Avoiding H-1B Status: Some Workable Options

By Eileen M. Martin

September 29, 2023 | **IMMIGRATION**

The H-1B temporary nonimmigrant visa has been a significant part of U.S. immigration strategies for many decades. This visa status is for foreign nationals who possess a university degree or the equivalent and are coming to work in the U.S. in a position that minimally requires that degree or the equivalent.

The biggest problem with H-1B status is that Congress has authorized so few of them to be approved on an annual basis. For some non-profit employers, the cap on the numbers does not impact them. For the rest of U.S. employers, the cap can be a yearly problem as they attempt to staff their businesses with foreign nationals when U.S. workers with the needed skills cannot be found. There are ways to avoid H-1B status and the aggravation it causes.

The U.S. immigration system uses an alphanumeric system to distinguish and describe various temporary non-immigrant classifications. Some alternatives to H-1B status follow in alphabetical order:

The E-1 is for treaty traders and employees of qualifying companies. The qualifying business can range from a sole proprietorship to a public company. The business can be in the U.S. or abroad, but its ownership must align with a country with which the U.S. has a Treaty of Friendship, Commerce, and Navigation. The individual visa seeker's

citizenship must also align with the country. The business must engage in substantial trade in goods and/or services between the U.S. and the treaty nation, and the individual visa seeker's role must maintain or enhance that trade.

The E-2 is for treaty investors and employees of qualifying companies. As with the E-1, the business can be small or large, however, unlike the E-1, it must be a U.S. entity. The ownership, the nationality of the investment and the citizenship of the visa seeker must all be the same as a country with a Treaty of Friendship, Commerce, and Navigation with the U.S. The foreign investment must be substantial, and the company must be active. The company must also demonstrate that it has or will have an impact on the U.S. economy, generally through the employment of at least one U.S. worker.

The E-3 is a specialty occupation visa for citizens of Australia under the Free Trade Agreement between the U.S. and Australia. The visa applicant must possess a university degree or the equivalent that is minimally required for the position in the U.S. The employer must attest that no
U.S. workers' employment will be hurt by the Australian workers' employment.

Very similar to the E-3 is the H-1B1 for citizens of Chile and Singapore. While there is an H-1B1 cap for individuals from these countries, it has never been reached. The educational criteria are the same as for the E-3.

The L-1 is for an executive, manager, or specialized knowledge worker who has worked for at least one out of the last three years in a qualifying position for a business with the requisite related ownership and control to the U.S. employer. Both the foreign entity and U.S. petitioner must remain active for the duration of the visa status.

The 0-1 provides work status for those who have extraordinary ability. If the foreign national has not won a major international award (think Nobel or Pulitzer), he or she must establish sustained national or international acclaim by meeting alternative criteria, including commanding high wages, writing scholarly books or articles, having articles written about him or her in major media, or making contributions of significance to organizations with distinguished reputations, among others.

TN is another free trade classification, specifically for citizens of Canada and Mexico, to work in specific professional capacities. Most of these professions minimally require the attainment of a university degree, without regard to equivalencies. The few professions with other requirements often enjoy heightened scrutiny from adjudicating officers. While Mexicans require visas issued into their passports to qualify to enter the U.S. in TN status, Canadians can apply at ports of entry, making this a speedy alternative to the H-1B status.

Whether someone is lucky enough to capture a coveted H-1B number or is applying for a visa or work status in the U.S., engagement of U.S. counsel is recommended to ensure that the process can be completed as smoothly as possible.

Eileen M. Martin is a partner and the immigration practice team co-leader at Lippes Mathias LLP. She has more than 20 years of experience in immigration law assisting clients from around the world with various matters including work permits, employment-based immigration, port-of-entry issues, visa issuance, family-based immigration, immigrant and non-immigrant waivers and assessment of U.S. citizenship. If you have questions pertaining to H-18 alternatives, please contact a qualified immigration attorney at Lippes Mathias LLP: Eileen M. Martin (emartin@lippes.com) and Elizabeth M. Klarin (eklarin@lippes.com).

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the author's firm, its clients, LexisNexis Canada, Law360 Canada, or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

This article was originally published by Law360 Canada, part of LexisNexis Canada Inc.

Related Team

Eileen M. Martin
Partner | Team Co-Leader - Immigration | Team Leader - Canada-U.S. Cross Border

Nisha V. Fontaine (Jagtiani)
Partner

Elizabeth M. Klarin
Partner

Andrew M. Wilson
Partner | Chief Advisory Officer | Team Co-Leader - Immigration