

US Employers: Work-authorized Visa Options for Hiring a Foreign National Worker

By Joshua S. Mirer and Jennifer L. Shanley



Employers in the United States increasingly seek to hire foreign nationals, as they possess unique perspectives and diverse backgrounds, also often having international experience, making them uniquely qualified for a particular position. The hiring process for foreign nationals, however, is different than the hiring process for US citizens. Hiring a foreign national can require company sponsorship in a related work-authorized category and an understanding of various factors that affect the chosen category. A brief overview of some of the most widely used categories, as well as the timing and other implications of those categories, are discussed in this article.

Foreign Nationals Entering the United States for Business Activities

The Most Widely Used Temporary Work Authorization Categories for Foreign Nationals in the United States.

There are many work-authorized visa categories for foreign nationals. This article focuses only on some of the most widely used categories by companies in the United States,¹ including the following: H-1B/H-1B1, TN, L-1, E-1/E-2, and O-1.²

H-1B/H-1B1: Work in a Specialty Occupation

An H-1B (or H-1B1 for nationals of Chile and Singapore)³ visa category is one of the most well-known work-authorized categories for

employers sponsoring foreign nationals for work authorization. A majority of these petitions are filed by a US employer on behalf of a foreign national whose job normally requires a minimum of a bachelor's degree in a specific occupational specialty. To qualify for H-1B status, the foreign national must possess either a university degree, or a combination of education and experience equivalent to a US degree, in a field related to the offered job. While a position may qualify for H-1B status by proving that the specific duties are so specialized and complex that the knowledge required to perform the duties are usually associated with the attainment of a bachelor's degree or higher, it is a difficult standard to prove if the degree is not directly related or if the role appears to be too administrative and not always successful.

TN: NAFTA Professionals

The North American Free Trade Agreement (NAFTA) created special economic and trade relationships between the United States, Canada, and Mexico. The Treaty NAFTA (TN) nonimmigrant classification permits qualified Canadian (TN-1) and Mexican (TN-2) citizens to seek temporary entry into the United States to engage in business activities at a professional level. To qualify for TN status, the Canadian or Mexican nationals must be employed in certain specified TN occupational categories, possess the minimum qualifications for that position/occupation (generally, a relevant bachelor's degree, although there are notable exceptions), and retain strong ties to their home country. The NAFTA categories include professions such as computer systems analysts, economists, engineers, biologists, and chemists, among others.⁴

L-1: Intracompany Transferees

The L-1 visa category is for multinational companies with intracompany transferees that, within the preceding three years from the date of the petition application, have worked at a company related to the US employer abroad⁵ (for example, a parent company) for at least one year.

There are two distinct L-1 categories: the L-1A, for managers and executives, and

the L-1B, for individuals with specialized knowledge. To qualify for an L-1A, an individual must have worked at a company related to the US employer abroad for at least one year in a managerial or executive position and must be coming to work in the United States in a managerial or executive position. For managers, there are two ways to qualify—either as a personnel manager or a functional manager. Personnel managers must primarily supervise and control the work of other supervisory, professional, or managerial employees, whereas functional managers must primarily manage an essential function within the organization.

To qualify for an L-1B, individuals must have worked for a related company abroad for at least one year in a position where they have gained specialized knowledge about the company's processes, methods, and procedures, and must be coming to the United States to use the specialized knowledge gained abroad to perform work in the country.

Individual L-1 petitions are filed with the US Citizenship and Immigration Services (USCIS). A company may also file a blanket petition with the USCIS seeking ongoing approval of itself, its parent, branches, subsidiaries, and affiliates as a qualifying organization.⁶ There are many advantages to a company that has an approved L Blanket. Primarily, L-1A and L-1B petitions filed under the company's blanket petition (at a US consulate or embassy abroad) dramatically reduce costs, as well as processing times, thereby allowing companies to transfer employees to the United States quicker and/or with short-term notice.⁷

E-1 and E-2: Treaty Traders and Treaty Investors

The E-1 and E-2 nonimmigrant visa categories comprise treaty traders and treaty investors entitled to be in the United States under a bilateral treaty of commerce and navigation between the United States and the country of which the treaty trader or investor is a citizen or national. The E-1 classification is for a foreign national coming to the United States solely to engage in trade of a substantial nature, principally

between the United States and the foreign national's country. The trade involved must be the international exchange of items of trade between the United States and a treaty country.

