OPENING A U.S. OFFICE:

GETTING THE IMMIGRATION PIECE RIGHT

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You can have the right product, the right people, and the perfect business plan, but when it comes to opening a new office in the U.S., if you don't get the immigration piece right, your carefully planned entry into the U.S. market may face serious delays, or may never get off the ground. That's why developing an effective immigration strategy is such a critical part of any foreign company's efforts to launch a new U.S. office.

The U.S. is a very inviting market, and when German and other foreign companies look for opportunities for expansion, the U.S. is often at the top of the list. Once sales reach a certain level, the logical next step is to consider opening a local office in the U.S., and that may require sending one or more key employees from the parent company to launch the new business. These employees, however, will usually need an appropriate work visa to oversee and operate the new business. To help ensure the successful launch of the new business, the strategic immigration needs of these key employees must be addressed in the most effective and expeditious manner.

The Prospecting / Pre-Operational Stage and "B-1" Business Visitor Status

Of course, opening a new office in the U.S. typically requires a great deal of preparatory work before the office is ready to begin operations. Frequent trips to the U.S. are usually necessary during this initial preparatory period, in order to explore opportunities, assess the market, prospect for possible customers and suppliers and develop the customer and supplier base, and ultimately engage in site selection for the new office. Preparatory activities of this kind generally do not require a work visa. They can usually be performed in business visitor – or "B-1" – visa status.

To qualify for B-1 business visitor status, the traveler needs to meet certain key criteria. In particular, the traveler must:

- reside outside the U.S. and be employed and paid from abroad by a foreign employer;
- be traveling to the U.S. for a temporary period only, to engage in business activities permissible in B-1 visa status;
- engage in activities for the benefit of the individual's foreign employer; and
- intend to return to the individual's home country at the end of the stay to resume employment with the foreign employer.

Permissible activities in B-1 visa status include participating in business meetings, attending trade shows and conferences, and negotiating sales and other contracts. In the context of opening a U.S. office, permissible B-1 activities would include investigating the market to assess business opportunities, visiting and meeting with prospective customers, suppliers, and distributors, and negotiating contracts preliminary to operations.

B-1 business visitor status may be obtained in one of two ways. The traveler

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may apply for a B-1 visa at a U.S. Consulate in the individual's home country. This requires completing a detailed on-line application, followed by an appointment for a typically brief in-person interview at the Consulate with a U.S. consular officer. Depending on the particular nationality of the applicant, B-1 visas are usually issued for multi-year, multiple-entry validity periods (Germans are typically issued 10-year multiple entry visas), with the length of stay of each visit determined by the U.S. Customs and Border Protection (CBP) officer at the port-of-entry. Although the holder of a B-1 visa may be admitted for a period of up to one year, most admissions are for 6 months or less.

In lieu of obtaining a B-1 visa, a business visitor may travel to the U.S. visa-free under the Visa Waiver Program (VWP), if the individual is a citizen of one of 38 countries (including Germany) whose nationals are eligible to participate in the program. VWP travelers must first obtain pre-approval online through the U.S. Department of Homeland Security's Electronic System for Travel Authorization, or "ESTA." Travelers entering on VWP are admitted for 90 days and generally are not eligible to extend or change their status.

Regardless of whether an individual enters the U.S. on a B visa or visa-free through the VWP/ESTA process, the types of permissible activities are the same. Business visitors of either type are limited to engaging only in activities permissible in business visitor status. Individuals in business visitor status are not permitted to engage in productive employment in the U.S. or to work on behalf of a U.S. entity. As a result, a foreign national cannot actually start operating or working for a newly opened U.S. office until the individual has secured the appropriate work visa status.

Choosing the Right Work Visa Category: Factors to Consider

There are a number of possible U.S. work visa categories that may be used to staff a U.S. office. Key factors to consider when deciding the most appropriate work visa category include:

- Ownership: If the U.S company will be majority foreign-owned, there may be additional, and better, visa options available than if the company is majority U.S.-owned. In particular, as discussed below, the E-1 and E-2 Treaty Trader and Investor categories may be the best option in such cases.

- New or Existing Business: U.S. government adjudicators tend to give closer scrutiny to new and smaller businesses, and start-ups by nature tend to lack a track record of successful operations. As a result, in general, it tends to be less challenging to secure a work visa for an existing business than for a start-up.

- Amount of the Investment/Start-Up Costs: In general, the more substantial the investment made in the new company, the stronger the employee's work visa application is likely to be.

- Type of Business: Will the new company be engaged in international import/export, or will it operate only in the domestic U.S. market? The type of business and nature of the trade can affect the type of visa options that may be available.

- Nature of Position: The most appropriate visa categories for opening a new office in the U.S. are generally focused on managerial and highly specialized positions. Visa options for lower level or less sophisticated positions are generally much more limited.

- New Hire or Current Employee: The work visa options are generally better if an existing employee is used to open the new U.S. business than if the company plans to use a new hire to launch the U.S. office.

- Employee's Nationality: Some work visa categories are nationality-based. As such, there may be additional visa options available, depending on the nationality of the employee.

