

IMMIGRATION CONSIDERATIONS

Foreign workers and individuals wishing to come to the United States have many visa options to choose from. Each visa category is designed to meet the needs of specific groups of individuals in various circumstances. Following is a brief discussion of a selected number of the most commonly utilized visa categories, broken down into “Temporary” and “Permanent” options.

TEMPORARY VISAS

A. BUSINESS VISITOR (B VISA)

The B-1 visa is designed to allow an individual to enter the US temporarily to carry on limited activities for the benefit of his or her foreign employer. While in the US, the individual must continue to be paid by the foreign employer. The business activity must be associated with international trade or commerce. Under this classification, the individual cannot perform local employment that would displace a US worker.

The B-1 visa classification is often used by sales personnel to enter the US to solicit sales of foreign-made products. The sales person, however, is not allowed to sell products that are made by a US subsidiary of the foreign employer. The B-1 visa is also often used by executives and managers of foreign companies to enter the US to do certain preliminary work necessary to start-up a business in the US. Such activities would include meeting with lawyers and accountants, opening bank accounts and entering into contracts and leases for the new US company. The executive or manager, however, cannot be actively involved in the management of the US business on a daily basis without proper work authorization. This would be considered local employment in the US with the benefit directly accruing to the US company.

Most business visitors must apply for a B-1 visa at a US Consulate. However, Canadian citizens and citizens from countries that participate in the Visa Waiver Program are not required to obtain a B-1 visa and may apply for entry directly at a port-of-entry or pre-flight inspection facility.

B. INTRACOMPANY TRANSFEREE (L-1 VISA)

The L-1 visa is available to individuals who have been employed outside the US as an executive, manager or person with specialized knowledge by a foreign company, for at least one continuous year during the preceding three-year period. The individual must seek to enter the US temporarily to render services to a related US company (branch, subsidiary, affiliate or 50/50 joint venture) of the foreign company in one of these capacities.

To qualify as an executive or manager (L-1A classification) the employee’s duties must primarily involve directing the work of other managerial, supervisory or professional employees, or directing a key department or function of the company’s business. First-line supervisors will not qualify unless the individuals they supervise are professional employees. A specialized-knowledge employee (L-1B classification) is one who has special knowledge of the company product, service, research, equip-

ment, techniques, management or other interests and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

To be eligible for this classification, the foreign and US operations must be related. Any proposed ownership arrangement must be carefully examined to ensure that a qualifying relationship exists for immigration purposes. The company must also continue to do business in the US and in at least one other country for the duration of the employee's stay in the US.

U.S. Immigration Law contains special rules regarding "new office" situations. A new office is defined as an office that has been doing business for less than one year. The employer must also show that the company has secured sufficient physical space in the US to house its new office and that such space will support the nature and scope of the business activity. In addition, the employer must provide Citizenship and Immigration Services with the organizational structure of the foreign and proposed domestic business entities, the financial goals of the entities, the size of the US investment, the financial ability of the foreign entity to pay the beneficiary and the financial ability to commence doing business in the US.

The L-1 visa can be issued for three years (only one year initially for new office situations) with the possibility of obtaining extensions. For the L-1A Visa, the maximum period allowed is seven years and for the L-1B visa, the maximum period allowed is five years. After this time, the employee must leave the US for one year before being eligible to re-apply for L visa classification. However, these caps do not apply if beneficiary can demonstrate that he or she does not reside continually in the US. If the employment is intermittent or consists of an aggregate of 6 months per year or less, the beneficiary can request unlimited extensions. The spouse and children of an L-1 employee, classified as L-2, are permitted to apply for general work authorization in the U.S., through the filing of an I-765 application with U.S. Citizenship and Immigration Services (USCIS), so that they may accept employment just by virtue of their L-2 status.

C. PROFESSIONAL (H-1B OR TN VISA)

The H-1B visa category can be utilized to bring individuals to the US to work in "specialty occupations". A specialty occupation is an occupation that involves the application of highly specialized knowledge and has, at minimum, an entry-level requirement of a baccalaureate degree or its foreign equivalent in the specific specialty.

The H-1B category has an annual cap of 65,000 visas, with an additional 20,000 reserved for individuals who have earned a U.S. Master's degree or higher, and is subject to a "labor attestation" requirement. This means that the US employer will have to attest to the US Department of Labor that certain employment conditions have been satisfied before hiring a foreign worker for a temporary period under the H-1B category. Some employers are considered "cap exempt" if they are institutions of higher education; non-profit organizations or entities related to or affiliated with institutions of higher education; or nonprofit research organizations or governmental research organizations.

A petition must be filed with the Immigration Service in the first instance to obtain an H-1B visa. The

H-1B visa can be issued for a three-year period, with the possibility of three additional years of extension, up to a maximum of six years. Additionally, H-1B time may be extended past the maximum six years if certain permanent (green card) paperwork is pending by certain deadlines.

The North American Free Trade Agreement (“NAFTA”) contains immigration provisions allowing certain Canadian and Mexican professionals to enter the US under a TN visa to work for a US employer. The TN visa is valid for up to three years with the ability to obtain one-year extensions. To be eligible under this category, the Canadian must demonstrate that he or she is a member of one of a select number of professions detailed on the NAFTA professional job list. Some examples of acceptable professions includes: accountants, engineers, scientists and computer systems analysts and management consultants. If an individual’s occupation does not appear on the list, the alternative H-1B procedures can be followed. Canadian citizens can apply for TN status at most ports of entry, while Mexican citizens need to apply for a TN visa at a U.S. consular post in Mexico.

