

# IMMIGRATION LAW

WEEK FOUR

# NONIMMIGRANT VISA OVERVIEW

## Visas for Business Visitors

- ▶ Visa Waiver Program (VWP) | B-1

## Visas for Intercompany Transfers

- ▶ L-1A (Managers / Executives)
- ▶ L-1B (Specialized Knowledge)

## Visas for Treaty Countries

- ▶ E-1 (Treaty Traders - Managers, Executives, Specialized Knowledge)
- ▶ E-2 (Treaty Investors - Managers, Executives, Specialized Knowledge)

# NONIMMIGRANT VISA OVERVIEW

## **Visas for Professional Specialty Occupations**

- ▶ H-1B
- ▶ H-1B1 (Free Trade Agreements – Singapore, Chile)
- ▶ TN (NAFTA Canada, Mexico)
- ▶ E-3 (Australia)

## **Visas for Training**

- ▶ J-1 | H-3 | F-1 OPT

## **Visas for those with Extraordinary Ability**

- ▶ O-1

# PETITIONERS AND BENEFICIARIES

5

When working with an employer or petitioner, looking to sponsor a foreign national or beneficiary to work in the United States, such employers are often less concerned with the name of the visa and more focused on the following factors:

- ▶ **Cost:** How expensive is it going to be to obtain employment authorization?
- ▶ **Duration:** How long is the visa valid for and can it be renewed?
- ▶ **Delay:** How long is it going to take to secure employment authorization?
- ▶ **Ease:** How much effort is required on the part of the Company to secure the employment authorization?
- ▶ **Petitioner:** The entity or individual filing an immigration benefit on behalf of a foreign national
- ▶ **Beneficiary:** The foreign national who is the recipient of an immigration benefit

# Change in Adjudicative Standards

5

In 2004, the USCIS issued a memo which clarified adjudication standards.

- ▶ adjudicators were instructed to defer to prior determinations of eligibility when adjudicating petition extensions involving the same parties and underlying facts as an initial petition, except in certain, limited circumstances.

In October 2017, this “prior deference standard” through the 2004 memo was revoked.

- ▶ Adjudicators are now to conduct a “*de novo*” review for each and every filing so that adjudicators “should not feel constrained in requesting additional documentation in the course of adjudicating a petition extension”.

This policy shift had increased requests for additional evidence and denials.

# VISAS FOR TREATY COUNTRIES

8 INA§101(A)(15)(E); 8 C.F.R.§214.2(e); 9 FAM 402.9

## **E-1: “Treaty Trader”**

- ▶ The applicant must be a national of a treaty country and hold a
- ▶ supervisory / executive or essential skills position
- ▶ The trading firm must have the nationality of the treaty country
- ▶ The international trade must be “substantial”
- ▶ The trade must be principally b/w the U.S. and the treaty country

# VISAS FOR TREATY COUNTRIES

8 INA § 101 (A) (15) (E); 8 C.F.R. § 214.2(e); 9 FAM 402.9

## E-2: "Treaty Investor"

- ▶ The applicant must be a national of a treaty country and must hold a
  - ▶ supervisory / executive or essential skills position
  - ▶ The U.S. entity must have the nationality of the treaty country
  - ▶ The investment must be "substantial", "real", and "not marginal"
- 
- ❖ Can apply directly at consulate / embassy
  - ❖ 100% nonimmigrant intent
  - ❖ Available for up to 5 years and renewable indefinitely
  - ❖ Spouses provided employment authorization

## ALERT:

Watch out for changes in ownership

# Example

- ▶ Intek UK is a privately held technology company headquartered in the United Kingdom and registered as a corporation under U.K. law. Intek UK has a small subsidiary in the United States called Intek US that is 100 percent owned by Intek UK. In order to determine if Intek US can use the E nonimmigrant visa classification, a consular officer will review the nationality of the individuals who own shares of Intek UK. If at least 50 percent of those shareholders are U.K. citizens, Intek US can use the E nonimmigrant visa to transfer British nationals to the United States.



