TROUTMAN SANDERS

Business Immigration Guide

The Troutman Sanders Immigration Practice focuses on business immigration matters in order to facilitate the smooth and expedient transfer of individuals to the United States for large global entities as well as smaller, closely held specialized entities. We are also called upon to facilitate the transfer of personnel from the United States to other parts of the world. In all of this, we serve the needs of the business in meeting its human resource objectives and also in providing personalized service to the individuals involved.

The Guide

This brief guide to non-immigrant work visas and employment based permanent residency is intended as a survey for use by companies who are hiring a global work force which will include employment of individuals, both short term and long term, in the United States. The guide is not designed to render legal advice or legal opinion. Such advice may only be given when related to actual fact situations.

The principal non-immigrant business visa categories are B-1, E-1/E-2, H-1, TN, and L-1.

B-1

During feasibility studies, preliminary startup activities, construction and the opening of a new enterprise, the B-1 visa is appropriate for personnel to temporarily enter the United States. The entry must be for a brief and defined period of time, and the individual must remain on payroll from outside the United States. (For those who are citizens of countries with whom the United States has a visa waiver agreement, then an actual B-1 visa is not required from the U.S. consulate.) The B-1 also is used for personnel to attend corporate meetings, obtain training, provide services with the direct benefit to the sending entity, and to solicit orders from customers. A B-1 in lieu of H-1 is available for those with applicable university degrees. B-1 status often serves as a bridge until a longer term, non-immigrant visa can be secured. If the initial period of B-1 stay is insufficient, an extension may be obtained. However, this is only true for those with B-1 visas and is not applicable to those entering on visa waiver. The B-1 visa is often given in conjunction with the B-2 visitor for pleasure visa. The B-1 should be used for trips to the U.S. for business purposes, while the B-2 is for pleasure trips.

E-1/E-2

Often referred to as the next best thing to a green card, the E-1/E-2 category is available only to citizens of those countries with whom the United States has an applicable treaty. This covers most of Europe, Japan, Taiwan and some countries in South/Central America and Africa. It includes Pakistan, but not India or the People's Republic of China. The E-1 is based on significant trade between the U.S. entity and the treaty country. The E-2 has nothing to do with trade but is based exclusively on a substantial at-risk capital investment. The E visa applies to principals, officers, executives, managers and individuals with essential skills. Those individuals must be citizens of the treaty country. The E visa application is presented at the U.S. Consulate. The Consul's first determination is whether the company is E qualified. If so, the next analysis is whether the individual meets the criteria for the E visa. There is no requirement of prior employment abroad with the international entity. An individual or group of individuals or a company may initiate an operation in the United States and then file for the E visa either on the basis of trade or upon significant capital investment. The individual applicants must be citizens of the foreign country which represents the majority stockholder(s) of the U.S. enterprise. While the E visa is generally given for five years, E status in the United States is generally granted in two year increments, as are extensions of stay. Careful attention must be paid to maintenance of E status by the principal and the derivative family members as their E status expiration dates will often vary.

H/TN/E-3

The H visa category covers professional workers (H-1), short-term/short supply situations (H-2B) and extensive training programs (H-3).

The H-1 category involves positions which require that the incumbent hold at least a bachelor degree (or equivalent) in a particular academic field, and the beneficiary must establish that they meet this academic requirement. In filing for this status, one must first obtain a prevailing wage to be sure that the proffered wage satisfies the prevailing wage requirement. Second, job postings must be placed on the employer's premises, and the U.S. Department of Labor must certify the Labor Condition Application. However, no test of the U.S. labor market is generally required, and the subsequently discussed labor certification application leading to permanent residency is not applicable to H-1 filings. The only exception is for H-1 dependent companies. Generally, regardless of the availability of U.S. workers, the employer is entitled to select an international worker as long as the individual satisfies the required professional requirements. This status may be granted for up to three years initially, and extended for an additional three years. Under special circumstances, it can be extended in further one or three year increments. Often, students with F-1 practical training status utilize the H-1 category to move into the U.S. labor market. The category also is helpful when the sending entity country does not have an E Treaty with the United States or if the individual does not have the requisite one year of experience with the company abroad as discussed below for L-1 classification. The annual H-1 visa allotment is 65,000 plus 20,000 for advanced U.S. degree holders. Singaporeans and Chileans have H-1 visas specially set aside for them.

Under NAFTA, Canadian and Mexican citizens may qualify for TN status. TN is limited to specific professional occupations. The TN is given in three year increments and does not have the H-1 maximum limit of six years. Moreover, Canadians can acquire TN status on a same day basis at the port of entry with minimal document preparation. The TN filing fee for Canadians is $50 while the H-1 filing fees may now exceed $3,000. Mexican applicants must apply for a TN visa at a U.S. Consulate. E-3 visas were created in 2005 for Australian professionals. An LCA must be approved by the U.S. Department of Labor and the visa application is then made at the U.S. Consulate.

