

IMMIGRATION OPTIONS FOR LAWYERS ENTERING THE US

BY GREG SISKIND

costs, including Street Law staff time, materials, travel, training, and technical assistance. NALP will also make an annual financial contribution to this program.

There is a great deal of enthusiasm and excitement among the firms that have signed on for the coming year. According to Elizabeth L. Deeley, a partner at the San Francisco office of Kirkland & Ellis LLP, and a member of their firmwide diversity committee, the lawyers at Kirkland "were eager to get involved on the ground floor of this innovative and important community initiative. The Street Law program fits squarely within our goals of opening doors and enhancing opportunities for students who may not otherwise be exposed to the exciting legal career possibilities within their reach."

There is similar enthusiasm at the Richmond office of Hunton & Williams LLP. Hunton will partner with the William & Mary School of Law in the program. According to Ameer McKim, Hunton's Legal Recruiting Director, "Hunton is thrilled to be an inaugural participant in the Street Law/NALP diversity pipeline project. The goals of this innovative program align with Hunton & Williams' diversity and lawyer development goals, and our interest in working to develop diverse talent. In joining forces with William & Mary School of Law, our lawyers are looking forward to the opportunity to work with both law students and high school students."

"Hunton & Williams has a long tradition of supporting pro bono service," said Lynda Butler, interim Dean of William & Mary School of Law. "We are delighted that our students will have the opportunity to partner with the firm's lawyers in this unique project cosponsored by NALP and Street Law." Robert Kaplan, Associate Dean for Career Services and Public Service Initiatives and Director of Externships at William & Mary, noted that the NALP Street Law initiative is "an exciting way for our students to give back to the community in William & Mary's citizen-lawyer tradition." ■

The news has been filled with stories of one profession after another facing shortages of workers as the US economy continues to grow despite the recent slowdown, overall unemployment remains at historically low levels, and baby boomers are starting to retire in ever increasing numbers.

We hear about too few nurses, doctors, teachers, engineers – but we're not hearing about a looming shortage of lawyers.

The perception in and out of the profession for many years has been that the US has far too many lawyers. And without getting into the controversial debate over whether America is too litigious or whether non-lawyers should be able to take on more forms of work traditionally considered legal in nature, the same demographic and economic pressures affecting the rest of the workforce are affecting the legal profession. Baby boomers have begun retiring and the number of workers replacing them cannot keep up.

Furthermore, US law firms – particularly the country's largest law firms – have done a brilliant job of competing for global legal work, and that has driven their continued growth. The largest law firms in the US have now crossed the 3,000 lawyer mark and there is no reason to expect this trend to slow anytime soon. Those firms hire an incredibly large number of students. Latham & Watkins, the number four law firm in the NLJ 250 survey, hired 282 summer associates in 2007 compared

to just 164 in 2003. ("Summer Hiring Is Heating Up," Leigh Jones, *NLJ*, February 26, 2007, and "Summer Associate Numbers Tick Up," Leigh Jones, *NLJ*, February 17, 2006.)

Finally, a most surprising trend – one that has never been a problem for American employers in prior generations – is a reverse brain drain where American lawyers are being recruited by foreign law firms that place a high value on American legal experience or top American legal education. The *National Law Journal* recently reported a single year jump of 23% in the number of American law graduates going to work for foreign firms.

The pressures on the legal labor market are starting to show up in the statistics. The number of law students graduating from US law schools each year is approximately 40,000 and that number has been relatively flat for several years. The number being recruited to work for NLJ 250 firms is now about 10,000 and the demand is increasing year to year. While producing more lawyers is not as difficult as producing more physicians or more pharmacists, simply saying that we will increase the number of lawyers is not so simple when there is considerable competition to attract students because virtually all professions are facing shortages at the same time.

