

Session 602

# Dual Representation and Conflicts of Interest for Corporate Immigration Counsel

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**#602 – DUAL REPRESENTATION AND  
CONFLICTS OF INTEREST FOR  
CORPORATE IMMIGRATION COUNSEL**

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## DUAL REPRESENTATION AND CONFLICTS OF INTEREST FOR CORPORATE IMMIGRATION COUNSEL

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- I. Introduction: Employing foreign workers can create conflicts for any employment law practitioner or corporate generalist. A panel of your peers will address the issues associated with representing both the employer and the employee in the applications for various employee immigration classifications. As corporations become more and more global and certain types of expertise is "imported," in-house counsel need to become more familiar with immigration laws. Here's your chance!

II. Visa Categories

<u>Visa</u>	<u>Description</u>
A	Diplomats and members of their immediate families
B	Temporary visitors
C	Aliens in transit
D	Crew members of ships or aircraft
E	Treaty traders and investors
F	Students in academic or language training programs
G	Representatives of foreign member governments to international organizations
H	Temporary workers
I	Representatives of foreign media, spouse, children
J	Exchange visitors
K	Fiancé(e)s of U.S. citizens and their children
L	Intracompany transferees
M	Students in vocational or recognized nonacademic programs
N	Parents and children of "special immigrants"
NATO	Representatives of NATO member states and NATO officials
O	Aliens of extraordinary ability

P	Athletes, entertainers, artists
Q	Participants in international cultural exchange programs
R	Aliens in religious occupations
S	Aliens supplying critical information relating to crime or terrorism
TN/TD	NAFTA professionals from Canada and Mexico, spouses, children

### III. Nonimmigrant Business Visas

#### a. B-1 Visa: Business Visitor

##### Description

- Most common visa used by foreign business travelers
- Cannot engage in gainful employment
- Cannot be paid as an independent consultant
- Business must be legitimate:
  - Engage in commercial transactions
  - Negotiate contracts
  - Participate in litigation
  - Attend conventions, conferences, seminars
  - Consult with business colleagues
- Must have adequate financial means
- Must depart at conclusion of visit
- Requires documentary evidence (i.e., letter re purpose of visit, duration of stay; itinerary)
- Do not use if intent is to later change to another visa category

Duration of stay: Time necessary to conduct business (not to exceed 1 year)

Extensions: Available in increments not to exceed 6 months each

Miscellaneous: Nationals of the following countries do not need a visa but may enter the U.S. under the Visa Waiver Pilot Program for up to 90 days and cannot change or extend their status:

- |             |                 |                  |
|-------------|-----------------|------------------|
| - Andorra   | - Germany       | - New Zealand    |
| - Argentina | - Iceland       | - San Marino     |
| - Austria   | - Italy         | - Slovenia       |
| - Belgium   | - Japan         | - Spain          |
| - Brunei    | - Liechtenstein | - Sweden         |
| - Denmark   | - Luxembourg    | - Switzerland    |
| - Finland   | - Monaco        | - United Kingdom |
| - France    | - Netherlands   |                  |

b. E Visa: Treaty Traders and Investors

Description

- Treaty of commerce and navigation between U.S. and alien's home country
- Treaty trader: engages in substantial trade (i.e., exchange, purchase or sale of goods/services) between U.S. and home country
- Treaty investor: has invested substantial amount of capital in a U.S. concern which he/she develops and directs
- If individual, is a national of the treaty country
- If company, is 50% or more owned by individuals in the U.S. who are of the nationality of the treaty country
- If individual, must be high-level executive, supervisor or someone with essential skills
- If company, must be parent-subsidary relationship with the U.S. concern

Duration of stay: No more than 2 years initially

Extensions: Increments of no more than 2 years

c. F-1 Visa: Academic Students

Description

- Granted for time required to complete a full academic program
- INS must approve educational institution
- Certificate (Form I-20) issued to student
- Must have sufficient monetary support for duration of program
- Educational institution can authorize employment (on-campus or off-campus)
- Curricular practical training may be available
- Optional practical training may also be available

Duration of stay: Time required to complete full academic program plus 1 year of practical training

Extensions: Not available unless student qualifies for another program

Miscellaneous: To remain employed after practical training, student must be granted another form of work authorization (e.g., H-1B visa).

d. H Visa: Temporary Worker

Description

- Temporary authorization granted
- Several subcategories a few of which are discussed here

H-1B Visa: Specialty Occupation

Description

- Permitted in occupations which require theoretical and practical application of a body of specialized knowledge and a bachelor's degree or higher
- If no degree, 3 years experience for every 1 year of college that is lacking
- Not necessary to prove foreign national is not displacing a U.S. worker
- Employer must pay prevailing wage for the position
- Employer-specific
- Subject to numeric limitation

Duration of stay: Total of 6 years (granted initially for 3 years)

Extensions: Available as long as duration of stay does not exceed 6 years

H-3 Visa: Trainee

Description

- Purpose is to train, not to improve employer's production
- Knowledge or experience must not be available in country where trainee resides
- Must submit detailed training schedule and reasons why it cannot be obtained abroad
- Must maintain foreign residence

