BUSINESS IMMIGRATION ESSENTIALS

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Introduction to the United States Immigration System

I. The Two Principal Categories — Immigrants and Nonimmigrants

The best way to understand U.S. immigration law is to know that it is divided into two principal categories: immigrants and nonimmigrants. Immigrants are foreign nationals who are permitted to live and work in the United States on a permanent basis. Other names for immigrants are lawful permanent residents or green card holders. In general, persons may qualify for immigrant (*i.e.*, permanent residence) status either through a very close family relationship with a U.S. citizen or permanent resident, or through special job skills which are deemed to be in short supply. This test of the labor market, known as the labor certification process, is often complex and difficult.

There are several routes to permanent residence status as alternatives to the labor certification process. These include qualifying as a multinational executive or manager; a person of extraordinary ability in a particular field; an outstanding professor or researcher; a person of exceptional ability (Schedule A); or a person whose work will benefit the national interest of the United States. All of these possibilities will be explained in greater detail later in this Overview.

Unlike immigrants, who may remain in the United States permanently, nonimmigrants are persons who are coming to the United States for a temporary period. The categories of nonimmigrants include:

- B-1 (visitors for business)
- B-2 (visitors for pleasure)
- F-1 (students)
- H-1B (professionals), officially called “specialty occupation” workers
- H-1B1 (professionals from Chile and Singapore)
- H-3 (trainees)
- L-1 (intracompany transferees)
- E-1 (treaty traders)
- E-2 (treaty investors)
- E-3 (Australian professionals)
- J-1 (exchange visitors)
- TN (NAFTA professionals)

- O-1 (persons of extraordinary ability)
- Q-1 (participants in international cultural exchange programs)

Whether a foreign national qualifies for a work-authorized nonimmigrant status depends on the specific requirements of the position, the particular qualifications of the individual and the legal requirements to qualify for a particular status. The definitions and particular requirements for each of these nonimmigrant statuses will be explained further in this Overview.

II. The Nonimmigrant Visa Categories — A Brief Discussion of the H-1B Specialty Occupation Classification

General Requirements

Of all the nonimmigrant work-authorized visa classifications, the H-1B specialty occupation (*i.e.*, professional) category is the most utilized. It doesn't require the employing entity to be owned by nationals of a particular country (as is the case with E-1 and E-2 visas), it doesn't require previous experience abroad with the employer (L-1s), it doesn't depend on the nationality of the individual (TNs, H-1B1s or E-3s), nor does it (in most cases) depend on a shortage of qualified U.S. workers for the position (the standard for most employment-based permanent residence categories). What does it require?

For an individual to qualify for H-1B status, a U.S. employer must offer a position that normally requires at least a bachelor's degree in a specific field. Further, the foreign national beneficiary must have earned at least a bachelor's degree in this, or a closely related, field. Degree equivalency is permitted under limited circumstances to provide possible H-1B eligibility for persons lacking formal degrees, or for those who have degrees unrelated to the position offered. As a general rule, three years of progressive work experience may be substituted for each year of university that is missing. An independent educational evaluation is required for those lacking a U.S. degree, and an experiential equivalency evaluation is required for candidates lacking a degree or a degree in the appropriate field.

Numerical Limitations

The annual quota for new H-1B cases is only 65,000, and each year the numbers are exhausted well before the fiscal year is up — often within the first five business days that USCIS begins accepting new H-1B filings. For example, in FY2015, the H-1B numbers were exhausted by April 7, 2014 (the first week of the filing period). While there are a few exemptions from the quota (see below), most employers are not able to file new H-1B petitions until April 1 of each year, requesting approval effective October 1 of that same year.

Those exempt from the 65,000 H-1B cap include:

1. Persons who currently hold H-1B status, whose employers seek to extend their H-1B status;
2. H-1B employees who “port” to a new H-1B employer;
3. Persons who have held H-1B status within the past six years and then left the country to live abroad for a year or longer before using up all six years of H-1B status. People in this situation may opt for “remainder time”;
4. Those employed at institutions of higher education, or their affiliated or related nonprofit entities;
5. Those employed at nonprofit research organizations or governmental research organizations; and
6. Those employed at the entities listed in 4 and 5 above who take on concurrent H-1B employment, even if that employment is for a for-profit organization.

In addition, there is a quota exemption (capped at a maximum of 20,000 H-1B visas per year) for those who were awarded U.S. master’s or higher degrees. These 20,000 visas are in *addition* to the “normal” annual allotment of 65,000 H-1B visas.

Labor Condition Application Requirements

The H-1B process includes a number of complex Labor Condition Application (LCA) requirements and procedures. The LCA is not to be confused with the Labor Certification Application required in most employment-based permanent residence cases. All H-1B petitions and extensions must be accompanied by an LCA approved by the United States Department of Labor (DOL).

