Poised for Recovery: Hospitality Visas in a New Economy

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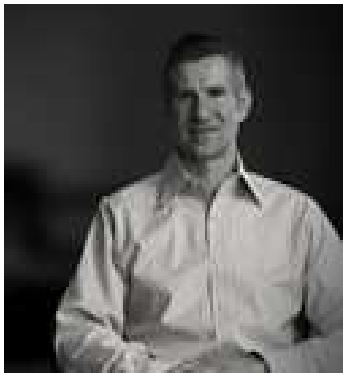

Grzeca Law Group (GLG) is an AV-rated immigration law firm with three locations (Milwaukee, Madison and Green Bay, Wisconsin) which provides professional legal services to the international business community and individuals on all aspects of immigration law. It advises corporate clients on all aspects of employment-related immigration law, and also counsel individuals and families to help meet their immigration needs.

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He is a past Director on the American Immigration Lawyers Association (AILA) Board of Governors and Chair of the Taskforce on Affiliate Programs (2009); Vice Chair of the DOS Liaison Committee (2009-2010); Executive Director Search Committee (2009); Department of State Liaison Committee (2007-2008); USCIS National Benefits Policy Liaison Committee (2005-2007); Chair of the Wisconsin Advocacy Committee (2005-present); Chair of the Nebraska Service Center (NSC) Liaison Committee (2004-2006); Wisconsin Chapter Chair and Chair of the Milwaukee Bar Association (Immigration and Nationality Section) (2001-2003). He is a seasoned speaker and author of a variety of topics relating to business immigration law, and has served on more than fifty professional panels, webinars and round-table discussions for businesses needing expertise in immigration matters. Mr. Grzeca is listed with The Best Lawyers in America, Who's Who of Corporate Immigration Lawyers and Super Lawyers for excellence in immigration law. Mr. Grzeca was also selected as a Leader in the Law by the Wisconsin Law Journal.

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I. Scope of Article

As the improving United States economy spurs new business recovery and growth, many employers are slowly beginning to rebuild their workforces. With the retirement of baby boomers in the coming years and the return of labor shortages predicted, the need for foreign workers in the hospitality industry will continue to increase.

Nonimmigrant visas allow individuals to temporarily enter the United States for a specific purpose such as business, study, temporary employment or pleasure. Each section of this article is designed to assist hospitality personnel and/or general counsel in understanding the basics of each of the nonimmigrant visa options available for current and potential employees. These nonimmigrant visa options include the following classifications: B-1; J-1; H-3; L-1; E-2; H-2B; H-1B; TN; and, O-1. In addition to this understanding, this article will also provide examples of when each of the different nonimmigrant visa options can be used.

II. B-1 Business Visitors and the Visa Waiver Program

The B-1 business visitor is the most common type of temporary visa that is used by millions of travelers every year. Individuals could be admitted in B-1 business visitor status for duration anywhere from a couple of days to up to six months. When an individual is admitted to the United States pursuant to this type of visa, he or she is not authorized to work. It is a common misconception among foreign employees and their employers that the B-1 business visitor category may be utilized for purposes of work, so long as it's only for a short time period. In fact, there are limited activities that are acceptable under this visa classification.[1] Furthermore, the misuse of the B-1 business visitor classification may lead to serious consequences for employees and their employers because the United States Customs and Border Protection (CBP) does not tolerate any misrepresentations at the time of admission.

In order to qualify for a B-1 business visitor classification, an individual must meet the following criteria: (1) he must show that he has no intention of abandoning his residence in the home country; (2) he only intends to enter the United States for a period of limited duration (temporary intent); and, (3) he is seeking admission for the sole purpose of engaging in legitimate business visitor activities.[2]

With the exception of Canadian citizens who are exempt from the requirement to obtain a visa, there are two ways for individuals to enter the United States under the business visitor category: an individual may either be admitted under the Visa Waiver Program (VWP), or may be admitted after presenting a valid B-1/B-2 visa at the time of entry.

[1] 9 F.A.M. 41.31 N8-N11 (2012).

[2] 9 F.A.M. 41.31 N1.

A. Procedure

The VWP is available to citizens from these countries who have received authorization to travel under the VWP through the Electronic System for Travel Authorization (ESTA).[3] When entering the United States, these individuals are granted entry as a business visitor for up to 90 days without first obtaining a visa at a United States Embassy or Consulate abroad.

There are currently 37 countries (outlined in the chart below) that are eligible to participate in the VWP.