# Example

- ▶ Rory, an Irish national, started a computer systems integration business in the United States. Based on this investment, Rory obtained E-2 nonimmigrant status. He has met a number of potential clients in the United States looking for help incorporating a very specific European systems integration software product into their existing operations. Although Rory searched for a few weeks, he could not find a U.S. worker who possessed this essential knowledge. However, he has a colleague, Ian, who is also an Irish national and is an expert in this exact type of work. Rory would be able to support Ian to obtain an E-2 essential skills visa to perform this work on behalf of his company.

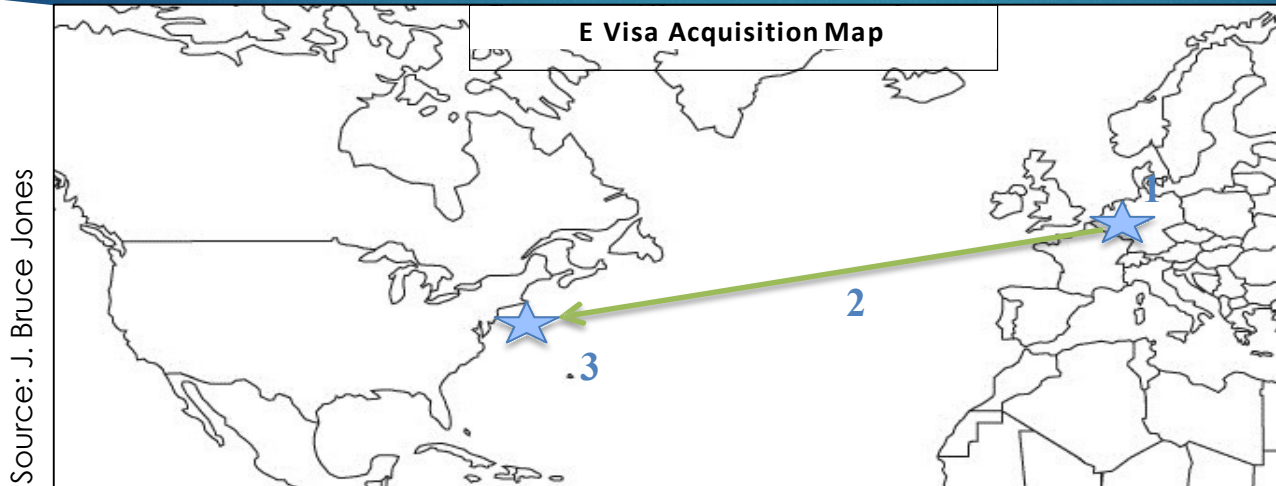
# Example

- ▶ SuperDuperComputer is a company in the United States owned by Mexican nationals that sells expensive automated engineering solutions for the beverage industry and only has a few very high value sales a year. The goods are made in Mexico and then sold to SuperDuperComputer in the United States for third party sales, service, and installation. The sales that the company does have are valued in the hundreds of thousands of dollars each. Therefore, the low volume of trade does not preclude the Mexican nationals from E-1 classification because the value of the trade is so high.

# Discussion Question

- ▶ Sprzet, Inc. is a Polish-owned hardware distributor in the United States that imports approximately 75 percent of its goods from Poland. Recently, the business has decided to start sourcing a number of its products from a new manufacturer in Vietnam and also start a global direct to consumer sales website. Currently, the president of the company is in the United States on an E-1 visa.
- ▶ What warnings would you give the president about the planned expansion and source of manufacturing?

# VISA ACQUISITION MAP



Step 1: Apply for E visa through embassy or consulate abroad. In this case, the application is made through the U.S.

Embassy in London.