The LCA must be prepared on the electronic version of the form ETA-9035 found on the DOL’s website, and it requires the internal posting of an informational notice for 10 days in two locations at the worksite(s). The notice provides information to all employees of the company’s intention to hire an H-1B worker and the salary (or salary range) to be paid.

The LCA, which can be valid for up to three years, is essentially a statement by the employer that it will pay the H-1B worker either at the actual wage level it pays to all other similarly qualified employees for the same job, or at the prevailing wage level (*i.e.*, average wage) paid by all employers for similar positions in the same geographic area, whichever of the two is greater. The basis for the actual wage and prevailing wage determinations must be well-documented and kept in a designated “public access” file for the employee. The prevailing wage level may

be determined by requesting a wage determination from the National Prevailing Wage and Help Desk Center, by accessing the DOL website, by relying on an independently published wage survey completed within the past 24 months, or by utilizing any other "legitimate source of wage documentation."

The DOL regulations governing the LCA set out very detailed and complex data collection and record-keeping requirements. The documents to be maintained include the original approved LCA, the posting notices, payroll records, and the actual and prevailing wage documentation. Deficiencies in the LCA documentation expose an employer to a civil penalty of between $1,000 and $5,000 for each violation. Willful violations by an employer of the LCA process may be punishable by disqualification from filing any work-related petitions with the USCIS for up to three years. Please refer to our LCA Memorandum for further details.

H-1B Portability: Employment Authorization Upon Filing

A company wishing to hire a foreign national professional who holds valid H-1B status for another employer is permitted under AC21 to employ that person upon the filing of a new H-1B petition, rather than upon its approval, as was the case in the past. As of February 2016, the USCIS still had not issued regulations for this particular provision of AC21, making the H-1B portability provisions difficult to decipher.

- For example, what happens if a foreign national left his H-1B employment 45 days ago and has remained in the country looking for another job? Can the new employer file an H-1B petition for him that also asks the USCIS to extend the worker's H-1B status, despite the fact that the worker has no recent pay stub to submit with the filing? The USCIS has not adopted a consistent policy on this and other important questions. Until it does, employers should check with us when seeking to "cushion" the effects of a layoff by placing an employee on a paid leave or on an "on-call" status. Those efforts, designed to help an employee, may have employment law consequences and might still not satisfy USCIS requirements as to proper maintenance of H-1B status.
- For I-9 employment verification purposes, the USCIS recently issued guidance on how to complete the I-9 for a "porting" employee. In the Handbook for Employers issued in January 2011, the agency stated that the H-1B employee's Form I-94 issued for employment with the previous employer, along with his passport, would qualify as a List A document. (A List A document is one that establishes both employment authorization and identity.) The new employer should write "AC21" and record the date it submitted Form I-129 to USCIS in the margin of Form I-9 next to Section 2. We

would add that when USCIS issues its official filing receipt (within several days if Premium Processing Service is used; 10 days to several weeks after filing if not), that receipt should be copied and added to the I-9 file. And, of course, when the new H-1B petition is approved, that approval should be noted on the I-9 form, together with the new expiration date.

H-1B Time Limitations

The initial H-1B petition may be approved for a three-year period with the possibility of a final three-year extension. The six-year limitation applies regardless of the number of different H-1B employers the individual has had. In certain circumstances, explained below, extensions beyond year six are available.

The American Competitiveness in the 21st Century Act (AC21) and Seeking 7th and Additional Years of H-1B Status, Even If There Is a Change of Employer

AC21 contains provisions permitting annual one-year extensions of H-1B status if a labor certification application, immigrant petition or adjustment of status application had been filed at least one year before the six-year limit was reached. USCIS has given a liberal reading to the extension provisions of AC21. In a written response to a request for an advisory opinion made by our Business Immigration Group, USCIS advised that a seventh year in H-1B status would be available even when the labor certification application or the I-140 preference petition had been filed by a former employer of the H-1B nonimmigrant, as long as those filings were made more than 365 days before the H-1B worker came to the end of six years in H-1B status. Signing on to our position, the USCIS agreed that the benefits of AC21 are "alien-based" and that the labor certification application and/or I-140 petition need not relate to the foreign national's current employment situation. That reading of the law was later confirmed by the USCIS in a policy memorandum.

However, there's one caveat to keep in mind. In 2007, the U.S. Department of Labor issued a regulation that requires employers to file an approved labor certification application together with an I-140 immigrant visa petition *within 180 days of the labor certification's approval*. After 180 days, the application expires and may no longer be used in a foreign national's permanent residence case. Why does this rule matter for H-1B extensions beyond year six?