The E-2 classification is authorized for a foreign national coming to the United States solely to direct and develop the operations of an enterprise in which the individual has invested, or is actively involved in the process of investing a substantial amount of capital. Certain employees of qualifying E-2 organizations may also be eligible for this classification if they are coming to the United States to serve as an executive in a supervisory position or possess skills essential to the firm's operations in the country. For example, a French national coming to the United States to serve in a managerial role with a US company ultimately owned by French nationals can apply for an E-2 visa directly at the US Consulate in Paris (assuming the US company is registered).

O-1: Individuals of Extraordinary Ability

The O-1 nonimmigrant visa category applies when an individual possesses extraordinary ability in science, art, education, business, or athletics. To qualify for an O-1 visa in science, education, or business, the individual must demonstrate extraordinary ability by having sustained national or international acclaim. To do so, individuals must demonstrate that they meet at least three of eight stated criteria⁸ (including receipt of national/international awards and authorship of scholarly articles, among others), showing that they are one of the small percentage who has risen to the very top of the field and continue to work in the area of extraordinary ability.

Short-term Work Authorization for Foreign Nationals in the United States

The B-1, in lieu of H-1B, is a specialty occupation category for short-term assignments of six months or less. To qualify for a B-1 in lieu of an H-1B visa, the foreign national must hold the equivalent of a US bachelor's degree, perform H-1B-caliber work (that is, the work in the United States

meets the definition of “specialty occupation” previously discussed), and be paid only by a foreign employer/company, except for travel cost reimbursement such as housing. The employee must not receive any salary from a United States source and only perform work in the country that can be accomplished in a short period of time.

Temporary Business Activities for Foreign Nationals in the United States

The B-1 “business” visa and the Visa Waiver Program can be used by foreign nationals who possess only a temporary intent to remain in the United States for short-term visits where they do not undertake any activities that benefit the US entity and/or engage in productive employment in the country. Some permissible activities for those entering in B-1 status are negotiating a contract; attending training, workshops, and trade shows/expositions; meeting with clients/customers or business colleagues; conducting data gathering and data mining; and reviewing files. An individual entering in B status or under the Visa Waiver Program cannot receive payment for services performed in the United States by a US company.

Individuals entering the United States in B status can be granted up to a one year stay, with the possibility of securing a six-month extension. Generally, however, B status is issued to allow just enough time for visitors to engage in their stated business in the country. For B-1 “business visitors,” the applicant could be given less than three months. Citizens of the Visa Waiver Program countries⁹ can travel to the United States for tourism or business visits without a visa, however, the maximum period of stay in the country under the Visa Waiver Program is up to 90 days, and once in the United States, the individual cannot extend or change status.

Timing and Availability of Some of the Most Widely Used Work-authorized Categories for Foreign Nationals

Time Limitations

Assuming a foreign national is qualified for a position and qualified for a work-authorized

category, a US employer may want to consider the time limitations and availability for certain work-authorized categories.

H-1B status can be granted to a foreign worker initially for three years, and extensions can be obtained for up to a total of six years. Further, if the individual reaches certain stages in the green card process, additional extensions may be possible.

L-1A status is granted for an initial period of three years, but the US company can apply for two extensions in two-year increments for a total of seven years. Alternatively, L-1B status is granted for an initial period of three years, but the US company can apply for one two-year extension for a total of five years.

O-1 status is granted for an initial period of three years and can be extended in one-year increments.

