

# Creating a Global Workforce

## Transferring Non-U.S. Citizen Personnel to the United States

By Bryan Y. Funai and Esther Contreras

To successfully compete on a global scale, multinational corporations must ensure that their most qualified personnel can assume positions within the organization anywhere in the world. Much uncertainty exists with the transfer of foreign personnel to an affiliated U.S. company. U.S. immigration laws are becoming increasingly complex and are often misinterpreted by U.S. Citizenship and Immigration Services (USCIS) adjudicators who have little experience or understanding of the realities of the worldwide business environment. In addition to navigating the immigration complexities, many employees are only transferred temporarily and additional issues must be examined, such as tax liability and the ability of spouses to work and dependent children to attend school in the United States. Depending on the nature of the transfer and length of assignment, procedures may be taken that will streamline the process of transferring

employees to the United States and provide a degree of certainty to the application of U.S. immigration laws.

### Temporary Business Trips

In many cases, an employee's services may only be necessary for a limited period of time to attend business meetings, carry out business transactions, participate in conferences or negotiations, or receive limited training. The sale and shipment of complex machinery to a business in the United States might require the assistance of technical personnel to install, troubleshoot, or train American workers on the machinery. These types of assignments are usually short-term (one year or less) in nature where the foreign national personnel maintain their employee status at the entity overseas. Under such circumstances, the B-1 visa classification for business visitors is the ideal solution.

The B-1 classification allows persons to enter the United States temporarily to render services for his or her employer abroad. The B-1 classification requires that all salary and other remuneration (with the exception of certain meal and living expenses) must be paid by the employer outside of the United States. Additionally, the benefit of any services rendered by the employee should accrue to the benefit of the employer outside of the United States. Furthermore, the employee must not be "working"; that is, he or she cannot be rendering services directly to,

accepting a salary from, or performing services for a U.S. entity that would normally call for the payment of salary or other remuneration. Traditionally, employers have used the B-1 classification to send employees to the United States to attend various types of meetings (board of directors, sales, staff, and operational), to participate in business negotiations, and to participate in U.S. litigation. Technical personnel may use the B-1 classification for the purpose of installing machinery and equipment, provided that it was shipped from a non-U.S. source and the contract for the purchase expressly stated that installation was to be included in the sale.

Finally, the B-1 classification may be used to dispatch non-U.S. employees to the United States for the purposes of receiving limited training. This classification is referred to as B-1 in lieu of H-3 (H-3 is a trainee classification). In addition to the aforementioned requirements for the B-1 classification relating to salary, remuneration, and work, the employee's visa application materials should include a detailed letter explaining the training program. The letter should clarify the type and amount of training to be provided; the quantity, if any, of substantive work that may be performed incidental to the training; and the reasons why this training is not available in the employee's home country.

Foreign national personnel can enter the United States for short-

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term business purposes either under the Visa Waiver Program (VWP) or by obtaining a B-1 business visitor visa. The VWP is limited to individuals who are nationals of one of a select 35 countries, which include much of Western Europe, Australia, Singapore, and South Korea. The maximum authorized period of stay in the United States under the VWP is 90 days. Foreign national employees on assignments of longer duration or who are not eligible to enter under the

## Immigration laws are becoming increasingly complex and are often misinterpreted by USCIS.

VWP must first apply for a B-1 visa at a U.S. consulate in his or her country of residence. Upon entering the United States, the B-1 visitor can be granted a maximum period of authorized stay of one year, although three to six months is more common. An extension of stay is not permitted, nor may the employee change to a different immigration status. Because the B-1 employee is not eligible to work in the United States (as previously defined), the employee will not be eligible to apply for a U.S. Social Security number and, consequently, cannot apply for a state driver's license.

### E-1 and E-2—The Treaty Visas

Employees at multinational corporations that are owned by nationals of one of the 80 countries that have entered into a Treaty of Friendship, Commerce and Navigation (FCN Treaty) with the United States, and who are of the same nationality as the country where the entity is based, may apply for the E-1 or E-2 visa. The E-1 visa companies, or "Treaty Traders," must be engaged in substantial trade with the United States (substantial being defined as more than 50 percent of all international trading activities). An E-2 visa company, or "Treaty Investor," must have made a substantial investment in the United States. A substantial investment is one that

provides more than just a standard of living for the investor and his or her family. Additionally, to demonstrate that an investment is substantial, the Treaty Investor must establish that the funds are actually at risk: investment of funds in a stock brokerage account, regardless of size, is not an investment for E-2 purposes.

A foreign national employee must possess the same nationality as the Treaty Trader/Investor and can be transferred to the United States as an execu-

tive, as a manager, or in a special qualifications capacity. The E visa does not require individuals to have previously worked at the foreign company. E visas are issued for a maximum of five years and, unlike other work-related nonimmigration classifications, the visas can be renewed indefinitely, which affords the Treaty Trader/Investor considerable flexibility. Upon entering the United States, the E visa holder can be issued a period of stay for two years from the date of entry into the United States, regardless of the expiration date of the visa. Subsequent entries into the United States will likewise result in a period of stay of two years from the date of entry. E visa holders who travel frequently overseas could theoretically never have to file an application with the USCIS to extend their stay.