Andorra	Hungary	New Zealand
Australia	Iceland	Norway
Austria	Ireland	Portugal
Belgium	Italy	San Marino
Brunei	Japan	Singapore
Czech Republic	Latvia	Slovakia
Denmark	Liechtenstein	Slovenia
Estonia	Lithuania	South Korea
Finland	Luxembourg	Spain
France	Malta	Sweden
Germany	Monaco	Switzerland
Greece	The Netherlands	Taiwan
		United Kingdom

For those individuals who are not Canadian citizens or nationals of one of the 37 VWP countries, an application for a B-1/B-2 visa must be submitted with a United States Embassy or Consulate prior to traveling. As part of the application process, the individual is required to attend a visa interview and present supporting documentation. If the visa application is approved, a B-1/B-2 visa is stamped in the individual's passport. Regardless of the validity of the approved B-1/B-2 visa, the authorized period of stay for each applicant for admission to the United States is determined by the CBP. Thus, even though a traveler may be in possession of a valid B-1/B-2 visa in his or her passport, CBP has the authority to deny admission or limit the period of stay at its discretion. For example, even though an individual's B-1/B-2 visa stamp indicates a validity period of ten years, CBP may limit the individual's authorized period of stay in the United States to ten days.

As previously mentioned, Canadian citizens are exempt from the need to obtain a visa. Therefore, in order to enter the United States as a business visitor, a Canadian citizen is only required to apply for admission with the CBP. Whether or not admission is granted is up to the discretion of CBP.

[3] *Welcome to the Electronic System for Travel Authorization*, U.S. CUSTOMS & BORDER PROT., https://esta.cbp.dhs.gov/esta/ (last visited Jan. 11, 2013).

B. Acceptable Business Visitor Activities

The acceptable business visitor activities include: engaging in commercial transaction that do not lead to gainful employment; negotiating contracts; consulting with business associates; participating in business, professional, scientific or educational conferences, conventions and seminars; undertaking independent research; and, litigating.[4]

When it comes to the admission of business visitors, it does not come as a surprise that immigration is mainly concerned with the misuse of the business visitor category for purposes of work. For example, if an employee is sent to the United States to merely offer advice and consultation on a project, this would likely be considered an acceptable B-1 business visitor activity. However, if the employee's involvement becomes hands-on, the activity will quickly fall outside the scope of what is allowed. If an individual attempts to enter the United States as a business visitor, and the CBP Officer makes a determination that, in fact, he or she intends to "perform services," the Officer will deny the individual's admission to the United States and, even worse, will likely bar the traveler from re-entering or re-applying for admission. Any misrepresentation at the time of admission will negatively impact the individual's eligibility for future immigration benefits. Individuals who have been barred due to misrepresentation are also required to obtain waivers in order to receive permission for readmission to the United States.

III. Training Future Managers – The J-1 and H-3 Classifications

Since management training is vital to the hospitality industry, it is imperative that there be some classifications available to trainees to enter the United States and complete management training programs with their employers. There are two classifications that are available to these types of trainees – the J-1 classification and the H-3 classification.

A. The J-1 Classification

The J-1 program is designed for foreign students or recent graduates who wish to enter the United States and obtain work-based learning to build on their academic experience by developing practical skills in their field. A foreign national generally may be eligible to enter the United States and work as a J-1 intern if he or she is currently enrolled in and pursuing studies at a degree or certificate granting post-secondary academic institution outside the United States or if he or she has graduated from such an institution within 12 months of beginning his or her exchange visitor program. Generally the maximum duration for an internship programs is 12 months.

Another way to obtain a J-1 classification is as a management trainee. This type of J-1 classification allows student and non-student candidates from abroad who are currently working or studying in the hospitality field to participate in practical training programs. The J-1 Management Trainee program can be valid for a 12-month period (18 months if the umbrella organization is able to have the Department of State (DOS) classify the program under the occupational code of "Management, Business, Commerce and Finance" instead of "Hospitality

[4] 9 F.A.M. 41.31 N8.

and Tourism"). In order to be eligible to participate in a training program, the prospective trainee must meet one of the following requirements:

1.) possess a degree or professional certificate from a post-secondary institution outside the United States and at least one year of prior related work experience in their occupational field acquired outside the United States; or,
2.) possess five years of work experience outside the United States in their occupational field.