Duration of stay: Time necessary to complete the training

Extensions: Available as long as total duration of stay does not exceed 2 years

e. J-Visa: Exchange Visitor

Description

- Used by foreign nationals who enter the U.S. to participate in an exchange program

- Purpose can be to teach, lecture, instruct, study, research, consult, or to receive certain training or education
- Controlled by United States Information Agency (U.S.I.A.) (an independent federal organization)
- May engage in employment and receive compensation if part of program

Duration of stay: Dependent upon category for which an individual is admitted

Extensions: Permitted if program extended

Miscellaneous: Must return to home country if this requirement not waived.

f. L-1 Visa: Intracompany Transferee

Description

- Available for executive, managers and those with specialized knowledge
- Must have been employed in the capacity for which foreign national is being transferred
- Must be coming to U.S. to fill position in that capacity
- Employed abroad by subsidiary or affiliate of U.S. company for at least one year of the preceding three years
- Foreign company transferring foreign national must be in business for the duration of stay
- Source of compensation not important
- Must depart U.S. at conclusion of stay

L-1A Description

- Executive
  - Directs the management of the organization or of a major component of the organization or a function in the organization
  - Establishes goals and policies of the organization
  - Possesses broad discretionary decision-making authority
  - Receives general supervision or direction from superiors
  - Supervises the work of others or of a function
- Manager
  - Directs the organization, a department or a division of the organization or a function
  - Controls the work of other professionals, supervisors or managers (unless he/she manages a function)
  - Possesses the authority to hire and fire or to make recommendations regarding hiring or other employee-related actions (unless he/she manages a function)
  - Exercises discretionary authority over day-to-day operations

Duration of stay: 7 years total



#### L-1B Description

- Specialized knowledge
  - Company product and its application in international markets
  - Advanced level of expertise of company processes and procedures

Duration of stay: 5 years total

#### g. O-1 Visa: Individuals of Extraordinary Ability

##### Description

- Extraordinary ability
- Nationally or internationally known for their expertise
- Made achievements in their field
  - Awards
  - Published in professional or trade publications
  - Recognized contributions in field of specialization
- Must have a sponsor and job offer

Duration of stay: Time necessary to complete the event or activity, not to exceed 3 years

Extensions: Increments of up to 1 year to continue same event or activity

#### h. TN Visa: Canadian and Mexican Professionals

##### Description

- To engage in professional business activities in accordance with NAFTA
- Must have Baccalaureate degree or appropriate credentials
- Equivalency in experience not accepted
- Visit to U.S. is temporary

##### Canadian Professionals

- Proof of Canadian citizenship
- Proof of credentials
- Profession listed on Schedule 2 of NAFTA
- Minimum of bachelor's degree
- Must establish nonimmigrant intent
- Documentation of remuneration re U.S. activity

Duration of stay: Maximum 1 year initially

Extensions: Unlimited extensions of 1 year

Miscellaneous: Visa processing usually occurs at the border or port of entry.

#### Mexican Professionals

- Must be sponsored by U.S. company which petitions INS for nonimmigrant worker status
- Labor Condition Application must be filed with and approved by DOL
- Must apply for visa at U.S. consulate
- Must prove nonimmigrant intent

Duration of stay : Maximum 1 year initially

Extensions: Unlimited extensions of 1 year

#### IV. Miscellaneous Considerations

- a. Change in employer: work visas are employer-specific
- b. Document fraud
- c. Employment discrimination re individual's national origin or citizenship status
- d. Family members must separately qualify to be allowed to work in U.S.
- e. Form I-9 Employment eligibility verification: applicable to foreign nationals hired as temporary employees; must re-verify prior to expiration of work authorization
- f. Overstays: subjects alien employees to removal if they remain in U.S. under expired visas
- g. Permanent residency: involves recruitment phase which requires proof that no U.S. citizen or permanent resident can perform minimum responsibilities of position
- h. Termination of employment: may require U.S. employer to pay cost of return airfare home for alien employee; employer to notify INS re termination
- i. Trade embargoes: foreign nationals from country where U.S. has imposed a trade embargo may not be able to work in the U.S.

## V. Conflict of Interest/Ethical Considerations

Hypothetical #1: Joe Cool is an employee of your domestic subsidiary in New York. He has been working under an H-1B temporary worker visa for 5 \_ years. He has applied for family-based permanent residency due to his marriage to a U.S. citizen. Before permanent residency is granted, however, Joe and his wife separate and a divorce is imminent. Joe calls you, the corporate attorney at the company's headquarters in Delaware, and asks you what he should do regarding his U.S. status.

Consider these questions: Is Joe your client? Is the company your client? Is there a conflict of interest situation here? What about the Marriage Fraud Act? Do you have any reason to question the validity of the marriage? And should you question it? What happens to Joe's ability to work in the U.S. if the permanent residency petition does not go through?