While the E visa can be used for smaller entities, in most instances the E visa is used by multinational corporations for the transfer of mid- to upper-level employees. Because the E visa is limited to employees who have the same nationality as the company that has entered into the FCN Treaty with the United States, the transfer of executives from countries other than the FCN Trader's country would not be eligible for the E visa. Additionally, E visa foreign nationals may be able to be transferred to other U.S.-based subsidiaries or affiliates of the FCN Treaty company

without prior USCIS approval.

Applying for the E visa consists of an initial application directly at the U.S. embassy or consulate in the employee's country of residence. Most consular posts that accept E visa applications specifically require that the petitioning company first register with the consular post. To register, a company would submit to the consular post its corporate information and documents, such as articles of incorporation, financial statements, stock ownership information, and employee staffing lists. Most consular posts also require that the E registration be maintained on an annual basis.

### L-1 Intracompany Transferees

When a company or employee does not qualify for an E visa, the employee may be assigned to the United States in an L-1 classification. The L-1 visa is available to intracompany transferees who have been employed at the foreign entity for at least one year in the three years prior to the application and are coming to the United States to work at an affiliated company in an executive, managerial, or specialized knowledge capacity. The foreign employment also must be classifiable as executive, manager, or specialized knowledge in nature; however, there is no requirement that the position be the same.

Unlike the E visa, an L-1 intracompany transferee must first obtain approval from the USCIS. The U.S. company must file a petition with the USCIS and when approved, the employee may then apply for the L-1 visa at the U.S. consulate in the employee's place of residence. The L-1 visa imposes a limitation on the amount of time that the employee may remain in the United States. In the case of executives and managers, the total period of time allowable is seven years. In the case of persons with specialized knowledge, the total period of time allowable is five years. The L-1 visa is issued for an initial three-year period with subsequent two-year extensions and the period of authorized stay is limited through the duration of the visa. In order to renew the visa or extend the authorized stay, a petition

for an extension of stay must first be filed. As a general rule, L-1 intracompany transferees are limited to employment at the location listed on the USCIS application and must generally work in the position stated in the

application.

Of particular usefulness to larger multinational corporations is the L-1 Blanket program. The L-1 Blanket, as the name implies, affords comprehensive coverage of a multinational

company and all of its listed subsidiaries and affiliates under one petition and approval for all qualified foreign national employees who will come to the United States in an executive, managerial, or professional

*As of the date of this article, the following countries are participants in the Visa Waiver Program:*

Andorra	Australia	Austria	Belgium
Brunei	Czech Republic	Denmark	Estonia
Finland	France	Germany	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	United Kingdom	

*As of the date of this article, the following countries have entered into Treaties of Friendship, Commerce and Navigation with the United States and are eligible for either E-1 classification, E-2 classification, or both:*

Albania	Argentina	Armenia	Australia
Austria	Azerbaijan	Bahrain	Bangladesh
Belgium	Bolivia	Bosnia & Herzegovina	Brunei
Bulgaria	Cameroon	Canada	Chile
China (Taiwan)	Colombia	Congo	Costa Rica
Croatia	Czech Republic	Denmark	Ecuador
Egypt	Estonia	Ethiopia	Finland
France	Georgia	Germany	Greece
Grenada	Honduras	Iran	Ireland
Israel	Italy	Jamaica	Japan
Jordan	Kazakhstan	Korea (South)	Kyrgyzstan
Latvia	Liberia	Lithuania	Luxembourg
Macedonia	Mexico	Moldova	Mongolia
Morocco	The Netherlands	Norway	Oman
Pakistan	Panama	Paraguay	Philippines
Poland	Romania	Senegal	Singapore
Slovakia	Slovenia	Spain	Sri Lanka
Suriname	Sweden	Switzerland	Thailand
Togo	Trinidad & Tobago	Tunisia	Turkey
Ukraine	United Kingdom	Yugoslavia	

*As of the date of this article, the following countries have entered into bilateral Social Security Agreements with the United States:*

Australia	Austria	Belgium	Canada	Chile
Czech Republic	Denmark	Finland	France	Germany
Greece	Ireland	Italy	Japan	Luxembourg
The Netherlands	Norway	Poland	Portugal	South Korea
Spain	Sweden	Switzerland	United Kingdom	

specialized knowledge capacity. The Code of Federal Regulations at 8 C.F.R. § 214.2(i)(4) et seq. states that, in order to qualify for the L-1 Blanket coverage, the company must establish that

A. the company maintains an office in the United States that has been doing business for at least one year;

B. the company has at least three domestic and foreign branches, subsidiaries, and affiliates; and

C. the company and the other qualifying branches, subsidiaries, and affiliates of the company

1. have applied for and obtained approval of at least 10 L-1 petitions in the previous 12 months; or

2. have U.S. subsidiaries and affiliates that have combined annual sales of at least \$15 million; or

3. have a total U.S. workforce of at least 1,000 employees.

It is not necessary that the company list all its subsidiaries, affiliates, or branches on the blanket application, but only those companies that are so listed will be afforded classification under the L-1 Blanket and be able to take advantage of its benefits.

