WHAT IF MY CASE DID NOT GET CHOSEN IN THE H-1B LOTTERY: EXPLORING WORK VISA OPTIONS BEYOND THE H-1B CAP (PART VII of an VIII Part Series)

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Last year USCIS announced earlier that it received approximately 236,000 H-1B petitions for the fiscal year 2017. Once the lottery (also referred as "random selection process") has been completed USCIS starts to send receipt notices. With uncertainty looming large as to who may or may obtain an H-1B in the 2018-2019 H-1B Fiscal Year Lottery, it is time that prospective H-1B visa beneficiary hopefuls start exploring other work visa options that may allow them to work and live in the United States on a temporary basis. This article provides a snapshot of possible work visa options that may be available to prospective H-1B nonimmigrant work visa beneficiaries who do not get chosen to be among the lucky few who are chosen to be in the 2017-2018 Fiscal year H-1B cap.

CAP-EXEMPT H-1B VISAS:

There are certain categories of cap-exempt H-1B visas. One such category is for foreign nationals having (or hoping to have) an employment offer from an institution of higher education (or related or affiliated nonprofit entities), or from a nonprofit/government research organization.

To be classified as cap-exempt, it not mandatory that the prospective H-1B employee should be employed by the institution of higher education (or related or affiliated nonprofit entities), or nonprofit/governmental research organization. Prospective H-1B employees, employed by *any employer*, who will perform the majority of his/her work at the qualifying institutions mentioned could qualify for the cap-exempt H-1B visa provided the work performed should 'predominantly further' the normal, primary, or essential purpose of the qualifying academic institution of higher education.

To illustrate, consider the case of an Information Technology (IT) company having a contract with a U.S University for hiring and placing IT consultants for developing/customizing University software. Assuming that IT consultants hired by the consulting company will primarily work developing/customizing University's software and that the work will benefit the university in reaching one of its stated primary or essential goals then it is arguable that such employees may be treated as H-1B cap-exempt employees even though they will not be employed directly by the University.

OTHER PROFESSIONAL SPECIALTY WORKER VISAS TO CONSIDER SUCH AS THE H-1B1, TN AND E-3 VISAS:

There are three nonimmigrant visa categories that are similar to H-1B visas that are designated for temporary professional workers from specific countries. These visas are based upon specific trade agreements that foreign nations have signed with the United States. Consideration of the existence of these visa types may also lead HR Professionals to hone their recruitment methodologies so as to focus on this potential pool of candidates.

The 'H-1B1' visa program is designed specifically for the nationals of Chile and Singapore. Up to 6,800 visas (1,400 visas for the nationals of Chile, and 5,400 visas for the nationals of Singapore) are set aside each Fiscal Year from the H-1B cap of 65,000. The H-1B1 can be obtained at the U.S. Consulate/Embassy abroad without submitting a petition to the USCIS. Additionally, Canadian and Mexican temporary professional workers may explore the option of TN classification. The regulations specify various categories of professions as well as the minimum qualifications for each profession that are covered by Appendix 1603.D.1 to Annex 1603 of North American Free Trade Agreement (NAFTA). In the Annex is a list of professional positions for which qualifying candidates can enter the us to work for U.S. employers.

Further, nationals of the Commonwealth of Australia may qualify for E-3 temporary work visas. Like the H-1B1, E-3 visas are subject to an annual cap of 10,500 per fiscal year. The E-3 candidate needs to obtain a Labor Condition Application (LCA) as a precursor to the grant of E-3 status.

Occupationally, H-1B1, TN and E-3 mirror the H-1B visa in that the foreign worker must be employed in a "specialty occupation". While both H-1B1 and E-3 requires Labor Condition Application (LCA) attestation from the Department of Labor (DOL), TN visa does not impose this requirement. Unlike the H-1B, which is a "dual intent" visa, none of the above-mentioned categories are dual intent. In simple terms, while a foreign national employed in a valid H- 1B status can pursue an employment-based immigrant visa (commonly referred as an employment-based "Green Card"), foreign nationals employed on H-1B1, TN or E-3 may find themselves constrained by this limitation. However, foreign nationals employed in these categories can pursue employment-based Green Card Petitions and/or Applications by changing their status to a dual intent nonimmigrant visa category such as H-1B, L-1, etc.

THE TREATY TRADER/INVESTOR VISA: A VISA CLASSIFICATION NOT TO BE OVERLOOKED

A foreign national may qualify for an E visa depending on the type of agreement [Bilateral Investment Treaty (BIT), Free Trade Agreement (FTA), or Treaty of Friendship, Commerce and Navigation (FCN)] his/her country of Citizenship may have with the United States. There are two types of E visas: Treaty Trader visa (E-1) and Treaty Investor visa (E-2). Nationals of a foreign country having a FTA may qualify in some cases for both an E-1 and E-2 visa Countries with a BIT allow only for an E-2 visa.

For an E-1 visa, a foreign national entering the United States is required to be engaged in substantial trade which is international in scope, principally between U.S. and the foreign state. The E-2 visa, on the other hand, requires the foreign national develop and direct the operations of an enterprise in which the foreign national has invested, or is actively in the process of investing, a substantial amount of capital. The enterprise must be a *bona fide* enterprise. Further, a "key employee", including the executives and supervisors, or persons whose services are "essential to the efficient operation of the enterprise" may qualify for an E-1/E-2 visa depending on the bilateral agreement between the foreign country and the United States.

FOREIGN STUDENTS EMPLOYED ON POST-COMPLETION OPT MAY BE ANOTHER CLASSIFICATION TO CONSIDER FOR STAYING AND WORKING IN THE U.S.