An example: You've just hired a foreign national in H-1B status, who came to your company after working for another company in H-1B status for five years. That company filed a labor certification application for him two years ago, which was approved one year ago. The company did *not* follow up and file an I-140 immigrant visa petition on his behalf.

In guidance issued in 2008, the USCIS stated that under this set of facts, a worker will *no longer* be eligible for additional years of H-1B status beyond year six. The agency's position is that since the former employer did not file an I-140 petition for this worker within 180 days of the labor certification's approval, and since the application "expired," it cannot be the basis of additional years of H-1B status.

It is no longer enough to find out whether potential H-1B workers, coming to the end of H-1B status, have had labor certification applications filed on their behalf. Now, it is crucial to find out whether a former employer also filed an I-140 immigrant visa petition in the wake of the approval of its labor certification application. Without that I-140 filing, an H-1B nonimmigrant may find that he has come to the end of all possible H-1B extensions.

AC21 and Special Relief for Nationals of Oversubscribed Countries

In recent years, immigration quotas based on an individual's country of birth created backlogs for nationals of certain countries, particularly India and China, for employment-based immigration. AC21 deals with this problem in two ways. First, the law provides for a reallocation of any unused immigrant visa numbers from the worldwide quota to nationals of oversubscribed countries.

Second, AC21 permits H-1B extensions beyond the normal six-year cap if the individual is the beneficiary of an *approved* I-140 immigrant visa petition but is unable to have his status adjusted to lawful permanent resident because of the per-country quotas. Unlike the provision of AC21 permitting extensions beyond six years in one-year increments, described earlier, this section of the law allows extensions in three-year increments. Moreover, there is no requirement that the labor certification application or the I-140 immigrant preference petition be filed at least 365 days before the end of the normal six-year limitation of H-1B status.

Payment of H-1B Attorney's Fees

Labor Department regulations prohibit an H-1B worker from paying attorney's fees associated with the preparation of the LCA or the H-1B petition. While the USCIS has not addressed the issue, the Labor Department has informally advised that there is nothing in the law or the regulation that would prohibit the attorney's fees from being paid by a third party, so long as the H-1B worker does not reimburse that third party for the amounts paid.

Payment of H-1B Filing Fees

In its "H-1B Advisor," the DOL claims that the $1,500 (or, in some cases $750) training and scholarship fee that must be submitted with an H-1B petition is not only an employer's business expense: It insists that the law requires that an

employer may *never* pass any portion of this fee on to the foreign national or a third party. The H-1B Advisor is available at http://www.dol.gov/elaws/h1b.htm.

However, the H-1B Advisor, which was introduced late in 2010, conflicts with what the DOL said in 2000 about filing fees. Back then, the agency stated that while the H-1B worker could never pay the fees, it did recognize that the statute does not prohibit payment of the filing fee by a third party. Nor does it require payment only from the employer. The only case in which third-party payment would be prohibited was if the third party receives or asks for reimbursement from the H-1B worker.

What about the $500 anti-fraud fee? According to the DOL's H-1B Advisor, that fee is an employer's business expense, and the employer may never pass any portion of this fee on to the H-1B worker or a third party.

But USCIS doesn't agree. During a meeting with the American Immigration Lawyers Association, the agency stated that the $500 anti-fraud fee required for H-1B and L-1 petitions does not need to be paid only by the petitioner, and that it may be paid by the beneficiary or by a third party.

Because of these conflicting statements between the agencies, and even within the DOL itself over the years, the safest course of action is for the employer to pay all fees associated with the H-1B petition process.

Corporate Restructuring

An amended H-1B petition is not required when the petitioning employer is involved in a corporate restructuring (including, but not limited to, a merger, acquisition or consolidation), as long as the new corporate entity "succeeds to the interests and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identity of the petitioner." In an important clarification of the meaning of "interests and obligations," a senior USCIS official has advised in a published letter that the assumption of liabilities refers only to "immigration-related liabilities, such as LCA obligations and violations thereof. It does not refer to nonimmigration-related obligations and liabilities, such as environmental or tort obligations, for example." This provision is a major benefit to companies that acquire or merge into other entities, as they will not have to file new H-1B petitions for each of the employees of the original H-1B entity.

The Department of Labor added its own gloss on the issue of employer obligations to H-1B workers following corporate restructuring. An employer that undergoes a corporate restructuring is not required to file a new LCA so long as the new entity agrees to assume the LCA obligations and liabilities of the prior entity. Further details of the Department of Labor regulations are contained in our LCA Memorandum.

