding 3years;
4. TN-1 (Canada) and TN-2 (Mexico): This visa classification is available only to citizens of Canada and Mexico who are coming into the U.S. to engage in professional-level activities as defined by NAFTA, which activities specifically require "at least a baccalaureate degree or appropriate alternate credentials demonstrating status as a professional." The TN

employment must fall within a NAFTA Schedule 2 profession. 8 C.F.R. § 214.6(b); 8 C.F.R. § 214.6(c);

5. H-3: This visa classification may be utilized by a U.S. business or individual seeking to bring foreign nationals into the U.S. for the purpose of engaging them in an established training program for up to 2 years. The U.S. employer must demonstrate that similar training programs are not available in the foreign national's home country. Although the training program may consist of a combination of classroom and on-the-job training, any productive employment must be "incidental" to the training program. 8 C.F.R. § 214.2(h)(7)(ii)(A);

6. E-1: This is a visa classification available to applicants from one of the enumerated countries with which the U.S. maintains a treaty of trade. Applicants must be sponsored by a U.S. employer which is owned at least 50% by national(s) of the foreign national's treaty country.[2] The U.S. employer must demonstrate substantial trade in services or technology between the home country and the U.S., while the employee must be entering the U.S. to perform supervisory or executive duties or have skills which are "essential to the operation of the enterprise." 8 C.F.R. § 214.2(e)(3);

7. E-2 (commonly known as an Investor Visa): Like the E-1, this is a visa classification available to applicants from one of the enumerated countries with which the U.S. maintains a treaty of commerce. Applicants must be entering the U.S. to develop and direct the operations of an enterprise in which the individual has substantially invested (or is in the process of investing) monies to create a business in the U.S. that is not marginal and has a reasonable growth trajectory.

[2] A publicly traded company is generally considered to have the nationality of the country in which its stock is listed and traded on a public stock exchange.

As set forth above, the H-1B visa category, in its current form, is not without its issues 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 retain and attract a more diverse, intelligent and energetic workforce.

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