Before an individual can apply for a J-1 visa at a United States Embassy or Consulate, he or she must meet the requirements, apply for and be accepted in one of the Exchange Visitor Program categories through a designated sponsoring "umbrella organization." The J-1 program's primary objective is to enhance the skills and expertise of the exchange visitor in his or her academic field through participation in a structured and guided internship or trainee program. In order to ensure that this objective is met, the host company must establish a bona fide internship/trainee placement and submit a detailed training plan demonstrating that the J-1 Exchange Visitor will not be engaging in ordinary employment. Once the training program has been developed for the J-1 intern or trainee, a J-1 sponsor can typically process the required documents in a few weeks. The individual can then schedule a visa interview at a United States Embassy or Consulate abroad.

Please note that a negative feature of the J-1 program is its two year foreign residence requirement for most foreign nationals. Foreign nationals must take the training and skills learned in the United States to their home country for two years if their field of expertise appears on a skills list maintained by the DOS, which is a record of skills in each country deemed to be in short supply.

The Summer Work/Travel Program is another type of J-1 classification. This program enables foreign college or university students to enter the United States to work during their summer vacation. A "student" is defined as a bona fide foreign post-secondary student currently enrolled in and actively pursuing a degree or a full-time course of study at an accredited educational institution, or as that status is defined in the foreign national's home country educational system. Individuals who enter the United States pursuant to the Summer Work/Travel Program can stay for a maximum of four months. The ending date of the period must not extend beyond the student's summer vacation and the first day of the following term at the college or university at which the student is enrolled for class.

This Summer Work/Travel Program can be used to "fill in gaps" for peak season, one-time needs or bridges when other visa options fall short. The biggest benefit to this type of J-1 classification is that the students can do any type of work for the company. It is not necessary for the work to be related to the student's degree. Also, this program is available to participants from all countries.

B. The H-3 Classification

1. Procedures

In addition to the Management Trainee J-1 classification, the H-3 classification is another option worth considering. The H-3 visa classification is used by United States companies and institutions to bring foreign employees to the United States for a temporary period in order to participate in an established company training program. In order to qualify for an H-3 visa classification, a prospective United States employer must show that the proposed training in not available in the trainee's home country. Furthermore, it must be established that the training will ultimately benefit the trainee in pursuing a career outside of the United States. Additionally, the beneficiary of an H-3 petition cannot be placed in a position that is within the normal operation of the business. Finally, productive employment is not authorized, unless it is incidental to the training.[5] Therefore, the program cannot consist exclusively of on-the-job training resulting in productive employment. The H-3 classification is intended to be temporary and it is not intended to allow trainees to enter the United States for the sole purpose of applying for a change of status to an H-1B or L classification.

For the H-3 petition, the company must provide very specific details of the training plan, including the specific amount of time that will be spent learning each task. The H-3 training program must offer a substantial number of hours of classroom instruction. The company must also show that it has the resources to provide training. Finally, any source of remuneration that the trainee will receive during the course of training must be identified in the H-3 petition.

The initial petition for H-3 classification is typically submitted at United States Citizenship and Immigration Services (CIS). A petition for an H-3 classification might be filed for multiple beneficiaries, if the training offered is identical for each trainee. If CIS approves the H-3 petition, each individual trainee will be required to schedule a visa appointment at a United States Embassy or Consulate abroad. After the visa interview, and if the applicant's visa has been approved, the trainee will get the visa stamped in his or her passport and this visa will authorize the trainee's entry into the United States in H-3 status. H-3 visas are typically approved for a two year period.

2. B-1 in Lieu of H-3

Another option for visitors already employed abroad who are coming to the United States for training is a "B-1 in lieu of H-3." This classification also allows employees to perform services in the United States, particularly in on-the-job training, for up to six months, without having to file a petition with CIS in advance of the visa request at a United States Embassy or Consulate. However, the company will need to articulate a structured training program for the employee to demonstrate exactly what he or she will learn. The criteria for this classification are as follows:

- The proposed training is not available in the employee's own country;

[5] 8 C.F.R. § 214.2(h)(7)(ii)(A)(1)-(4).

- The employee will not be placed in a job that is in the normal operation of business and in which United States workers are generally employed;
- The training will benefit the employee in pursuing a career outside the United States; and,
- The employee will continue to receive a salary from a foreign employer except for an expense allowance or other reimbursement.[6]

Also, the issuance of the "B-1 in lieu of H-3" visa is up to the discretion of the Consular Officer. Consular Officers can be reluctant to issue the "B-1 in lieu of H-3" because the individual must have the intent to return to their home country to utilize training obtained in the United States. When applying for the visa at the United States Embassy or Consulate, the individual must present substantial documentation proving that he or she meets the requirements for this classification. If approved, the individual must also present the same documentation to the CBP Officer at the port-of-entry. Due to CBP's broad discretion, the Officer has the authority to readjudicate the Application and approve or deny the individual's admission in "B-1 in lieu of H-3" status.

