Mathews & Peddibhotla Law Group, PC

Start-Ups
Visa Summary Comparison

Non-Immigrant Visa Options (Provides Temporary Work Authorization)	**Immigrant Visa Options** (Pathway to the Green Card
H-1B – specialty occupation workers **Considerations:** Will typically require a founder to take an "Individual Contributor" Role Need to establish that the Founder can be controlled, i.e. terminated by the Board of Directors **Cap Subject:** Subject to an annual lottery if the person has never had an H-1B **$$:** Funding typically around $500K is a good start. Can do a case for less if there is revenue or if there are strong investors **Validity:** Valid in 3 year increments. **Dependent/ Work Authorization:** Dependent spouses (H-4) cannot work until an I-140 has been filed.	**EB-2 – Members of Professions Holding Advanced Degrees** **EB-3 – Skilled Workers; Professionals** PERM (Labor Certification) – 14 mos. to 2 years from start to certification I-140 (Immigrant Petition) – 1 month for approval in premium; 6 months in regular processing I-485 / Green Card Application can be filed when the Priority Date is Current. *Priority Date Wait Times:* EB-2 India – 8 years ave. EB-2 China – 4 years ave. EB-2 All Other Countries – Current EB-3 India – very backlogged EB-3 China – 4 years ave. (but could retrogress) EB-3 All Other Countries – 3 mos.
L-1A – Intra-Company Transfer of Executive / Manager **Considerations:** Ideal where the start-up has been operating overseas for 1 year, and the founder is coming to the U.S. to set-up a new office. Foreign company must have a qualifying relationship with a U.S. entity. **$$:** Either significant revenue or funding typically around $500K is a good start; $1 million is better **Validity:** New Office L-1A is valid for 1 year. Then an extension can be filed and secured for 3 years.	**EB-1(c) Intra-Company Transfer of Executive / Manager** Can file after the U.S. has been operating for 1 year. We typically file after the L-1A extension is secured. No PERM /Labor Certification Required. I-140 (immigrant petition) - No premium processing; 6 to 8 mos regular process. I-485 / Green Card Application case can be filed concurrently with the I-140 or after the I-140 is approved.

Dependent/ Work Authorization: Dependent spouse (L-2) is eligible to apply for work authorization after entering the U.S. Takes 90 days for processing.	
O-1 Extraordinary Aliens in Business, Sciences, the Arts **Considerations:** This is a difficult visa in general, however, it can be viable especially for funded start-ups. Types of evidence for O-1 used for other start-up founders include: 1) Evidence of significant funding; 2) Contracts with substantial customers as evidence work is being implemented or adopted by others; 3) Customer reference letters; 4) Industry expert reference letters; 5) Press articles 6) If part of any significant incubator programs, evidence of that 7) Significant salary + shares (depending upon valuation of company this could be deemed significant) **$$:** Either significant revenue or funding typically around $500K is a good start; $1 million is better **Validity**: 3 years; extension possible **Dependent/ Work Authorization:** Dependent spouse O-3 is <u>not</u> eligible for work authorization	**EB-1(a) Extraordinary Aliens in Business, Sciences, the Arts** The scrutiny on these petitions are higher than the non-immigrant O-1, despite having the same proof requirements. We would usually file only after the company has had a Series A round, whereas the O-1 can be filed based upon a Seed Round. Again much of this will depend on the specifics of the start-ups. No PERM /Labor Certification Required. I-140 (immigrant petition) – Premium Processing is available and therefore can get a response in 15 days; 6 to 8 mos. for regular processing. I-485 / Green Card Application case can be filed concurrently with the I-140 or after the I-140 is approved.
E-2 Visa This is a non-immigrant visa based on a treaty between a particular country and the U.S. Not all countries are E-2 eligible. E-2 visas are used by companies that have been established based on, or will be carrying out,	**Eb-1, EB-2, or Eb-3 (see above)**

investment in the United States to operate a commercial enterprise. Treaty investors must demonstrate possession and control of the capital assets and investment funds, and show that the funds are irrevocably committed to the U.S. enterprise. There is no specific requirement on the amount to be invested, but it must be "substantial" relative to the nature of the business to be operated in the United States. The investment must be sufficient to ensure the successful operation of the enterprise and have the capacity to either generate a significant economic impact in the United States or to generate significant income beyond providing a living to the investor and his or her family. Additionally, the amount of capital invested must be substantial in proportion to the total cost of purchasing an established organization or creating a new one: the lower the cost of the enterprise, the higher the required percentage of initial investment.	