- ▶ Step 2: With E visa issued by the embassy, the British National travels to the United States.
- ▶ Step 3: The British National is admitted by Customs and Border Protection in New York, New York and the British National commences working for the qualifying E classification enterprise in the United States.

# SHARED REQUIREMENTS FOR E-1 AND E-2 VISA CLASSIFICATION

In order for a foreign national to qualify for either type of E visa, two shared threshold requirements must be demonstrated:

- ▶ Citizens of a treaty country must own at least fifty percent of the entity that will employ the foreign national in the United States ("**Fifty Percent Rule**"), and
- ▶ The foreign national who will be employed in the United States must be a citizen of the same country of citizenship as the owners of the entity. Prior employment with the company is not required.

# REQUIREMENTS FOR AN E-1 TREATY TRADER

- Trade based
- Issued to enable foreign national to facilitate international commerce between the United States and a treaty country
- Enterprise employing the foreign national, or in the case of an owner/operator, must be:
  - engaged in trade which is substantial in nature
  - principally with the United States and
  - the individual E-1 visa applicant must be a manager, executive, or
  - ▶ **“essential skills”** employee

# REQUIREMENTS FOR AN E-1 TREATY TRADER

## Essential Skills Employee:

- ▶ Employee with special qualifications that make the service s/he renders essential to the efficient operation of the enterprise.

# REQUIREMENTS FOR AN E-2 TREATY TRADER

- E-2 visa classification is
- **active, substantial investment by a treaty investor.** The investment in the United States must not be marginal and must be overseen by the principal investor or an employee within an executive, supervisory or essential role in the enterprise.
- To ensure an active exchange of culture and commerce, and to constitute an active investment, the E-2 nonimmigrant visa applicant must have invested or be in the process of investing in an operating company which produces some good or service in the United States
- If the business is not yet operational, the applicant must demonstrate that there is a business plan in place and that contracts have been formed to carry out the investment



# DURATION OF STAY

- E visa granted admission for up to two years
- May extend status by filing a petition on **Form I-129, Petition for a Nonimmigrant Worker**, with the USCIS:
  - However, this course of action is only recommended if travel to the foreign national's home country in order to apply for a visa in a different category is not feasible or practical from a business perspective, since a full E nonimmigrant visa filing is required abroad in order to reenter the United States
- Visa exempt Canadian nationals still required to process E-2 visas through a consular section before coming to the United States in this category.

# CASE FOR DISCUSSION, pg. 101

TigerTaleTechnologies or TTT, manufactures a specialty foam for the automotive industry using organic materials. Currently, the business only exists in Japan and caters almost exclusively to the Japanese automotive industry. The only owner of TTT, Taiko, a Japanese national, wants to expand to the U.S. market and establish an enterprise that will first serve as a sales office. Later, Taiko hopes to manufacture the TTT foam in the United States. Taiko wants to invest around \$50,000 for the initial operations of the office in the United States. Taiko wants his son Yuyai, also a Japanese national, to move to the United States to run the business. Yuyai does have a degree in agricultural engineering and is considered by most to be bright and trustworthy.

- Describe what the enterprise will need to prove in order to obtain an E-1 visa for Yuyai
- Describe what the enterprise will need to prove in order to obtain an E-2 visa for Yuyai
- What additional information would be helpful?

# VISAS FOR INTRACOMPANY TRANSFERS

INA § 101(A)(15)(L); 8 C.F.R. § 214.2(I); 9 FAM 402.12

## L-1A: Intracompany Managers / Executives

- Max Stay: 7 years

## L-1B: Intracompany Specialized Knowledge Employees

- Max Stay: 5 years
- EE has 1-year qualifying employment abroad.
- U.S. Co. & Foreign Co. must have at least 50% common control
- Spouses (L-2) provided employment auth.
- Carries dual intent

# VISAS FOR INTRACOMPANY TRANSFERS

INA § 101(A)(15)(L); 8 C.F.R. § 214.2(I); 9 FAM 402.12

- For new U.S. Companies initial visas issued for one year (“new office L visa”)
- Larger multi-national company should consider blanket L authorization

## **ALERT:**

Increased Scrutiny - In 2013 46% RFE Rate and 34% denial rate for L-1Bs (a 10-fold increase in a decade)

## **NEW FOR 2015:**

USCIS issued a memo clarifying the meaning of specialized knowledge—now a lower standard!