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Law firms are using a variety of strategies to address the crisis, but one of the least known is the recruitment of global talent. A growing number of firms are starting to take their cues from other professions and their overseas competitors and have begun to seek out global legal talent. In the past, many international lawyers were recruited from the ranks of those pursuing JD and LLM degrees from US law schools. That pool of students is still an important source of talent. But American law firms are now combing the planet in search of top lawyers.

Assuming a firm is able to identify an attractive candidate from overseas, how does the firm weave its way through the immigration maze?

NON-IMMIGRANT VISAS — THE ALPHABET SOUP

The vast majority of international lawyers seeking to work in the United States must seek non-immigrant work visas (as opposed to the more commonly known permanent residency visa that is known as a "green card"). While a green card is something many lawyers will eventually seek, this article will focus on non-immigrant categories.

THE H-1B VISA

Most people think of H-1Bs as tech worker visas. But they are used by all sorts of professionals including lawyers.

The number of H-1B visas available today is the same as the number set in 1990 and has not kept up with overwhelming demand. The 65,000 allotted H-1B visas can be claimed up to six months before each new fiscal year begins, and on April 1, 2007, the allotment for the fiscal year that began October 1, 2007 opened. Within hours, US Citizenship and Immigration Services received a staggering 200,000 applications and had to have a lottery to determine which companies would get their workers. Lawyers working at universities and

non-research institutions are exempt from the quota.

Law firms may have a slight edge, however. In the early part of this decade, Congress passed legislation creating a special bonus pool of 20,000 H-1B visas for those receiving advanced degrees from US universities. This covers foreign law students receiving JD and LLM degrees in the US. The 20,000 bonus visas were used up after just a few weeks in 2007, but at least a law firm able to file a case in early April could secure a visa with an October 1 start date without having to go through a lottery. Of course, not all firms have the luxury of being able to time an application for an April filing.

H-1B applications for attorneys have a few key requirements:

- the applicant must have an employer sponsor.
- the employer must demonstrate that the applicant will be paid the prevailing salary in the metro area or at least as much as similarly employed lawyers at the same firm possessing the same experience and credentials.
- the employer needs to show that it has the ability to pay the offered salary.
- the applicant must have the requisite qualifications to work in the position (e.g., possession of the necessary education and a license, if required, or proof that all requirements for licensure have been met if actual possession of the visa is a requirement for licensure).
- it must be demonstrated that the position is one normally requiring a bachelors degree or higher. (Obviously this is not a problem to demonstrate for attorney positions.)

H-1B applications are initially filed with US Citizenship and Immigration Services, and the processing times vary depending on where the case is filed and how much money is paid. Normal processing takes three to four months.

For \$1,000 on top of normal filing fees, a case will be decided in 15 days or less.

The \$1,000 for speedy processing is just the start, however. H-1B employers also must pay roughly \$800 in base filing fees plus potentially another \$750 or \$1,500 depending on the size of the employer and the type of employer (universities and nonprofit research institutions may be able to avoid the fees).

After USCIS approves the initial applications, persons in the US (such as those on student visas) can begin work if an H-1B number is available. If an applicant is not changing his or her status in the US, then a US consulate abroad will process a visa application. The waiting time can be just a few days up to a few months, depending on the demand for appointments at the particular consulate. Consular fees will usually run a few hundred dollars and vary depending on reciprocal agreements between the US and the applicant's country.

Congress is expected to take up legislation soon that would increase the number of H-1B visas available and create new exemptions from the H-1B cap that could make this a more user-friendly category in the future.

TREATY VISAS

Another popular visa strategy for hiring a foreign lawyer is to apply based on a treaty between the US and the lawyer's home country.

Canadian and Mexican lawyers can apply for TN visas based on the North American Free Trade Agreement (NAFTA). There are few restrictions except that a lawyer must be licensed either in the US or in the home country and the lawyer needs an employer sponsor in the US. There is no limit on the number of TNs that can be issued in a year, and an applicant can apply for issuance of the TN classification on the spot at a US port of entry (usually at an airport or a land crossing).

