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Key Considerations Before Engaging in Business Immigration Sponsorship

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This practice note identifies key topics and best practices for an employer to consider when developing and assessing its immigration sponsorship policy. This includes the practice of sponsoring foreign national employees for temporary and permanent immigration status. Specifically, this practice note provides guidance on the following issues concerning business immigration sponsorship:

- Overview of employment-based sponsorship and employment verification
- Government agencies overseeing visa issuance
- Visa classifications
- Common categories of employment-based nonimmigrant (temporary) and immigrant (permanent) visas
- Choosing between nonimmigrant (temporary) and immigrant (permanent) sponsorship
- Considering financial costs of sponsorship
- Determining compliance obligations for sponsors and visa holders

For a checklist concerning business immigration sponsorship, see Checklist – Best Practices for Employers Undertaking Business Immigration Sponsorship (Nonimmigrant and Immigrant). For more information on business immigration visas, see Lexis Practice Advisor's Business Immigration / Visas practice notes and Lexis Practice Advisor's Business Immigration / Visas forms.

Overview of Employment-Based Sponsorship and Employment Verification

Below we outline some key issues concerning employment-based sponsorship and employment verification.

- **Employment-based sponsorship for nonimmigrant and immigrant (permanent residency) status.** Employers may sponsor foreign workers for employment in the United States pursuant to a nonimmigrant work-authorized visa status, which will typically provide a time-limited authorization to work and reside in the United States, or an immigrant visa status, which will authorize permanent residency and work authorization in the United States. In either case, the employer should consider development of an immigration policy to address when and how it will offer sponsorship, the obligations and responsibilities of all the stakeholders in the visa sponsorship process (e.g., the business leadership, the employee-beneficiary), and the employer's commitment to conduct any such visa sponsorship process in accordance with governing regulations.

- **Employment verification.** Employers should be aware that the work authorization for every employee must be verified at the time of hire. If a U.S. employer wishes to hire a candidate that is not a U.S. citizen or U.S. lawful permanent resident (LPR), and the individual does not possess independent work authorization, the employer may choose to sponsor the candidate to work in either a temporary or permanent visa classification as outlined by U.S. immigration regulations. For more information on employment verification, see Lexis Practice Advisor's Business Immigration / Employment Verification practice notes and Lexis Practice Advisor's Business Immigration / Visas forms.

- **Accompanying spouse and children.** In many cases, where the employer is the sponsor (petitioner) for the candidate's work authorization, the candidate and the accompanying spouse and minor children (children under the age of 21 who are

unmarried and thus dependents) may be permitted under U.S. regulations to enter, be physically present, and remain in the United States subject to the ongoing employer-employee relationship with the principal employee beneficiary.

Government Agencies Overseeing Visa Issuance

Multiple government agencies administer the U.S. immigration laws facilitating visa issuance for foreign nationals seeking admission and/or residency in the United States. The primary agencies involved in the visa process are the following agencies:

- **U.S. Citizenship & Immigration Services (USCIS)**. USCIS is the bureau within the Department of Homeland Security (DHS) that adjudicates petitions for various immigrant and nonimmigrant visa classifications.
- **U.S. Department of State (DOS)**. DOS is the federal executive department that operates the network of worldwide consulates and embassies of the United States that issue visas for travel, employment, and permanent residency.
- **U.S. Customs & Border Protection (CBP)**. CBP is the bureau within DHS that administers inspection and admission to the United States at ports of entry (POE) located in the United States and preclearance locations abroad.
- **U.S. Department of Labor (DOL)**. The DOL is the federal executive department that oversees wage requirements, certification of offered jobs as eligible for sponsorship, and various employment and training obligations of visa sponsors.
- **U.S. Immigration & Customs Enforcement (ICE)**. ICE is the bureau within DHS that manages enforcement of compliance with sponsorship or visa admission obligations including the verification of employment authorization.

Visa Classifications

A primary distinction in the structure of U.S. immigration regulation differentiates between temporary (nonimmigrant) visa classifications, and permanent (immigrant) classifications, with a focus on the required intent of the employer and the individual visa holder at the time of entering the United States.