# Example

- ▶ Sharifa has been employed abroad for an international financial services provider for the last thirteen months. The company now wishes to transfer Sharifa to the United States in a managerial position. However, over the course of Sharifa's employment with the company abroad, she has spent a total of eight weeks in the United States in B-1 visa classification to attend meetings and conferences. Therefore, Sharifa will not be immediately eligible for an L visa transfer. She must wait until she has served at least twelve months of working for the company outside of the United States before she can file. In other words, she must wait an additional one month to qualify.

# Discussion

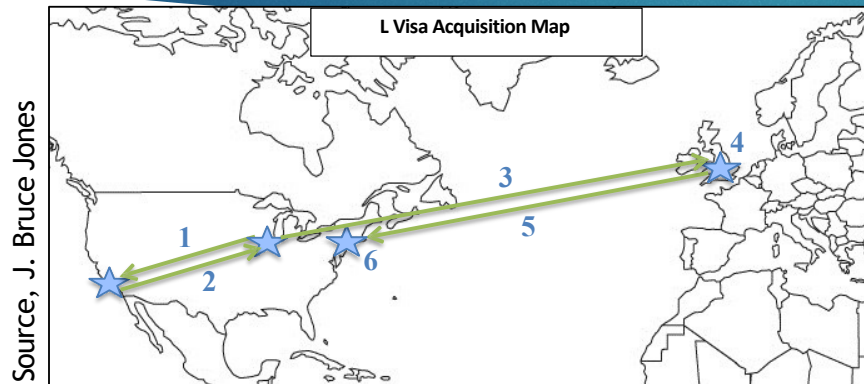
- ▶ Limone, LLC is the U.S. subsidiary of a large lemon producer in Lebanon. Its business in the United States has been failing lately and the company wants to transfer Amir there to help correct the financial issue. Amir has worked for the parent company for the past five years as a Supply Chain Engineer. Once he arrives in the United States, Amir will be promoted to the position of Supply Chain Manager.
- ▶ Can Amir get an L-1A nonimmigrant visa for this purpose?
- ▶ If so, what additional information would be needed in order to proceed?

# Discussion

- ▶ StoneBook, Inc. is the U.S. parent company to StoneBook, GmbH in Germany. StoneBook, Inc. owns 100 percent of StoneBook, GmbH, which currently employs Sasha in the position of Account Manager. In this position, she is responsible for managing some of the company's key European accounts. She often gives presentations regarding its proprietary technology to clients and at industry trade shows. In addition, Sasha recently wrote an article in an industry trade publication regarding StoneBook, GmbH's latest product line. Sasha supervises the work of three Junior Account Managers and is responsible for directing personnel activities for her subordinates including hiring, firing, promotion, and demotion. StoneBook, Inc. now wishes to employ Sasha in a similar position in the United States.
- ▶ Is Sasha eligible for L classification?
- ▶ If so, which version of the L visa would be easier to obtain for Sasha and why?

# L VISA ACQUISITION MAP

8 CFR § 214.2(L) | 9 FAM 402.12



**Step 1:** A subsidiary of a U.K. company located in Chicago, Illinois files a petition for L-1 nonimmigrant visa classification on behalf of a designated beneficiary with the USCIS California Service Center.