Change in H-1B Work Location

An H-1B employer must obtain a new LCA from the Department of Labor and must also file an amended H-1B petition before relocating an H-1B employee outside of the metropolitan statistical area (MSA) listed on the LCA. An amended filing is not required when the H-1B employee moves to a worksite within the same MSA listed on the LCA already on file with USCIS (for example, a move from Manhattan to Brooklyn would not require an amended filing). Amended filings are not required for short-term placements (not exceeding 30 days or, in some circumstances, 60 days). In those instances where an amended filing is required, the H-1B employee can immediately begin work at the new location upon filing of an amended H-1B petition.

H-4 (Dependent of H-1B) Status

The spouses of H-1B workers may enter the U.S. in H-4 status. Individuals in H-4 status are eligible for work authorization only if their H-1B spouse either (1) is the beneficiary of an approved Form I-140 immigrant visa petition or (2) has been granted a one-year extension of his or her H-1B status based on 365 days or more having passed since the filing of an application for labor certification or an immigrant visa petition on his or her behalf. Eligible H-4s will not receive work authorization automatically. Rather, they must file an application for an employment authorization document (EAD), together with evidence of eligibility. Furthermore, H-4s cannot begin working until the EAD has been issued, which normally takes between 90 and 120 days.

The dependents of H-1B nonimmigrants who hold H-4 status are eligible for an H-4 extension beyond the six-year limit if the H-1B spouse's stay is extended beyond six years. However, in order to qualify for an H-1B extension beyond year six, the spouse of an H-1B worker who also holds H-1B status must meet all of the requirements for H-1B extensions independently.

For example, if a husband and wife are both in their sixth year of H-1B status, and the husband's employer had filed a labor certification application for him several years ago but the wife's employer had not taken steps to get her permanent residence status, the husband would be able to get an extension of his H-1B status beyond year six, but the wife would not. She would have to change to H-4 status.

L-1 Intracompany Transferees

Executives and managers (L-1As) and specialized knowledge employees (L-1Bs) who have worked abroad for a subsidiary, affiliate or branch of the U.S. company for one year out of the prior three years are eligible for L-1 status if they are transferring to a related U.S. entity. The spouses of L-1 transferees enter the U.S.

in L-2 status, and once they have done so, they (unlike H-4 visa holders) can apply to USCIS to obtain work authorization.

L-1 managers may not be first-line managers, unless they direct other professionals. If, however, they manage an “essential function” of the organization or one of its departments or divisions, they need not have supervisory responsibilities over other employees to qualify.

Specialized knowledge includes either “special knowledge of the company product and its application in international markets” or “an advanced level of knowledge or expertise in the organization’s processes and procedures.” Although the knowledge need not be “proprietary,” it should be knowledge that is different from or greater than the ordinary or usual knowledge of an employee in the particular field.

In an attempt to crack down on perceived abuses in the L-1B category, Congress passed the L-1 Visa Reform Act of 2004. That law, aimed at so-called job shops, takes a hard stance on specialized knowledge personnel who are primarily stationed at the worksite of another employer. L-1Bs will not be granted if the beneficiary is controlled and supervised by that unaffiliated employer, or if the L-1B’s placement is part of an arrangement primarily to provide labor for the third-party entity. The Act also imposed a special anti-fraud filing fee of $500 for the first time an employer files an L-1 petition for an individual; the fee is not imposed on extensions of stay.

L-1 Time Limitations

Like H-1B petitions, L petitions may be approved for an initial three-year period. L-1As may be granted two extensions of two years each (for a total stay of seven years), while L-1Bs are limited to one extension of two years (for a total stay of five years). For U.S. entities operating for less than one year, initial approval is for a one-year maximum period, with extensions possible. Also, there are additional and substantial evidentiary requirements for new-business Ls.

Blanket Ls

The “blanket L” is a way of obtaining preapproval from USCIS that the requisite corporate ownership exists between the U.S. company and the foreign branch, subsidiary or affiliate. Once a blanket L petition is approved, individual L-1 papers are presented to a U.S. consular officer abroad (and not to USCIS), who will determine whether the individual meets the other requirements of having qualifying employment abroad and a qualifying offer of employment in the U.S.

For a company to be eligible for blanket L approval, it must have been doing business in the United States for at least one year, have at least three domestic

and foreign operations, which, like itself, are engaged in commercial trade or services, and satisfy one of the following additional requirements: a) it has had at least 10 L approvals for executives, managers or specialized knowledge professionals during the previous 12 months; b) the U.S. operations have a combined gross annual income of at least $25 million; or c) the U.S. workforce numbers at least 1,000.

Once a blanket L petition is approved, there are three principal advantages:

1. The individual L case can often be approved relatively quickly by the U.S. consular officer abroad;
2. There is no need to re-establish the qualifying nature of the corporate relationships, as this was already favorably decided in the course of the blanket L petition's adjudication; and
3. An L-1 employee can change his employer within the corporate group without the need for an amended filing, provided the new employer is listed on the blanket L petition.