This Memorandum outlines some of the non-immigrant and immigrant visa options available to founders of start-ups and their key personnel.

I. L-1 (8 CFR §214.2(l))

The L-1 visa and nonimmigrant status allows for the intra-company transfer of employees of foreign entities to U.S. parent, affiliate, and subsidiary companies.

A. Definitions

There are two types of L-1 status:

L-1A: employees performing managerial or executive assignment in the U.S., with a maximum validity period of 7 years, for an initial petition of 3 years and two extensions of 2 years each.

L-1B: employees performing specialized knowledge assignments, with a maximum validity period of 5 years, for an initial petition of 3 years and one extension of 2 years.

B. L-1A requirements

An L-1A visa application for an intra-company transferee must meet three requirements:

1) The petitioning U.S. company must be an affiliate, branch or subsidiary of a foreign based company.
2) The applicant must be employed at the company abroad for at least one of the three previous years. There is no requirement that the work abroad must be in a managerial or executive level for one year; however, this requirement does exist for the EB-1(c) discussed below.
3) Time spent in the U.S. on temporary assignment or as a trainee of the foreign firm does not count toward one year of employment with the company abroad; and
4) The employee must be coming to work at the U.S. Company as an executive or manager.

C. New Office

If the U.S. office has been open for less than 1 year and does not yet have extensive business activity, then it is possible for the foreign national to enter the U.S. on an L-1A to open a new office.

This petition will need to be supported by a business plan that really establishes the plans for growth backed up by financial forecasting. In addition to the other L-1 requirements we would need to show:

1) Sufficient physical premises to house the new office have been secured;
2) The intended U.S. operations within one year of the approval of the petition will support an executive or managerial position.

See 8 CFR 214.2(l)(3)(v)(A) and (C).

The L-1A for a new office is only given for 1 year. In that 1 year, the new office must show that it is generating both revenue and has hired employees who would then be managed by the L-1A employee. In order to get an extension past 1 year we would have to show that you have accomplished this.

If not, then it becomes quite hard to get the L-1A extension. (It is possible, but in the current climate it is difficult. We may actually have better luck in converting to an H-1B.)

D. One year of continuous employment with foreign entity

Time spent in the U.S. on the B-1 does not break the continuous employment with the foreign entity. However, the time spent in the U.S. does not count toward the 1 year. See 8 CFR 214.2(l)(3)(iii).

1) Documentation of employment with foreign entity

One of the issues for start-ups is documenting employment especially where the individual is not yet drawing a salary. Some of the documentation that may be supplied to support that the employee is employed with the foreign entity may include:

- Letter from foreign entity verifying the employment;
- Copy of employment contract;
- Copy of founder's agreement, if a founder;
- Paystubs;
- Tax documents reflecting salaries paid;
- Shareholding agreement;
- We would also need to document your employment with the Pvt. Ltd. If you were paid a salary this would be the easiest way.

E. Pitch & Other Considerations for L-1A

As a general matter, the L-1 category is one of the more difficult categories to secure approval. At the same time though, it is currently one of the better options for a start-up since: (1) H-1B visas are subject to an annual quota, which has already been reached this year; (2) O-1 visas are more difficult; (3) there is currently no start-up visa. Therefore, it is our only real option for most of the start-up cases.

In order to secure an L-1 visa, in addition to establishing the basic requirements, we would need to convince USCIS that the foreign entity is a viable business, that it has a compelling reason to enter the US market, and that its entry into the US will help the US economy. This latter point is critical. Some of the points that would need to be emphasized is (1) how the US entity would create jobs; and (2) how this company's business / product is good for the US economy. For example, if the company may be solving problems that are important to the US then that is something that we would play up; alternatively, if the company is producing a new software app that may have more entertainment or

leisure value, then we need to focus on company's business projections and its potential to create new jobs.