- Employee's Background: The higher the employee's education and skill level, the more work visa options the individual is likely to have.

Work Visa Options

The two main visa categories for start-ups and new offices are the E and L visas. Each has its own eligibility criteria and advantages and disadvantages, and understanding the differences between the two categories is critical to making the right strategic immigration decision.

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E-1/E-2 Treaty Trader/Investor Visas

There are five main criteria that must be met to qualify for E-1 or E-2 Treaty Trader/Investor visa status:

- First, there must be a qualifying treaty of trade or investment between the U.S. and the foreign investor's or foreign trader's country of nationality. Over 80 countries have qualifying treaties, including Germany, which has both qualifying trade and investment treaties.

- Second, the foreign investor or foreign trader must be a citizen of the treaty country. If (as is typically the case) the investor or trader is a company rather than an individual, then the company must be at least 50% owned by citizens of the treaty country.

- Third, the employee applying for the work visa must have the same nationality as the employing investor or trader. For example, if the new U.S. business is majority German-owned, then the employee being sent to open or staff the U.S. office must be a German citizen.

- Fourth, the employee either must be taking up an executive or supervisory position or must have special skills that make the individual essential to the efficient operation of the company.

- Fifth, either the U.S. company must represent a substantial investment (for E-2 visa cases), or the company must be engaged in substantial trade between the U.S. and the treaty country (for E-1 visa cases).

There is no specific dollar figure that would qualify as "substantial" trade or a "substantial" investment. For E-1 Treaty Trader cases, trade generally may be considered substantial if it reflects multiple transactions and a regular, continuous flow of good or services between the two countries. For E-2 Treaty Investor cases, an investment generally may be considered substantial if it is sufficient to successfully launch a business of that type, and if the investor is at real risk of significant loss if the business does not succeed. In addition, for E-2 cases, it must be established that the investment is not marginal, which can be achieved by showing that the company will generate more than enough income to support the visa applicant and his or her family or will have a significant economic impact, in particular by creating employment opportunities for U.S. workers.

The E-1/E-2 Treaty Trader/Investor category has a number of important advantages over other work visa options. In particular, there is no overall time limit on how long an individual can hold E visa status. An employee who qualifies for E visa status can maintain E status indefinitely, as long as the individual remains employed by the company and the company continues to operate and remains at least 50% foreign-owned by nationals of the treaty country. In addition, an E visa may be used for either an existing employee or for a new hire, and the applicant is not required to possess any particular level of education or experience.

Lastly, unlike most work visa categories, the E visa does not require pre-approval in the U.S. by the U.S. Citizenship and Immigration Service (USCIS). Rather, an E visa can be obtained directly at the U.S. Consulate in the applicant's home country. As one of the principal missions of U.S. Embassies and Consulates abroad is to promote trade and investment between the U.S. and the host country, U.S. consular officers are encouraged to construe the E visa requirements broadly so as to facilitate international trade and investment.

L-1 Intracompany Transferee Visas

The other main work visa category for "new office" cases is the L-1 Intracompany Transferee visa. The main criteria for this category are the following:

- There must be a qualifying corporate relationship indicating common ownership – such as parent/subsidiary, brother/sister subsidiaries, or parent/branch office – between the visa applicant's foreign employer and the applicant's prospective U.S. employer;

- The visa applicant must have been employed by the foreign affiliate for at least one year within the past three years; and

- The visa applicant's qualifying employment abroad and his or her prospective position in the U.S. must qualify as either executive, managerial, or involving company-specific specialized knowledge.

In addition, if the applicant is not being transferred to an existing U.S. affiliate but is instead being sent to open or staff a new office (defined as an entity that has been doing business in the U.S. for less than one year), then the application generally must also establish that the organization has secured sufficient physical premises to house the new office and has the financial ability to remunerate the transferred employee and commence doing business in the U.S. "New Office" L visas are approved for only one year, and to obtain an extension, the company must present documentation showing that the new office has been successfully launched and is operational.

Unlike the E visa category, which is available only to companies that are at least 50% foreign-owned by nationals of a country having a qualifying treaty of trade or investment with the U.S., there is no nationality or treaty requirement for L-1 visas. The company sponsoring the L-1 visa applicant may be majority U.S.-owned, or may be owned by several nationalities none of which hold at least 50%, or may be majority foreign-owned by nationals of any country, regardless of whether the country may have any special treaty relationships with the U.S. In addition, unlike the E visa, where the visa applicant must have the same nationality as the majority foreign owners of the company, an L visa applicant faces no nationality restrictions. So, for example, although a German-owned company can employ only German nationals on an E visa, that same company can use L visas to transfer employees of any nationality to a U.S. affiliate (provided the employee otherwise qualifies for L visa status).

Although the L visa category does not face the ownership and nationality restrictions of the E visa category, there are several other aspects of the L visa category that are generally less favorable than the E visa category. For example, while E visa holders face no overall time limit, L visa holders face a maximum stay of five years for specialized knowledge employees and seven years for executive and managerial employees. In addition, while E visas are available to both existing employees and new hires, an L visa is only available to individuals who have been employed by the foreign affiliate abroad for at least one year in the past three years.