L-1

This category covers the transfer of key executive, managerial or specialized knowledge personnel from locations outside the United States to the international company's U.S. operations. It requires common ownership and control of the sending and receiving entities through a subsidiary, affiliate or branch relationship. The U.S. operation may be in its startup phase. The individual must have at least one year of employment with the sending entity, and this experience must have been gained while the individual was physically outside the United States. The requisite one year may be accumulated any time during the three-year period immediately prior to applying for L-1 status. While this category was created for large multi-national companies, it is equally applicable to small operations as long as the company's entry into the U.S. marketplace is rational, creating the need for the transfer of key personnel to the U.S. operations while maintaining the company's activities outside the United States. Executives and managers may hold L-1 status for a total of seven years, while those in the specialized knowledge category may do so for up to five years. If the U.S. operation is a startup, the initial L-1 approval is for one year, and this may be extended at the end of the inaugural year in increments of at least two years. A great advantage of this category is that it also leads directly to permanent residency but only for executive or managerial positions. The L-1 must be initially approved by USCIS, as is the case with the H-1. The only exceptions are for Canadians, who may present the L-1 petition at the port of entry, and those applying under a Blanket L approval at a U.S. Consulate. The L-1 is also applicable to joint ventures as long as at least 50 percent of the owners of the international entity also own and control at least 50 percent of the U.S. enterprise. For those international companies with at least two offices outside the U.S. that send at least ten individuals in this category per year to the United States, a blanket L is available. The blanket L is also available for companies with annual U.S. sales of at least $25,000,000 or a U.S. work force of at least 1,000 employees.

Filing Fees

An expedite fee of $1,225 may now be paid to insure a USCIS adjudication within 15 days. This applies to E/H/L/O/P filings and certain I-140 Petitions.

Employment-Based Permanent Residency

As mentioned above, if an individual will be serving permanently in a managerial or executive capacity and otherwise meets the L-1 requirements, they are also eligible for lawful permanent

residence (LPR), i.e., a green card.[*] In addition, for those entrepreneurs who invest at least $1,000,000 of at-risk capital and create employment for at least 10 full-time U.S. workers, conditional lawful permanent resident status is available.[**] The investor must prove the legitimate source of their funds and document the transfer of those funds to the U.S. enterprise. The investor must play an active management role. There are special cases for the purchase of troubled businesses and additional requirements for buying on-going enterprises. Permanent residency is also available for those who are internationally renowned in their calling or for those who are outstanding researchers or professors or whose presence would serve a national interest.

The most common employment-based filing begins with a PERM labor certification application filed by the U.S. employer proving that it is unable to find a qualified U.S. worker for the position. It requires up to six months of good faith recruiting, including an internal posting on the company's premises, placement of the position in the State Department of Labor Job Bank, and advertising the position in a local newspaper of general circulation or in a national journal appropriate to the industry. All resumes received must be reviewed by the employer (the alien may not conduct the review as they must not be involved in the recruitment process), and those individuals appearing to satisfy the minimum requirements must be interviewed. They may only be rejected for lawful business-related reasons. If there is at least one qualified U.S. applicant, then the application cannot be filed; however, there is no obligation on the part of the U.S. employer to hire any of the U.S. applicants. Careful records must be kept during the recruitment phase, as all of the recruitment proofs and results must be made available upon request to the U.S. Department of Labor. Once the labor certification is approved, the company then files an I-140 petition, followed by or in conjunction with an application for permanent residency on behalf of the individual and their immediate family members, i.e., spouse and minor children under the age of 21. Some children who are 21 may be grandfathered in under CSPA. The labor certification is specific to the individual, to the particular job, to the location and to the petitioning employer. The employer must also demonstrate a continuing financial ability to pay the proffered wage.

Other Visa Categories

J-1

For those employers who conduct a great deal of training for their international work force, a J-1 training visa should be considered for individuals who will be in the U.S. for more than six months. The employer should also consider obtaining J-1 program sponsorship authorization.

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[*] In this situation L-1 status may be acquired and subsequently upgraded to LPR status, or the LPR status may be applied for initially. If the U.S. entity is a startup, then only the L-1 may be applied for initially. After one year of operations, LPR status can be sought.

[**] An investment of $500,000 in a targeted employment area (rural location or area of high unemployment) is permitted, as well as in an approved Regional Center area. At the end of two years of conditional lawful permanent residence, full resident status is applied for and will be granted if all the investment requirements continue to be met. This process also includes the investor's spouse and children under 21.

O-1, P-1

For those individuals with outstanding international stature, O-1 or P-1 visas should be considered, particularly for entertainers or athletes.

R-1

Religious workers are covered under the R-1 category.

Miscellaneous

Some of the non-immigrant categories described, e.g., H or L, require initial United States Citizenship and Immigration Services (USCIS) approval with subsequent visa issuance by the U.S. State Department through its consular offices. Visas are not issued by USCIS. DHS, through the CBP, has exclusive jurisdiction over admission of persons to the United States, including the issuance of entry documents with the appropriate non-immigrant classification, and the period of time the individual is allowed to remain in the United States in that status. It is imperative that all individuals maintain lawful, non-immigrant status which also applies to their immediate family members. There are also situations where USCIS may approve an applicant's change of status to allow employment in the U.S., while at other times the individual must proceed to a U.S. Consulate in order to obtain the visa and then re-enter in the new status. The Consul has final authority as to whether to issue the visa. Careful attention should be paid to this distinction to ensure that individuals are working with USCIS permission and to ensure that if they leave the United States, they will be able to return with proper status. In certain instances, one can hold non-immigrant work status and simultaneously pursue lawful permanent residency. It would be helpful to consult counsel in these situations to reduce or eliminate any risk.

An annual lottery of immigrant visas is conducted with green cards issued on a random basis to applicants from around the world. The lottery is available to most, but not all, countries. PRC nationals are not included. The applicants number in the millions.

Also available upon request are detailed explanations of the steps involved in the H-1 process and labor certification-based permanent residency applications.

For more information regarding this guide or the immigration practice at Troutman Sanders, please contact:

Mark J. Newman at 404-885-3194 or mark.newman@troutmansanders.com.
Aimee Clark Todd at 404-885-3697 or aimee.todd@troutmansanders.com
Yane S. Park at 404-885-3927 or yane.park@troutmansanders.com