TN status is granted for a three-year period of stay and can be extended in three-year increments. E-1/E-2 status is granted for a maximum initial stay of two years, and requests for extension of stay may be granted in increments of up to two years each. A company can extend individuals’ TN status or E-1/E-2 status as long as the individuals can demonstrate a nonimmigrant intent (that is, intent to return to their home country). In fact, every time foreign nationals enter in E-2 status, their status will be extended an additional two years during the validity of the E visa.

Limits on Availability

Some work-authorized categories are limited by the USCIS. The H-1B, one of the most popular categories used by US employers, is one of those categories. Specifically, the current annual cap, as set by Congress, is 65,000. An additional 20,000 petitions filed on behalf of foreign nationals with a US master’s degree or higher are exempt from the cap. In addition, H-1B workers who are petitioned for or employed at an institution of higher education (or its affiliated or related nonprofit entities), a nonprofit research organization, or a government research organization are not subject to this numerical cap. Further, up to 6,800 visas are set aside from the 65,000 each fis-

cal year for the H-1B1 program under the terms of the legislation implementing the United States-Chile and United States-Singapore free trade agreements.

The H-1B cap can be, and has been, reached extremely quickly.¹⁰ If more H-1B petitions are filed than that allotted, the USCIS uses a computer-generated random selection process, or lottery, to select enough petitions to meet the 65,000 general-category cap and the 20,000 cap under the advanced degree exemption. Further, because the US government’s fiscal year starts on October 1 and H-1B petitions can be filed up to six months prior to an employee’s start date, H-1B cap petitions should be filed on or within the first few days of April 1 for an October 1 start date.

For the other work-authorized categories previously discussed—the L-1, O-1, E-1/E-2, and TN—there is no limit on the number of petitions that can be filed and/or approved each year.¹¹

Other Considerations When Sponsoring a Foreign National for Work Authorization in the United States

USCIS’s Review

Under the current administration, USCIS scrutiny of all petitions has increased greatly. When reviewing a particular petition, the USCIS can issue a request for evidence, requesting additional information with regard to the qualifications for the work-authorized category or a Notice of Intent to Deny, explaining the reasons that the USCIS will likely deny the petition if certain information/supporting documents are not provided. If the USCIS is satisfied with the company’s response, it will approve the petition. If the USCIS does not believe the company provided sufficient information, it will deny the petition.

In fiscal years 2017 through 2018, H-1B petitions have been subject to extremely strict scrutiny, and the USCIS has issued a large number of Requests for Evidence, generally in two main areas: first, the USCIS has requested evidence that a particular position is, in fact, a specialty occupation, and second, it has requested evidence that a particular entry level position is deserving of a

level 1 wage (the lowest wage level). Overcoming these requests for evidence can be cumbersome, requiring the company to provide more detailed information about a particular job, about the company's organizational structure, and about its employment practices.

L-1B petitions in particular have always been subject to intense scrutiny. In fiscal year 2014, there was a 35 percent denial rate, which has only increased in the following years. Along with the increase in L-1B petition denials, the number of Requests for Evidence is also high, reaching 45 percent of L-1B petitions filed during fiscal year 2014.

The USCIS has recently focused on L-1A petitions as well, requiring that companies demonstrate detailed job duties and associated tasks, along with a weekly percentage breakdown for each duty. The USCIS has also required evidence, including organizational charts, job descriptions and pay statements, for all subordinates of the sponsored manager/executive.

Recordkeeping

For H-1B (as well as H-1B1 and E-3) petitions, a company must retain a Public Access File that is available for public inspection. As part of this file, a company must retain a copy of the completed Labor Condition Application; documentation proving the wage paid to the H-1B worker, which includes an explanation of the system the employer used to set the actual wage; the system the employer used to set the prevailing wage and satisfy the employee notification; and a summary statement of benefits offered to US workers and H-1B workers.

Deemed Export Control

The deemed export rules are administered by the US Department of Commerce (DOC). The Export Administration Regulations (EAR) are administered by the Bureau of Industry and Security (BIS). An export is defined as a transmission of items subject to the EAR outside the United States or a release of technology or software subject to the EAR to a foreign national in the United States.