There may be alternate visa option available to foreign graduates of U.S. Universities. If not selected for H-1B cap, F-1 students in Science, Technology, Engineering, and Mathematics (STEM) fields can apply for a special STEM OPT extension. To get the extension, the student should be employed by an employer enrolled in E-Verify, and should have received an initial grant of post-completion OPT related to such a degree. Regulations require that STEM subject must be in the major or dual-major of the student's most recent degree received. This extension of the OPT period for STEM degree holders gives U.S. employers two chances to recruit these desirable graduates through the H-1B process. The STEM OPT extension is long enough to allow for H-1B petitions to be submitted in two additional fiscal years (two H-1B cycles). The underlying policy for this iniative is that the U.S. was frustrated by training highly-skilled STEM workers only to send them home because they did not make the H-1B Cap.

Students who do not hold STEM degrees may choose the option of going back to school. For instance, a student who has completed a Bachelor's Degree from a U.S. institution may exercise the option of enrolling in another Bachelor's or Master's Degree program. While enrolling in a Bachelor's Degree program may be a good idea to buy time in the United States with the hope of making it to the H-1B cap in the next Fiscal Year the option of enrolling in a Master's Degree program should be exercised with caution. Before enrolling in a Master's Degree program, a student make sure that the U.S. University qualifies as an "institution of higher education" as defined by section 101(a) of the Higher Education Act of 1965 because *not* every Master's Degree from a U.S. educational institution will qualify an individual for the H-1B Master's Cap.

ALWAYS CONSIDER THE OPTION OF THE L-1 VISA FOR FOREIGN EMPLOYEES OF MULTINATIONAL COMPANIES:

Employees employed by companies with an offshore presence can explore the potential use of the L-1 visa option. The L-1 visa classification facilitates the temporary transfer of foreign nationals with management, professional, and specialized knowledge skills to the United States. Thus, even within the L category, important distinctions are drawn between the two types of L visas, the L-1A which is used for "executives and managers", and the L-1B for employees with "specialized knowledge".

L-1A *executives* direct the management of an organization or a major component or function of an organization. Similarly, L-1A *managers* have the primary duty of (1) directing an organization, or area of an organization, and "supervision or control of the work of others", or (2) management of an "essential function" at a senior level in the organization's hierarchy. Managers and executives need not supervise subordinates. The L-1 regulations a person to perform "functional management". To qualify for an L- 1B visa, the employee should have the *specialized knowledge* of the company, its product and its application in international markets, or have an advanced level of knowledge of processes and procedures of the company.

AN EXTRAORDINARY OPPORTUNITY TO WORK AROUND THE H-1B CAP IS TO GET AN O-1 VISA FOR EXTRAORDINARY ABILITY FOR YOUR VISA CANDIDATE:

Like the L-1 nonimmigrant visa, there are two types of O-1 visas. Also, like the L-1 visa, O-1 visa is not subject an annual cap. The nonimmigrant work visa O-1 category is divided into two categories: O-1A and O-1B.

The O-1A classification is for foreign nationals having "extraordinary *ability*" in the field of the science, art, education, business or athletics. If in motion picture or TV production, the person may qualify for an O-1B visa provided s/he has a demonstrated record of "extraordinary *achievement*." Thus, there are different standards under the O-1 visa.

It is important to know that O-1 is not limited to the above-mentioned categories. USCIS interprets the statute to encompass "any field of endeavor," including craftsmen and lecturers. Further, the term "arts" includes not only the principal creators and performers, but also essential personnel such as directors, set designers, choreographers, orchestrators, coaches, arrangers, costume designers, make-up artists, stage technicians including, but not limited to, animal trainers.

Based on the foregoing, it is safe to conclude that before a foreign national sets out to pack their bags, prospective H-1B visa hopefuls should carefully explore their several work visa options in the United States. One may still qualify for a cap-exempt H-1B visa if s/he has an offer of employment from an institution of higher education (or related or affiliated nonprofit entities), or from a nonprofit/government research organization. Even employment with a third-party employer may qualify an individual for cap-exempt H-1B provided that the Beneficiary will perform the majority of work at the qualifying institutions and if the work will benefit the primary or essential purpose of the qualifying institution.

Also, It would be prudent for the national of a foreign country to check on the type of trade agreement his/her country has in effect with the United States as this may qualify the individual for an H-1B1, TN, E-1, E-2 or an E-3 nonimmigrant classifications. Additionally, employees of companies with offices both in the United States and offshore could explore the option of L-1 visa. Moreover, individuals with the "extraordinary *ability*" in the field of the science, art, education, business or athletics may qualify for an O-1A visa while an O-1B may be appropriate for a foreign national with "extraordinary *achievement*" in motion picture or TV production. Last but not the least, F-1 STEM students should try to obtain the STEM OPT extension in order to be able to get into another cycle (or two) for H-1B consideration. We reemphasize that students choosing to enroll in the Master's Degree program with the hope of having a better chance of making it to the H-1B cap next year should be certain to choose a Master's Degree program very carefully since not all Master's Degree programs qualify an individual for the Master's Degree H-1B cap of additional 20,000 visas.

For more information about the H-1B nonimmigrant work visa process or to consider H-1B nonimmigrant work visa options, the immigration and nationality lawyers and attorneys at the Nachman Phulwani Zimovcak (NPZ) Law Group, P.C. invite you to visit them on the web at www.visaserve.com or to email them at info@visaserve.com or to call the firm at 201.670.0006 (x107).