Immigration Discussion With Kevin McNamara

Boston College
Thursday, February 23, 2017

Mintz Levin. Not your standard practice.
H-1B "Specialty Occupation" Visa

• Job must normally require minimum of a Bachelor’s degree in a particular field(s) of study
• Must have that degree or its equivalent
• Must work for petitioning employer only
• Employer must pay prevailing wage
• Dual intent visa
• Part-time available
• If terminated, employer must provide return transportation
• Concurrent H-1B employment allowed
• Portable on filing of new employer's petition
Validity Period of H-1B Visa

- Allowable for six years (with some exceptions)
- Approvable in increments of up to three years
- Exception for time spent outside U.S.
- Exceptions for green card process
- Grace periods
The H-1B Visa Cap

- 65,000 per Fiscal Year, but 6,800 reserved for citizens of Singapore and Chile
- 20,000 for holders of U.S. Masters or higher degree
- FY: October 1st - September 30th
- Quota opens up on April 1st
- FY2017 – about 1 and 3 petitions filed in first week of April were selected for processing
- Forecast for FY2018
Cap Exempt H-1B

• Institutions of Higher Education
• Related or Affiliated Non-Profits
• Non-Profit Research Organizations
• Governmental Research Organizations
• Employed by for-profit, but working at an Exempt Institution
  – Majority of time spent working at and in furtherance of Exempt Institution
• Concurrent Exempt and Non-exempt employers allowed
• Extension of H-1B, Second H-1B, Transfer H-1B
Rights of H-1B Family Members

• Spouse and children entitled to H-4 derivative visa status but may NOT work.

• Except for spouses in H-4 status, who may apply for work authorization if H-1B spouse has reached a certain point in green card application process.
H-1B Filing Fees

• $500 anti-fraud fee for first time petitions
• $1,500/$750 employment and training fee
• $460 filing fee
• $1,225 premium processing fee
• Legal fees
• Who pays?
H-1B Visas for Entrepreneurs

• It is possible to start a company and get an H-1B visa; you **must prove** there is an arms-length relationship between you and your company

• Beneficiary may own shares but better to own less than 50%

• Preferred Corporate Vehicle: Corporation, not LLC

• Company is the “sponsor”

• Independent Board of Directors

• Key criteria: must prove company “controls” company owner (reviews work, can fire, etc.); funding; office space; other employees
H-1B Visas for Entrepreneurs

• Plan ahead – meet with counsel who understands immigration aspects of setting up a new business

• “C” job titles subject to extra scrutiny

• Immigration petition form requires disclosure of ownership interest in petitioning company
Two Ways to Work in H-1B Status When Quota Exhausted

1. Work is both physically performed on campus or other worksite of quota-exempt institution and furthers the interest of the institution

2. File two H-1B petitions successively:

   - Two-step process:
     - Step One: University or other cap-exempt employer files H-1B petition for P/T position
     - Step Two: Once exempt petition approved, non-exempt company files second H-1B petition on your behalf for "concurrent" H-1B employment

   - Private company H-1B not subject to H-1B quota as long as you continue to work for quota-exempt employer part-time.

   - If you stop working for quota-exempt employer, your second H-1B approval no longer valid
Free Trade "H-1B’s"

• Special Trade Agreement-Based Visa Options for Citizens of:
  – E-3 Australia
  – TN Canada
  – H-1B1 Chile
  – TN Mexico
  – H-1B1 Singapore

• No Dual intent
Nonimmigrant Visa L-1

• Intra-company transferee

• Nexus between foreign and U.S. company ownership (parent/subsidiary, affiliate, branch office, joint venture)

• Must have worked for related company abroad in a qualifying position for at least one year during three year period before the transfer

• Must be offered a qualifying position with the U.S. petitioner

• Dual intent visa

• Spouses and children under 21 get L-2 visas

• Spouses may apply for EADs
Nonimmigrant Visa L-1A

Qualifying positions - L-1A

• Must fill an executive/managerial position
• Initial period of three years with seven year maximum
Nonimmigrant Visa L-1B

Qualifying positions - L-1B

• Position must require "specialized knowledge" of the company’s products, processes, operations, or procedures

