

Focus | International/Immigration Law

So, You Didn't Win the (H-1B) Lottery...Now What?

BY IRINA B. PLUMLEE AND KRISTY UYEN LE

The H-1B “lottery” process has become known as the fastest way to get one’s hopes up for a much-coveted professional work visa and an even faster way to get them dashed. With the number of lottery entries inching towards half a million and the number of H-1B visas available for distribution hovering at only 65,000 (with an extra 20,000 ‘wins’ reserved for U.S. graduate degree holders), drawing a lucky ticket is indeed...a lottery. So, how does one increase their chances of achieving the ultimate goal of working in the U.S.? By not focusing solely on the H-1B lottery! Below are a few alternatives for would-be H-1B employers, employees, and their lawyers to consider.

Is the potential U.S. employer an international company? If yes, consider employing the foreign visa candidate with an affiliated company abroad for one year to qualify them for an intracompany transfer (L-1 visa) to the U.S. As a bonus, if the employee is well-trained or assumes managerial responsibilities, that that individual may meet the requirements of either an L-1A (executive or managerial) or L-1B (specialized knowledge) transfer.

An alternative avenue: the H-1B visa with a “cap exempt” employer. Hidden within the fine print of H-1B petition forms is a question about a petitioner’s eligibility for “cap exemption.” The small print hides a big (but often underutilized) benefit for qualifying employers who do not have to abide by the government’s mandated H-1B quota. Employers who hit this major jackpot

may hire as many H-1B workers as needed without having to enter the lottery. It is often assumed that only academic and research institutions qualify for cap exemption, but in reality, any nonprofit organization affiliated with “institutions of higher learning” may potentially qualify for a cap exemption. This affiliation does not have to amount to a corporate relationship and may, instead, be through affiliation agreements. Thus, a potential H-1B-sponsoring nonprofit employer should consider its possible cap-exemption qualifications, and foreign nationals should explore H-1B opportunities with cap-exempt entities.

Is the U.S. business foreign-owned, or does the foreign job candidate share the foreign owner’s nationality? If so, then the E visa is your friend. The E visa is for personnel of foreign companies investing in the U.S. economy and is highly beneficial for both the company and its employees, but there are a few hoops to jump through. E visas are available for countries that have a treaty with the U.S. While large foreign-owned companies have an advantage in qualifying for E visas, mom-and-pop businesses (and even sole proprietorships) may also qualify. E visa applications require an experienced attorney to pursue due to the sheer amount of corporate data needed and strategic considerations regarding the company and the visa candidate. The benefit of a five-year visa with no renewal limit that also provides for a dependent spouse’s U.S. employment authorization is worth the effort.

What about country-specific visas? While you may not ask a job applicant about his or her national origin, if your

conversation with them has progressed to immigration sponsorship needs, chances are you already know their nationality. If so, you should review the special visa options available to nationals of certain countries. For example, Canadian and Mexican nationals are eligible for the TN visa, which allows them to work in predetermined occupational categories in the U.S.; nationals of Singapore and Chile enjoy their own version of an H-1B visa; and Australians have an E-3 visa option. Keep these nationalities in mind!

Hopping back on the student train. Student visas are often under-appreciated and forgotten even though students attending U.S. universities are eligible and encouraged by their schools to gain practical experience in the U.S. during their studies and after graduation. For example, Curricular Practical Training (CPT) might help retain a talented worker for future employment opportunities either in the U.S. (with better luck in the next H-1B lottery) or abroad while providing them with valuable

training and know-how.

Remote work? With remote work quickly becoming the norm, many employers have moved to a hybrid or fully remote workplace. If working remotely from the would-be employee’s home country is possible, this may be worth considering. However, review the risks of establishing a corporate presence in a foreign jurisdiction and consult local counsel.

All of the above notwithstanding, continue keeping the H-1B lottery on your radar. It is not over until (the government says) it is, and the government historically conducts more than one lottery round until the congressionally mandated quota is met. And... don’t give up—second only to, possibly, estate planning, immigration is about strategizing in advance and never saying “never.” **HN**

Irina B. Plumlee is a Shareholder, and Kristy Uyen Le is an Associate, at Munsch Hardt Kopf & Harr, P.C. They can be reached at iplumlee@munsch.com and kle@munsch.com, respectively.