IV. Retaining Employees Through the Global Mobility of Managerial and Specialized Knowledge Personnel

The ability to transfer employees throughout the company and the world is essential to the operations of international companies. There are two types of classifications available for the intracompany transfer of executives, managers and specialized knowledge/essential skills employees – the L-1 classification and the E-2 classification.

A. Intracompany Transfers – The L-1 Classification

International companies often transfer their highest level executives and managers and other key employees to the United States as L-1 intracompany transfers. There are two types of L-1 sub-classifications that companies can utilize in order to transfer individuals to the United States – the L-1A executive/managerial classification and the L-1B specialized knowledge classification.

1. Managers and Executives

The L-1A classification is for executives and managers of a company who have held an executive or managerial position with the company outside the United States for at least one continuous year in the three years preceding the individual's application. In addition, the position being offered to the individual in the United States must also be executive or managerial in nature. To qualify as a "manager" for L-1A classification, the position must be an assignment in an organization in which the beneficiary primarily:

- Manages the organization, department, subdivision, function or component;

[6] *See* 9 F.A.M. 41.31 N11.

- Supervises and controls the work of other managerial, supervisory or professional employees, or manages an essential function within the organization;
- Has authority to hire and fire or recommend personnel actions (if other employees are directly supervised), or, if no direct supervision, functions at a senior level within a hierarchy or as to the function managed; and,
- Exercises discretion over day-to-day operation of the activity or function.[7]

A "traditional" manager would be an individual who manages the operations of the organization or a department or subdivision of the organization and supervises other managers, supervisors or professionals. "First line supervisors" are specifically excluded from the definition of managers, unless the employees they supervise are professionals, which could be established by providing copies of the academic credentials of the individuals that are supervised.[8] A professional employee is one that possesses at least a bachelor's degree. Examples of a "traditional" manager are usually the department heads or assistant department heads in a hotel. In addition, other positions that manage a subdivision of the Hotel can also be considered "traditional" managers, such as Outlet Managers, Assistant Outlet Managers, Accounting Managers, Sous Chefs and Assistant Front Office Managers.

A "functional" manager is the senior-most manager in charge of an essential function of the hotel's operations. Please note, in order for a manager to be considered a "functional" manager, it is important to be able to establish that there are subordinate employees or other employees in the department who perform the day-to-day duties of this essential function of the hotel's operations. If other employees do not perform the day-to-day duties, it is difficult to prove that the "functional" manager is responsible for managing the essential function of the hotel's operations. Some examples of a "functional" manager would be the Director of Information Technology, Sales Managers, Training Managers, Recruitment Managers and Assistant Director of Human Resources.

To qualify as an "executive" for L-1A classification, the position must be an assignment in an organization in which the beneficiary primarily:

- Directs the management of the organization or a major component or function;
- Establishes goals and policies;
- Exercises wide latitude in discretionary decision making; and,
- Receives only general supervision or direction from higher level executives.[9]

The L-1A executive category is usually reserved for the General Manager of a hotel or high-ranking corporate employees.

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[7] 8 C.F.R. § 214.2(*l*)(1)(ii)(B).

[8] I.N.A. §101(a)(44)(A).

[9] 8 C.F.R. § 214.2(*l*)(1)(ii)(C).

2. Specialized Knowledge Personnel

The L-1B nonimmigrant classification is available to transfer "specialized knowledge" employees to the United States. In order to qualify for an L-1B classification, the employee must have served in a "specialized knowledge" position with the company outside the United States for at least one continuous year in the three years preceding the individual's application. In addition, the employee must be coming to the United States to fill a specialized knowledge position with the company.

"Specialized knowledge" is defined as "special knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures."[10] It is important to note that this specialized knowledge must be company, not industry, specific.

Although the L-1B classification is considered one of the most scrutinized of the nonimmigrant classifications, it is still available to those individuals who meet the requirements. One example of a possible specialized knowledge employee would be an individual who assists with the development or customization of software or system for a hotel company and applies for an L-1B classification to roll-out the software or system to the individual properties.