- **Nonimmigrant visas**, including, among others, employment-authorized H-1B, L-1, TN, and O-1 visas, are issued for finite periods. They typically require the visa holder to maintain permanent ties with his or her country of origin. For a description of all nonimmigrant visas, see Understanding Temporary Worker Visa Classifications and Chart – The Most Common Temporary Worker Visa Classifications.
- **Immigrant visas**, which include the employment-based (EB) categories, authorize lawful permanent residence. They allow the visa holder, and his or her spouse and children (unmarried person under 21 years of age), to remain in the United States permanently. Immigrant visas provide a pathway to U.S. citizenship through naturalization.

In both the nonimmigrant and immigrant contexts, visa categories are further differentiated as either being incident to employment or incident to a familial relationship. This practice note will focus primarily upon employment-based visa categories in both the nonimmigrant and immigrant contexts.

Common Categories of Employment-Based Nonimmigrant (Temporary) and Immigrant (Permanent) Visas

Employers have a finite list of employment-based visas from which to choose for potential sponsorship of employees. This practice note will focus on the categories most commonly used by U.S.-based employers to sponsor foreign workers for nonimmigrant or immigrant visas, as delineated below.

Common Nonimmigrant Visa Categories

Below we address and provide guidance on some of the most common nonimmigrant visa categories. For information on all nonimmigrant (temporary) visas, see Understanding Temporary Worker Visa Classifications, Chart – The Most Common Temporary Worker Visa Classifications, and Navigating the Nonimmigrant (Temporary) Consular Visa Process.

- **H-1B visa for specialty occupation workers (generally up to six years of status, offered in three-year increments with extensions available in three-year increments).** The H-1B visa allows U.S. employers to employ foreign workers in specialty occupations, which are positions of sufficient complexity and responsibility that they generally require—at a minimum—a bachelor's degree in a specific area of study relevant to the job duties.

  Among other requirements, employers seeking to sponsor employees for H-1B visas must make several attestations with DOL. These attestations include confirmation that the wage paid to the H-1B worker is a wage equivalent to either the wage paid

by the employer to all others with similar experience and qualifications for that employment or the wage for the occupational classification in the area of employment, whichever wage is higher. Employers must also post notices confirming the salary offered to the H-1B worker, either at the job site(s) in visible locations or electronically with copy to the full work corps, or, if the job is subject to a collective bargaining agreement, by notification to the collective bargaining representative. The employer must also maintain records of the H-1B employment for public access. In addition, the employer must attest that the H-1B hire is not occurring in the midst of a labor dispute such as a strike or lockout. Employers deemed "dependent" on H-1B workers face additional requirements. These requirements include demonstrating non-displacement of U.S. workers for the H-1B job offered, unless the H-1B job qualifies for exemption from the "dependent" attestations because the H-1B worker's salary is $60,000 or higher, or the H-1B worker has a master's or higher degree. See Checklist – Labor Condition Application: Employer Compliance Obligations.

On a yearly basis, the number of new H-1B visas issued is capped, with a quota of 65,000 per fiscal year, plus another 20,000 visas for individuals who have earned at least a master's degree from an accredited U.S. college or university. Since 2014, this annual quota has been exceeded soon after the visas become available, and USCIS selects H-1B petitions on a computer-generated random lottery basis. Workers who are citizens of Australia (E-3), Singapore (H-1B1), and Chile (H-1B1) benefit from similar visa categories with less restrictive numerical limitations. See 8 C.F.R. § 214.2(h); 20 C.F.R. § 655.700.

For more information on the H-1B visa, see Understanding the H-1B Visa. See also Checklist – Preparing and Submitting an H-1B Nonimmigrant Petition and Employer Support Letter for H-1B Visa Petitions.

- **L-1 visa for intracompany transferees (generally up to seven years of status for executives or managers, or five years of status for specialized knowledge workers, offered initially for three years with extensions available in two-year increments).** The L-1 visa category facilitates U.S. assignments for individuals who have transferred from a foreign related entity (i.e., an intracompany transfer) and is available to workers entering the United States as managers or executives (in the L-1A subcategory) or as specialized knowledge professionals (in the L-1B subcategory). To qualify for L-1 classification, the worker must have at least one continuous year within the previous three years of full-time employment abroad with a parent, subsidiary, affiliate, or branch of the U.S. employer. Transfers between the joint venture partners and the joint venture entity, when the joint venture is organized according to a 50-50 ownership structure, also are allowed. Both the position abroad and the U.S. position must be managerial or executive (for L-1A) or require specialized knowledge not commonly available in the market (for L-1B). In contrast to the H-1B visa category, there is no numerical limitation on the number of L-1 visas issued each year. See 8 C.F.R. § 214.2(l).

