



# **Immigration Seminar**

## **Transitioning To Temporary Work Visas**

### **(Nonimmigrant Visa Options)**

# Overview

- Nonimmigrant (temporary) visas:
  - H-1B, E-3, E-2, TN , O-1, TN, J-1 and others
- Interviewing strategies
- Q & A

# Overview

- All non-U.S. citizens and non-permanent residents require a visa to enter the U.S.
- Most nonimmigrant visas require Employer sponsorship
- Nonimmigrant visas are valid for temporary period
- Generally, Employer must sponsor an employee for permanent residence (“green card”)

# Nonimmigrant Visas (H-1B)

- H-1B Specialty Occupation Visa requirements:
  - Must hold bachelor's degree or equivalent in a specific specialty (e.g., Biology, Engineering, Mathematics, etc.)
  - Job must require at least bachelor's degree in specialized field
- “Specialty occupation” – requires theoretical and practical application of a body of specialized knowledge and attainment of a bachelor's or higher degree in the specific specialty as a minimum for entry into the occupation
- Employer must file Labor Condition Application to confirm that it will pay required wages

# Nonimmigrant Visas (H-1B)

- H-1B is subject to an annual cap (private industry employers only):
  - 65,000 visas issued each fiscal year, including
    - 5,400 Singapore
    - 1,400 Chile
  - Additional 20,000 issued to graduates of U.S. advanced degree programs (master's or above)
- Cap is often reached on the first day!

# Nonimmigrant Visas (H-1B)

- Entities NOT subject to H-1B cap:
  - Institutions of higher education (universities, colleges, or other degree-granting entities)
    - Must be public & non-profit
  - Non-profit organizations affiliated with institutions of higher education (must have affiliation agreement)
  - Non-profit research organizations
  - Government research organizations

# Nonimmigrant Visas (H-1B)

- Validity period of H-1B visa:
  - 3 years, plus 3-year extension (total 6 years)
  - May extend beyond 6-year maximum if:
    - Green card started more than 1 year before H-1B expiration (will get 1-year extensions)
    - Immigrant visa (I-140) approved, but employee may not file for adjustment of status (I-485) due to visa retrogression (will get 3-year extensions)
- Spouse/children: H-4 visa (no work authorization)

# Nonimmigrant Visas (H-1B)

- Employer-specific visa (must work for sponsoring employer only)
- May work full-time or part-time
- May work for multiple employers (need concurrent petitions)
- May transfer to another employer if transfer petition is filed
- Material changes to employment (salary, duties, location, hours) may require amended petition



# Nonimmigrant Visas (H-1B)

- Employer's responsibilities:
  - Pay prevailing wage
  - Pay ALL applicable USCIS filing fees
  - Offer same benefits as to U.S. workers
  - Attest that no strike at workplace
  - Maintain Public Access File
  - If H-1B worker dismissed before approval term ends, must pay for return transportation home (if worker returns home)

# Nonimmigrant Visas (H-1B)

- H-1B USCIS filing fees:
  - Standard fee: \$325
  - Fraud prevention and detection fee: \$500 (only with initial filing)
  - Training fee (paid by cap-subject employers for initial filing and first extension):
    - \$1,500 for employers with 26 or more employees
    - \$750 for employers with 25 or fewer employees
  - Premium processing fee (optional): \$1,225

# Nonimmigrant Visas (H-1B)

- Who pays H-1B/LCA attorney and government filing fees? Employer!
  - Employer must pay “required” wages - higher of “actual” (paid to similarly qualified employees) and “prevailing” wage
  - Employer must pay ALL *legal and filing fees* if such fees reduce Employee’s salary below “required” wage
- *Kutty v. DOL*: Employer must pay J-1 waiver fees because waivers are required to transition to H-1B, and H-1B attorneys’ fees are Employer’s “business expense” (federal court decision – currently on appeal in 6<sup>th</sup> Circuit)
- *Limanseto v. Ganze & Co.*: Attorney fees for H-1B & LCA preparation are Employer’s responsibility (DOL ALJ decision)

# Nonimmigrant Visas (H-1B)

- H-1B planning strategies:
  - File for **April 1** to avoid missing the H-1B cap
  - Obtain employer cooperation
  - Explain employer responsibility to pay all H-1B fees
  - Obtain detailed description of duties
  - Avoid “job shops”
  - If employment terminated, no grace period
  - Develop contingency plans (e.g., F-1, E-2, E-3)

# Nonimmigrant Visas (H-1B)

- If reached 6-year H-1B maximum:
  - Recapture time spent abroad (keep travel records);
  - Request 7<sup>th</sup>-year extension if green card timely filed
  - Qualify for another nonimmigrant visa
  - Go abroad for 1 year (to re-start 6-year clock)
- Because of 6-year limit, must start long-term planning early (but no later than in 5<sup>th</sup> year)