Hypothetical #2: Komp Uter, a fledgling genius, has been working at your company under the practical training aspect of a student visa after completing his bachelor's degree at Advance University. Your CEO has taken a real liking to Komp and wants you to get a visa so Komp can continue working after the practical training ends.

Komp comes to your office and shows you his passport and practical training authorization which expires next week. Knowing that it is impossible to obtain an H-1B employment visa before the practical training will expire, you advise Komp that he will have to leave the country and wait for a visa while in Timbuktu. Komp tells you that he cannot go back to Timbuktu and, if you can't get a visa for him, he will go to your competitor and make it his life's work to drive your company out of business. You explain to Komp that you can get him a B-2 tourist visa; then, while he is on a B-2 visa, you can try to change his status to an H-1B. Komp agrees with the plan and tells you he is never going to leave the United States, no matter what happens.

You file for and obtain the B-2 visa. You then file the H-1B and obtain that visa for Komp. Komp returns to work at your company. He stops by to see you three months later and shares with you that he was so glad to be back because his moonlighting job was really starting to be a drag; he wants a copy of his approval notice because the people in Human Resources keep calling him, wanting the immigration documents. Komp also tells you that he wants you to file for his employment-based permanent residency.

Question: What are the ethical considerations from the beginning of Komp's history with your company to the present?

Hypothetical #3: Nikki is an intracompany transferee, working for your company under an L-1B visa. She is from Japan and is married to a Brazilian man, T. J., who is working for another company in the U.S. under an H-1B visa. Nikki will be granted permanent residency based on her husband's employment-based permanent residency petition.

Nikki and T.J. are quite excited about the upcoming birth of their child. Nikki goes into labor early and has some complications. Although her new son is fine, Nikki has developed a serious health condition and needs to take time off from work.

Your company's human resources staff member does not explain FMLA leave to Nikki because he mistakenly believes that Nikki is considered a "temporary" worker and is thus not entitled to the same benefits as U.S. workers. In addition, during the time Nikki is out, her L-1B visa expired before the approval of her extension was received.

As the in-house attorney for Nikki's company, what do you do?

Consider these questions: What conflict of interest matters have arisen, if any? Who is your client? The company? The HR employee? Nikki?

Is Nikki entitled to the same benefits as U.S. workers? Doesn't the Labor Condition Application state that the company will offer her "equivalent" benefits? What are "equivalent" benefits? What if Nikki is getting an allowance for housing, although no U.S. worker is getting that benefit? Is paid housing an "equivalent" benefit?

Even though Nikki's husband works for another company, should you ask for proof that he and Nikki are in fact enroute to permanent residency? Should you at least monitor this process?

How does Nikki's "out of status" situation affect the permanent residency process, if at all?

Hypothetical #4: Same situation as #3 but Nikki's grandfather in Japan is quite ill. She plans to visit Japan if things get worse. You explain to Nikki that there are several issues to consider which would jeopardize her status in the U.S. and would jeopardize her ability to reenter the U.S. A vice president of the company tells you to do whatever it takes so that Nikki can visit her dying grandfather. The vice president is particularly sensitive to this because she herself just recently lost her mother to cancer and remembers the trauma the family endured when her brother was not able to make it to the funeral. Her brother had a legitimate reason for not being there as he was in the Navy and on a ship destined for an unspecified site. His absence nonetheless made things awkward for the family.

Consider these questions: Who is your client? Nikki? The vice president? The company? All three to varying levels? Are there competing interests here? Do you listen to the vice president and follow her orders, knowing that Nikki may not be permitted to reenter the U.S.?

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## An Overview of Temporary U.S. Business Visas

by Cynthia A. Binns

*Cynthia A. Binns is corporate attorney for Nordson Corporation and president of ACCA's Northeast Ohio Chapter.*

To remain competitive in the world economy, U.S. employers may wish to overcome the shortage of qualified U.S. workers in a given discipline (whether perceived or real) by employing foreign nationals. Alternatively, U.S. companies may find it beneficial to train employees of a foreign subsidiary in the operation and maintenance of its products or technology. Facilitating this global exchange of personnel requires an understanding of the procedures involved in obtaining temporary employment authorization for foreign nationals. There is much more to this process than simply completing the appropriate form and submitting it to the proper authority or attempting to figure out what to do after the employee arrives in the United States.

### Immigration Forms and Instructions

Immigration forms and instructions can be obtained through Immigration and Naturalization Service (INS): 800/870-3676; [www.ins.usdoj.gov](http://www.ins.usdoj.gov). When following the instructions, include a check for the correct application fee, submit adequate documentary evidence, and forward the material to the appropriate INS office. Chances are the effort will be successful. In the event information or documents are missing or are not clear, INS will contact the applicant company. Deficiencies can usually be overcome.