  For more information on the L-1 visa, see Understanding the L-1 Intracompany Transferee Nonimmigrant Visa. See also Checklist – L-1 Visa Petition Requirements, Employer Support Letter for L-1A Multinational Manager or Executive Visa Petitions, Employer Support Letter for L-1B Specialized Knowledge Visa, Petitioner Support Letter for Blanket L Petition Approval, and Employer Support Letter Based Upon Approved Blanket L-1 Petition.

- **TN visa for NAFTA professionals (no defined upper limit with initial period of admission of up to three years).** The TN visa category is a preferential temporary worker visa created by the North American Free Trade Agreement (NAFTA). It is available to foreign professionals who are citizens of Canada and Mexico in qualifying occupations. The occupations are listed on Schedule 2 of NAFTA, and include a limited number of professions, with precise eligibility requirements. No numerical limitations are in place for issuance of TN visas. See 8 C.F.R. § 214.6.

  For more information on the TN visa, see Understanding the Trade NAFTA (TN) Nonimmigrant Visa. See also Checklist – Requirements and Procedures For Acquiring the Trade NAFTA (TN) Nonimmigrant Visa and Employer Support Letter for TN Approval or Admission.

- **O-1 visa for extraordinary ability professionals (no upper limit with initial period of admission of up to three years).** The O-1 visa category is reserved for individuals with extraordinary abilities who have "sustained national or international acclaim in their respective fields" and who seek temporary entry into the United States to continue working in their field of endeavor. This visa category comprises two subcategories: O-1A and O-1B. The O-1A visa is reserved for individuals with extraordinary ability in the sciences, arts, education, business, or athletics. The O-1B visa is reserved for individuals with extraordinary ability in the arts or extraordinary achievement in the motion picture or television industry. See 8 C.F.R. § 214.2(o). The governing regulations include precise factors to reference in each instance to assess whether the candidate's credentials exemplify "extraordinary ability," which is a standard generally reserved for the top 1% of professionals in a particular field.

  For more information on the O-1 visa, see Checklist – O Visa Petition Requirements.

- **Work authorization for trailing spouses.** Spouses of nonimmigrants in several employment-based nonimmigrant visa categories, including E-1, E-2, E-3, L-1A, and L-1B, are eligible to apply for an Employment Authorization Document (EAD) that permits the spouse to accept U.S. employment. In certain instances, such as where the principal visa holder is the

beneficiary of an approved immigrant petition (I-140) or, alternatively, based on an employer-sponsored residency process having been initiated over a year before reaching the sixth year in H-1B status, spouses of H-1B visa holders may also seek work authorization by applying for an EAD. Note that in these two instances the H-1B principal also is eligible for extensions of H-1B status past the sixth year.

In addition to the above employment visa categories, employers should be aware of visas available for trainees and interns, such as the J-1 (8 C.F.R. § 214.2(j)) and H-3 (8 C.F.R. § 214.2(h)) visa categories, as well as employment visa categories available for nationals of countries with treaties or bilateral agreements with the United States designed to promote trade and investment, such as the E-1 treaty trader and E-2 treaty investor visas (see 8 C.F.R. § 214.2(e)). See Chart – The Most Common Temporary Worker Visa Classifications.

Immigrant Visa Categories

Employment-based immigrant visas are available for employers to sponsor workers, subject to an annual quota divided into "preference" categories. See 8 C.F.R. § 204.5. For more information on immigrant (permanent) visas, see Understanding the Preference Categories for Permanent Worker Visas and Chart – Key Preference Categories for Permanent Worker Visas.