There are, however, some drawbacks to the blanket L. If a consul is untutored in L-1 law, he or she might erroneously deny the individual's application. In that case, the employer can still file an individual petition with the Vermont Service Center, but it must disclose the consular denial and then seek to overcome this adverse determination.

TN Status

The North American Free Trade Agreement (NAFTA) provides for TN status for qualified Canadian and Mexican nationals. A U.S. job offer is generally (though not always) required. Only those specific professions listed in NAFTA are amenable for TN treatment. The list of professions includes graphic designers, economists, computer analysts, lawyers, management consultants, university teachers, engineers and geologists. The specific educational requirements vary with each profession listed, but usually a bachelor's degree is required. One significant exception is for "management consultants," who may substitute five years of experience in the specific field for the missing degree. We caution, however, that a management consultant must be coming to work either for a management consulting firm or on a specific, temporary consulting assignment that is not a regular ongoing position.

A Canadian national may have TN papers adjudicated at the border, and both Canadians and Mexicans may have TN papers adjudicated by the Vermont Service Center. Upon approval, however, a Mexican national must also have a TN visa issued at a consular post. Alternatively, a Mexican national may file TN papers at a U.S. consulate and if they are approved, a TN visa will be issued. TN status is

granted for up to three years at a time (at agency discretion), and theoretically it may be extended without limitation (for up to three years at a time) so long as the individual does not have an intent to remain in the United States permanently. When a labor certification application or an immigrant visa petition is filed on behalf of an individual in TN status, this is generally regarded as exhibiting immigrant (*i.e.*, permanent) intent.

The H-1B1 Classification

In 2003, President Bush signed free trade agreements with Chile and Singapore, which became effective on January 1, 2004. Included in the agreements are a number of immigration provisions, including those that allow for the temporary entry of H-1B1 business professionals. In the case of Singapore, 5,400 nonimmigrants are permitted to enter the United States annually in H-1B1 status; in the case of Chile, 1,400 may enter each year.

H-1B1 processing is faster and less costly than H-1B petitions because initial H-1B1 applications are handled directly at U.S. consulates abroad (thus bypassing USCIS and its hefty filing fees). However, if it wishes to do so, an employer can submit a petition to USCIS to change a foreign national's status to H-1B1 if that person is already in the United States in another nonimmigrant status. Like the TN classification, there is no maximum limit on the number of years one can hold H-1B1 status. However, admission in H-1B1 status is for only one year at a time, and extensions must be applied for annually. Those entering in H-1B1 status are presumed to be intending immigrants and must maintain a residence abroad that they have no intention of abandoning.

For the most part, for an individual to qualify for H-1B1 status, the job must be a professional one, requiring a minimum of a bachelor's degree in a specific field; the Chilean or Singaporean national must have the required degree (or its equivalent); and the employer must file an LCA attesting that it will pay the higher of the actual or the prevailing wage.

Unlike the H-1B petition, no premium processing is available for H-1B1 petitions. Nor may an H-1B1 "port" to a new job before the new employer's petition is approved.

Spouses of H-1B1 principals are not authorized to be employed in the United States.

O-1 Persons of Extraordinary Ability or Achievement

U.S. immigration law recognizes persons of high distinction under three different standards. For persons of extraordinary ability in the arts (which is defined as "any field of creative activity or endeavor"), the standard is "distinction" in the

field. This has been defined by USCIS to mean “a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.”

The second level applies to persons of extraordinary ability in the field of science, education, business or athletics. The standard required is a level of expertise indicating that the individual is one of the small percentage who has risen to the very top of the field.

The third and final level for qualifying for O-1 status is for persons of extraordinary achievement in television or film. The individual must have played a leading, outstanding or notable role in the field of television or film as shown by “a degree of skill and recognition significantly above that ordinarily encountered.” While the evidentiary standards for O-1 eligibility differ for each level described above, the criteria listed on page 37 (in the description of the EB-1(1) Extraordinary Ability category) provide a sense of the types of evidence that establish O-1 eligibility.

Although the O-1 status is used most frequently in the entertainment and arts world, it may be a very useful alternative in cases where the individual lacks a degree or experience necessary for H-1B status, where the H-1B numbers have been exhausted, where the individual has reached the time limit in an H-1B or L-1 status, or where the individual cannot qualify for other work-authorized statuses. It can be used for persons in a wide variety of fields, including economics, journalism, advertising and medicine.