According to the BIS, EAR are "designed to

restrict access to dual use items by countries or persons that might apply such items to uses inimical to US interests. The EAR also include some export controls to protect the United States from the adverse impact of the unrestricted export of commodities in short supply." Discussions with a foreign national in the United States are deemed to constitute an "export" if they reveal technical information regarding export-controlled technology.

For purposes of EAR, US citizens, green card holders, and asylee/refugees are US persons not subject to controls. However, if the technology is classified, as well as controlled, permanent residents are deemed foreign nationals and subject to controls. Foreign nationals in the United States on nonimmigrant visas are generally covered by the rules.

To make a determination regarding export control, the company will have to answer what form of access a worker will have to controlled technology, whether the worker will be exposed to internal company research materials, and whether the worker will participate in meetings and conference calls regarding such technology, etc. If an export license is required, the US company can still hire the foreign national, but it will need to prevent access to the controlled technology or technical data by the foreign national until the company has received the required license or other authorization.

For H-1B/H-1B1, L-1, and O-1 petitions, the US employer will then need to complete an attestation that confirms it has reviewed the Export Administration Regulations and the International Traffic in Arms Regulations and has determined whether a license is required to release controlled technology or technical data to the sponsored worker to file the petition.

If a Nonimmigrant Petition is Approved, a Foreign National Must Secure a Visa at a US Embassy/Consulate Abroad before Entering the Country

To enter the United States in a work-authorized category, an individual must obtain a visa at a US Consulate or Embassy outside of the country (a Canadian national is not

required to secure a visa before entering the United States).¹²

To obtain a visa, a foreign national first needs to complete the DS-160, the online Nonimmigrant Visa Application, and make an appointment with a US Consulate or Embassy outside the country. At the visa appointment, the foreign national should present the approval notice (Form I-797) if the petition was filed with the USCIS,¹³ a letter from the US employer confirming employment, a copy of the nonimmigrant petition filed by the US employer, and any other documentation specified by the US Department of State and/or its consular posts.

Alternatively, if foreign nationals are applying for L-1 status and the company has a blanket L petition, they may apply and secure a visa at a US Consulate or Embassy abroad. Similarly, foreign nationals applying for E-1, E-2, or E-3 status may apply by providing the US Consulate or Embassy with a support package detailing how the company/individual qualifies for the status.¹⁴

Consider Sponsoring the Foreign National for a Green Card

US employers may decide to sponsor the foreign national to work for the company on a permanent basis. The most common employment-sponsored route is Form ETA 9089, Application for Permanent Employment Certification (Labor Certification and or PERM) based green card, which requires the company to recruit for the position to determine whether there are any minimally qualified/willing/able US workers. There are some instances where a PERM is not needed to move forward with a green card, for example, in the case of Outstanding Researchers, Individuals of Extraordinary Ability, Managers/Executives who worked for a related company abroad, and National Interest Waivers.

Despite the many benefits, there are a few drawbacks, including tax consequences. A foreign national may wish to speak with a tax advisor before starting the green card process. **CL**



Joshua S. Mirer is a partner and co-chair of the Immigration Practice Group at Robinson+Cole with nearly 20 years of experience counseling multinational Fortune 100 and Global 500 companies on all their corporate immigration-related legal needs. Attorney Mirer serves as primary outside counsel concerning US immigration matters for global manufacturing, pharmaceutical, and biotechnology companies.



Jennifer L. Shanley is an associate in the Immigration Practice Group at Robinson+Cole, where her practice encompasses all business-related nonimmigrant and immigrant petitions. Attorney Shanley frequently handles multinational intracompany transfers, transfers for individuals with specialized knowledge, and petitions for outstanding researchers and individuals with extraordinary ability. She has helped secure immigration approvals for hundreds of employees, helping business clients attract and secure top talented individuals across a range of industries.