Australian lawyers can apply for E-3 visas. The requirements for the E-3 are essentially the same as for the H-1B visa, including possessing a license or showing that all requirements for licensure have been met except for providing a visa. Ten thousand E-3 visas are available each year. However, this supply has so far exceeded demand by a wide margin.

While Australians can pursue H-1Bs and other categories, there are a couple of key benefits that make the E-3 attractive (aside from its general availability when the H-1B cap is filled). First, E-3s can be filed directly at a US consulate. This means that expensive USCIS filing fees applicable to H-1Bs are not collected. It also means that a visa can be secured in a matter of days as opposed to several months. Another key benefit of the E-3 is that spouses can obtain a card granting permission to work for any employer as long as the attorney spouse remains in E-3 status.

Nationals of Singapore and Chile were recently granted a special H-1B visa category of their own with an annual allocation of over 5,000 visas.

And nationals of more than 50 countries are eligible for E-1 and E-2 visas. E-1 treaty trader visas are available to people from a country with a commercial trade treaty with the US who are engaged in trade between the US and the treaty country. Trade in services, such as legal services, is a permitted form of trade under the E-1 category. The employer must be majority-owned by nationals of the treaty country (and green card holders or dual citizens in the US don't count). This then means that the E-1 is basically only available to foreign law firms with offices in the US or in instances where a lawyer has his or her own practice and is contracting services out to other firms. The E-1 also requires a substantial volume of trade between the US and the treaty country. This might not be a problem for a US branch office of a foreign law firm as long as it can demonstrate that the majority of the work involves matters involving the treaty country.

E-2 treaty investor visas are available to owners and employees of companies making a "substantial investment" in a commercial enterprise in the US. Like the E-1, the majority of the ownership has to be in the hands of nationals of the treaty company. E-2 status is tied to the size of the investment. US immigration rules do not specify a dollar amount to qualify for the E-2, though if a foreign firm can demonstrate it has a business plan and can document adequate capital to run the office, this often will satisfy a consular officer.

The E-1 and E-2 are available to executives, managers, and essential skills employees. This would normally include partners and attorneys with supervisory responsibilities. It would also include associates who have skill sets difficult to find in a local market. Like the E-3 visa, one can apply for the E-1 and E-2 directly at a consulate. However, some consulates can take many months to schedule an appointment. And like the E-3, spouses can receive work authorization.

TRANSFER CASES

Law firms transferring in attorneys from an overseas office can take advantage of the L-1 intra-company transfer visa. There are several key requirements for L-1 visas:

- employment abroad by the firm for a year.
- the US and the foreign offices have a qualifying relationship; offices that are merely part of an alliance likely will not.
- the attorney must be coming in an executive, managerial, or specialized knowledge capacity.
- a firm establishing a new office must have a sufficient business plan and capitalization demonstrating financial viability.

To meet the executive, managerial, or specialized knowledge requirement, the firm will want to show that the attorney will be managing paralegals and, if applicable, other attorneys. Attorneys who manage a "function" can also qualify even if no personnel are being managed.

Attorneys with unusual specialties and skill sets can also qualify as specialized knowledge employees if the firm can show that it would be impractical to find someone in the local market with a similar expertise.

To meet the requirement for a qualifying relationship, traditional branch offices are normally fine as are typical law firm partnerships and corporate structures where each office is owned 100% by the partnership or the corporation. Problems may arise, however, if the US and the foreign office operate under the same name but have different ownership structures. If one owner controls 50% or more of both offices, then there will be no problem as the offices will be considered affiliates. If no party has a controlling interest and the ownership breakdown of each office is not the same, there could be a problem. A joint venture between two firms may qualify despite the fact that the foreign firm does not have a controlling interest in the US branch as long as the foreign entity transferring the attorney has a 50% interest. Many firms have offices that operate under the same name but are independently owned and merely part of an alliance. These types of relationships will also not qualify.