Planning ahead is important, as the employment authorization process can be time-consuming. It typically requires documentary evidence of the reason for the transfer, the qualifications of the person being transferred, and the relationship between the domestic and foreign companies. This article will provide a general overview to assist in-house counsel in the decision-making process regarding temporary business-related visas. It is not meant to be a complete dissertation on the visas listed, nor is every business-related visa discussed. The article addresses visas that are most often encountered by U.S. corporations and their in-house counsel.<sup>1</sup>

A word of caution: this area of law can be a moving target. Be sure to check the law for subtleties or consult an immigration attorney who deals with these issues on a daily basis. (To assist in making a quick assessment of the situation, consult the "Temporary Nonimmigrant Business Visas at a Glance" chart)

<b>Temporary Nonimmigrant Business Visas at a Glance</b>		
<b>VISA Category</b>	<b>Description</b>	<b>Maximum Duration of Stay</b>
B-1	Business Visitor	Time necessary to conduct business not to exceed 1 year, with extensions available in increments not to exceed 6 months each
F-1	Student	Time required to complete a full academic program (in other words, duration of status), plus a period of practical

		training/ employment not to exceed 1 year
H-1B	Temporary Worker: Specialty Occupation	6 years (initially granted for up to 3 years, with extensions available up to 3 years)
H-3	Temporary Worker: Trainee	2 years (initially granted for the time necessary to complete the training, with extensions available not to exceed a total of 2 years)
J-1	Exchange Visitor	Depends on the category in which admitted, but no more than 18 months
L-1A	Intracompany Transferee: Executive or Manager	7 years (initially granted for up to 3 years, with extensions available up to 4 years)
L-1B	Intracompany Transferee: Specialized Knowledge	5 years (initially granted for up to 3 years, with extensions available up to 2 years)
O-1	Individual with Extraordinary Ability	Time necessary to complete the event or activity, not to exceed 3 years
TN	Trade NAFTA (Canadian and Mexican Professionals)	1 year with unlimited renewals of 1-year increments

### **B-1 Visa Category: Business Visitors**

The most common visa used by foreign business travelers is the B-1 visa. Foreign nationals who need to conduct business during a brief visit to the United States but who will not engage in gainful employment use this visa.<sup>2</sup> U.S. employers cannot pay these visitors a salary nor can they compensate visitors as independent contractors.<sup>3</sup> In other words, the benefit derived from the business activity must accrue outside of the United States.

The business conducted by these visitors in the United States must be legitimate and of a commercial or professional nature.<sup>4</sup> Although there is no clear-cut test to determine the activities that fall under this category, examples include foreign nationals who enter the United States to engage in commercial transactions, negotiate contracts, participate in litigation, attend conventions, conferences, or seminars, and to consult with business colleagues.

This visa is granted for the duration of the visitor's stay, which is not to exceed one year. Additionally, extensions may be granted in increments no greater than six months each.<sup>5</sup> Foreign business visitors must have adequate financial means to travel in the United States and must have made arrangements to depart at the conclusion of their visit.<sup>6</sup> Documentary evidence is needed to support the visa petition, such as a company letter. The letter should

set forth details of the trip, including the business purpose, duration of stay, and a copy of the visitor's itinerary. The letter should also provide assurance that travel expenses and salary will be covered by a non-U.S. source.<sup>7</sup>

Foreign nationals should not use a B-1 visa as a quick way to enter the United States when their intent is to later change their status to another visa category. Such a use can be considered fraudulent and may result in the visitor being denied a visa, having deportation proceedings initiated, or being barred from future visits to the United States.<sup>8</sup>

Nationals of several countries are not required to obtain a B-1 visa under certain circumstances if their country participates in the Visa Waiver Pilot Program. This program is available to nationals from Andorra, Argentina, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, San Marino, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.<sup>9</sup>

Foreign nationals seeking this waiver cannot remain in the United States for more than 90 days and are not permitted to extend or change their status.<sup>10</sup>

### **F-1 Visa Category: Academic Students**

F-1 student visas are granted to foreign nationals for the time required to complete a full academic program at an approved educational institution.<sup>11</sup> Many U.S. employers hire F-1 students during the practical training aspect permitted under this visa. The student's school, which must be approved by Immigration and Naturalization Service (INS) for attendance by foreign students, issues a certificate (Form I-20) to the student.<sup>12</sup> The student then presents the certificate, an application, and supporting documents to a U.S. consulate office in his or her home country for issuance of the visa.<sup>13</sup>

To qualify for this visa, students must be enrolled in a full course of study in the United States.<sup>14</sup> Neither part-time nor vocational programs qualify.<sup>15</sup> Students must be able to demonstrate that they have sufficient monetary support for the duration of the academic program.<sup>16</sup> On-campus or off-campus employment may be authorized by the U.S. educational institution under certain situations.<sup>17</sup> The employment must not exceed 20 hours per week while school is in session; full-time employment may be permitted when school is not in session.<sup>18</sup>

Of particular interest to employers is the practical training component. This training (in other words, employment) is available to qualifying F-1 students if it is directly related to the student's major area of study.<sup>19</sup>

