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ACQUIRING KEY PROFESSIONALS USING THE FREE TRADE AGREEMENTS AS ALTERNATIVES TO THE H-1B

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GIVEN THE RECENT ECONOMIC DOWN-TURN, employers are reinventing their industry business strategies to get ahead of the curve. It is in such times of adversity when fresh and novel ideas are not only keys to success, but perhaps to survival. Necessity is the mother of invention. As such, we find ourselves living in an economy poised for the emergence of great ideas. Historically, a significant source of such great ideas have been foreign-born professionals, and even the children of foreign-born professionals. (An eye-opening discussion of this phenomena is an article by Stuart Anderson in the Summer 2004 edition of *International Educator* entitled "The Multiplier Effect").

The traditional way to secure key foreign-born professionals in the U.S. has been the H-1B visa program. When I was an evening law student, I wrote an article about the H-1B legal process and its practicality as applied in the real world. In it, I commented on how the annual cap on the availability of H-1B visas every year was arbitrary, and thus ineffective in securing ample top-shelf professional talent necessitated by U.S. employers. The article urged Congress to address this disconnect so 21st Century American businesses would not be forced to rely on 20th Century law when competing for the rising stars of the global economy. The rationale was simple: if they are not working here to benefit American companies, they will work for our competitors abroad.

A decade has passed, and Congress has done little. Accordingly, our country's demand for top global professionals now far outstrips the supply of H-1B visa numbers. This has given rise to an "H-1B Season" when in unison, employers nationwide file H-

1B visa petitions for key foreign national personnel. On March 31st, the petitions are overnighted to the Citizenship and Immigration Service. And on April 1st, the agency announces the statutory H-1B cap has been reached for the fiscal year. In the last few years, H-1B petitioning employers have had about a 50/50 chance of success under the antiquated cap.

The purpose of this article is to enlighten U.S. employers to a viable and under-utilized alternative to the uncertainty of H-1B Season: the professional visas available under our free trade agreements. Currently, the U.S. is a party to four free trade agreements with provisions for temporary employment-authorized visas for citizens of party nations. These are the North American Free Trade Agreement ("the NAFTA"), the United States-Chile Free Trade Agreement ("the Chile FTA"), the United States-Singapore Free Trade Agreement ("the Singapore FTA") and the Australia-United States Free Trade Agreement ("the AUSFTA").

Utilizing the professional immigration provisions these agreements provide for is a fast and relatively inexpensive alternative to the H-1B, which remains available all year long. An overview of these avenues follows.

TN Visa Status Under the NAFTA

The NAFTA permits citizens of Mexico and Canada to enter the United States to work for U.S. employers in any one of 61 predefined "professional" occupations (borrowed from the NAFTA's predecessor, "the Free Trade Agreement," to which only the U.S. and Canada were parties). These are listed in an appendix to the NAFTA together with the minimum eligibility requirements for each occupation described in terms of education required,

experience needed, or licensure. Though there are exceptions, NAFTA occupations generally require a relevant baccalaureate education as a minimal requirement for admission.

The available visa for NAFTA professionals is termed "TN" for "Trade NAFTA." Thanks to a recent modification to the NAFTA immigration provisions, TN nonimmigrants may now enter the U.S. to work for up to three years on a single application, renewable (at least in theory) indefinitely. With the narrow and highly scrutinized exception of management consultants, TN visa status does not permit self-employment in the U.S.

Though the evidentiary requirements are currently the same for Canadian and Mexican TN applicants, the application process differs. Generally speaking, Canadians are exempt from having to apply for a physical visa stamp at a U.S. embassy or consulate general abroad. This permits Canadians to apply for admission to the U.S. directly at a Port of Entry. Under the NAFTA provisions, a Canadian coming to the U.S. to work may present to a U.S. Customs and Border Protection ("CBP") officer at a port of entry, evidence of his or her job offer in the United States and eligibility requirements under the NAFTA. This generally consists of a detailed letter from the employer with copies of supporting evidence as exhibits, plus a nominal filing fee. A successful Canadian applicant will be issued by CBP a Form I-94 Arrival Departure Record reflecting employer-specific TN visa status for a period of up to three years.

