Our firm assists professionals with US visa and residence approvals for present or future staff members. We can assist you with identifying visa issues during the hiring process, and with pursuing various visa remedies for your staff.

Visas are endorsements to travel documents, generally valid passports, for entry into the United States for specific purposes here such as lawful nonimmigrant employment. All applicants for all nonimmigrant visas except for H, L and O, are under a presumption of immigrant intent. Visa applicants are required to overcome the presumption of immigrant intent to qualify for the other kinds of visas.

Canadians are visa exempt with only a few limited exceptions. This means that Canadians apply for entry at US Customs offices seeking a specific visa status by the US Customs inspection process. For many types of inspected entry, a Canadian worker must also have a visa petition approval from USCIS immigration.

Permanent residence or the ‘green card’ can be the result of family or employment based immigrant processes. Many staff members will immigrate based upon an employment based process involving a PERM alien labor certification. Some may qualify based upon a family member’s petition, and some may qualify on more exotic kinds of immigrant petition such as extraordinary ability or multinational executive or manager petitions. These matters are discussed in some additional details below.

B-1/B-2 VISITOR VISAS

Most foreign nationals will require some kind of visa to enter the US. For short term visitors for business or pleasure, they would generally secure a B-1 or B-2 visitor visa. This would include applicants for positions here coming for job interviews and the like. Remember that all pure nonimmigrant visa applicants must overcome the presumption of immigrant intent. B visas are frequently denied for failure to overcome this presumption.

A special rule in the Foreign Affairs Manual permits the issuance of B-1 visas for workers who would otherwise be qualified for H-1B professional visas. The rule requires that their source of payment/compensation be from a foreign entity which can also include a related office of the US company abroad. The below explanation about this special exception to regular business visitors was secured from the US Consulate Mumbai information:

B-1 IN LIEU OF H-1B

Any person holding a B1 or B1/B2 visa may be eligible to perform H-1B work in the United States as long as they fulfill the following criteria:

· Hold the equivalent of a U.S. bachelor's degree

· Plan to perform H-1B-caliber work or training

· Will be paid only by their foreign employer, except reimbursement of incidental travel costs such as housing and per diem. The employee must not receive any salary from a U.S. source.

· The task can be accomplished in a short period of time.

These travelers would be admitted as B1 visitors, and may only stay in the U.S. for the time allotted by the Department of Homeland Security upon entry.

Like any other B1/B2 applicant, travelers must still show strong professional, familial and financial or other ties, which indicate a strong inducement to return to the country of origin or another country other than the United States.

Consulate General Mumbai is prepared to issue B1/B2 visas to qualified applicants for this purpose. These visas may also be used for tourism. Current holders of B1/B2 visas may already use this provision without seeking another visa.

When seeking a visa for this purpose, please clearly explain this in the applicant's BEP cover letter.

Upon arrival at U.S. border entry posts, applicants should be prepared to explain completely their purpose of travel and source of pay. Travelers are encouraged to carry a letter from their host company and Indian employer listing the traveler's duties, length of stay and remuneration plans.

WT/WB VISA WAIVER

The Visa Waiver Program (VWP) enables nationals of 36 participating countries to travel to the United States for tourism or business (visitor [B] visa purposes only) for stays of 90 days or less without obtaining a visa. The program was established to eliminate unnecessary barriers to travel, stimulating the tourism industry, and permitting the Department of State to focus consular resources in other areas. VWP eligible travelers may apply for a visa, if they prefer to do so. Nationals of VWP countries must meet eligibility requirements to travel without a visa on VWP, and therefore, some travelers from VWP countries are not eligible to use the program. VWP travelers are required to have a valid authorization through the Electronic System for Travel Authorization (ESTA) prior to travel, are screened at the port of entry into the United States, and are enrolled in the Department of Homeland Security's US-VISIT program.