**Step 2:** The petition is approved by the USCIS and returned to the U.S. subsidiary.

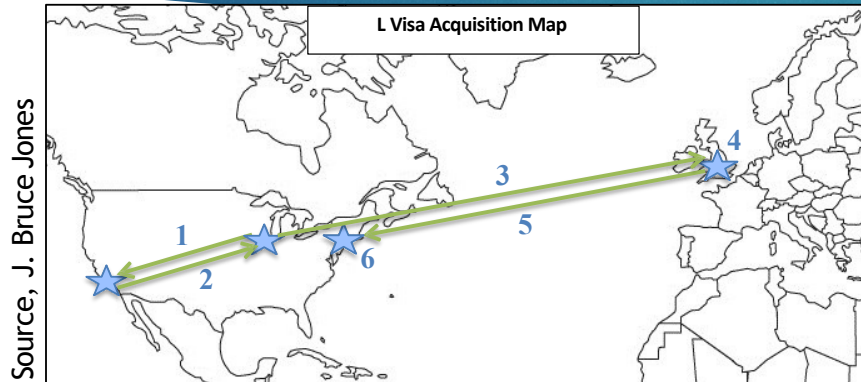
**Step 3:** The company sends the approval notice to the foreign national in the U.K.

**Step 4:** The beneficiary of the petition applies for an L visa through the embassy or consular office abroad. In this case, the application is made through the U.S. Embassy in London.



# L VISA ACQUISITION MAP

8 CFR § 214.2(L) | 9 FAM 402.12



**Step 5:** With L visa issued by the embassy, the foreign national travels to the United States.

**Step 6:** The foreign national is admitted by Customs and Border Protection in New York, New York and begins working as an executive, managerial or specialized knowledge employee.

# QUALIFYING ORGANIZATION

To be considered a **qualifying organization**, the following requirements must be met:

- ▶ The organization must be a multinational company maintaining both a foreign and domestic presence
- ▶ The U.S. and foreign entities must share a qualifying corporate relationship(key factor is control); and
- ▶ The multinational company must be doing business in the United States in the present or near future

# QUALIFYING EMPLOYMENT: L-1 A VISA FOR MANAGERS

- ▶ Managerial capacity means an assignment within an organization in which the employee primarily:
  - Manages the organization, or a department, subdivision, function, or component of the organization;
  - Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization

# QUALIFYING EMPLOYMENT: L-1 A VISA FOR MANAGERS

- Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed, and
- Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional

# QUALIFYING EMPLOYMENT: L-1A VISA FOR EXECUTIVES

Executive capacity means an assignment within an organization in which the employee primarily:

- Directs the management of the organization or a major component or function of the organization;
- Establishes the goals and policies of the organization, component, or function;
- Exercises wide latitude in discretionary decision-making; and
- Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization

# L-1B VISA FOR SPECIALIZED KNOWLEDGE

- For L-1B nonimmigrant status, the transferee must be engaged in work requiring **specialized knowledge**.
- While specialized knowledge carries a plain meaning that immediately resonates, for immigration purposes, the term carries a special definition (below)
- Specialized knowledge can also be fulfilled by having an advanced level of knowledge or expertise in the organization's processes and procedures. The L-1B intracompany transferee must have knowledge that surpasses the usual knowledge of an employee in the same field, and the expertise must have been gained through "significant prior experience" with the company.
- **Specialized Knowledge:** Knowledge of the company's products, services, equipment, techniques, management, or other interests and its application in international markets.



# NEW OFFICE L CLASSIFICATION

- The U.S. entity of a multinational company that has been doing business for less than one year is considered a new office
- Because the USCIS is concerned about the organization becoming real, active, and, operating in the United States, New Office L visas are only issued for one year, allowing the opportunity to review the actual activities of the company.