# Nonimmigrant Visas (E-3)

- E-3 Treaty Visa requirements:
  - Beneficiary must be Australian citizen
  - “Specialty Occupation” visa (similar to H-1B)
  - Not subject to annual cap
  - Valid for 2 years with indefinite extensions
  - May apply at Consulate
  - If filed with USCIS, no premium processing
- Spouse/children: E-3 Dependent visa (may apply for work authorization)

# Nonimmigrant Visas (E-2)

- E-2 Treaty Investor Visa requirements:
  - Requisite treaty between U.S. & country of citizenship
    - <http://travel.state.gov/content/visas/english/fees/treaty.html>
  - Enterprise must have “treaty nationality”
  - Individual must have “treaty nationality”
  - Investment in U.S. company
  - Investment must be substantial

# Nonimmigrant Visas (E-2)

- U.S. company must be a “commercial” enterprise
- Investment must not be marginal (solely for living)
- If *Investor*, must “direct and develop” enterprise
- If *Employee*, must work in Executive/Supervisory or “Essential Skills” capacity
- Must intend to depart U.S. – when visa ends



# Nonimmigrant Visas (E-2)

- Visa NOT subject to annual cap
- Visa granted for up to 5 years
- May extend indefinitely
  - If applying at Consulate, may extend in 5-year increments
  - If applying at USCIS, may extend in 2-year increments
- E-2 USCIS filing fee: \$325 (may request premium processing)
- Admitted to U.S. for up to 2 years on each trip
- Allows for self-employment
- Spouse/children: E-2 Dependent Visa (may apply for work authorization)



# Nonimmigrant Visas (TN)

- TN (Trade NAFTA) Visa requirements:
  - Applicant must be citizen of Canada or Mexico
  - Applies to listed NAFTA “professions”  
(<http://travel.state.gov/content/visas/english/employment/nafta.html>)
  - May work full-time or part-time for U.S. employer (self employment NOT permitted)
  - Applicant must meet occupational qualifications listed in NAFTA

# Nonimmigrant Visas (TN)

- TN visa valid for 3 years (may be extended indefinitely)
- Applicant must maintain nonimmigrant intent
- May apply at border (for Canadians) or at consulate (for Mexicans)
- Extensions may be filed with USCIS
- TN USCIS filing fee: \$325 (premium processing available)
- Spouse/children: TD visa (no work authorization)



# Nonimmigrant Visas (O-1)

- O-1 Extraordinary Ability Visa (Science, Education, Business, Athletics) requirements:
  - Must demonstrate “sustained national or international acclaim and recognition for achievements,” and
  - Applicant has risen to the top of the field
- “Sustained acclaim” requires:
  - Evidence of a one-time achievement (a major, internationally recognized award); or
  - Evidence of at least 3 regulatory criteria

# Nonimmigrant Visas (O-1)

- Must meet at least 3 of the following criteria:
  - National or international awards
  - Membership in associations in the field that require outstanding achievements
  - Published material about beneficiary
  - Participation as a judge of the work of others
  - Original scientific or scholarly contributions of major significance
  - Authorship of scholarly articles in professional journals
  - Employment in a critical/essential capacity for organizations with distinguished reputation
  - High salary or remuneration for services

# Nonimmigrant Visas (O-1)

- Valid for 3 years, with 1-year extensions
- May extend O-1 visa indefinitely
- O-1 USCIS filing fee: \$325 (premium processing available)
- Spouse/children: O-3 visa (no work authorization)

# Nonimmigrant Visas (O-1)

- Suggested evidence in support of petition:
  - Confirmation of achievements (publications, presentations, peer-review or editorial duties, awards, memberships, etc.)
  - Reference letters (8-10) from experts in the field
  - Press about beneficiary or his/her work
- Present as much evidence as possible to meet more than 3 criteria
- O-1 visa may be stepping stone for green card

# Nonimmigrant Visas (O-1)

- O-1 Extraordinary Ability Visa (Arts and Motion Picture or TV Arts) requirements:
  - Lower legal standard
  - Different standards for the arts and motion picture/television arts
- Spouse/children: O-3 visa (no work authorization)



# Nonimmigrant Visas (O-1)

- O-1 visa in the arts, including performing arts, fine arts, visual arts, and culinary arts :
  - Must show “distinction”
  - Distinction: “a high level of achievement ... substantially above that ordinarily encountered”
  - Must be “prominent, renowned, leading, or well-known” in the field

# Nonimmigrant Visas (O-1)

- O-1 visa in the motion picture or TV arts:
  - Must show “record of extraordinary achievement”
  - Extraordinary: “very high level of accomplishment ... significantly above that ordinarily encountered”
  - Must have “skill and recognition significantly above that ordinarily encountered”

# Nonimmigrant Visas (O-1)

- Must have one-time achievement or meet at least 3 of the following criteria:
  - Lead/starring participant in productions/events with distinguished reputations
  - Recognition through critical reviews or publications in major papers, trade journals or other professional publications
  - Lead, starring or critical role for organizations and establishments with distinguished reputations
  - Record of major commercial success
  - Recognition from organizations, critics, agencies, or experts
  - High salary or other remuneration