One type of practical training is "curricular practical training," an internship arrangement offered to students by sponsoring employers through an agreement with the student's school.<sup>20</sup> The training must be part of an established curriculum program. Students who participate in one year or more of full-time curricular practical training will not be eligible for post-completion practical training.<sup>21</sup>

F-1 students may apply for another form of practical training called "optional practical training," under which they may be employed while still enrolled in school or after

completing the course of study.<sup>22</sup> The training/employment must be concluded within a 14-month period following completion of the study.<sup>23</sup>

Regardless of the form of employment, it cannot exceed one year.<sup>24</sup> Furthermore, prior to accepting employment, students must obtain an Employment Authorization Document issued by INS.<sup>25</sup> If an employer desires to continue employing a student, the employer is required to petition INS for a temporary work visa (an H-1B visa) for the student prior to the expiration of the practical training.

### **H Visa Category: Temporary Workers**

Foreign nationals who desire to work temporarily in the United States may qualify for an H visa.<sup>26</sup> A few H visa categories are discussed below.

### **H-1B Visa Category: Specialty Occupations**

This visa allows U.S. employers to temporarily hire foreign nationals who perform services in a "specialty occupation."<sup>27</sup> Specialty occupations are defined as those that require the theoretical and practical application of a body of specialized knowledge and a bachelor's degree or higher (or the equivalent) in that specialty.<sup>28</sup> Examples include accounting, architecture, engineering, education, business specialties, medicine and health, mathematics, physical sciences, law, theology, the arts, and social sciences.<sup>29</sup> Documentary evidence showing that the position is in a specialty occupation is required.<sup>30</sup> If the foreign national does not have a degree, three years of specialized training and/or work experience must be shown for each year of college that is lacking.<sup>31</sup>

It is not necessary for employers to prove the foreign national is not displacing a U.S. citizen to fulfill the requirements for issuance of this visa, but employers must pay foreign nationals the prevailing wage for the position. This wage rate is subject to review and approval by the Department of Labor (DOL) prior to the visa application being filed.<sup>32</sup>

The initial duration of stay under the H-1B visa category is no more than three years.<sup>33</sup> An extension of stay may be requested for up to three years, but the total period of time foreign nationals can remain in the United States while classified in this category is six years.<sup>34</sup>

The visa is employer-specific. If a foreign national changes employers, he or she must obtain a new visa. The foreign national would not be permitted to begin new employment until the visa is approved.<sup>35</sup>

H-1B visas are subject to a numeric limitation (in other words, a cap). Recent legislation raised the limitation to 115,000 visas for the federal fiscal year 1999 (October 1 to September 30). The same number of H-1B visas will be available in 2000. In subsequent years, however, the number of H-1B visas will decrease, to 107,500 in 2001 and only 65,000 in 2002.<sup>36</sup>

### **H-3 Visa Category: Trainees**



The purpose of an H-3 visa is to provide training to alien employees. It is not meant to improve employers' production or employment situations.<sup>37</sup> Foreign nationals must be provided knowledge or experience that is unavailable in their country of residence.<sup>38</sup>

Evidence must be submitted in support of the application, which describes the training program and supervision required. The reason the alien employee requires the training and why it cannot be obtained abroad must also be described. Further details of the training are required, such as the number of hours to be spent in on-the-job and in classroom training.<sup>39</sup> A general description of the program that does not include a set agenda or schedule or appears incompatible with the nature of the U.S. employer's business will not be accepted.<sup>40</sup>

Foreign national employees must maintain a foreign residence during their stay in the United States under this visa category. The stay cannot exceed two years.<sup>41</sup> Extensions of stay may be permitted for the duration of the training program, but cannot exceed a total of two years.<sup>42</sup>

### **J-1 Visa Category: Exchange Visitors**

This visa is available to foreign nationals who enter the United States to participate in an exchange program.<sup>43</sup> The purpose of the stay can be to teach, lecture, instruct, study, research, consult, or receive certain training or education as part of an established program.<sup>44</sup> Categories of J-1 visas include students, scholars, trainees, teachers, professors, and research assistants.<sup>45</sup>

The J-1 visa is unlike other visas in that it is not controlled by INS but by the United States Information Agency (USIA), an independent federal organization.<sup>46</sup> Exchange visitors may engage in employment and receive compensation through an approved sponsor when their employment is part of the exchange program.<sup>47</sup> Sponsors may be educational institutions, nonprofit associations, government agencies, hospitals, or business concerns.<sup>48</sup>

The duration of stay in the United States is dependent upon the category in which an individual is admitted.<sup>49</sup> Extensions of stay are permitted if the program is extended.<sup>50</sup>

Once the purpose of the visa has been realized, foreign nationals may be required to return to their home country and are not permitted to apply for any other temporary work visa or for permanent residency until the requirement has been met or a waiver obtained.<sup>51</sup>

### **L-1 Visa Category: Intracompany Transferees**

Two categories of intracompany transfer visas are available to foreign nationals: executives and managers (L-1A visas) and individuals with specialized knowledge (L-1B visas). To be granted a visa in either of these categories, foreign nationals must have been employed by the related foreign company as an executive/manager or as someone with specialized knowledge, and must be coming to the United States to fill a position in that capacity.<sup>52</sup>

These visas are available to foreign nationals who have been employed abroad by a parent, subsidiary, branch, or affiliate of a U.S. company for a continuous one-year period sometime during the preceding three years.<sup>53</sup> The foreign company transferring the

individual must be in business for the duration of the foreign national's stay in the United States.<sup>54</sup>

Although the source of compensation is not important, foreign nationals must be employed by the U.S. company. Upon completion of the authorized stay, foreign nationals must depart the United States<sup>55</sup> unless permanent residency has been obtained.