Notes

1. The authors of this article do not purport to provide any legal advice. The article merely focuses on a very simplistic overview of issues that U.S. employers may face when hiring foreign national workers. Readers are cautioned not to attempt to resolve issues on the basis of information contained herein and are strongly advised to seek advice from an experienced immigration attorney regarding specific case situations.
2. There are alternate ways an individual can work for a particular company in the U.S. outside of being sponsored for a work authorized status. Many foreign nationals who are enrolled in a college/university in the U.S. are in F-1 status. Eligible students can apply for Curricular Practical Training (CPT), which is temporary employment authorization while the student is enrolled in a college-level degree program. Eligible students can also apply to receive up to 12 months of OPT employment authorization before completing their academic studies (precompletion) and/or after completing their academic studies (post-completion). In addition, a company can host a J-1 trainee or intern (assuming they meet the requirements). A foreign national may also apply for a J-1 Research Scholar position with a particular college/university and, through that program, can work for a particular company. Lastly, some individuals are sponsored by contracting companies who have already sponsored that individual for an H-1B petition to work at off-site location (i.e., at a client's worksite).
3. There is also an E-3 category that applies only to nationals of Australia, which has the same criteria as that of the H-1B/H-1B1.
4. As of the date of this writing, the NAFTA agreement is still in effect and has not been changed by the current Administration.
5. A company related to the U.S. entity means the company is one of the following: (1) Parent—A firm, corporation, or other legal entity that has subsidiaries; (2) Branch—An operating division or office of the same organization houses in a different location; (3) Affiliate—One of two subsidiaries which are both owned and controlled by the same parent; or (4) Subsidiary—A firm, corporation or other legal entity in which (1) a parent owns (directly or indirectly) more than half of the entity and controls the entity or owns half of the entity and controls the entity; (2) owns 50% of a 50-50 joint venture and has equal control and veto power over the entity; or (3) owns less than half of the entity but controls the entity.
6. A company can file a blanket petition if the company and its parent, branches, subsidiaries and affiliates entities are engaged in commercial trade/services, the company has an office in the U.S. that has been doing business for at least one year, the company has three or more domestic and foreign branches, subsidiaries, affiliates, and the company (1) has obtained approval of at least 10 L-1A/L-1B petitions during the previous 12 months, (2) the company has U.S. subsidiaries/affiliates with combined annual sales of at least \$25 million, or (3) the company has a U.S. workforce of at least 1,000 employees.
7. One potential hurdle in using a company's approved L Blanket is that, for L-1B petitions, the U.S. position must require, and an individual must possess, at least the equivalent of a U.S. bachelor's degree in order to apply at a U.S. Consulate or Embassy. If the company does not require at least a bachelor's degree for the position or if an individual does not possess at least the equivalent of a U.S. bachelor's degree, the company must file an individual L-1B petition with the USCIS.
8. The USCIS requires that an individual demonstrate evidence of at least three of the following criteria: Receipt of nationally or internationally recognized prizes/awards; Membership in associations that require outstanding achievements; Published material in professional or major trade publications, newspapers or other major media about the individual; Original scientific, scholarly, or business-related contributions of major significance; Authorship of scholarly articles in professional journals or other major media; A high salary or other remuneration for services; Serve as a judge of the work of others in the field; Employment in a critical or essential capacity for organizations that have a distinguished reputation.
9. Please see <https://travel.state.gov/content/visas/en/visit/visa-waiver-program.html> for a list of countries that participate in the Visa Waiver Program.
10. Most recently, the H-1B lottery was triggered on the following dates: April 7, 2017 (FY 2018), April 7, 2016 (FY 2017), April 7, 2015 (FY 2016), April 7, 2014 (FY 2015), April 5, 2013 (FY 2014).
11. There is also an annual cap of 10,500 that limits the number of E-3 visas that can be approved each year.
12. Canadian nationals can apply for TN status or L-1 status at the Canadian border or an International Airport.
13. While not required as the U.S. Consulate or Embassy will have access to Petition Information Management Service (PIMS), a computer database that confirms approval of petitions, it is generally recommended that a foreign national bring the approval notice to the visa appointment.
14. The application procedure for E-1/E-2 visa applications differ depending on the country.

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