# Nonimmigrant Visas (J-1)

- J-1 Exchange Visitor Visa:
  - Issued by employing institution (no attorney needed)
  - May last from 12 months to 7 years, depending on program
  - May have 2-year home residence requirement
- Spouse/children: J-2 visa (spouse may apply for work authorization)

# Nonimmigrant Visas (J-1)

- If subject to 2-year home residence requirement, J-1 holder:
  - Must return home for 2 years before eligible for H or L visas, or permanent residence
  - May not change status in the U.S.
  - May be eligible for other visas (J-2, O-1, TN, F-1, E-1, E-2, E-3) by applying abroad

# Nonimmigrant Visas (J-1)

- J-1 holder may be subject to 2-year requirement because of:
  - Skills List (available at [http://travel.state.gov/visa/temp/types/types\\_4514.html](http://travel.state.gov/visa/temp/types/types_4514.html))
  - Government funding (U.S. or home country)
  - Graduate medical training (medical residency or fellowship)

# Nonimmigrant Visas (J-1)

- If “subject,” J-1 holder may:
  - Fulfill 2-year requirement in home country (country of citizenship or last permanent residence);
  - Obtain another nonimmigrant status and stay in the U.S. (note: 2-year requirement will still apply); or
  - Obtain a waiver of 2-year requirement

# Nonimmigrant Visas (J-1)

- Waivers of 2-year requirement:
  - No-Objection Waiver
  - Interested Government Agency Waiver (e.g., Department of Health & Human Services, National Science Foundation, Department of Energy, Department of Defense, etc.)
  - Hardship Waiver
  - Persecution Waiver



# Nonimmigrant Visas (P-1 & P-2)

- **P-1A Internationally Recognized Athlete:** coming to U.S. to perform at a specific athletic competition as an individual athlete or as part of a team, at an internationally recognized level of performance
- **P-1B Member of Internationally Recognized Entertainment Group:** coming to U.S. to perform as a member of an entertainment group that has been recognized internationally as outstanding
- **P-2 Performer (Reciprocal Exchange Program)**

# ***Nonimmigrant Visas (F-1 OPT)***

- F-1 Optional Practical Training (OPT):
  - Employment Authorization Document (EAD) after completion of studies
  - 12-month: standard employment authorization
  - 29-month: available in some circumstances (17-month extension in addition to standard 12-month EAD)
- When to apply for OPT:
  - 90 days prior to graduation; or
  - 60 days after graduation
- Spouse/children: F-2 visa (no work authorization)

# ***Nonimmigrant Visas (F-1 OPT)***

- 17-month OPT extension available to:
  - Students in Science, Technology, Engineering, Mathematics (STEM)
  - List of STEM degree programs available at:  
[http://www.ice.gov/doclib/sevis/pdf/nces\\_cip\\_codes\\_rule.pdf](http://www.ice.gov/doclib/sevis/pdf/nces_cip_codes_rule.pdf)
- Job must relate to field of study
- Employer must participate in E-Verify

# *Nonimmigrant Visas (F-1 OPT)*

- STEM OPT extension has reporting requirements:
  - Employers must report within 48 hours of termination
  - Student must report to school every 6 months
- To qualify for 17-month STEM OPT extension, must file extension application:
  - Will get 180 days of continuous employment authorization while extension pending

# *Nonimmigrant Visas (F-1 OPT)*

- F-1 OPT holders must be employed:
  - 90 days of unemployment = out of status (for standard 12-month OPT)
  - 120 days of unemployment = out of status (for STEM 29-month OPT)
- What constitutes employment:
  - Full-time, part-time, internship, self-employment, volunteering

# Interviewing Strategies

- Use EAD as stepping stone to prove yourself
- Be upfront about immigration status
- Ask about company sponsorship policies
- Offer to recommend immigration attorney
- Offer to pay fees allowed by law (but...)
- Explain benefits of hiring international staff

# Why Hire International Staff?

- International life and work experience
- Multi-lingual communication skills
- Understanding of global cultures, markets, and business practices
- Adaptability and perseverance in managing changing environment
- Strong motivation and work ethic

# Why Hire International Staff?

- Enthusiasm and team-oriented attitude
- Ability to work internationally
- Fresh perspectives and new problem-solving skills
- Commitment to employer because of visa sponsorship
- Diversity in the workplace





# Presenter

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## Sostrin Immigration Lawyers, LLP

is an immigration law firm headed by partners Rita Sostrin and Alexander Dgebuadze. The firm's principals are recognized experts in niche business immigration law areas, including immigration of individuals of extraordinary ability, healthcare professionals, artists and entertainers, and personnel requiring permanent employment sponsorship through the Department of Labor laws and regulations. Our firm is also committed to offering guidance in family-based immigration matters and United States citizenship.

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