### **L-1A Visa Category: Executives or Managers**

Factors used to determine whether an individual is an executive include the following:

- \* Directs the management of the organization or of a major component of the organization or a function in the organization;
- \* Establishes goals and policies of the organization;
- \* Possesses broad discretionary decision-making authority;
- \* Receives general supervision or direction from superiors; and
- \* Supervises the work of others or of a function.<sup>56</sup>

Factors used to determine whether an individual is a manager include the following:

- \* Directs the organization, a department, or a division of the organization or a function;
- \* Controls the work of other professionals, supervisors, or managers (unless he/she manages a function);
- \* Possesses the authority to hire and fire or to make recommendations regarding hiring or other employee-related actions (unless he/she manages a function); and
- \* Exercises discretionary authority over day-to-day operations.<sup>57</sup>

Foreign nationals need not show that they maintain a foreign residence during the duration of their stay under an L-1A visa.<sup>58</sup> The maximum duration of stay in the United States under an L-1A visa is seven years.<sup>59</sup>

Whether individuals are considered executives or managers, they are exempt from the labor certification process if permanent residency is sought. This means that it is not necessary to prove a foreign national is not displacing a U.S. worker in order to have permanent residency granted.)

### **L-1B Visa Category: Individuals with Specialized Knowledge**

This visa is used when foreign nationals have specialized knowledge that would be used to benefit a U.S. entity. This specialized knowledge can be of the company product and its

application in international markets or an advanced level of expertise of company processes and procedures.<sup>60</sup>

Individuals can remain in this status for a total of five years.<sup>61</sup> If permanent residency is sought, it is necessary to prove there is no U.S. citizen or permanent resident ready, willing, and able to perform the minimum requirements of the position.

### **O-1 Visa Category: Individuals of Extraordinary Ability**

This visa is available to individuals who are deemed by INS to have "extraordinary ability" and are nationally or internationally known for their expertise.<sup>62</sup> Foreign nationals may qualify for this visa if it can be shown that they have made achievements in their field.<sup>63</sup> These can be major, internationally recognized, awards, published material in professional or trade publications, or recognized contributions in their field of specialization.<sup>64</sup> This category is meant to be used by foreign nationals with extraordinary ability in arts, athletics, business, education, and sciences, as well as by those who have a documented record of outstanding achievement in the motion picture or television industry.<sup>65</sup>

Foreign nationals who seek this visa must have a sponsor and a job offer.<sup>66</sup> The duration of stay under this visa category is the time necessary to complete the event or activity, not to exceed three years.<sup>67</sup> Extensions are permitted in increments of up to one year for individuals to continue the same event or activity for which they were admitted.<sup>68</sup>

### **TN Visa Category: Canadian and Mexican Professionals**

The TN visa allows for expedited visa processing. It is available to Canadian and Mexican citizens who desire to enter the United States to engage in professional business activities in accordance with the provisions of the North American Free Trade Agreement (NAFTA).<sup>69</sup> Professionals must have at least a baccalaureate degree or appropriate credentials indicative of their professional status. This is one situation for which equivalency in experience will not be accepted.<sup>70</sup> These professionals must plan to remain in the United States on a temporary basis only.<sup>71</sup> The requirements for Canadians and for Mexicans are somewhat different.

#### **Canadian Professionals**

Canadian foreign nationals must have proof of their Canadian citizenship and proof that they possess the necessary credentials for the position.<sup>72</sup> The intended activity in the United States must be in a profession listed on Schedule 2 of NAFTA.<sup>73</sup>

Canadian foreign nationals must establish a nonimmigrant intent.<sup>74</sup> They must have documentation of the remuneration arrangements for their activity in the United States.<sup>75</sup> The maximum period of initial stay is one year, but unlimited extensions of stay for one-year durations can be obtained.<sup>76</sup> Processing for a TN visa usually occurs at the border or port of entry.