- **Employment first preference (EB-1): priority workers.** EB-1 priority workers include candidates in one of the following subgroups: persons with extraordinary ability in the sciences, arts, education, business, or athletics (EB-1A), outstanding professors and researchers (EB-1B), and multinational managers or executives (EB-1C). Employers seeking to sponsor employees for immigrant visas in these categories do not have to conduct a test of the U.S. labor market (as required by other immigrant visa categories), but must file a Form I-140 immigrant petition with USCIS. See 8 C.F.R. § 204.5(h)-(j).

- **Employment second preference (EB-2): professionals holding advanced degrees or persons of exceptional ability.** Before submitting a Form I-140 immigrant petition, employers seeking second-preference classification for a candidate must conduct a test of the U.S. labor market (unless eligible for a waiver based on national interest) certified by DOL to determine if any qualified, willing, and able U.S. workers are available to accept the position. Candidates for this classification must hold an advanced degree (beyond a baccalaureate degree) or possess exceptional ability in the sciences, arts, or business. See 8 C.F.R. § 204.5(k).

- **Employment third preference (EB-3): skilled workers, professionals, or other workers.** Employers seeking third-preference classification for a candidate must conduct a test of the U.S. labor market certified by DOL to determine if any qualified, willing, and able U.S. workers are available to accept the position before filing Form I-140. There are three subgroups within this category:

    - Skilled workers whose jobs require a minimum of two years of training or work experience
    - Professionals whose jobs require at least a U.S. baccalaureate degree or its equivalent
    - Unskilled workers (other workers), who are persons capable of filling positions that require less than two years of training or experience

  See 8 C.F.R. § 204.5(l).

- **Employment fourth preference (EB-4): special immigrant religious workers.** To qualify as a special immigrant religious worker, the foreign religious workers must:

    - Have been a member of a religious denomination that has a bona fide nonprofit religious organization in the United States for at least two years immediately before the filing of a petition for this status with USCIS
    - Seeks to enter the United States to work in a full-time, compensated position as a minister or in a professional or nonprofessional religious vocation –and–
    - Be coming to work for either a bona fide nonprofit religious organization in the United States or a bona fide organization that is affiliated with the religious denomination in the United States

  See 8 C.F.R. § 204.5(m).

- **Employment fifth preference (EB-5): employment creation investors.** This visa category allows a two-year conditional residency to any foreign investor who, after November 29, 1990, invests $1,000,000 (or under certain circumstances $500,000) in a new commercial enterprise that employs a minimum of 10 qualifying employees full-time and engages in the business through day-to-day management or policy formation, including as a U.S. limited partner. See 8 C.F.R. § 204.6. For more information, see Chart – EB-5 Immigrant Investor Visa Requirements.

Choosing between Nonimmigrant (Temporary) and Immigrant (Permanent) Sponsorship

At the onset of an employer-employee relationship, most employers choose to sponsor a foreign national requiring work authorization for a nonimmigrant visa and then progress to sponsorship of an immigrant visa after a period of employment. The temporary nature of nonimmigrant visa classifications provides the employer with time to evaluate the performance of the employee and make the determination of whether the employer seeks to continue the employment relationship on a more permanent, indefinite basis based on that performance and the employer's assessment of ongoing business needs.

Sponsorship for employment-based immigrant visas, however, is often a primary concern for foreign nationals during the recruitment process. The employer should develop a holistic policy that addresses the circumstances under which it will consider and undertake permanent residency sponsorship. For example, the employer may mandate that the employee accumulate at least one or more years of employment with the company, be in good standing, and have a high performance rating before undertaking sponsorship for permanent residency.

Employers should also be aware that foreign workers may have other avenues to obtain permanent residency. For example, foreign workers married to a U.S. citizen, permanent resident, or applicant for permanent residency may pursue residency through their spouse's status.

Considering Financial Costs of Sponsorship

The fees and costs associated with visa sponsorship vary by visa category, employer size, and the employer's worker profile, but employers generally find that costs associated with processing nonimmigrant visas run at a fraction of the costs associated with immigrant visa sponsorship. The most common nonimmigrant visa categories—the H-1B and L-1 visas—often necessitate substantial government filing fees. Visa categories based upon U.S. treaties—such as the NAFTA TN visa classification reserved for citizens of Canada and Mexico, and the treaty/trader E visa— require lower visa application filing fees to secure work authorization. Submissions in nonimmigrant visa categories generally will also require associated attorney's fees.