E Visa Status

Both the E-1 (treaty trader) and E-2 (treaty investor) statuses are available to certain foreign nationals who will be employed in the United States by a company at least 50 percent-owned by nationals of the applicant’s country of citizenship. The nationality of the company and of the individual must be the same, and that nation must have a treaty of trade or investment with the United States. Certain countries have both types of treaties, while others (such as Israel or Denmark) have only a treaty of trade or investment, but not both. Moreover, many countries (including Brazil) have no treaties whatsoever.

The individual who seeks E-1 or E-2 status may qualify as the principal trader or investor or, more commonly, as an employee who will function in an executive, supervisory or essential skills position.

For E-1 eligibility, the U.S.-based E-1 entity must demonstrate that more than 50 percent of its international trade is between the treaty country and the United States. Domestic sales do not count. For example, a U.S.-based, wholly owned

subsidiary of a British company imports $5 million worth of raincoats in a year from its British parent. The $5 million represents 100 percent of its annual international trade. The fact that it then sells the coats in the United States for $15 million does not dilute the fact that 100 percent of its international trade is with Great Britain.

Please note, however, that a different rule is imposed for U.S. branch offices of foreign companies. Branch offices must establish that more than 50 percent of the entire entity's international trade is between the home country and the United States. For example, if a French bank establishes a U.S. branch office, the U.S. consul will look to see whether the majority of the French bank's international trade is with the United States. The fact that the branch office may have 100 percent of its trade with France is not sufficient if the entire French entity cannot meet the 51 percent test.

For E-2 eligibility, the employer must demonstrate that a substantial investment has been made in the U.S. business. No minimum dollar amount is specified, but the investment must satisfy proportionality and marginality tests that have been formulated by the U.S. Department of State. As a general rule, investments of less than several hundred thousand dollars are unlikely to be considered "substantial."

E-3 visas are for Australian professionals. There are 10,500 new visas per fiscal year for Australians seeking to work in "specialty occupations" as defined in the H-1B provisions of the law. E-3 processing is faster and less costly than H-1B petitions because E-3 applications are handled directly at U.S. consulates abroad (thus bypassing USCIS and its hefty filing fees). E-3 visas are also more favorable given that there is no maximum limit on the number of years one can hold E-3 status.

For an individual to qualify for E-3 status, the job must be professional in that it requires a minimum of a bachelor's degree in a specific field, the Australian national must have the required degree (or its equivalent) and the employer must file an LCA attesting that it will pay at least the prevailing wage. Although E-3 visas are not "dual intent" visas, E-3 holders do not need to have a foreign residence. They simply must attest that they intend to depart the U.S. when their status terminates.

E visas are normally applied for directly at a U.S. consular post, usually in the applicant's home country. E-1 and E-2 visas are usually issued for five years and are renewable for subsequent five-year periods, without limitation. E-3 visas are issued for two years and also may be renewed. There's no limitation on how long someone can remain in E-3 status. Upon each entry, the E visa holder is admitted for two years.

Spouses of E-1, E-2 or E-3 principals may apply to the USCIS for employment authorization.

Training Visas: F-1, H-3 and J-1

There are several types of visas available to persons who will receive training in the United States: F-1 (optional practical training), H-3 (trainee), and J-1 (exchange visitor) status.

F-1 Optional Practical Training Status

Students in good standing are entitled to 12 months of optional practical training (OPT) per degree, which may be used before or after graduation in any combination. The job duties must be related to the student's major field of study, but there is no pre-adjudication by the USCIS. Rather, once the student presents the Employment Authorization Card to the employer, he may be placed on payroll and commence employment.

Post-Completion Optional Practical Training

Practical training undertaken *after* graduation is referred to as "post-completion" OPT. Those students in OPT who are seeking to change status to H-1B may be eligible for an automatic extension of OPT status while the H-1B petition is pending and until it becomes effective, normally on October 1. Those students in OPT status whose underlying degree is in the field of science, technology, engineering or mathematics (STEM) may be eligible for an additional period of 17 months of OPT after completing 12 months of post-completion OPT, but only if the employer registers in E-Verify. (Note that a challenge to the legality of the 17-month STEM OPT extension provision of the law is currently undergoing judicial review. Please see Part One of this Overview for details.)

What if an F-1 student who has a bachelor's degree in a STEM field is in post-completion OPT based on a non-STEM master's degree? Is he eligible for the 17-month STEM extension of his OPT? For example, suppose one of your F-1 employees was awarded a bachelor's degree in electronic engineering but is currently employed in OPT status based on his recent receipt of a master's degree in business administration. Can he qualify for the 17-month STEM extension based on his engineering degree?

The answer is no. Under the regulations, the degree that is the basis for the student's current period of OPT has to be the STEM degree. Since in this case the student's OPT was based on his master's degree program in business administration, he is not eligible for the STEM extension.

Which Are the STEM Professions?

