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FM SECSTATE WASHDC

TO ALL DIPLOMATIC AND CONSULAR POSTS COLLECTIVE

UNCLASSIFIED

STATE 063795

E.O. 13526: N/A

TAGS: CVIS

SUBJECT: B-1 IN LIEU OF H

1. Summary: The guidance for issuing B-1 visas in lieu of H-1B and H-3 visas in 9 FAM 41.31 N11 is under review in an interagency process, but is still in effect until further notice. Consular officers should not hesitate to apply this guidance in appropriate cases. This cable reviews the existing B in lieu of H-1B and H-3 guidance and related requirements set out in the FAM.

2. 9 FAM 41.31 N11 states, in part: "There are cases in which aliens who qualify for H-1 or H-3 visas may more appropriately be classified as B-1 visa applicants in certain circumstances; e.g., a qualified H-1 or H-3 visa applicant coming to the United States to perform H-1 services or to participate in a training program. In such a case, the applicant must not receive any salary or other remuneration from a U.S. source other than an expense allowance or other reimbursement for expenses incidental to the alien's temporary stay. For purposes of this Note, it is essential that the remuneration or source of income for services performed in the United States continue to be provided by the business entity located abroad, and that the alien meets the following criteria: (1) With regard to foreign-sourced remuneration for services performed by aliens admitted under the provisions of INA 101(a)(15)(B), the Department has maintained that where a U.S. business enterprise or entity has a separate business enterprise abroad, the salary paid by such foreign entity should not be considered as coming from a 'U.S. source'; (2) 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 customarily 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."

Applicant Must Overcome Presumption of Immigrant Intent to Qualify for B Status

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3. Applicants for all B visas, including B-1 visas issued under 9 FAM 41.31 N11 ("Note 11"), must overcome the presumption of immigrant intent established by INA 214(b). Note 11 applicants might qualify for B, H, and/or L visas, but may choose a B visa under Note 11 for convenience and efficiency.

Applicant Must Also Plan to Engage in H Activity

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4. Applicants should only be annotated (see para 6 below) under B-1 in lieu of H-1B when they plan to engage in hands-on work that would normally require an H-1B. Similarly, applicants should only be annotated under B-1 in lieu of H-3 in the rare case when the proposed training has a hands-on work component or other component that is permissible in H-3 status, but would not clearly be permissible in B-1 status, but for Note 11.

Employer and Source of Remuneration Must be Overseas

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5. As described in Note 11, the applicant must continue to be paid by the overseas employer while they are in the United States. An expense allowance from a U.S. employer is permitted, and a foreign branch of a U.S. firm can qualify as a foreign firm for purposes of Note 11.

Not for Long Term Placement

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6. B-1 visas issued under Note 11 are not intended for long term placement and should generally be issued for activity in the United States that is less than six months in duration. Also, to avoid possible delays at the port of entry, the Department advises consular officers to annotate with "B in lieu of H, 9 FAM 41.31 N11."

B-1 in Lieu of H-1B

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7. In order to qualify for B-1 in lieu of H-1B, the consular officer must find that the applicant clearly meets the H-1B requirements, and is clearly an employee of the overseas company. The work and the applicant must be H-1B caliber, that is, the work must meet the definition of "specialty occupation" in that it requires a bachelor's degree or equivalent, and the applicant must clearly have a bachelor's

degree or equivalent experience. If the H-1B caliber of the work cannot be clearly established to the satisfaction of the consular officer, then the applicant must file a petition for an H-1B with USCIS. Further, the applicant must be an employee of the overseas firm, and paid by the overseas firm. It may be more difficult for a new hire to establish their employment status with the overseas firm if they are immediately sent to the United States to engage in H-1B caliber activity.

8. Thus, in order to qualify for B-1 in lieu of H-1B, the applicant must overcome the 214(b) presumption of immigrant intent, clearly be employed and paid by an overseas firm, and clearly plan to engage in H-B caliber activity for a temporary period, normally less than six months in duration. Note that while an H-1B worker is not subject to the immigrant intent provisions of 214(b) and may change employers in the United States, a Note 11 B-1 applicant is subject to 214(b) and must intend to maintain employment with the same overseas employer.

9. Examples of applicants who would need to file an H-1B are those who: are not clearly H-1B caliber or not planning to engage in H-1B caliber activity; are not clearly an employee of an overseas firm or paid by an overseas firm; plan to stay in the United States on more than a temporary, short-term basis (which generally would mean a stay of more than six months); plan to change employers in the United States; or fail to overcome 214(b).

B-1 in Lieu of H-3

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10. In order to qualify for B-1 in lieu of H-3, the consular officer must find that the applicant clearly meets the H-3 requirements for a trainee, and is clearly an employee of the overseas company. A training program designed to train aliens to work in the United States is not an appropriate H-3 training program. The regulatory criteria for an H-3 petition approval are that the proposed training is not available in the alien's home country, the beneficiary will not be placed in a position that is in the normal operation of the business in which U.S. citizen and legal permanent resident workers are normally employed, and that there will be no productive employment unless it is incidental and necessary to the training and pursuance of a career outside of the United States. Further, the applicant must be able to describe the training, and the consular officer will normally require documentation of the training provided by the employer. If the applicant cannot clearly establish these requirements, then they must file an H-3 petition with USCIS.

11. Thus, in order to qualify for B-1 in lieu of H-3, the applicant must overcome the 214(b) presumption of immigrant intent, clearly be employed and paid by an overseas firm, and clearly plan to engage in H-3 activity as described above, generally for less than six months.

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