Individuals who enter without a visa are ineligible for a change or extension of their stay while in the USA, with very limited exceptions. While this can be a useful short term solution for visitors, it has the shortcoming of no changes or extensions after admission to the United States.

For the regulation providing guidance for B Visitors, the link is:

http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=8cfr

E-2 INVESTOR VISA

For some, the most expedient and friendly visa process may be to pursue an E-2 visa for an essential services or managerial hire.

No degree is required for E-2 eligibility. Spouses can have employment authorization and visa issuance does not require prior USCIS approval here.

For the regulation providing guidance for E visa applicants, the link is:

http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=8cfr

H-1B PROFESSIONAL/SPECIALTY OCCUPATION VISAS

To qualify for H-1B, the applicant must have a university level degree and US company sponsor for work in their professional field [or equivalent based upon progressive work experience]. In the past, this visa category has been very popular and the annual quota of visas was often exhausted or fully allocated during the first few days of April proceeding the October 1 fiscal year starting date.

The category is moderately regulated and highly taxed, with filing fees along $2,325 for employers with 26 or more full-time staff. The employer must offer the prevailing wage for the occupation, and document that wage in public inspection files. Posting of the H-1B opportunity is required with site checks from various agencies possible. For this reason, H-1B compliance is

something that should be a matter of ongoing concern.

The H-1B is increasingly necessary for various reasons. Some other categories are not too compatible with immigrant intent, or immigrant cases. Also, as long term staff face the limitations of 5-years in L-1B status and the mandate that immigrant actions must be undertaken before the 5th anniversary in combined L-1B and/or H-1B status, moving key staff to H-1B and pursuing employment based immigrant benefits is now part of necessary long term visa planning. If no employment based immigrant case has been initiated or immigrant petition approved by the 5 th anniversary in status here, H-1B has a maximum 6-years total time in the US.

The H-1B requires a 4-year university degree or combined progressive working experience with academic training to be deemed equivalent to a qualifying university degree. Essentially, 3-years of working experience is needed for each year of academic university level completed studies that are missing. The job offer must be for employment in a ‘specialty occupation’ as defined by USCIS, which means essentially a job that requires a suitable 4-year or greater degree, or equivalent, for entry into the occupation.

In the past few years the annual quota for H-1B has run out by December or January, leaving a long blackout period from then until the following October. For this reason, advance planning is important along with consideration of other visa strategies when the H-1B may not be a good remedy due to urgency.

There are also H-2 visas, and H-3 training program visas. While a possible remedy for some, these are generally best for grounds of workers in either seasonable positions or for a large scale training program that meets the requirements of the applicable regulation. The highly complex regulations for H-1B workers can be found at:

http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=8cfr

E-3 FOR AUSTRALIAN NATIONALS

This discussion follows H-1B since the underlying eligibility criteria are very closely related. The E-3 visa tracks the H-1B visa criteria except that it has a special quota only for citizens of Australia, and can be filed directly at US consular offices without prior USCIS approval here. Like the H-1B, the process requires a labor condition approval ETA 9035 with a prevailing wage requirement and internal posting and compliance. Unlike H-1B, it is not compatible with immigrant intent, and applicants must prove that they will depart from the US when the visa or their position will end. E-3 is for specialty occupations and also requires a baccalaureate degree or equivalent for entry and approval.

E-3 visas are approved for 2-years per approval. Change or extension of E-3 status is possible while present in the USA, but would thereafter require consular processing as an original matter at a US consular office for international travel visa requirements.

E-3 information is available at the US consular web sites for Australia.

J-1 EXCHANGE VISITORS

The J-1 visa can be both simple and one of the most complex areas of immigration law. Some users of J-1 visas like foreign medical graduates or Fulbright Scholars face a very difficult task to avoid the 2-year foreign residence requirement that is mandatory in such cases. Private employers may use a J-1 visa for an ‘intern’ or ‘trainee’. Private J-1 programs would not necessary involve the 2-year foreign residence requirement unless the worker is a native or last resident of a country with a published skills list of needed skills in that country.