As with the individual L-1 classification, executives and managers may be transferred to the United States utilizing the L-1 Blanket. However, the L-1 specialized knowledge classification under the L-1 Blanket is limited to "specialized knowledge professionals." A "specialized knowledge professional" is a person who, in addition to having specialized knowledge of the company's processes and procedures, also has attained a minimum education of a baccalaureate degree or the equivalent.

The benefit of the L-1 Blanket as opposed to the individual L-1 application is that the L-1 Blanket visa holder may be transferred to other entities listed on the blanket application as long as the person will be performing substantially the same job duties as when he/she originally entered the United States. In the event that the job duties will be different, it will be necessary to obtain USCIS approval prior to the transfer. In addition, persons

who apply pursuant to the L-1 Blanket will be allowed to submit their application directly to the U.S. consular post in their place of residence and will not have to submit an individual application with the USCIS. This will save considerable time and expense, as well as uncertainty over the inconsistent review and adjudication of individual L-1 applications.

### **H-1B Specialty Occupation Worker**

In the event that an employee does not qualify as a B-1 temporary visitor, E Treaty Trader or Treaty Investor, or L-1 intracompany transferee, the visa of last resort is the H-1B Specialty Occupation Worker. While the H-1B classification is the most well-known

## **The visa of last resort is the H-1B Specialty Occupation Worker.**

work-related visa, having been utilized by numerous high-tech companies and consulting companies for the hiring of technical personnel, from a corporate planning standpoint, because of various issues and restrictions, the H-1B visa should be used for the transfer of expatriate personnel only if the foreign national will not qualify for any of the other visas.

In order to qualify for the H-1B classification, the employee must establish that he or she has earned a bachelor's degree or the equivalent in a field of study directly related to the position being offered. The employer must establish that the position being offered is one that typically requires a bachelor's degree. Furthermore, the employer also must comply with Department of Labor requirements for the payment of a prevailing wage for the position in the area of intended employment. The employer also must post the proposed position on the company premises, listing the job duties and rate of pay. Finally, in the event of a termination of the H-1B employee, the employer must pay for the return transportation to the

employee's last country of residence. If approved, an H-1B employee may remain in the United States for a maximum of six years, subject to special provisions allowing a longer period of stay if the employee is in the process of applying for Permanent Resident Status (green card).

The requirements to qualify for H-1B classification are stringent and take much of the decision making away from the company. The H-1B classification has an annual numerical limitation of 65,000 visas. In prior years (2009 being a notable exception) the quota of visas was exhausted within the first week after the filing period opened, resulting in further uncertainty over whether a person will be

accorded H-1B classification. In most instances, the H-1B classification is utilized when hiring foreign national personnel who are not expatriates or who have been recently hired overseas and do not have the requisite one year of employment needed for L-1 classification or are not of the same nationality as the FCN Treaty company.

### **Other Considerations**

In determining the course of action to be taken in transferring foreign national personnel to the United States, the following additional factors should be borne in mind:

*Worldwide Taxation.* Persons who are considered to be residents of the United States for tax purposes (which is often determined regardless of visa classification) will be required to declare worldwide income. While credits and deductions are available in the United States for income earned abroad and taxes paid to a foreign government, an analysis of worldwide income must be conducted to determine if additional withholdings or estimated tax payments should be made. Because expatriates may continue to receive remuneration

from foreign sources, the result can be an under-withholding of U.S. income taxes with a later assessment of penalties and interest.

*Social Security and Welfare Taxes.* As a part of tax withholdings, all U.S. taxpayers must withhold for Social Security. Prior to the transfer of foreign national personnel, it should be determined whether the foreign national personnel will be covered under one of the Social Security Totalization Agreements that have been entered into between the United States and certain countries and, if applicable, application for a certificate of coverage should be submitted with the proper agency.

*Employment by Dependent Spouses.* The foreign national spouse may wish to work in the United States. While spouses and children under the age of 21 are generally accorded dependent status, which allows them

to accompany the employee to the United States, employment is generally not permitted. However, spouses, but not dependent children, of E and L visa holders are allowed to apply for employment authorization in the United States and, if granted, may commence employment on a full- or part-time basis.

*Education for Children.* Dependent children are allowed to attend public school without applying for a separate student visa. Because there is technically no dependent classification for a B-1 business visitor, dependents are granted B-2 classification as visitors for pleasure. While current regulations prohibit persons from attending school in B-2 classification, the dependents of B-1 visa holders are exempted because their studies are incidental to their primary purpose, which is to accompany their B-1 parent.

## **Conclusion**

The decision to transfer personnel to the United States is one that takes considerable forethought and planning. Most multinational corporations should explore both registering as an E company and obtaining L-1 Blanket approval, which will afford the maximum amount of flexibility for transferring personnel to the United States. The B-1 classification is useful for temporary stays but not for long-term assignments. Lastly, the H-1B classification should be considered the visa of last resort for transferee purposes and used only in the event that the employee will not qualify as an E or L employee. Companies interested in transferring employees to the United States should consult with experienced immigration counsel to discuss their company's needs and the immigration options available for their workers.