Processing of immigrant visas has a broader range of related fees based upon the professional history of the worker and the classification sought. They generally necessitate a more substantial investment in time and resources by both the employer and its outside counsel. Sponsorship of workers in the employment-based, second-preference category (EB-2), reserved for employees working in positions requiring an advanced, post-graduate degree or its equivalent, and the employment-based, third-preference category (EB-3), reserved for skilled workers, professionals holding at least a bachelor's degree or its equivalent, and unskilled workers in high-demand professions, normally requires the employer to conduct a labor market test—the PERM labor certification process—to determine if there are any qualified, willing, and able U.S. workers available for the position being offered to the employee. Such a test requires the employer to recruit for the offered position through, among other required steps, two Sunday classified advertisements in the newspaper of largest circulation in the area of employment, followed by submission of an application for labor certification to the Department of Labor. These processes may require a significant investment by the employer including the costs for advertisements, government filing fees, and attorney's fees. Less costly is sponsorship of first-preference multinational managers (EB-1C), which does not require a labor market test, but does require government filing fees and attorney's fees.

For both nonimmigrant and immigrant classifications, an employer should analyze whether it will support applications for an employee's dependent spouse and/or children, who will normally also require visa filings to acquire U.S. nonimmigrant and immigrant status. In comparison to visa sponsorship for the employee, support for dependent applications is more contained, although attorney's fees and government filing fees for accompanying dependents for permanent residency are more costly than nonimmigrant filings.

Determining Compliance Obligations for Sponsors and Visa Holders

Development of a plan for continued compliance of an employer's immigration processes involves consideration of multiple facets of the employment relationship, including job duties and placement, salary, record-keeping requirements, and calculation of the visa filing deadlines. Employers must also consider the maximum allowable time for employment of workers in certain nonimmigrant visa categories, such as the H-1B and L-1 classifications. As referenced below, if the employer does not initiate permanent residency for an H-1B worker early, it may not qualify for extensions of status past the sixth year of H-1B status.

Tracking Visa Expiration and Visa Maximum Periods

Visa Renewals

Employers seeking H-1B or L-1 status for employees and potential employees may request an initial approval from USCIS of up to three years. Each classification can subsequently be renewed up to enumerated time limitations discussed above. Employers must develop standard policies for visa renewal, including a time line for initiating the renewal process, and targeted filing dates well in advance of the expiration of the employees' work authorization. USCIS will accept petitions requesting extension of nonimmigrant

status up to six months in advance of visa expiration. Employers should also consider a uniform policy for the submission of petitions and applications via USCIS's Premium Processing service, which guarantees a response from the agency within 15 days for a fee of $1,225. The service is only available for certain employment-based submissions.

Extension of Nonimmigrant Status Petitions

An extension of nonimmigrant status petition cannot be filed if the employee's authorized stay is expired. The employee must be in the United States when the extension of nonimmigrant status petition is filed, but may travel abroad while it is pending. An employee's lawful nonimmigrant status ends—such that the government considers the employee to be out of status— when the employee's Form I-94 expires, even if the employer has timely applied to extend the employee's nonimmigrant status. However, an employee is permitted, in E, H-1B, L-1, O-1, P-1, or TN status, to continue his or her previously authorized employment for a maximum period of 240 days while the extension application is pending if USCIS receives the application before the employee's Form I-94 expires. If the application for an extension of nonimmigrant status is approved, the approval will relate back to the date the Form I-94 expired, and the employee's status while the application was pending will then be considered to have been lawful. If the application is denied, the employee may be required to cease employment and depart the United States immediately.

Time Limits for Specific Visa Categories

Employers must also be cognizant of the limitations on the number of years an employee may spend in specific visa categories. For example, the L-1 visa for intracompany transferees has a visa maximum limitation, with a maximum of seven years for intracompany managers in L-1A status, and a maximum of five years for specialized knowledge professionals in L-1B status.

Nonimmigrant Intent

Treaty visa categories, such as TN and the treaty/trader E-1 and E-2 employment visa classifications, do not have defined visa maximum limitations, but require the maintenance of nonimmigrant intent by the visa holder. Nonimmigrant intent requires a demonstration by the visa holder that they intend to return to their home country at the time of entering the United States, including evidence of substantial ties to the home county. Proving nonimmigrant intent may be challenging to demonstrate to U.S. immigration authorities following multiple renewals of status and extensive time spent in the United States.