Someone subject to the 2-year foreign residence requirement can apply for a waiver based upon a ‘no objection letter’ from the government of the applicable nation for return, or upon

hardship or potential persecution grounds. Waivers can take months to secure, and are not always granted.

Regulations regarding J-1 exchange visitors can be viewed at:

http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=8cfr

K-1 FIANCEE AND K-3 SPOUSE OF CITIZEN PETITIONS

The K-1 visa allows a foreign-born fiancé(e) of a United States citizen the ability to travel to the United States and marry the visa holder's U.S. citizen spouse within 90-days of the visa holder's arrival. Thereafter, the visa holder may apply for adjustment of status to that of a lawful permanent resident.

Eligible children of K-1 visa applicants receive K-2 visas.

A K-3 visa allows the a foreign citizen of a U.S. citizen spouse the opportunity to obtain a nonimmigrant visa overseas, enter the United States and remain in the United States to await the approval of the immigrant visa petition. Once the petition is approved, the visa holder may seek to adjustment of status to that of a lawful permanent resident.

Eligible children of K-3 visa applicants receive K-4 visas. Both K-3 and the K-4 visas allow their recipients to stay in the U.S. while immigrant visa petitions are pending approval by USCIS.

Applicable K visa regulations can be viewed at:

http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=8cfr

L-1 INTRACOMPANY VISAS

There are individual L-1 visas, and blanket L-1 visas. USCIS has become increasingly hostile to individual L-1 visas including large company petitions particularly for specialized knowledge applicants.

The L-1 visa category allowed a foreign business owner, executive or manager to immigrate to the United States based upon the establishment of a division of their foreign enterprise here. In order to qualify for benefits under the intra-company L-1 visa category, a US corporation or qualifying business entity must be either a parent, subsidiary, affiliate, branch or 50/50% joint venture of a foreign organization. The USA enterprise can engage in any form of business. There is no requirement that the business activity have any similarity to the foreign business. If the interested parties have established a new business organization here in the USA, they can qualify for an immediate one year visa status to operate the business, and receive permanent residence one year later if your company here can support an executive position. Key employees who are also executives or managers with your foreign firm for at least one year can also qualify for these benefits. Existing companies qualify workers for a three year initial visa to transfer to their USA organization. Remember that USCIS has become extremely hostile to these petitions, and special knowledge transferees are now rarely approved.

A blanket petition approval may be available for certain companies. A blanket petition allows the petitioner to circumvent the need to file individual petitions initially with USCIS here, a major strategic advantage. This saves time, filing fees and avoids the intense scrutiny of the Homeland Security process. To qualify, the transferee must be executive, manager or professional. So far, the US consular staff members have accepted a standard similar to the H-1B standard for ‘specialty occupation’ for blanket visa issuance, allowing experience to substitute for a 4-year baccalaureate degree. Essentially, 3-years of working experience is needed for each year of academic university level completed studies that are missing. We have

provided applicant's lacking a 4-year diploma with an evaluation from a service that will include working experience with academic work to support a claim to the equivalence of a baccalaureate degree. This permits the blanket L-1 to serve as a viable alternative to H-1B, and not subject to the high level scrutiny, taxation or quota limitations.

A move from L-1 to H-1B may become necessary again for long term staff members seeking US immigration benefits who may need more than 4-years to reach the final residence process. While many of these visas are compatible, long term planning is now ever more important to avoid the loss of eligibility or reaching a maximum period in status without appropriate options to maintain the staff member in the US.

Spouse of L-1 workers can secure employment authorization. This too can be an important benefit, and one that is lost when a staff member must change status to H-1B worker.