# NEW OFFICE L CLASSIFICATION

- The primary requirement, in addition to proving qualifying employment abroad, is to show that the business is set up to become fully operational quickly. The petitioning entity must submit evidence that sufficient physical premises have been secured to house the new office. In addition, a strong business plan indicating how the business will be grown both in terms of revenue and staff is critical to success and a key component to the New Office L visa petition
- Dual Intent: The intent to remain either temporarily or permanently in the United States



# BLANKET STATUS

Blanket L classification for larger multinational companies who would like to expedite the transfer of their managers, executives, or specialized knowledge employees

U.S. entity must demonstrate that:

- All of the business' L-qualifying organizations are engaged in commercial trade or services
- The U.S. entity has been doing business for one year or more
- The petitioner has three or more domestic and foreign entities and one of the following:
  - The petitioner and other qualifying organizations have obtained approval for at least ten “L” petitions during the previous twelve months
  - The company has U.S. subsidiaries or affiliates with combined annual sales of at least \$25 million ; or
  - The company has a U.S. work force of at least 1,000 employees

# DURATION OF STAY

- Intracompany transferees applying for an L visa through consular processing are not subject to the presumption that they intend to immigrate to the United States, and therefore are not required to prove intent to return to their home country as part of the visa application process. Instead, this classification allows for what is known as dual intent.
- The initial admission period for an intracompany transferee in L-1 status is up to three years for both L-1B and L-1A classification(except for New Office L beneficiaries). Transferees in a managerial or executive position or L-1A, may qualify for a two-year extension twice, for a total of seven years. Specialized knowledge or L-1B transferees may only qualify for a single two-year extension, for a total of five years.

# VISAS FOR PROFESSIONAL SPECIALTY OCCUPATIONS: H-1B

## Four Part Test:

1. Foreign National has a U.S. baccalaureate degree or a foreign degree equivalent in field of study related to intended position;
2. Position requires a degree in a specific field of study;
3. Position pays the “prevailing wage” for the occupation in the metropolitan area as determined by the Department of Labor (“DOL”); AND
4. There is a “H-1B number” available (85,000 available annually).

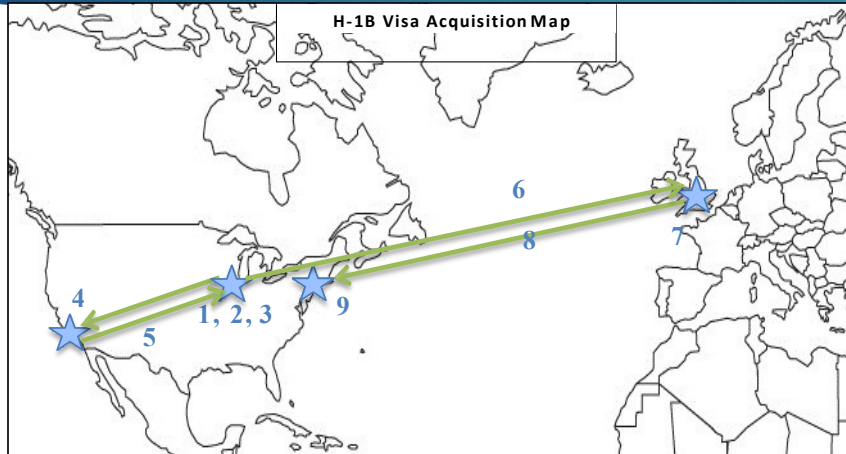
# VISAS FOR PROFESSIONAL SPECIALTY OCCUPATIONS: H-1B

- 6-year maximum period of stay (can be extended when foreign national has commenced green card process - AC 21)
- Carries dual intent
- Spouses are now allowed to work in limited circumstances - AC 21 104(c)

CAUTION: Export Control Licenses went into effect in February 2011!

# H-1B ACQUISITION MAP

Source, J. Bruce Jones



**Step 1:** A company located in Chicago posts a notice informing workers of the future H-1B filing in two locations where the employment will occur for a foreign national based in the United Kingdom.

**Step 2:** The Company files a Labor Condition Application or LCA on Form ETA 9035 with the DOL, most often electronically via the iCert Portal.