• Initial period of three years with maximum stay five years

"New Office" L-1A/L-1B – One year initial authorization
E-1/E-2 Treaty-Based Visas

E-1 = "trade"-based visa – requires established trade pattern between U.S. and home country
E-2 = "investment"-based visa – requires "substantial" investment in U.S. business

- Prospective visa holder must be citizen of country which has relevant treaty with U.S. (see list)
- Sponsoring U.S. company must be at least 50%-owned by nationals (or companies) of that same treaty country
- Admit as an Investor, Executive, Manager or Essential Capacity Employee
- For New Start-up E-2 "investor" visa is only option
- E-2 investor visa portion of investment $ must be committed prior to visa approval
- E-1/E-2 spouse can get work authorization
## Treaty Countries

<table>
<thead>
<tr>
<th>Treaties or equivalent arrangements providing for trade and investment (E-1 and E-2) status are in effect with the following countries:</th>
<th>Treaties conferring only E-1 treaty-trader status exist with the following countries:</th>
<th>Treaties conferring only E-2 treaty-investor status exist with the following countries:</th>
</tr>
</thead>
</table>
| • Argentina  
• Australia  
• Austria  
• Belgium  
• Bolivia  
• Bosnia and Herzegovina  
• Canada  
• Chile  
• China (Taiwan only)  
• Colombia  
• Costa Rica  
• Croatia  
• Denmark  
• Estonia  
• Ethiopia  
• Finland  
• France  
• Germany  
• Honduras  
• Iran  
• Ireland  
• Italy  
• Japan  
• Jordan  
• Korea (South)  
• Kosovo  
• Latvia  
• Liberia  
• Luxembourg  
• Macedonia  
• Mexico  
• Montenegro  
• Netherlands  
• Norway  
• Oman  
• Pakistan  
• Paraguay  
• Philippines  
• Poland  
• Serbia  
• Singapore  
• Slovenia  
• Spain  
• Suriname  
• Sweden  
• Switzerland  
• Thailand  
• Togo  
• Turkey  
| • United Kingdom  
• Yugoslavia  
• Brunei  
• Greece  
• Israel - E-2 implementation pending  
| • Albania  
• Armenia  
• Azerbaijan  
• Bahrain  
• Bangladesh  
• Bulgaria  
• Cameroon  
• Congo (Brazzaville)  
• Congo (Kinshasa)  
• Czech Republic  
• Ecuador  
• Egypt  
• Georgia  
• Grenada  
• Jamaica  
• Kazakhstan  
• Kyrgyzstan  
• Lithuania  
• Moldova  
• Mongolia  
• Morocco  
• Panama  
• Romania  
• Senegal  
• Slovak Republic  
• Sri Lanka  
• Trinidad & Tobago  
• Tunisia  
• Ukraine |
Nonimmigrant Visa O Category

• Alien of extraordinary ability
• Authorized for time necessary to complete the engagement, project or performance
• Semi-Dual intent in that no foreign residence required and PERM or I-140 shall not be sole basis for denying O-1 approval
Nonimmigrant Visa O Category

Must show at least three of the following:

- Nationally or internationally recognized awards
- Membership in associations requiring outstanding achievement
- Published material in professional or major trade journal or media about the applicant
- Participation on panel or as judge of the work of others
- Major contributions to the field
- Authorship of scholarly articles in the field
- Employment in critical or essential capacity for an organization or establishment
- High salary compared to others in the field
Green Card Options

• PERM Labor Certification
• Extraordinary Ability/Outstanding Researcher or Professor/Multinational Manager or Executive
• National Interest Waiver
• Investor
• Family-based
• Diversity Lottery

Annual quotas based upon country of birth and immigrant visa category determine timing of qualified applications

DOS monthly Visa Bulletin; subscribe at listserve@calist.state.gov and in message body: Subscribe Visa-Bulletin.
THANK YOU!

Kevin R. McNamara, Esq.
Immigration Section Manager
Mintz Levin
One Financial Center, 40th Floor
Boston, MA 02111
(617) 348-1633
krmcnamara@mintz.com