3. Procedures

Both types of L-1 classifications are available to individuals of any nationality as long as the prospective transferee has been employed with the company in a qualifying capacity for at least one year. Normally, the L-1A and L-1B Petitions are submitted to a CIS Service Center in the United States for adjudication. These classifications are usually granted for a three-year period initially. L-1A visa holders are eligible for 2 two-year extensions for a maximum of seven years in L-1A classification. L-1B visa holders are only eligible for one two-year extension for a maximum of five years in L-1B classification.

In addition, spouses and children of the principal L applicant are eligible to apply for L-2 classification as dependents. Spouses can also apply for an Employment Authorization Document (EAD) with CIS upon entry into the United States.

4. Intermittent Travel Allowed

Furthermore, the L-1A and L-1B classifications can be used for employees who need to travel to the United States on an intermittent basis to perform services on behalf of the company. These individuals can continue to be paid from outside the United States and there is no specific amount of time that they need to spend in the United States. If an individual applies for an L-1A or L-1B classification to travel to the United States intermittently, and, he or she spends less than 180 days a year in the United States, the individual would not be subject to the seven-year and the five-year limitations on the L-1A and L-1B classifications.

[10] 8 C.F.R. § 214.2(*l*)(1)(ii)(D).

5. L-1 Blanket Certification

Moreover, international companies can also apply for an L-1 Blanket Certification as long as the company meets the requirements set forth by CIS. Utilization of an L-1 Blanket certification to transfer executives, managers, and specialized knowledge employees to the United States expedites the process, eases the documentary requirements for each petition, and eliminates the standard filing fee associated with regular L-1 petitions. Specifically, the L-1 Blanket Certification establishes the corporate relationship between the company in the United States and its affiliated entities abroad. Upon approval of the L-1 Blanket Certification, the corporate relationship between all entities on the Address List has been established. Therefore, it is not necessary to reestablish the corporate relationship, with supporting documentation, with each new case.

The following are the requirements that a company must meet in order to apply for an L-1 Blanket Certification:

- The company and each of the qualifying organizations must be engaged in commercial trade or services; **and,**
- The company must have an office in the United States that has been doing business for one year or more; **and,**
- The company must have three or more domestic and foreign branches, subsidiaries, or affiliates; **and,**
- The company and the other qualifying organizations have obtained approval of petitions for at least ten "L" managers, executives, or specialized knowledge professionals during the previous 12 months; **or** have United States subsidiaries or affiliates with combined annual sales of at least $25 million; **or** have a United States work force of at least 1,000 employees.[11]

Upon approval, this L-1 Blanket Certification would allow executives, managers and specialized knowledge employees from any of the locations abroad to transfer expeditiously to the United States as long as they meet the requirements for the L-1A or L-1B classification. These employees would be able to apply for L-1 classifications directly at a United States Embassy or Consulate outside the United States, instead of waiting for an L-1 Petition to be adjudicated at a CIS Service Center in the United States. This faster process can usually save companies one to three months of processing time or an additional $1,225 to expedite the petition.

An initial L-1 Blanket Certification is valid for three years. At the end of this three-year period, the company would be able to petition for their L-1 Blanket Certification to be valid indefinitely. Upon the addition of any companies inside or outside the United States, the L-1 Blanket Certification should be amended to include these locations to ensure that individuals could transfer to or from these locations.

[11] 8 C.F.R. § 214.2(*l*)(4)(i)(A)-(D).

B. The E-2 Classification

The Treaty Investor visa is for citizens of a country with which the United States maintains a treaty of commerce and who wish to travel to the United States to invest a substantial amount of capital. The business seeking to qualify for the E-2 visas must file an application that establishes the ownership of the company, the nationality of that ownership, and the nature and skill of the operations in the United States. The application is submitted at the appropriate United States Embassy or Consulate. For purposes of the E-2 application, it must be established that the foreign investor is 50% or more owned by nationals of the treaty country. In addition, employees of the company coming to the United States must also be citizens of the treaty county. Furthermore, for the E-2 investment classification, the company investor must show that it has placed substantial funds at risk and the funds must be irrevocably committed. Whether or not the investment is substantial will be judged by the nature of the proposed business in the United States.

The E-2 classification is not subject to the maximum validity periods to which H-1B and L-1 classifications are subjected. The initial E-2 visa is usually granted for a five-year period. In addition, upon entry into the United States, an E-2 visa holder is usually granted a stay in the United States of two years. Each time the individual enters the United States while their E-2 visa is valid, he or she should be given a new two-year period. Renewals of these classifications could be processed directly at the United States Embassy or Consulate outside the United States. A petition for extension may also be submitted to CIS. However, even if CIS approves the extension, once the individual investor needs to obtain a new visa stamp in his passport, the United States Embassy or Consulate will practically re-adjudicate the application.