While USCIS is supposed to make the ultimate decision for a non-immigrant visa, the US Consulate abroad sometimes improperly treat their role as second adjudicators. Thus, we may secure an approval before USCIS, only for a Consulate official to deny the visa. To this end, we would highly advise that the transferring foreign national go through an interview prep session with my firm

F. Green Card after of L-1A → EB-1(c)

The primary advantage of the L-1A is that it would be easier to file for a green card for under the EB-1(c) category. It has similar requirements, and because the priority date is current the green card application can be filed at the same time as filing the immigrant petition.

To file an EB-1(c), the petitioning U.S. company must have been doing business for at least 1 year prior to filing. While there is an exception for L-1A to open a new office, there is no similar exception for EB-1(c). Therefore for new offices, we would have to file only after the new office has been in business for 1 year.

Unlike the L-1A, the foreign national must have worked abroad for 1 year <u>in</u> a managerial or executive capacity. This may be difficult to establish if there were very few employees of the foreign company and the foreign national may have numerous roles in the company.

II. L-1B or H-1B

In the L-1B category we would have to show that the foreign national has specialized knowledge in the foreign company'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. *8 CFR 214.2(l)(1)(D)*. This in recent years has become a high standard.

The main advantage though is that the there is no prevailing wage that must be paid.

In contrast, an H-1B requires us only to show that the foreign national would be employed in an occupation that requires (a) theoretical and practical application of a body of highly specialized knowledge, and (b) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the U.S. Prevailing wage would have to be paid. *INA §101(a)(15)(H)(i)(b); 214(i)(3)*

H-1B's are initially given for a maximum of 3 years and can be extended to an additional 3 years. To extend beyond the 6 years, an immigrant petition will need to have been filed beforehand.

A. Challenges for H-1B

The challenges of an H-1B for a start-up where the individual is also a shareholder relates to whether the individual's employment is controlled by the employer company – i.e. can the individual be hired or fired? We could overcome this issue with an employment agreement, bylaws, board resolutions, organization charts, and any other information establishing that there is a review procedure.

The other challenge is that while we do not have to show an ability to pay, we would have to show that there is a viable business that would be paying for the H-1B salary.

Finally, the position itself will need to show that it requires someone with specialized knowledge.

CEO roles are difficult for H-1Bs. For an H-1B a CEO position we would need to show that the H-1B employee would be managing people in an executive capacity. This is not required in the first year for a new office for the L-1A. Moreover, obtaining a prevailing wage for a CEO could take significant time.

A more technical position, such as a sales engineer, could avoid this problem.

Business development and marketing positions are difficult to justify as specialty occupations.

B. Green Card after H-1B → possibly EB-1(c) or EB-3

While the L-1A provides an easy stepping stone to EB-1(c) it may also be possible to seek the EB-1(c) after the H-1B.

To do so, we would need to elevate the role to a managerial position in the U.S. for filing the EB-1(c). This path is not as common after the H-1B as it is after the L-1A.

The fallback position would be to file the Green Card in the EB-2 or EB-3 category, for which the wait time is between 5 to 12 years for the Green Card.

III. O-1 Visa (8 CFR §214.2(o)

The O-1 visa is a temporary work visa for foreign nationals who have "extraordinary ability in the sciences, arts, education, business, or athletics. Extraordinary ability means that a person has achieved a high level of expertise in a particular field. In order to qualify for the visa, the aliens of extraordinary ability must demonstrate "sustained national or international acclaim" in their field of endeavor.

A serial entrepreneur or otherwise successful entrepreneur may qualify for an O-1 if it can be established that s/he is extraordinary in business. This is a high standard to meet, but could be a good option for a foreign national who meets the criteria.

IV. Investor Visas

There are other options for Treaty Investors (i.e. foreign nationals from countries where US has a treaty. Does not exist for India); or for people making significant investments into the US, but such investment does not typically involve venture funding, since the investment must be based on money that the foreign national is putting at risk.

V. Start-up legislation for Green Card

While there has been legislation proposed, at the time of this writing the U.S. does not have specific start-up legislation.