Although the type of positions that can be sponsored for E or L visas (i.e.: executive, supervisory, or specialized/essential for Es, and executive, managerial, or specialized knowledge for Ls) may appear superficially to be similar, the regulatory definitions of the qualifying types of positions and the administrative interpretation of those definitions tend to be substantially narrower for L visa cases than for E visa cases. As such, it may be harder in practice to establish that a particular position meets the criteria for L visa classification than it would be to establish that that same position meets the criteria for E visa classification.

Lastly, L visas generally require pre-approval by the USCIS in the United States before the foreign national can apply for an L visa at the U.S. Consulate in the individual's home country. This is significant in two respects. First, this requirement for USCIS pre-approval adds an extra step to the application process. Second, the USCIS tends to give close scrutiny to L visa petitions, particularly for "new office" cases, whereas consular officers adjudicating E visa applications may tend to be more favorably disposed to such applications, in order to facilitate international trade and investment.

Other Temporary Work Visa Options

Although there are a handful of other alternatives to the E and L visa categories for employees being hired to staff a new office in the U.S., their utility is relatively limited.

Historically, the traditional "workhorse" in the temporary worker category has been the H-1B visa for foreign nationals employed in a "specialty occupation." Specialty occupations are professional positions that normally require at least a bachelor's degree in a specialty field, such as engineers, accountants, software developers, financial analysts, market research analysts, and the like. Qualifying an employee of a new office for H-1B visa classification can sometimes be a challenge, particularly for one-person offices, as such positions may need to serve as "jack-of-all-trades," with a broad array of duties and general operational responsibilities that the USCIS might not view as sufficiently specialized to merit specialty occupation classification.

More significantly, unlike the E and L visa categories, the H-1B category is subject to strict annual numerical limits, and those limits fall far short of meeting current demand. Indeed, in the past few years, the annual numerical limit has been exhausted, and greatly exceeded, in the first week of the annual filing season, making H-1B visas unavailable for almost the entire year. This year, almost three times as many H-1B petitions were filed in the first week of the annual filing season as are available for the entire year, requiring USCIS to hold a lottery to randomly choose which cases would be processed. With H-1B visas unavailable for almost the entire year, and with perhaps roughly a one-in-three chance of securing an H-1B visa in the annual lottery, the H-1B category is currently not a reliable staffing option.

Certain nationalities, however, benefit from special professional work visa categories that either have no annual limit or have limits that have never been reached. In particular, citizens of Canada and Mexico may take advantage of the NAFTA TN professional temporary work visa category, provided the individual will be working in a professional occupation listed on the NATFA TN schedule and the individual has the requisite background (which varies depending on the occupation but in most cases would be at least a bachelor's degree in a field related to the occupation). In addition, citizens of Chile and Singapore are eligible for the special H-1B1 work visa, and citizens of Australia may make use of the special E-3 work visa category. These latter two categories are defined similarly to the H-1B specialty occupation category. While a foreign national in one of these alternative categories might, in a particular case, still face a potential issue of whether their responsibilities may be too broad in nature to qualify as a specific professional or specialty occupation, the individual will not need to worry about numerical limits or visa availability, as would be the case for the H-1B category.

Finally, individuals with exceptional backgrounds may potentially qualify for the O-1 extraordinary ability work visa category, which is generally reserved for individuals who are among the small percentage who have reached the top of their field. Although there are no nationality restrictions or numerical limits on this category, the standard for qualifying is very high and requires meeting at least three of eight criteria (such as awards, publications, or major contributions to the field) and having earned sustained national or international claim. As such, most foreign nationals would not be able to take advantage of this category.

Practical Tips and Considerations

Given the relatively limited number of viable alternatives, the E and L work visa categories remain the main "go-to" visas for opening a new office in the U.S. There are, however, some practical tips that companies need to be aware of.

First, as the above discussion illustrates, the rules and qualifications for the various visa options that might be used for "new office" cases can be quite complex.

Second, "new office" visa applications – whether for E or L or other visa categories – typically require extensive documentation, including documentation relating to the creation and ownership of the U.S. entity, such as Articles of Incorporation, By-Laws, and stock certificates and stock ledgers; financial documentation, such as bank statements, financial statements, and documentation of capital expenditures and start-up costs; and documentation relating to the company's operations, such as copies of leases, purchase orders, invoices, receipts, contracts, and the like. It is also important to have a detailed and well-conceived business plan that specifically describes how the new business intends to be successful in the U.S. in the foreseeable future.

Third, the government tends to give greater scrutiny to new and smaller companies and start-ups, so the burden of proof can be a high one in practice. As such, it is critical for the applicants in "new office" scenarios to be able to produce substantial and tangible evidence establishing that the new business will be a bona fide operating business in the U.S. This is particularly true for filings submitted to the USCIS in the United States.

Given the above, when opening a new U.S. office, it's critical to retain competent immigration counsel and to consider the immigration issue from the very outset and factor this into your business and HR strategies for the new office. Companies looking to open a U.S. office need to plan ahead and start the immigration process as early in the overall process as possible, to help ensure that they are able to fully achieve the important business goals behind the establishment of their new U.S. office.