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IN PRACTICE

EMPLOYMENT COMPLIANCE

Your H-1B Petition Was Not Selected in the Lottery; Now What?

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Fairly soon, an estimated 150,000 businesses in the United States will receive some bad news: U.S. Citizenship and Immigration Services ("USCIS") will not be considering their H-1B petitions for skilled foreign workers. The petitions will be rejected without any analysis as to their merits. The candidate may be expertly qualified and the job may be a specialty occupation. Yet these businesses with a clear need for temporary help will have to explore other ways to keep their prospective or current employee working for their company, or face the possibility that the foreign worker may be forced to return home.

The H-1B program is capped at 85,000 visas per year. When the economy is thriving, as it has been the last four years, the cap is met within the first five days of the application period. USCIS is required to put any petition filed during those first five days into a "lottery," then randomly select which petitions will be reviewed. For Fiscal Year ("FY") 2017, USCIS received approximately 238,000 petitions within the first five days. It received 233,000 in FY2016; 172,500 in FY2015; and 124,000 in FY 2014. It is expected that FY2018 will meet or exceed the petitions filed in FY2017.

If you are one of the unlucky employers whose petition was not selected for review, you may have alternatives. This article provides a brief overview of some of the more popular options. It is not meant to be exhaustive in listing the requirements for each visa; instead, general information is provided. Significant further analysis of the relevant treaties, statutes and regulations are necessary before deciding whether any of these programs are appropriate.

Visa Options for Specific Nationalities

Certain nationalities have special visas allocated to them. If your employee hails from one of these nations, you can circumvent the H-1B cap. For instance, individuals from Chile and Singapore can apply for **H-1B1 visas**, as 6,800 H-1B visas are "set-aside" as H-1B1 visas for Chilean and Singaporean nationals. The initial period of H-1B1 employment is one year and visas can be renewed twice in one-year increments. **E-3 visas** require that the employee be an Australian citizen or national. Although in the E visa category, the E-3 is very similar to an H-1B visa, albeit not identical. E-3 visas are valid up to two years and may be renewed indefinitely. **TN visas** allow individuals from Mexico and Canada to enter the United States for certain types of employment, mainly professional positions, pursuant to the North American Free Trade Agreement ("NAFTA"). The TN visa is valid up to three years and, like the E-3, can be renewed indefinitely.

The H-1B1, TN and E-3 function similarly to the H-1B. **E-1/E-2 treaty trader/investor visas** are country-specific, yet the requirements are substantially different. Only specific countries are eligible for the E-1 and E-2 visa programs. A full list is provided by the U.S. Department of State ("DOS") at https://travel.state.gov/content/visas/en/fees/treaty.html. Notably, for these visas, the nationality analysis is not limited to just the employee; the prospective employer must also have the nationality of a treaty country. If the treaty trader or investor is a business or employing entity, then the entity's nationality is determined by the individual owners, and at least 50% of the owners must be nationals of the treaty country. The **E-1 treaty trader visa** is for an enterprise (*e.g.*, company, corporation) that is engaged principally and substantially in trade between the U.S. and the treaty country. If the corporation is eligible, it can use the E-1 visa program to bring in executive or supervisory employees, or individuals who possess skills essential to the firm's operations in the U.S. The **E-2 treaty investor visa** allows individual investors to be admitted to the U.S. solely to develop and direct the operations of an enterprise in which he or she has invested, or of an enterprise in which he or she is actively in the process of investing a substantial amount of capital.

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O Visas for Individuals of Extraordinary Ability

The **O visa** is a popular alternative to the H-1B, but the program is highly restrictive. O visas allow foreign nationals who have demonstrated extraordinary ability in the sciences, education, business, athletics, arts or motion picture/television industries to visit the United States temporarily in order to work in their field. O visas may be granted for up to three years and extensions can be filed indefinitely. Employment could be the basis upon which an O visa application is based; however, just because a prospective employee could qualify for H-1B employment does not mean the same individual would be eligible for an O visa. Extraordinary ability in the fields of science, education, business or athletics means a level of expertise indicating that the person is one of the small percentage who has risen to the very top of their field of endeavor. If your prospective employee is very distinguished in his or her field, then an O visa should be considered.

