Talent Retention Options for Employees Not Selected in the H-1B Lottery

A Guide for Corporate Clients Seeking International Options to Retain Employees Losing Status in the United States

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Corporate clients expend significant resources recruiting, onboarding, and training foreign national talent every year. Unfortunately, they are often left at the mercy of the annual H-1B lottery to determine if they can continue to employ or hire new foreign national talent in the United States. Many are disappointed when the results are released and immigration practitioners receive an influx of queries seeking alternative options to retain talent not selected in the lottery.

While there are some alternative U.S. immigration options, they are not often viable for every employee of the company. Therefore, to fully address our corporate clients' business needs, immigration practitioners should be prepared to provide options beyond the limited avenues of U.S. immigration.

The goal of this article is to address potential non-U.S. immigration options for international companies seeking to relocate employees unable to remain in the U.S. While hiring or transferring employees to an overseas entity has always been an option for companies, it is not traditionally explored as a part of a comprehensive long-term plan for each foreign national employee. What makes this a more attractive option this year is that due to the pandemic, companies have realized the power of collaboration across international borders and the ability to continue business despite limited in-person meetings.

On the flip side, the pandemic has also made it increasingly challenging to plan and execute an overseas transfer or hiring strategy. Unlike years past, the timeline in obtaining immigration status for an employee being transferred from the U.S. is unpredictable due to constantly changing travel restrictions and closures of borders, consulates, and immigration authorities. Layered on top is an undeniable change in governments' attitude towards immigrants, including highly skilled economic immigrants, due to the sharp increase in unemployment for their citizens and permanent residents.

Understandably, non-U.S. immigration options will be largely dependent on where the corporate client has established presence and location of internal teams. Time zones may also be a consideration when collaboration with international colleagues is required. Once the client has defined these limitations, immigration practitioners can assess employee-specific factors to determine the viability of obtaining a work permit in the destination countries.

Employee-specific factors to account for are occupation, tenure with the company, salary range, relevant education to the role, and nationality. Please note that it is recommended to obtain advice from an immigration attorney licensed in the destination country and information in this article is intended to serve as general guidance about the factors that should be accounted for when assessing for work permits and should not be construed as legal advice.

As a general rule, applications for work permits for occupations in Engineering, IT, or healthcare sectors will likely be less scrutinized by immigration authorities than Sales, Marketing, Customer Service roles in most countries. While there has been a very clear shift in countries like Singapore and Canada encouraging companies to build a strong local talent core, there is still a high approval rate for work permits for occupations where local talent is not readily available. Countries such as UK and Ireland have "shortage occupation lists" which list the roles for which there is a shortage of qualifications, experience, or skills required for the proper functioning of the country's economy. Most roles on these lists are for various fields of engineering, medical professionals, and IT roles. Canada also offers a Global Talent Stream for employers to sponsor foreign nationals in IT and engineering roles for work permits without conducting a labor market test. Therefore, an employee in one of these occupations will have a good chance at obtaining a work permit in a country outside of the U.S.

Those employees who have been with the company for more than 12 months can also be considered for an intra-company transfer ("ICT") work permit. When considering an intra-company transfer, the analysis should hone in the specialized knowledge the employee possesses within the Company and in the industry generally. Further, careful thought should be given to how the destination country will benefit from this employee's specialized knowledge. Countries like Canada, Ireland, and the UK emphasize the benefit gained by the receiving entity as a crucial factor in the approval of an intra-company transfer application. A potential downside of an ICT work permit is that it often does not offer a path to permanent residency for the employee, especially in countries like the UK, Singapore, Ireland, and Canada. However, it remains an attractive option for many employees who may want to return to the U.S. on an L-1A visa after spending the required time employed for the company abroad.

To round out the analysis, immigration authorities for every country generally require the employee to have a relevant degree and/or work experience that matches the role for which they are seeking a work permit. For example, in Ireland, a relevant degree and work experience is required for a Critical Skills Employment Permit but for a General Employment Permit, a degree can be replaced by extensive relevant work experience. Salary ranges are also specified for each role and depend not only on the job market but also on the employee's experience. For example, in Singapore, while the minimum required salary for an Employment Pass is SGD 4,500 per month, it is only a starting point and should increase based on the employee's years of work experience.

Last but not least, companies should also be ready to conduct labor market tests, if required, to identify potential local talent before an employee from abroad can be sponsored for a work permit. These labor tests are designed to show the immigration authorities that qualified local talent could not be located and foreign national talent needs to be brought in to meet the business' needs. Countries such as Canada, Australia, and Singapore are notorious for requiring detailed recruitment efforts before granting a work permit to a foreign national. If a company is looking to avoid the labor market test requirements, countries such as United Kingdom, Colombia, Mexico can offer viable options.

Over the past year, the pandemic has added another layer of analysis to the viability of a work permit sponsorship in almost every country – unpredictable processing timelines and travel restrictions. Timelines are a crucial factor in setting realistic expectations for start dates and avoiding gaps in employment if an employee's EAD is expiring in the U.S. To determine proper timelines, the employee's nationality and where they are physically located should be reviewed. These factors trigger applicable travel restrictions and entry visa requirements, which in turn impact the time required to obtain a work permit and the physical relocation of the employee.

In conclusion, it is not the end of the road for a corporate client or a foreign national if U.S. immigrations are limited or non-existent. An understanding of the factors that may lead to ongoing employment abroad can help clients retain valuable talent.

About the Author

Zara Najam is a Senior Global Attorney at Erickson Immigration Group. Zara specializes in international business immigration, including advising clients on global immigration strategy and program development, securing proper immigration status for overseas assignments (transfers & new hires), and supporting global mobility and HR teams with management of the company's global mobility program.

Zara has been recognized as a Super Lawyers Rising Star and is also a certified Global Mobility Specialist (GMS) by Worldwide ERC. She has been a speaker at several global mobility conferences and authored articles on various aspects of hiring foreign national talent to scale globally.

Answers to the Consular Quiz

1. (b). The applicant's residence is the determining factor for the place of application under normal circumstances. 9 FAM 504.4-8(A)

2. The E visa classification. 9 FAM 402.9-2(b)

3. True. 9 FAM 302.3-2(B)(3)(f)(2)

4. (c)

5. (b) 9 FAM 305.4-3(E)

6. (a)

7. (b)

8. False. 9 FAM 302.9-4(B)(3)(b)

9. (b) FAST = "First and Second Tour"

10. False. See for example: "If USCIS authorized a Change of Status to E for a person in the United States, that status is only valid as long as you remain in the United States. To obtain an E-visa, the company and applicant must submit a complete package by mail as per first time applicants."

11. (c) 9 FAM 302.1-8

12. There are more immigration attorneys, but it's really close! Per the American Foreign Service Association, there are currently **15,600** Foreign Service Officers. According to Rachel Sommers Pulda, AILA's Associate Director of Online Resources of AILA in an email dated March 1, 2021: "We currently have around **15,800** AILA members."