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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

When To Apply For Lesser-Known 'B-1 In Lieu Of H-1B' Visa

By **Allissa Wickham**

Law360, New York (February 24, 2016, 7:32 PM ET) -- When it comes to short-term projects in need of a skilled foreign worker, the "B-1 in lieu of H-1B" visa for business visitors may be a good option for immigration practitioners to have in their toolkits, but it shouldn't be used as a replacement for a typical H-1B visa, attorneys warn.

With only 65,000 H-1B visas provided under the cap each year — along with an additional 20,000 for people who have earned a master's degree or higher in the U.S. — employers must often get creative with how they bring skilled foreign workers into the country.

One option that hasn't gotten as much attention is the "B-1 in lieu of H-1B" visa, which takes advantage of B-1 visas for temporary business visitors, although attorneys say it isn't a replacement for a three-year H-1B visa and should only be used in specific situations.

"I don't view 'B-1 in lieu of H-1B' as a substitute for an H-1B," said Eleanor Pelta of Morgan Lewis & Bockius LLP. "I think that [classification] is for a very specific, narrow set of circumstances."

The "B-1 in lieu of H-1B" designation isn't its own separate visa category, according to a U.S. State Department spokesperson. Rather, there are times when foreign nationals who qualify for skilled worker visas can be "more appropriately" classified as applicants for B-1 visas.

To qualify for a "B-1 in lieu of H-1B" visa, applicants must be employed and paid by a foreign company, have a bachelor's degree or equivalent experience, be doing work on the visa that requires a college degree, and have a short planned work period that is, preferably, only a handful of months. B-1 visas aren't based on immigration petitions, so applicants can apply at a U.S. consulate, the State Department spokesperson said.

"It's really designed for temporary visits to the United States for that foreign employee to perform professional-level services, remain employed by the foreign employer, [and] paid by the foreign employer — and then depart the United States after the term of stay is complete," said Jeffrey Bell of Polsinelli PC.

This visa might be used when a foreign company has an agreement with a U.S. company to provide certain services, or if a multinational company is involved, according to attorneys.

"Maybe the U.S. company is looking to build a facility in the United States and contracts with a foreign firm to provide some engineering oversight, for example, where perhaps a high-level engineering manager maybe would need to be on-site in the U.S. to help oversee the project for a short amount of time," he said.

It's crucial to remember that the source of the worker's compensation has to come from abroad, meaning he or she can't come to the U.S. and be on an American company's payroll and benefits, according to Michele Frangella of Mintz Levin Cohn Ferris Glovsky & Popeo PC.

"They can get incidental things like housing, but really the the main source of remuneration has to be from the employer abroad," Frangella said.

And it's also important to keep in mind that the "B-1 in lieu of H-1B" classification may garner extra scrutiny from immigration officials, attorneys said. According to Bell, the worry is that an employee may really just be coming to the U.S. to work, as opposed to providing services for a foreign company.

"It is a category that is under a lot of scrutiny by Customs and Border Protection sometimes," added Morgan Lewis' Pelta. "So, I think that it should be used appropriately and sparingly, in the right circumstances."

There have been high-profile enforcement actions involving business visitor visas, which may have raised their profile with immigration inspectors. In 2013, consulting company Infosys Ltd. **agreed to pay** a record \$34 million settlement following allegations that it improperly used B-1 visa holders to do jobs involving skilled labor that should have been done by H-1B visa holders.

Given the high number of requirements for "B-1 in lieu of H-1B" applicants, attorneys should consider other backup options for people who strike out in the H-1B visa lottery.

Possible alternative visas for H-1B seekers include the the TN visa for Canadian and Mexican nationals, the E-3 visa for Australian nationals, the O-1 visa for people with extraordinary abilities, or an extension of optional practical training for certain F-1 visa holders, according to Chad Blocker of Fragomen, Del Rey, Bernsen & Loewy LLP.

Companies may also consider transferring a foreign national to an outpost abroad to start accumulating the time needed to apply for the L-1 visa for intracompany transfers, according to Frangella.

And, of course, even though the annual H-1B lottery leaves the selection process up to chance, it never hurts to **present a sparkling H-1B petition**.

--Editing by Mark Lebetkin and Catherine Sum.

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