Mexican professionals, on the other hand, present their eligibility requirements to a United States embassy or consulate general abroad. The Mexican application also includes the required application

documentation and fees for a visa. Once submitted, the applicant is scheduled for an interview with a consular officer, who decides whether to issue the visa. If the consul issues a TN visa stamp, the applicant presents it to a CBP officer at a port of entry for admission to the U.S. Terms of admission are the same as a Canadian applicant. The fee for Mexicans is slightly higher, as they are applying for an actual visa, but still far less than an H-1B applicant.

H-1B1 Visa Status under the Chile FTA and the Singapore FTA

Both the Chile FTA and the Singapore FTA came into force at the same time, and have identical immigration provisions. The H-1B1 visa category is similar to the traditional H-1B category in that it requires the sponsoring employer to first file and obtain a certified Labor Condition Application ("LCA") from the U.S. Department of Labor. The purpose of an LCA is to make a certified attestation that the U.S. employer agrees to pay the foreign national at least the prevailing wage for the position in the geographical area where the job is located, that working conditions for U.S. workers will not be adversely affected by employing the H-1B1 worker, and there is no strike or lockout in progress at the employer. The LCA also requires the employer to post notice it is hiring an H-1B1 worker, listing the employee's salary and occupational category.

Another difference from the TN category is that H-1B1 applicants are not limited a predefined list of professional occupations. Rather, an H-1B1 applicant must be coming to work for a sponsoring employer in the U.S. in "specialty occupation" as

defined by the standard H-1B regulations; that is to say a position which requires at least a bachelors degree in the field to perform at a competent level. An applicant for an H-1B1 visa applies for his or her visa at a U.S. embassy or consulate by submitting the offer of employment from the U.S. company, a copy of the certified LCA, evidence the job offered is a speciality occupation, and evidence the applicant is qualified for the position. The filing fees are more than a TN process in that U.S. law requires payment of a \$1,500 "training fee" for H-1B and H-1B1 cases (\$750 for smaller employers). But, H-1B1s are not required to pay the \$500 "fraud detection fee" required for regular H-1B cases. Nor do they need to pay the \$320 filing fee for H-1B matters filed with the U.S. Citizenship and Immigration Service if they apply abroad. H-1B1 visa status is valid for only one year. But, like the TN, it is not subject to regulatory limitation in terms of extensions of stay.

E-3 Visa Status Under the AUSFTA

Though the E-3 visa category for Australian citizens is more directly a product of the REAL ID Act of 2005, it was born of the negotiations between the U.S. and Australia in creating the AUSFTA. Like the H-1B1, the E-3 requires an LCA and a visa application at a U.S. consular post evidencing the position is a specialty occupation, and the applicant's qualifications for the job. E-3 status is also valid for one year at time, and renewable. However, unlike the TN, H-1B and H-1B1 categories, spouses of E-3 employees are eligible for employment authorization in the U.S. as well. Also, there are no filing fees other than those paid to the consular post when applying for the visa stamp itself.

Once again, H-1B Season is upon us, and the inadequacy of the cap remains unchanged. While the legal fees for a typical H-1B case have not increased much since that law school paper, the government filing fees have exploded to \$2,320 per case plus an additional \$1,000 for so-called "Premium Processing" expedite service. Many employers pay \$4,000 to \$5,000 or more per H-1B case each year for perhaps a 50/50 shot at securing an H-1B visa for top talent.

It is fair to point out that the TN, H-1B1 and E-3 visa categories are, in fact, capped like the H-1B category is. However, U.S. employers have not come close to reaching the annual limits placed upon these categories. As such, the pool of key professionals from free trade partner nations is underutilized. So, in this time of economic uncertainty, your corporate clients seeking to retool their organizations with innovative professionals should consider this untapped potential, and include candidates from Canada, Mexico, Chile, Singapore and Australia in thier recruitment programs. They may find themselves with an edge over industry competition by thinking smarter about how best to recruit from the global pool of industry-leading professionals. ■



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