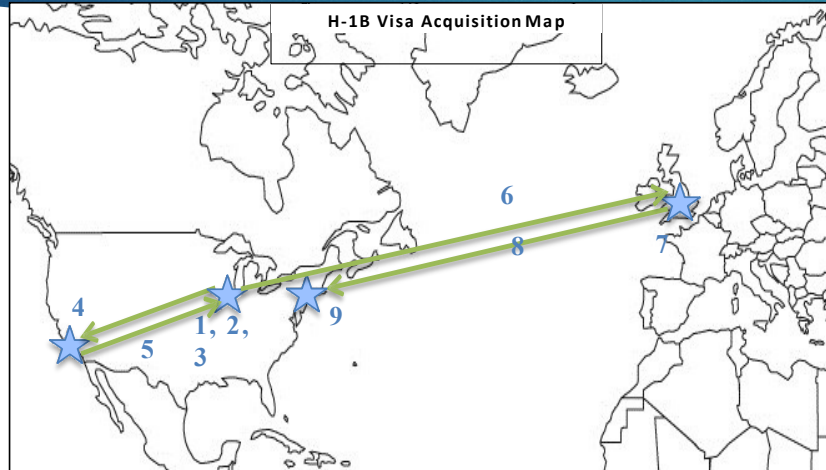
**Step 3:** The DOL certifies the LCA.

**Step 4:** The H-1B petition with the certified LCA is submitted to the USCIS Service Center.

**Step 5:** The petition is approved by the USCIS and returned to the Company.

# H-1B ACQUISITION MAP

Source, J. Bruce Jones



**Step 6:** The Company sends the approval notice to the foreign national in the United Kingdom.

**Step 7:** The foreign national applies for the H-1B visa through the U.S. embassy in London.

**Step 8:** With H-1B visa issued by the embassy, the foreign national travels to the United States.

**Step 9:** The foreign national is admitted by Customs and Border Protection in New York, New York, and commences working for the company in the professional specialty occupation.

# H-1B REQUIREMENTS

H-1B nonimmigrant classification requires:

- The employer is a real, active and operating entity
- The occupation is a **specialty occupation**, requiring at least a baccalaureate level education or higher
- The proposed employee is qualified for the specialty occupation, and
- The wage paid to the employee is one hundred percent of the **prevailing wage** or the **actual wage**, whichever is higher

# LABOR CONDITION APPLICATION (LCA) REQUIREMENT

The **Department of Labor (DOL)**

- Seeks to protect jobs of U.S. workers from undue displacement
- Ensures that foreign workers are not exploited by U.S. employers.

To achieve this goal, the DOL requires that a Labor Condition Application or LCA, be filed with and approved by the DOL before an H-1B petition can be submitted to the USCIS.



# LABOR CONDITION APPLICATION (LCA) REQUIREMENT

A potential employer intending to petition for a foreign national must attest to the following:

- The wage paid to the H-1B worker will be the higher of the prevailing wage or actual wage
- The foreign national will be working under conditions which do not adversely affect the working conditions of similarly employed workers
- There is no current strike or lockout as a result of a labor dispute in that occupational classification and
- The employer has provided notice of the filing of the LCA to the bargaining representative of the employer's employees in the occupation classification in which the H-1B nonimmigrant will be employed, or, if there is no bargaining representative, has posted notice of filing in the employer's location where the foreign national will be employed

# ACTUAL AND PREVAILING WAGE

As part of the LCA, the petitioner must attest that it is paying the foreign worker the required wage rate.

The wage paid to the H-1B beneficiary must be the higher of:

- i. The **actual wage** paid by the employer to employees with similar experience and qualifications within the occupation; or
- ii. The **prevailing wage** for the employee's occupation in the geographic area.

# ACTUAL AND PREVAILING WAGE

38

**Actual Wage:** Where there are other employees within the company with “substantially similar experience and qualifications in the specific employment in question”, the actual wage is the wage paid to those employees. If no such employees exist at that particular location, then the actual wage is simply the wage paid to the H-1B visa holder.