Options for Multinational Employers

Multinational employers have a unique set of alternatives. One is to have the prospective employee continue working for the company, but to station them at the office of an affiliated foreign branch. This allows the employee to remain employed by the company and could give the employer additional chances to apply for an H-1B visa in future fiscal years. Moreover, having the employee work for an international affiliate may open up other doors. **L visas** allow for the intra-company transfer of foreign employees to U.S. parent, affiliate or subsidiary companies. The **L-1A visa** is for employees performing managerial or executive assignments in the United States. Initial approval can be up to three years, with the opportunity for two 2-year extensions, up to a maximum of seven years. The **L-1B visa** is for employees performing specialized knowledge assignments. Initial approval can be up to three years, with the opportunity for one 2-year extension, up to a maximum of five years. To be eligible for either L visa, the employee must have been continuously employed on a full-time basis by the foreign company for at least one year in the immediately preceding three years. Therefore, sending a managerial, supervisory or special knowledge employee overseas for one year would allow the company to file for an H-1B next year (for FY2019) and, if unsuccessful, to file for an L visa instead, since the one-year of employment prerequisite would be met.

Utilizing OPT and CPT

For certain students and recent graduates, missing out on a FY2018 H-1B visa is not the end of the world. The U.S. allows certain F-1 students and recent graduates to work before and/or after graduation through either the **Curricular Practical Training ("CPT")** or **Optional Practical Training ("OPT")** programs. Students in the STEM fields (*i.e.*, science, technology, engineering and math) can obtain longer OPT periods than other eligible students. If your employees have CPT and/or OPT eligibility left, then it may be possible for them to continue working for you until the H-1B filing date for FY2019 (*i.e.*, April 2, 2018). Importantly, pursuant to "cap-gap regulations," the employee does not need his or her OPT status to last all the way until October 1, 2018 (the start of FY2019 H-1B employment). If an H-1B petition is filed while the employee is on OPT, they qualify for a "cap-gap" extension and can continue working until either (i) their H-1B is denied, revoked, withdrawn or not selected in the lottery, or (ii) their start date of H-1B employment (*i.e.*, until September 30, 2018). If the H-1B petition is received while an individual is in their 60-day grace period after the end of OPT, they would be allowed to remain in the U.S. in F-1 status until their October 1, 2018 start date, but would not be eligible to work during that time.

Training or Internship Programs

An **H-3 visa** allows foreign nationals to receive training in the U.S., as long as: the training is not available in their home country; the training will benefit the foreign national in pursuing a career outside the United States; the foreign national will only engage in productive employment that is incidental and necessary to the training; and the trainee job is not in the normal operation of the U.S. business or one in which U.S. citizen or permanent resident workers (*i.e.*, green card holders) are regularly employed. There are obvious drawbacks to this route. First, unlike the H-1B, H-3 trainees are not allowed to have dual intent, meaning both a temporary and permanent intent to remain in the United States. H-3 trainees must have nonimmigrant intent and must prove their intention to return to their home country after the H-3 training has concluded. Second, the H-3 visa is not suitable for standard employees, which are the individuals for whom most H-1B petitions are filed. For a program to qualify under H-3, the focus should be on training and a trainee should only be doing productive work necessary and incidental to the on-the-job portion of the training. This would disqualify most employers whose primary goal in filing an H-1B is to add a productive employee to the workforce, but could be an option for employers offering a *bona fide* training program.

The **J-1 visa** classification allows foreign nationals to visit the United States as exchange visitors in order to receive training or participate in internships through programs offered by DOS-designated sponsors. J-1 trainee or intern status requires the foreign national to show (a) enrollment in or prior completion of a qualifying foreign university degree and/or (b) foreign employment experience. Trainees can receive permission to be in the U.S. for up to 18 months, and interns up to 12 months. DOS has specifically stated that it does not want J-1 training or internships to be used to staff U.S. businesses. Some J-1 programs also require the "graduating" foreign national to physically reside within their last country of legal permanent residence for two years before he or she may return to the U.S. in certain statuses, one of which being H-1B.

Permanent Residence

If your company wants to make a substantial commitment to the employee and pursue his or her "permanent" employment, it could consider sponsoring the employee for lawful permanent residence (*i.e.*, a green card). The process can be long and costly, and analysis of this option is beyond the scope of this article. However, if the position is one that would be difficult to fill with U.S. workers, green card sponsorship should be considered.

Conclusion

These are some of the many methods businesses use to keep their foreign talent when an H-1B petition is not selected in the lottery. It is not meant to be exhaustive. Only an experienced immigration attorney can help you analyze all the options that may be available to your particular situation.•