Furthermore, the E-2 classification can be obtained for executives, managers and individuals who possess essential skills. As with the L-1 classification, the executive positions would usually be the General Manager of a hotel or high-ranking corporate employees. The managerial positions would be department heads or assistant department heads. Essential skills employees can serve in technical capacities requiring special training and qualifications, and who are needed to: establish the enterprise (start-up); train or supervise persons serving in technical positions, such as manufacturing, maintenance or repair technicians; or, continuously monitor and develop product improvement and quality control.

At the time of the application at the United States Embassy or Consulate, the individual investor must be employed by the company investor. However, there is no requirement as to how long he or she has to be employed with the company prior to transferring to the United States. E-2 nonimmigrants do not need to maintain foreign residence abroad but must intend to leave the United States at the end of their stay. In addition, spouses can apply for an Employment Authorization Document (EAD) with CIS upon entry into the United States in E-2 dependent status.

V. H-2B Seasonal Workers

The H-2B visa category is used to temporarily employ foreign nationals in a position for which the employer has a temporary need and for which qualified United States workers are

unavailable. These foreign nationals must be entering on the basis that the employer's need is a "one-time" occurrence, a seasonal need, a peak load time, or an intermittent need. Typically, H-2B Temporary Workers come from industries such as landscaping, agriculture, hospitality, and construction.

A "labor certification" must be sought from the United States Department of Labor (DOL) certifying that the foreign national is not displacing qualified unemployed United States workers in the region and that the proposed employment does not adversely affect the working condition of United States workers who are similarly employed.

The first step in the labor certification process is to obtain a prevailing wage determination from the DOL. Upon receipt of the prevailing wage determination, the employer must submit an H-2B registration to the Employment and Training Administration (ETA) of the DOL and the ETA can certify the employer's temporary need for up to three years.[12] Upon completion of the registration process, the Application for Temporary Employment Certification (ETA-9142) can be filed with the DOL. Depending on the amount of time remaining before the start date, the employer may simultaneously file the H-2B registration and the application.

The application can cover a number of foreign workers to fill the same position who will be working in the same location. This Application and the required supporting documents must be submitted 75 to 90 days before the employer's start date for the position. During this stage, the employer does not need to have chosen specific employees' names to include with the Application.

Once the ETA-9142 is submitted, the ETA will order the recruitment, which consists of two advertisements ran in a newspaper of major circulation, one of which must run on a Sunday, a ten day posting on the State Workforce Agency's job search website and a job order posted on the national job registry by the DOL. The State Workforce Agency's job order and the job registry posting need to stay active and the employer must continue to accept United States applicants until 21 days before start date. Upon completion of the recruitment, the employer must demonstrate that it was unable to find enough qualified, willing and able United States workers by submitting a recruitment report which lists every applicant who has applied and outlines the reasons why he was not hired for the position.

Once a labor certification has been secured, a petition based on the certification is filed with CIS. The initial period of stay granted to the aliens admitted to the United States in the H-2B status is governed by the period of time during which his temporary services are needed. This period must be reasonable in terms of the duties to be performed and cannot extend beyond nine months. Unlike the application submitted to the DOL, the employer must designate named foreign workers by the time it files the petition with CIS. Exceptions to this rule can be granted

[12] *Wage and Hour Division H-2B Side-by-Side Comparison of the 2009 and 2012 Rules*, U.S. DEP'T OF LABOR, http://www.dol.gov/whd/immigration/H2BFinalRule/H2BSideBySide.htm#.UO-qa3XnaUk (Feb. 2012).

by CIS in emergency situations or in special situations as determined by CIS. The employer can substitute foreign workers for the named workers after the approval of the CIS petition.

Following approval of the petition, the third and final step occurs, where the foreign workers take the petition Approval Notice to a United States Embassy or Consulate abroad and apply for an H-2B visa permitting their admission to the United States.

There are only 66,000 H-2B numbers available each Fiscal Year. 33,000 of these H-2B visa numbers are released on October 1 and 33,000 are released on April 1. Individuals already in the United States pursuant to a valid H-2B classification are not subject to the H-2B cap.

VI. H-1B Specialty Occupation Classification

The H-1B classification is available to individuals regardless of nationality. In order to obtain an H-1B classification, it is necessary to establish to CIS that the position being offered to the individual in the United States is a "specialty occupation" position as defined by CIS and that the prospective employee has sufficient educational credentials and experience to establish his or her professional status. United States immigration law generally equates specialty occupation status with the attainment of a United States Bachelor's Degree or its equivalent in a specific field related to the proposed position. For example, engineering and analyst positions usually qualify for the H-1B classification, given the complexity of the duties and the fact that most of these types of positions require at least a Bachelor's Degree.

