

## DISTINCTIONS AMONG EMPLOYMENT-BASED NONIMMIGRANT VISAS FOR PROFESSIONALS

U.S. companies seeking to sponsor foreign workers for work visas face a complex and confusing array of nonimmigrant visa options. This article summarizes the most commonly utilized employment-based nonimmigrant visas by category.

This discussion excludes consideration of immigrant visa processing, which typically involves a delay of several months or years and is consequently not a viable short-term option for employment of foreign workers. It also excludes some of the nonimmigrant work visas available for student interns, trainees and low-skilled workers (e.g., F-1 OPT/CPT, J-1, H-2B, H-3), focusing instead on visa categories applicable to experienced professionals.

### Visa vs. Immigration Status

A visa is a document within a passport that allows an alien to travel to the country (e.g., “H-1B visa”). By contrast, immigrant status refers to the actual classification under which an alien is legally in the United States, irrespective of the visa stamp(s) contained in the alien’s passport (e.g., “H-1B status”).

Professional work visas can be classified into two general categories: a) visas based upon an alien’s citizenship, and b) visas based upon an alien’s notable education, experience or skill.

### CITIZENSHIP-BASED VISAS

The following visa categories base eligibility upon an alien’s citizenship in a particular

qualifying country.

- **TN Visa (Mexico or Canada)** – In 1994, the passage of NAFTA created the TN visa category, which allows Mexican and Canadian nationals falling within certain designated professional categories (specified in NAFTA Appendix 1603.D.1) to work in the United States. An initial applicant for a TN visa need not file any petition with the USCIS. An alien in TN status must maintain nonimmigrant intent for the duration of stay.

### IMPORTANT CONCEPTS

Nonimmigrant Visas – Visas that allow foreign workers to stay in the United States for a temporary period of time. Depending on the visa category, “temporary” can be as short as a day or as long as years, a decade or more.

Immigrant Visas (“Green Card”) – Visas that allow foreign workers to stay in the United States on a permanent basis, as Permanent Residents.

Immigrant Intent – Nonimmigrant visas generally require the alien to lack “immigrant intent,” which can be described as a long-term intention to reside in the United States permanently. Along these lines, the alien must also have a foreign residence that he/she has no intention of abandoning.

Dual Intent – Certain nonimmigrant visa classifications allow the alien to have long-term immigrant intent, as long there is a short-term intention to depart the United States upon expiration of nonimmigrant status. Aliens in these classifications may adjust their status to Permanent Resident by applying while in the United States, or by procuring an immigrant visa stamp at a U.S. consulate overseas.

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- **E-3 Visa (Australia)** – This visa is almost identical to the H-1B visa (discussed below), with a few exceptions. First, it is available only to Australian citizens. Further, unlike the H-1B, an initial applicant for an E-3 visa need not file any petition with the USCIS prior to applying for a visa at a U.S. consulate. Dual intent does not apply to the E-3 visa.
- **H-1B1 (Chile or Singapore)** – This visa is also very similar to the H-1B visa, with a few exceptions. First, it is available only to citizens of Chile and Singapore. Further, like the E-3, the H-1B1 visa can be issued to an initial applicant directly at a U.S. consulate, without the need to file a petition with the USCIS. Dual intent does not apply to the H-1B1 visa.
- **Visa Waiver (Numerous Countries) and B-1 Visas (All Countries)** – The Visa Waiver program is a derivative of the traditional B-1 visa, which citizens of any country may acquire for temporary business visits to the United States. Foreign nationals in B-1 status may enter into contracts, negotiate deals, attend seminars and participate in meetings, but may not engage in productive employment while in the country.

B-1 visas are notoriously difficult to acquire at U.S. consulates as consular officers have a high degree of suspicion as to applicants' immigrant intent. Aliens from Visa Waiver countries have the advantage of entering the United States in B-1 status without the hassle of a consular visa application. Instead, Visa Waiver aliens can fill out an online pre-clearance form (ESTA) on the U.S. Customs and Border Protection website, and seek admission to the country as B-1 aliens using just their passports. The Department of State maintains a list of countries eligible for Visa Waiver. This list includes many of the countries (such as UK, France, Germany, Japan, etc.) with which U.S. companies routinely engage in trade.

#### **VISAS BASED UPON AN ALIEN'S NOTABLE EDUCATION, EXPERIENCE OR SKILL**

Certain other professional visa categories are based on an alien's qualifications. These include the H-1B, L-1, O and P visas. All of the visa categories described in this section a) are open to nationals of any country, b) allow for Dual Intent, and c) require that a visa petition be filed with USCIS prior to applying for a visa at a U.S. consulate.

- **H-1B** – One of the most commonly known work visas, the H-1B is designated for professionals seeking employment in a specialty occupation. In essence, the H-1B visa is meant for positions requiring at least a Bachelor's degree in a specific field of study. As this category is open to aliens from all countries, demand is typically very high. Even during the recent economic slowdown, demand for the H-1B has far outpaced its annual quotas, which are comprised of 65,000 "regular" visas and an additional allocation of 20,000 visas for U.S. Master's degree holders. As the H-1B allows for Dual Intent, many

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TN, E-3 and H-1B1 status holders choose to change to H-1B status in order to pursue immigrant visa processing.

- **L-1** – The L-1 visa allows managers, executives and specialized knowledge workers of multinational companies to be transferred from an overseas company to a United States subsidiary, parent, affiliate, branch or joint venture. The USCIS currently interprets “specialized knowledge” as being akin to proprietary knowledge of a multinational's business or processes.
- **O / P** – The O visa category is reserved for aliens having extraordinary ability in the sciences, arts, education, business or athletics, or who have demonstrated records of extraordinary achievement in the motion picture or television industry. This is essentially a “celebrity” visa, and is hardly useful for most businesses. Along similar lines, the P visa is designated for internationally-recognized athletes, artists and entertainment group members.