#### **Mexican Professionals**

Mexican professionals may have more difficulty obtaining TN visas than their Canadian counterparts. An employer from the United States must sponsor the individual and petition INS for nonimmigrant worker status.<sup>77</sup> A Labor Condition Application must be filed and approved by the DOL (similar to the first step in the H-1B visa process) to ensure that the professional will be paid the prevailing wage for the position.<sup>78</sup>

Once the visa petition has been approved, the Mexican foreign national must apply for a visa at the United States consulate office. The individual must prove nonimmigrant intent or be subject to denial of the visa.<sup>79</sup> As with a TN visa for Canadian professionals, the visa is typically granted for one year and one-year extensions are possible.<sup>80</sup>

### **Miscellaneous Considerations**

In addition to meeting the various nonimmigrant visa requirements, keep in mind that there are a number of other issues to address. Here are the major ones:

#### *Change in Employer*

Temporary work visas are employer-specific and are not transferable. Therefore, a visa holder employed by one company cannot use that visa as authorization to work for another company. A new visa must be obtained.

#### *Document Fraud*

It is unlawful to prepare, file, or assist another in preparing or filing documents with knowledge or reckless disregard of the falsity of those documents.<sup>81</sup>

#### *Employment Discrimination*

It is unlawful to discriminate against an individual with regard to hiring, discharging, or recruiting because of the individual's national origin or citizenship status.<sup>82</sup> Employees may not be treated differently because of their appearance, accent, name, or similar factors or because they have a temporary work status in the United States.

#### *Family Members of Visa Holders*

Appropriate visas must be obtained for family members transferring to the United States with foreign nationals. Family members of visa holders are not permitted to be employed in the United States unless they separately qualify for and obtain an appropriate temporary work visa.

#### *Form I-9 Employment Eligibility Verification*

The I-9 process is applicable to foreign nationals who are hired as temporary employees. Because an expiration date is associated with the individual's employment authorization, employment eligibility must be reverified prior to the date the work authorization expires.

#### *Overstays*

Alien employees who remain in the United States under expired visas are subject to removal.<sup>83</sup> Further, employers who continue to employ these individuals may be subject to civil and criminal sanctions.<sup>84</sup> It is imperative, as a matter of compliance with the law, to make certain the status of alien employees remains current and that their documents, including passports, have not expired.

### *Permanent Residency*

Should it become desirable to seek permanent residency status for an alien employee, the process should be started as soon as reasonably possible. Currently, processing takes two years or more. When an employer petitions for permanent residency, the first step is referred to as labor certification. This is the recruitment phase which requires proof that there are no U.S. citizens or permanent residents ready, willing, and able to perform the minimum requirements necessary to fill the position.<sup>85</sup> Once that step has been successfully completed, the employer petitions INS to obtain immigrant status for the individual and then ultimately files the permanent residency application.

### *Termination of Employment*

If a foreign national's employment is terminated before his or her temporary work visa has expired, the U.S. employer must notify INS. INS will then officially revoke the nonimmigrant status of that individual.<sup>86</sup> In some cases, the U.S. employer is required to pay the cost of airfare home for the terminated employee.<sup>87</sup> Although the law does not require employers to pay for the return transportation of the foreign national's family or household goods, many employers cover these expenses as part of their relocation package.

### *Trade Embargoes*

In certain situations, U.S. employers may not employ foreign nationals who are located outside the United States and are from a country on which the United States has imposed a trade embargo. Consult the applicable regulations for further details.

## **Conclusion**

The procedures to obtain business visas must be followed with precision. At any point along the way, something could go wrong that could lead to a denial of the requested visa. Even if the visa has been granted, final approval is always at the discretion of the immigration officer reviewing the case. For situations that may present more of a challenge, in-house counsel may benefit from consulting an immigration handbook or immigration counsel. Further, bear in mind that obtaining employment authorization is only part of the process. One must also look into the associated tax and benefit issues that may affect the employee. There are also the employee's dependents to consider, especially educational requirements for children. Issues related to the storage or transportation of the employee's household goods are another consideration, as is language and cultural training. Other factors may involve special medical needs of the employee or a family member and moving a beloved pet. These comments are not meant to discourage employers from temporarily employing foreign nationals, but are meant to alert in-house counsel to some practical considerations.

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## NOTES

1. Some other business-related visas are: E-1 Treaty Trader, E-2 Treaty Investor, H-1A Registered Nurse, H-2A Temporary Agricultural Worker, I Representative of Foreign International Media, P-1 Internationally Recognized Athlete or Member of a Recognized Entertainment Group, and R-1 Religious Worker. For a quick listing of all visas, see the applicable sections on the website *Margaret W. Wong & Assoc., LPA Newsletter* (last