To answer this question, USCIS refers to a "STEM Designated Degree Program List," which is based on the U.S. Department of Education's "Classification of Instructional Programs" (CIP) 2000 report, available online at http://www.ice.gov/sevis/stemlist.htm.

According to USCIS, the list of degrees includes those in the following fields:

- Computer Science: NCES CIP Codes 11.xxxx (except Data Entry/Microcomputer Applications, NCES CIP Codes 11.06xx)
- Engineering: NCES CIP Codes 14.xxxx
- Engineering Technologies: NCES CIP Codes 15.xxxx
- Biological and Biomedical Sciences: NCES CIP Codes 26.xxxx
- Mathematics and Statistics: NCES CIP Codes 27.xxxx
- Military Technologies: NCES CIP Codes 29.xxxx
- Physical Sciences: NCES CIP Codes 40.xxxx
- Science Technologies: NCES CIP Codes 41.xxxx
- Medical Scientist (MS, PhD): NCES CIP Code 51.1401
- Actuarial Science: NCES CIP Code 52.1304

How to Apply for the 17-Month Extension of OPT

To apply for the 17-month extension of employment authorization, STEM graduates on OPT must seek out the recommendation of the designated school official (DSO), who must make the recommendation through the Student and Exchange Visitor Information System (SEVIS).

Once the DSO recommends the extended training period, the student must submit a form I-765 (with fee) to the USCIS before the expiration date of his current EAD. Please remember that STEM OPT will not be granted unless the employer is registered to participate in E-Verify.

What Happens If the Student's Current 12-Month EAD Expires While Awaiting the 17-Month Extension?

EADs are automatically extended for 180 days for students with pending requests for extension of post-completion OPT while USCIS adjudicates the request for the extension.

Employer Responsibilities

In addition to registering in the E-Verify employment verification program, employers must report to the student's DSO within 48 hours if the student leaves the employer prior to the end of the authorized OPT employment period. A student will be deemed to have left the employment if the employer knows that the student has terminated employment or if the student has not reported for work for five consecutive business days without the consent of the employer, whichever occurs earlier. The employer can find the DSO's contact information on the student's form I-20.

Student Responsibilities

Under the regulation, students seeking a 17-month STEM extension must agree to report within 10 days the following changes to the DSO:

- The student's legal name
- The student's residential or mailing address
- The employer's name
- Address of the student's employer
- Loss of employment

And in a Fact Sheet posted on the USCIS website, the agency says that the student must also notify the DSO of the following additional changes:

- Job title
- Email address
- Supervisor name and contact information
- Employment start date
- Employment end date

The student must also file a validation report with the school every six months from the date the STEM extension starts, even if there have been no changes. All of the information reported to the school must be reported in SEVIS by the DSO.

Is There a Grace Period When the 17-Month STEM Extension Is Over?

Yes. A 60-day grace period applies after the extended 17-month OPT employment authorization expires. Again, no employment is permitted during these 60 days.

Rules on F-1 Employment

There are also rules in place covering students with an EAD who are unemployed. Students with a 12-month EAD may have an aggregate maximum period of unemployment of only 90 days. That period increases by 30 days for F-1 students in the 17-month STEM extension period.

Other rules governing OPT include:

- Employment must be at least 20 hours a week and must be related to the student's degree program.
- Students such as musicians and other performing artists may work "gigs."
- Students on OPT may also start a business and be self-employed, but the self-employment must be full time.
- A student may work for more than one employer, but all employment must be related to the degree program.
- Regarding unpaid employment (*e.g.*, volunteer work), Student and Exchange Visitor Program rules provide:
  - For regular post-completion OPT, the employment does not have to be paid employment, but it does have to be at least 20 hours a week.
  - For the 17-month STEM extension, employment must be paid employment, and it must be at least 20 hours a week. Volunteer work is permitted, but it does not count as employment for maintaining status.

H-3 Trainees

H-3 status is available for individuals coming to the U.S. to receive formal training and instruction provided by the employer. The employer must develop a very detailed training program that will not displace any U.S. workers. The training must be unavailable in the foreign national's home country, and there must not be any net productive gain to the U.S. employer. It is this last requirement that makes H-3 cases difficult.

The H-3 petition is filed with the appropriate USCIS Regional Service Center, and approval may be granted for up to two years.

Generally, any trainee present in H-3 status for 24 months must live abroad for at least six months before qualifying for readmission in either H or L status.

J-1 Exchange Visitor Status

The J-1 classification is administered by the DOS. Unlike most nonimmigrant classifications, J-1 applications are not submitted directly to USCIS or to a U.S. consular post abroad. Rather, a U.S. employer (also referred to as a "host organization") must either have a preapproved J program or apply through one of several designated J-1 sponsors (*e.g.*, International Student Exchange, the Spain-U.S. Chamber of Commerce or the American Immigration Council). Host organizations must enter into third-party agreements with the J-1 sponsor. Training may be offered in a variety of fields, including business, journalism, law, finance, advertising, graphic design and marketing.