L-1 regulations can be viewed at:

http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=8cfr

O-1 VISAS FOR OUSTANDING INDIVIDUALS IN THE ARTS OR BUSINESS

The O-1 alternative has become more important as H-1B quotas and L-1B options have diminished. This is a viable alternative for individuals with significant achievements to their credit including awards, publications, significant commercial successes, and the like. In general, the criteria for an O-1 artist are as follows:

(iv) Evidentiary criteria for an O-1 alien of extraordinary ability in the arts. To qualify as an alien

of extraordinary ability in the field of arts, the alien must be recognized as being prominent in his or her field of endeavor as demonstrated by the following:

(A) Evidence that the alien has been nominated for, or has been the recipient of, significant national or international awards or prizes in the particular field such as an Academy Award, an Emmy, a Grammy, or a Director's Guild Award; or

(B) At least three of the following forms of documentation:

(1) Evidence that the alien has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications contracts, or endorsements;

(2) Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications;

(3) Evidence that the alien has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials;

(4) Evidence that the alien has a record of major commercial or critically acclaimed successes

as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications;

(5) Evidence that the alien has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements; or

(6) Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence; or

(C) If the criteria in paragraph (o)(3)(iv) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

Recently, USCIS in California has been swift to act on O-1 petitions without having the additional premium processing fee of $1,225 for a reasonable expectation for the agency’s response. It is difficult to provide anyone with an accurate opinion about chances for a specific O-1 case without a detailed resume and possible interaction with the candidate about possible evidence to support some of the required criteria. We have enjoyed reasonable success with this category.

Lead time will vary with O-1 applicants. Some are very proactive and will prepare and send exhibits immediately once the process is explained and the required criteria understood. Others struggle with reference letters, proof of their major works, documentation of their lead roles with organizations with a distinguished reputation and the like. Often the documentation process for an O-1 worker can take one month or much longer. Once again, each case of this type is unique and the ultimate decision making by USCIS will be quite subjective.

You can review the O-1 regulations at:

http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=8cfr

NAFTA "TN" BENEFITS FOR CANADIANS AND MEXICAN CITIZENS

The North American Free Trade Agreement or NAFTA, created the TN admission and visa category for Canadians and Mexican citizens, respectively. Canadians can be granted a 3-year admission for TN employment, while Mexican nationals must secure a visa at a consulate limited to 1-year per visa issuance. While both Canadian and Mexican applicants can change to, or extend TN status while present in the USA, the durability of the new status for Mexican nationals is often tested when return from travel to Mexico. US Customs officers tend to demand TN visa issuance for return admission, and can be difficult along with airline ticket agencies resulting in complications.

To qualify for TN, the individual must be entering the US to perform professional services in one of the listed occupational field or areas expressly listed in the NAFTA annex. You can review these fields at the below link to the applicable regulation. Most all of the TN occupational field require a specific level of degree, and some a degree with experience. The two exceptions are for management consultants and scientific technologists. These kinds of occupations gather a great deal of attention, and can be difficult for that very reason.

Regulations for TN benefits can be found at:

http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=8cfr

PERMANENT RESIDENCE BASED UPON 'PERM' ALIEN LABOR CERTIFICATION

The majority of employment based immigrants will need to secure a PERM approval from USDOL before they file an immigrant petition for final permanent residence or 'green card' benefits, including their dependents if any. Individuals who are married to US citizens, or have other reasonable family based cases may avoid securing a PERM approval.

PERM is a process with USDOL for submission of a digital application for permanent alien labor certification. Prior to filing, the employer conducts a test of the labor market and secures the USDOL prevailing wage rate. The design could be for a skilled, professional or advance degree worker. The design is important and can mean the difference between a fast case taking 18 months to come to fruition, or an Eb3 design that could languish for 5 years or longer in queue. There are 5 basic steps to securing residence in this process as follows:

1] Design

2] Recruitment

3] USDOL ETA 9089 PERM filing

4] USCIS I-140 immigrant petition filing

5] USCIS I-485 application for adjustment, or in some cases US Consular processing

Steps 1 through 4 can often be accomplished within 12 to 18 months. Employers by law are required to pay the legal fees and recruitment costs associated with this program. Recruitment costs can be significant, particularly for advanced degree type cases involving additional recruitment steps like radio ads, journals, and more. Also, the more complex the occupation, the more expensive recruitment can become.