The H-1B Classification is valid for an initial period of 3 years and may be extended for an additional 3 years, for a total of six years. The employer must pay the H-1B beneficiary the prevailing wage for the position, as determined by a prevailing wage determination from the DOL or an alternative wage survey.

Dependents of H-1B nonimmigrants are eligible for H-4 dependent status to travel. However, H-4 nonimmigrants are not authorized to work in the United States.

A. Timing

United States law limits the number of new H-1B's to 65,000 per year ("the cap"), measured from the federal government's fiscal year starting on October 1st. In addition, an additional 20,000 H-1B's are available for foreign nationals with Master's or higher level degrees from United States institutions of higher education. Petitions for such individuals that are filed after the 20,000 exemptions are granted will be counted against the 65,000 cap. The earliest that an H-1B Petition can be filed is April 1st for an October 1st start date.

The cap does not apply to current H-1B beneficiaries who were previously counted in the prior 6 years, e.g. H-1B extensions, changes in employment terms or employers, or a second concurrent H-1B.

Once the cap is reached for a particular year, no new H-1B petition can be filed until the following April 1st, for positions beginning no earlier than October 1st of that year, except for

individuals who are exempt from the cap. The H-1B cap for Fiscal Year 2013, which started on October 1, 2012, has already been met.

In addition, if an individual is currently maintaining an H-1B classification with one employer, he or she may begin work for the new employer after a non-frivolous H-1B petition is filed by the new employer on the individual's behalf, and the petition is received by CIS, subject to the total six year limitation. It is advisable for new petitioning employers to wait for the issuance of a Receipt Notice as evidence of the filing before allowing the foreign national to begin employment.

B. B-1 In Lieu of H-1B Classification

Another viable option for individuals who wish to work in the United States is the "B-1 in lieu of H-1B," which is a short-term (6 months or less) visa alternative for foreign workers who meet the following criteria:

- Must be paid from outside the United States, except for an expense allowance or other reimbursement.
- United States activities must benefit the employer abroad and the individual's presence in the United States must further the international trade or commerce of the employer.
- Must be a professional (i.e. possess at least a Bachelor's Degree or its equivalent), specialty occupation employee, and the United States employer must have a need for a professional to do the proposed work (the position must require a Bachelor's Degree or its equivalent); the applicant must show that he or she will engage in H-1B type activities.
- The work of the employee must be controlled primarily by the foreign employer.
- The work product of the employee must be created predominantly outside of the United States.
- The United States employer must show that a United States worker would not have to be hired if the employee was not admitted to the United States.

Also, the issuance of the "B-1 in lieu of H-1B" visa is up to the discretion of the Consular Officer. Consular Officers are reluctant to issue the "B-1 in lieu of H-1B" visas because they see it as a way for employers to get around the requirements of the H-1B classification and/or the cap on H-1B visa numbers. When applying for the visa at the United States Embassy or Consulate, the individual must present substantial documentation proving that he or she meets the requirements for this classification. If approved, the individual must also present the same documentation to the CBP Officer at the port-of-entry. Due to CBP's broad discretion, the Officer has the authority to readjudicate the Application and approve or deny the individual's admission in and"B-1 in lieu of H-1B" status. Canadians and those eligible for the VWP can apply directly to CBP, without first obtaining a visa.

VII. TN Classification Under the North American Free Trade Agreement

The TN classification is part of the North American Free Trade Agreement (NAFTA) and is only available to citizens of Canada and Mexico. The professional position being offered to the individual must fall within the 63 professions listed under Appendix 1603.D.I of Chapter 16 of NAFTA. Each applicant for a TN classification must meet the specific requirements within the selected category.

The professions of Hotel Manager, Accountant, Computer Systems Analyst and Engineer, which are all included in the NAFTA list of professions would apply to the hospitality industry. The requirements for each of these professions are as follows:

Hotel Manager – Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate in hotel/restaurant management, and three years of experience in hotel/restaurant management

Accountant – Baccalaureate or Licenciatura Degree; or C.P.A., C.A., C.G.A. or C.M.A.