The J-1 regulations that went into effect on July 19, 2007, narrowed the scope of qualified J-1 applicants, and introduced a new form, DS-7002, which requires extensive information about the proposed training. The regulations divide qualified J-1 applicants into two categories: "trainees" and "interns." Trainees are foreign nationals who have a postsecondary, foreign degree or professional certificate and at least one year of prior related work experience acquired abroad. Alternatively, trainees are defined as foreign nationals who acquired five years of work experience abroad in their occupational field. Interns are foreign nationals who are currently enrolled in a foreign postsecondary school, or who graduated from such an institution no more than 12 months prior to the exchange-visitor program start date. Both trainees and interns must demonstrate verifiable English language skills, which may require an interview with the sponsor.

The J-1 training programs must not be used as substitutes for ordinary employment, and trainees must not be placed in positions that displace American workers. Although some productive work is permitted, as these are work-based learning programs, the overriding purpose of the program must be training.

The regulations permit trainees to return to the U.S. for additional training that is more advanced or in a different field, as long as they have been absent from the U.S. for at least two years following the completion of the initial training program.

Certain J-1s (and their accompanying J-2 family members) are subject to a requirement to return to their home country for a two-year period before they are permitted to change status to H or L, or to become permanent residents. Js become subject to this foreign residence requirement if there is government funding (United States or foreign) for their participation in the J program, or if the individual's occupation is in short supply in the foreign national's home country, as listed on a "skills list" maintained by the United States Department of State. (All foreign physicians coming to the United States in J-1 status to participate in graduate medical education or training are subject to the two-year rule.)

Waivers of the foreign-residence requirement might be possible, depending on the source of the funding and the position taken by the home country's government. If the residence requirement is caused by a skills list designation, then a waiver is likely to be approved so long as the home country government states that it has "no objection" to its citizen not returning home. On the other hand, waiver requests in cases where there is substantial U.S. government funding are generally very difficult, if not impossible, to obtain.

B-1 (Business Visitor) Status

The B-1 category remains extremely attractive for persons seeking to enter the country to engage in a wide range of permissible "B-1" activities. The status is available to foreign national employees of an entity abroad coming on business for the foreign employer and receiving no U.S. remuneration, except that reimbursement for living expenses is permitted.

With two important exceptions, B-1s may not provide services to a U.S. employer. These two exceptions are for B-1s otherwise eligible for H-1B (professional) status or for H-3 (trainee) status. Although both the State Department and the USCIS have announced their intention to eliminate the "B-1 in lieu of H-1B rule," that provision remains in effect, at least for the time being. In no instance, however, can the B-1 visitor be paid for his services by any U.S. source, and he must remain on the payroll of the foreign employer.

B-1 visits are generally of short duration, no more than several months per visit. If, however, a longer period is needed, an extension may be requested.

B-1 status is also available to certain trainees who have no foreign employer, so long as they will not be paid a U.S. salary and they are coming solely to observe the U.S. operations for a brief period (usually no longer than six months). Recently, the DOS made one minor but important change in the B-1 observer provision: The U.S. entity may no longer reimburse the B-1 observer for reasonable living expenses.

Visa Waiver Program

Foreign nationals of Andorra, Australia, Austria, Belgium, Brunei, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Taiwan and the United Kingdom may enter the United States without a B-1 or B-2 (tourist) visa if they are coming for no longer than 90 days for business or tourism. Citizens of Visa Waiver Program countries who are dual nationals of Iran, Iraq, Syria or Sudan, or who

have visited these countries on or after March 1, 2011, are not eligible for the Visa Waiver Program. The same rules that apply to B-1 entries with a visa, as discussed above, also apply to persons entering for business under the Visa Waiver Program (*i.e.*, a visit must be at the request of a foreign employer, with no remuneration from any U.S. source except for reimbursement of expenses).

If arriving by air or sea, the visitor must have a round-trip, nontransferable ticket. If by land, the individual must have evidence of financial solvency and a residence abroad. A visitor entering under the Visa Waiver Program may be readmitted after a visit to Canada, Mexico or the "adjacent islands" (*i.e.*, the Caribbean) provided that: 1) the 90 days given upon initial admission has not expired; 2) the individual intends to depart the United States by the 90th day; and 3) the individual presents a valid passport reflecting admission to the United States under the program. Readmission to the United States will be only for the balance of the time that was left on the individual's I-94 before he departed, and will not restart the clock.

No extensions or requests for changes of status may be made following entries under the program, and the program is not available to those arriving on private jets.