Step 5 is the objective, with unrestricted employment and advance parole travel permits available for all applicants at that time. Filing of step 5 is limited by the Visa Bulletin and the applicable country cutoff date for the individual's Eb priority date, or PERM filing date. For example, workers who filed PERM cases in late 2005 are now eligible to file step 5 adjustment of status, and enter the final part of the immigrant program.

A good review and description of the PERM program can be visited at the USDOL site at:

http://www.foreignlaborcert.doleta.gov/perm.cfm

PERMANENT RESIDENCY BASED ON U.S. CITIZEN AND LAWFUL PERMANENT RESIDENT FAMILY MEMBERS

The foreign national of a U.S. citizen parent, spouse, sibling, child, or the widow/er of a U.S. citizen, m

MORE ADVANCED AND EXOTIC IMMIGRANT CASES

Multinational managers and executives have a special program for immigrant benefits that does not require a PERM approval. These applicants can proceed to file the I-140 petition with proof of their multinational qualifications, and can file I-485 benefits concurrently. A word of caution is appropriate here, as in the L-1 arena. USCIS is taking an ever increasingly stingy view of who can qualify in management or as executives. Small company management beware the USCIS indicates that any functions not purely in management can be grounds for denial of these benefits. Likewise, functional managers are under attack too. When approved, these matters are very efficient and are in the Eb1 quota, where there is no delay for filing and approval of I-485.

Another class of Eb1 workers are for individuals of exceptional ability in the arts, sciences, business or the like. Some individual confuse this category and the applicable criteria with that of the O-1 visa for outstanding workers. To qualify for the Eb1A exceptional ability standard, the applicant must prove that the individual has arisen to the very top of their field and are one of a very few in the world so qualified. The criteria starts with a Nobel or comparable international prize or award, or in the alternative a minimum of three [3] of the other major achievements or accomplishments. While success on such cases remains possible, they are very subjective and often denied by USCIS. We often encourage applicants to go with a more conservative Eb case such as a PERM since approvals are more likely, and the denial is not so subjective.

Finally, there is another class for a waiver of the PERM requirement ‘in the national interest’. Known as the national interest waiver, such petitions are filed directly with USCIS and must prove by subjective evidence that the long term employment and residence of the beneficiary is in the interest of the United States. The agency significantly limited the kinds of applicants who

are likely to be approved for this benefit in the precedent case of the Matter of New York Department of Transportation
. This case requires that not only must the area be in the national interest but that the individual's participation and contributions are significantly related to accomplishing the national interest objectives.

Limitations on status in the United States: Congress has placed limits on the maximum amount of time that workers can be in the United States in H-1B and L-1 status. For L-1 staff, management can hold L-1A for 7 years, while the professional and special knowledge class L-1B are limited to 5 years. These limits are enforced and do not have many exceptions unless the staff member is a commuter, or can 'recapture' time absent from the US during their respective periods holding L-1 status here.

H-1B staff will be eligible for a maximum period of 6 years in the US, unless an employment based immigrant matter has been filed before their 5th anniversary holding H-1B [or combined H-1B and L-1] status. If the staff member can 'recapture' time absent from the US during their respective periods holding H-1B status here, that computation could have the effect of pushing out their effective 5 th anniversary to a later date as well.

For L-1 staff who may be looking for a long career in the US, moving them to H-1B will probably become necessary so long as the employment based quota for Eb3 professionals remains behind by over 5 years. Obviously, with a queue or quota that takes 5 years to accomplish post PERM filing, a 5-year maximum L-1B will not permit a sufficient period of time to reach the final step 5 adjustment of status.