- modified May 5, 1999): [www.imwong.com](http://www.imwong.com) or visit the website *United States Immigration and Naturalization Service* (last modified Jan. 18, 1999): [www.ins.usdoj.gov](http://www.ins.usdoj.gov).
2. 8 U.S.C. §1101(a)(15)(B)(1994); 8 C.F.R. §214.2(b)(1998); 22 C.F.R. §41.31 (1998).
  3. 22 C.F.R. §41.31(b)(1).
  4. *Id.*
  5. 8 C.F.R. 214.2(b)(1).
  6. *Id.* §41.31(a)(3).
  7. Austin T. Fragomen Jr., Alfred J. Del Rey Jr. & Steven C. Bell, IMMIGRATION PROCEDURES HANDBOOK, 1-5 (1999).
  8. *Id.* at 1-8.
  9. 8 C.F.R. §217.2(a).
  10. 8 U.S.C. §1187(a)(1).
  11. *Id.* §1101(a)(15)(F); 8 C.F.R. §214.2(f)(5)(i).
  12. 8 C.F.R. §§214.2(f)(5)(i), 214.2(f)(1)(i)(A).
  13. *Id.* §214.2(f)(1)(i)(A); *see also* Fragomen, *supra* note 7, at 2-5.
  14. 8 C.F.R. §214.2(f)(5)(i).
  15. *Id.* §214.2(f)(6)(E)(ii). Vocational or business schools are classified as M-1 schools. For details, see *id.* §214.2(m).
  16. 8 C.F.R. §214.2(f)(1)(i)(B).
  17. *Id.* §214.2(f)(9).
  18. *Id.*
  19. *Id.* §214.2(f)(10).
  20. *Id.* §214.2(f)(10)(i).
  21. *Id.*
  22. *Id.* §214.2(f)(10)(ii).
  23. *Id.* §214.2(f)(10)(ii)(A)(4).
  24. *Id.* §214.2(f)(11).
  25. *Id.*
  26. 8 U.S.C. §1101(a)(15)(H); 8 C.F.R. §214.2(h).
  27. 8 C.F.R. §214.2(h)(1)(i).
  28. *Id.* §214.2(h)(4).
  29. *Id.* §214.2(h)(4)(ii)(4).
  30. *Id.* §214.2(h)(4)(iii)(B)(2).
  31. *Id.* §214.2(h)(1)(iii)(D)(5).
  32. *Id.* §214.2(h)(4)(iii)(B)(2).
  33. *Id.* §214.2(h)(9)(iii)(A)(1).
  34. *Id.* §214.2(h)(13).
  35. *Id.* §214.2(h)(2)(i)(D).

36. Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, No. 105-277, §411 (Oct. 21, 1998). *See also, The H-1B Compromise Bill: An Analysis*, 17 IMMIG. L. REP. 230 (1998); *Changes Regarding the H-1B Visa*, WONG'S GUIDE TO IMMIG. BASICS, NOV. 1998, at 3.
37. 8 C.F.R. §214.2(h) (7) (ii) (A) (3).
38. *Id.* §214.2(h) (7) (ii) (A) (1).
39. *Id.* §214.2(h) (7) (ii) (B).
40. *Id.* §214.2(h) (7) (iii).
41. *Id.* §214.2(h) (9) (iii) (C) (1).
42. *Id.* §214.2(h) (15) (ii) (D).
43. 8 U.S.C. §1101(a) (15) (J); 8 C.F.R. §214.2(j).
44. 8 U.S.C. §1101(a) (15) (J).
45. *Id.*
46. *Id.*
47. 22 C.F.R. §514.16.
48. *Id.* §514.3(a).
49. 8 C.F.R. §214.2(j) (1) (ii).
50. *Id.* §214.2(j) (1) (iv).
51. 8 U.S.C. §§1182(e), 1258(3).
52. 8 C.F.R. §214.2(l) (1).
53. 8 U.S.C. §1101(a) (15) (L); 8 C.F.R. §214.2(l) (1) (i).
54. 8 C.F.R. §214.2(l) (ii) (G) (2).
55. *Id.* §214.2(l) (1) (ii).
56. *Id.* §214.2(l) (1) (ii) (C).
57. *Id.* §214.2(l) (1) (ii) (B).
58. 8 U.S.C. §§1184(b), (h).
59. 8 C.F.R. §214.2(l) (12) (i).
60. *Id.* §214.2(l) (ii) (D).
61. *Id.* §214.2(l) (12) (i).
62. *Id.* §214.2(o) (1) (ii) (1).
63. *Id.* §214.2(o) (1) (iii).
64. *Id.* §214.2(o) (3) (iii).
65. *Id.* §214.2(o) (1) (i).
66. *Id.*
67. *Id.* §214.2(o) (6) (iii) (A).
68. *Id.* §214.2(o) (12) (ii).
69. *Id.* §214.6(a).
70. *Id.* §214.6(b).
71. *Id.* §214.6(b).
72. *Id.* §214.6(e) (3).
73. *Id.* §214.6(c).
74. *Id.* §214.6(b)

76. *Id.* §§214.6(f), (h) (2).
77. *Id.* §214.6(d) (1).
78. *Id.* §214.6(d) (2) (i).
79. *Id.* §214.6(b).
80. *Id.* §214.6(h) (1).
81. *Id.* at §274C(a).
82. Immigration and Nationality Act §274B(a), 8 U.S.C. §1101 (1994).
83. 8 U.S.C. §1251(a) (1) (C).
84. *Id.* §1324a(e).
85. 8 U.S.C. §(a) (5) (A).
86. 8 C.F.R. §214(h) (11) (i) (B) (ii).
87. *Id.* §214.2(h) (4) (iii) (E).