L-1A visas are available to managers and executives and can be obtained for up to seven years. L-1Bs are available to specialized knowledge employees and can be obtained for up to five years. Employees of new offices will be approved for an initial period of a year.

L-2 spouses are permitted to seek independent employment authorization after entering the US.

J-1 TRAINEES

The J-1 trainee category permits training in public administration and law for up to 18 months. Approved J-1 exchange programs can sponsor applicants to engage in training with third-party employers.

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An employer will need to provide a training program that describes the training objectives and the skills the trainee attorney will acquire through the training, and justify the use of on-the-job training. The sponsor must also provide details on the stipend to be paid to the trainee and an estimate of living costs.

The J-1 may also be the visa of choice for attorneys who are not able to or interested in acquiring a state law license. J-1s can be used by those in law clerk or paralegal positions as well as foreign legal specialist positions.

Like the E and L categories, J-2 spouses are permitted to seek employment authorization after entering the US in J-2 status.

VISITORS

Sometimes going through the complicated application process to obtain a work visa may not be necessary and an attorney can enter as a B-1 business visitor.

B-1 visitors must meet the following basic tests:

- ☐ Maintain residency abroad;
- ☐ Intend to enter the United States for a period of specifically limited duration; and
- ☐ Seek admission for the sole purpose of engaging in legitimate activities relating to business.

There are a number of legitimate activities in which lawyers typically engage that are specifically permitted by the State Department's Foreign Affairs Manual:

1. Participating in seminars, conventions, and conferences.
2. Consulting with business associates or clients.
3. Assisting clients negotiating contracts.

4. Engaging in independent research.
5. Participating in board of directors and partnership meetings and related activities.
6. Assisting investor clients scoping out investment opportunities and engaging in startup activities.
7. Attending trade shows.

A key to B-1 cases is that the applicant has specific and realistic plans for the entire period of the contemplated visit. The absolute length of the stay is not as important as showing that the stay has some finite limit. But the total authorized stay on each entry is limited to 180 days (with extensions permitted).

The B-1 applicant must demonstrate permanent employment, meaningful business, or financial connections, close family ties, or social or cultural associations abroad, which will indicate a strong inducement to return to the country of origin. And the applicant should show a salary from abroad and adequate resources demonstrating no need to work illegally in the US.

Applicants from 27 countries with low overstay rates can qualify in the Visa Waiver Program, which allows applicants to enter the US for up to 90 days without obtaining a visa stamp. Note that extensions of stay for Visa Waiver entrants are not permitted.

Finally, when an attorney is being paid by a foreign entity but coming to the US to perform activities similar to an H-1B, the B-1 may be used in lieu of the H-1B. In order for an employer to be considered a "foreign firm," the entity must have an office abroad and its payroll must be disbursed abroad. To qualify for a B-1 visa, the employee must be employed by the foreign firm, the employing entity must pay the employee's salary, and the source

of the employee's salary must be abroad. Note that many consulates are reluctant to issue B-1s in lieu of H-1Bs.

O-1 EXTRAORDINARY ABILITY APPLICANTS

Attorneys who can demonstrate that they have extraordinary ability in their field of business can potentially qualify for O-1 visas. Applicants need to show that they have reached the top of their field either in the US, internationally, or in the applicant's home country.

O-1s need to show a single one-time accomplishment demonstrating extraordinary ability or evidence showing a combination of other evidence such as winning awards, press coverage, high compensation, etc.

O-1s are available for up to three years at a time and require a consultation letter from a peer group. For lawyers, this might include a local, state, or national bar organization. The letter is essentially a statement indicating the group has no objection to the granting of the visa.

CONCLUSION

While the number of attorneys immigrating to the US has been relatively modest to date, that will certainly change in the years to come as the demand for the services of highly qualified attorneys will increase and the supply of attorneys will likely remain flat. With careful immigration planning, US and foreign law firms should be able to recruit legal talent globally. ☐