BEST
D
2024

(D Mag. Best 2018, 2020, 2022, 2023, 2024)

MARTIN MERRITT

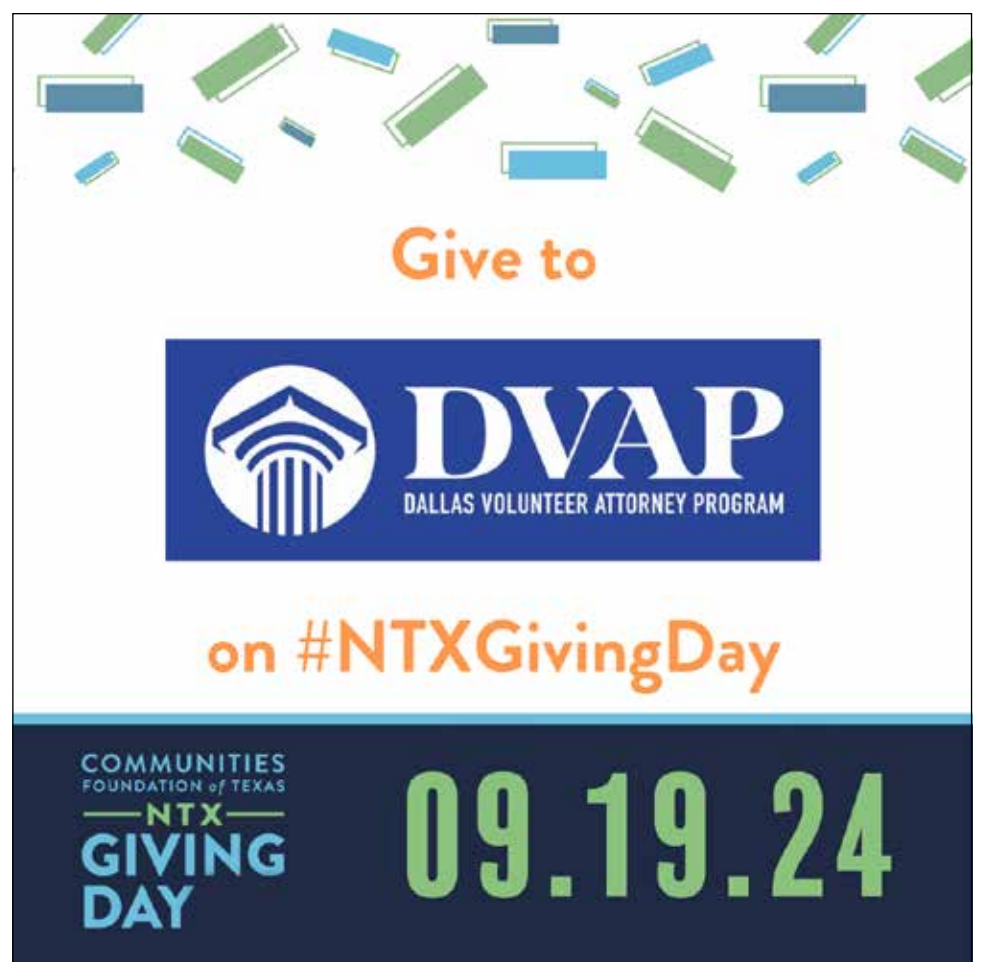
Health Law and Healthcare Litigation

Chair, DBA Health Law (2021)


Past President, Texas Health Lawyers Association

Martin@MartinMerritt.com | Dir. (214) 952.1279

Experienced. Over 30 years, in Texas and nationally, Martin Merritt litigates cases against the FBI, DEA, OIG, CMS, AUSA, TMB, Tex. OAG, Tex. Med. Bd., Pharm. Bd., TXDSHS, Civil False Claims Act Subpoenas and lawsuits, civil investigative demands, arbitration, criminal and other administrative actions. He has a proven track record applying this knowledge to win victories for business litigators.




Give to



DVAP
DALLAS VOLUNTEER ATTORNEY PROGRAM

on #NTXGivingDay



09.19.24



LOYAL.

You wanted a Texas legal malpractice insurance company that’s loyal to its customers. Heck, we’ve been doing that since 1979. It’s in our DNA. You wanted a provider that was committed to building relationships with our members to keep them happy, feeling respected and customers for life.

We listened.

Be Heard.



TLIE TEXAS LAWYERS' INSURANCE EXCHANGE®
Experience when you need it most.

TLIE.ORG or (512) 480-9074