**Prevailing Wage:** The prevailing wage is the wage dictated by a collective bargaining agreement if the position is unionized. If it is not, then the wage paid to all similarly situated employees in the area of intended employment is the prevailing wage. Normally, the prevailing wage is obtained through a government wage survey compiled by the Bureau of Labor Statistics.

# NUMERICAL LIMITATIONS: THE H-1B CAP

- One of the most challenging aspects of dealing with the **H-1B classification** is the fact that there is a numerical limitation to the amount of H-1B visas that will be issued to foreign nationals each year.
- This limitation is known as the **H-1B Cap**. At the beginning of the fiscal year - which commences on October 1st for the USCIS -65,000 H-1B visas are made available.
- In addition, Congress passed the ***H-1B Visa Reform Act of 2004***, which created an additional allotment of 20,000 H-1B visas specifically for foreign nationals who have earned a master's or higher degree from a United States Institute of Higher Education.

# DURATION OF STAY

- The **H-1B visa** can be held for up to six years and is issued in two increments of three years each.
- Similar to the L visa classification, to become eligible for H-1B classification after reaching the six-year maximum period of stay, a foreign national must depart the United States for a full year.
- When attempting to secure H-1B status after spending the requisite year abroad, a new petition must be filed and the foreign national once again becomes subject to the H-1B Cap.

# CASE FOR DISCUSSION, pg. 129

Top of the Heap, Inc. is a recycling company in the United States. They wish to hire Jaden, a Public Relations Specialist, from New Zealand to be their newest Marketing Manager. Jaden has a degree in Psychology from abroad.

- Make an argument as to why Jaden's education is a related field to the offered position of Marketing Manager

# VISAS FOR TRAINING: J-1 | H-3

## J-1 Visas for Training: 9 FAM 402.5

- J-1 Interns: up to 12 months. Must be in post-secondary program abroad or recent grad. Training must be in a field related to area of study.
- J-1 Trainees: up to 18 months. Must be foreign graduate and have one year of experience or 5 years of professional experience.
  - ▶ Spouses permitted employment authorization
  - ▶ Watch out for 2-year home residency requirement - skills list

# VISAS FOR TRAINING: J-1 | H-3

## ▶ H-3 Visa for Training: 8 CFR §214.2(h)

- ▶ Can be obtained for up to 2 years
- ▶ Harder to obtain - stringent USCIS adjudication
- ▶ No spouse employment authorization
- ▶ Best used for intracompany training

**ALERT:** Department of State has started site visits (wary of J-1 being used as a means of getting around H-1B limitations)

### **Practice Pointer:**

- ▶ Foreign Students (F-1) get “free” training after degree (“OPT”) valid for 1 year and can be extended 24 mos. (as of May 10, 2016) if STEM degree and employer is E Verify



# CASE FOR DISCUSSION, pg. 132

Olivia is a dual national of Australia and Canada. Olivia has found an employer in New York that wants to hire her as an Accountant. Olivia has a degree in Accounting from a well-respected University in Australia. Olivia's husband wants to be able to work in the United States as well.

- Which professionally specialty visa will best serve Olivia and her husband's stay in the United States and why?

# VISAS FOR EXTRAORDINARY ABILITY

O-1 INA §101(A)(15)(O); 8 C.F.R. §214.2(O)

## ▶ Extraordinary ability in Business, Science, Athletics

- Those that have risen to the very top of their field of endeavor
- One-time major award - such as Nobel Prize OR
- At least 3 of an additional list of qualifiers - e.g. publications, other awards

## ▶ Extraordinary ability in the Arts

- One-time major award - such as Oscar / Grammy OR
- At least 3 of an additional list of qualifiers - e.g. published material about the foreign national, distinguished roles
- *Must be tied to a specific itinerary - 3 years initial - 1-year extensions*