Computer Systems Analyst – Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years of experience

Engineer – Baccalaureate or Licenciatura Degree; or state/provincial license[13]

It is important to note that a Post-Secondary Diploma or Certificate must be received upon completion of at least a two-year program. All degrees and diplomas must be presented in original. In addition, if an individual presents a degree, diploma or certificate from an educational institution not located within Canada, Mexico or the United States, it must be accompanied by a credential evaluation from a reliable credentials evaluation service. However, given the reluctance of border officials to review credential evaluations (note that they may confuse this with a request to review a "combination evaluation" featuring both education and experience – which they will not accept), there may be additional questions and potential delays for applicants that have attained their credentials outside of Canada, Mexico or the United States.

The Hotel Manager designation does not apply only to the General Manager or Hotel Manager of a hotel. Delineations of the title of Hotel Manager are also widely accepted by the CBP in Canada and the United States Embassy and Consulates in Mexico. Therefore, there is a wide range of positions that can potentially qualify under this classification, including Sales Manager, Outlet Managers, Housekeeping Managers and Front Office Managers.

The Accountant designation is limited to those individuals in the controlling or accounting department at a hotel given the requirement of a four-year degree in Accounting or certification as an accountant.

[13] North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289, app. 1603.D.I, ch. 16 (1993).

Directors of Information Technology or Information Technology Managers are usually the only hospitality positions that could be classified under the Computer Systems Analyst position. Likewise, the Director of Engineering is most likely the only position that could be classified under the Engineer designation, and would questionable in smaller hotels.

The TN classification is usually issued in three-year increments and serves as an employer-specific work authorization. Since Canadian citizens are visa exempt, a visa is generally not needed for this classification. Thus, with the proper documentation, a new TN classification for a Canadian citizen can be obtained at a port-of-entry inspection through immediate review and adjudication. Since Mexican citizens do require a visa, a new TN classification and visa can be applied for directly at a United States Embassy or Consulate in Mexico.

VIII. O-1 Extraordinary Ability Classification

The O-1 is a nonimmigrant classification for aliens with extraordinary ability in the sciences, arts, education, business or athletics which has been demonstrated by sustained national or international acclaim. O-2's are available for aliens whose presence is essential to facilitate the work of an O-1. In addition, an O-1's spouse and minor children may obtain O-3 status to accompany the O-1 to the United States, but O-3 status does not authorize them to work.

The O-1 classification is employer-specific and requires the employer to file a Petition with CIS that must be accompanied by voluminous evidence of the individual's extraordinary ability. In addition, the employer must seek an advisory opinion from a United States peer group (which could include a person with expertise in the field), labor and/or management organization regarding the nature of the work to be done and the applicant's qualifications.

The O-1 employment must be in the field of the applicant's expertise, though the employer is not required to demonstrate that an individual of extraordinary ability is required for the position.

To be considered to have extraordinary ability in the field of the sciences, education, business or athletics, a person must be one of the small percentage who have risen to the very top of their field of endeavor, as demonstrated by receipt of a major, internationally recognized award, such as the Nobel Prize, or at least three of the following:

1. Receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor (in this case the field of endeavor might be hotel management or some subset of it);
2. Membership in associations in the field which require outstanding achievements of their members (this is generally proven by documenting membership in an associations whose bylaws require prospective members to be nominated for membership, based on some accomplishments);
3. Published material in professional or major trade publications or major media about the alien concerning the alien's work in the field;
4. Participation on a panel, or individually, as a judge of the work of others in the field;

5. Scientific, scholarly, or business-related contributions of major significance in the field (this would require letters from experts in the field describing the nature of the individuals' contributions and stating that the letter writer considers the foreign national to be among the small percentage who have risen to the very top of their field of endeavor) ;
6. Authorship of scholarly articles in the field in professional journals or other major media;
7. Employment in a critical or essential capacity for organizations and establishments that have a distinguished reputation;
8. High salary or other remuneration commanded by the alien for services; [14] or
9. Other comparable evidence (this allows for other evidence that might not fit easily into the other categories).[15]

Possible hospitality positions that may qualify for the O-1 classification are Chefs, high-level Business Executives and General Managers. There is no explicit limitation on the period of stay in O-1 classification. An initial petition may request a validity period of up to three years, and subsequent extensions may be requested in one year increments. As with the H-1B classification, employers must pay the return transportation for O-1 workers whose employment is terminated by the employer prior to the expiration of the authorized period of stay. Only if the alien terminates the employment relationship is the employer released from this obligation.

[14] 8 C.F.R. § 214.2(o)(3)(iii)(B)(1)-(8).

[15] 8 C.F.R. § 214.2(o)(3)(iii)(C).