Pursuant to the American Competitiveness in the Twenty-First Century Act (AC21), H-1B regulations allow employers to renew an employee's H-1B visa for up to a total time spent in H-1B status of six years (the max-out date), unless the employer has begun the process of sponsoring the employee for an immigrant petition well in advance of the max-out date, such that one of two circumstances apply:

- First, where the employer has submitted a PERM application, Form I-140, or employment-based Form I-485 at least one year in advance of the employee's max-out date, and that PERM, Form I-140, or employment-based I-485 remains pending (106 P.L. 313, 114 Stat. 1251–§ 106(a)) –or–
- Second, where the employee is the beneficiary of an approved Form I-140, but the applicable immigrant quota prevents the employee from concluding the immigration process (106 P.L. 313, 114 Stat. 1251–§ 104(c))

To be poised to capitalize on these provisions that facilitate elongated nonimmigrant work authorization, employers should consider a policy of petitioning for changes of status to nonimmigrant workers in other visa categories, including L-1B, TN, and E classifications, to H-1B visa status.

Extensions of H-1B status are permitted under AC21 until the employee is eligible to adjust status to LPR based upon the employee's place in line (called a priority date) in the backlog of green card applicants from certain countries, including India and China. The employer may monitor DOS's monthly visa bulletin as related to nationals of these countries to monitor when an employee's priority date becomes current.

With these limitations in mind, employers and employees alike require confirmation of a process and a timeline to maintain the employees' work authorization without interruption. Tracking the deadline for extensions of the initial status is important. In addition, if the employment relationship will extend beyond the visa maximum, the employer should assess the point at which it will initiate sponsorship of the employee for an immigrant visa. The employer should permit sufficient time to evaluate the employee's performance before initiating the green card process, but must also make a decision to proceed with enough time to ensure the seamless work authorization of the employee.

Material Changes

A material change to the employment status of the nonimmigrant worker may trigger a requirement that the employer file an amended nonimmigrant petition with USCIS. For instance, the H-1B and L-1 nonimmigrant classifications have been the subject

recently of scrutiny for their effect on U.S. workers and as related to isolated cases of noncompliance with immigration and labor regulations. In particular, the heightened scrutiny for H-1B visa holders parallels the regulatory requirements associated with this visa type, as employers must certify that H-1B workers will be provided working conditions and a salary consistent with U.S. workers, and confirm the precise worksite placement and supervision of the H-1B worker.

Should the employer make a material change to any foreign national employee's working conditions, including: (1) moving the employee to a different worksite not covered in the initial petition, (2) placing the employee in another company's offices, (3) substantially changing the employee's job duties, or (4) reducing the employee's salary, then the employer must take steps to ensure there is no disruption in regulatory compliance. Employers should develop a process to notify its human resources department and internal or outside immigration counsel should the business be considering adjustments to a foreign national visa worker's employment that would differ from the information provided to USCIS and the DOL in the initial petition.

A material change may also compromise the immigrant sponsorship process. If the residency sponsorship is dependent on a PERM job market test, for example, material changes can result in denial, unless the change occurs after the beneficiary's case has advanced to the final stages.

Business Visitors

Employers should also closely monitor its usage of B-1 business visitor visas for workers entering the United States from abroad. The B-1 visa does not provide the visa holder with employment authorization in the United States, and instead permits the holder to enter the United States strictly for business-related meetings, conventions, trainings, and related events. The visa holder may not perform gainful employment in the United States or receive wages from a U.S. employer. Abuse of the B-1 visa category to circumvent the more rigorous petitioning process for work authorization has come under scrutiny by immigration regulators. For instance, in October 2013, Infosys Corporation, a consultancy firm based in India, entered into a record settlement of $34 million with the Department of Justice as a result of allegations of systemic visa fraud and abuse of immigration processes related to its usage of B-1 visas for individuals performing gainful employment in the United States. For an annotated B-1 visa application with additional information on the B-1 visa, see Invitation Letter in Support of a B-1 Business Visitor Visa or B-1 Admission Application.