USCIS just finalized a regulation that, come May 26th, will allow some H-1B dependents (H-4s) to apply for work authorization through an I-765 submission. Eligibility to apply for work authorization, however, depends on the status of the H-1B spouse’s pending employment-based green card case. Therefore, not all H-4 dependents will be able to seek work authorization.

D. TREATY INVESTOR (E-2 VISA)

Nationals of certain countries having treaties of commerce with US are eligible to apply for entry as treaty traders or treaty investors under the E visa category. By virtue of the Canadian Free Trade Agreement, Canadians are eligible for this classification. The treaty trader (E-1) visa category is not covered in this summary.

The treaty investor (E-2) visa is designed for companies or individuals who invest, or are actively in the process of investing, substantial funds in a US business. The US business must have the “nationality” of the foreign country, meaning that at least 50% of the business must be owned by nationals of the treaty country. Each individual seeking to enter the US must also be a citizen of the treaty country.

An application must show that he or she has made a substantial investment that qualifies for treaty investor status. There is no minimum dollar amount used to determine whether an investment is substantial. A substantial investment is generally defined as one that is more than half the value of the US business or more than half the amount necessary to establish a new business of the type contemplated. The investment is measured by the amount that the investor has “at risk” in the US business. Indebtedness such as mortgage debt or commercial loans secured by assets of the US business does not count toward measuring the amount of the investment, unless personally guaranteed by the investor applicants.

The investment cannot be used solely for the purpose of earning a living for the investor. It is therefore important to demonstrate that investment will create jobs for US workers. The investor must also demonstrate that he or she has assets or income from other sources that will continue after the in-

vestment is made. The investor must enter for the purpose of developing and directing the business activities.

A treaty investor application is filed directly at a US Consulate abroad without the need to first file a petition with USCIS. A treaty investor is generally valid for five years and can be extended in five-year increments.

PERMANENT VISAS

A permanent visa (also known as an immigrant visa or “green card”) may generally be obtained based on the following:

An employment-based petition; or

A close relationship to a US citizen or US permanent resident; or

Through a diversity (“visa lottery”) program

Since some permanent visas are subject to annual quota restrictions, there may be considerable backlogs and delays in obtaining permanent resident status.

A. EMPLOYMENT-BASED IMMIGRATION

After work authorization is obtained through another visa classification, permanent resident status may be applied for under employment-based immigration procedures. For individuals in H-1B or TN nonimmigrants status, an employer usually is required to first obtain a labor certification. This is a multi-step process whereby the employer “tests the market” to determine that no qualified US workers are available to fill the position and then seeks a determination from the Department of Labor that their efforts warrant hiring a permanent worker in a permanent capacity. This is lengthy process, which requires the employer to advertise, recruit and reject (if appropriate) US citizens or permanent resident who apply for the position.

After labor certification is issued, or if the employer believes that the worker is exempt from labor certification, the employer will file a preference petition with Citizenship and Immigration Services. Once the preference petition is approved, the foreign worker is then ready to enter the final stage in the process – the actual application for the permanent visa. Before undertaking the third and final step, however, there must be visas available in the preference category in which the foreign worker qualifies. If visas are not immediately available because of backlogs, the worker is on the “waiting list” and must wait until a visa is available. The waiting period can vary significantly depending on one’s preference classification and country of birth.

Once a visa number is available, there are two ways a foreign worker may apply for the immigrant visa. First, the worker may apply at a US Consulate (generally referred to as a “visa processing”).

Second, if he or she is already working in the US under a temporary visa, the application may be filed with the US Immigration Service (generally referred to as “adjustment of status”).

The Immigration Act of 1990 (the “Act”) completely revised the categories for employment-based immigration. The Act also significantly decreased the number of employment-based visas available annually so that backlogs and delays should be reduced.

The Act creates five employment-based immigration categories with a relatively sophisticated mathematical formula for calculating the number of visas that will be issued in each category. For the sake of this overview, the general percentage of total visas offered will be given rather than a specific number.

First Category- Priority Workers (28.6% of the worldwide employer-based preference level, plus any numbers not used in the fourth and fifth preference categories).

Priority Workers are defined as follows:

Aliens with extraordinary ability in the sciences, arts, education, business or athletics
Outstanding researchers and professors; and
Multi-national executives and managers

The first two subgroups are limited to an elite group of individuals who have achieved national or international acclaim and have risen to the very top of their profession. The third subgroup, multi-national executives and managers, covers the same type of employee who is covered under the L-1 visa category.

Immigration in this category does not require labor certification as discussed above

Second Category – Aliens who are members of professions holding advanced degrees or aliens of exceptional ability in the sciences, arts, or business (28.6% of the worldwide employer-based preference level, plus any numbers not used in the first preference category).

An advanced degree is defined as any degree above a baccalaureate degree. An employee without an advanced degree can still qualify under this category if he or she has a baccalaureate degree and at least five years of progressive experience in his or her specialty.

An employee would have to satisfy at least three of the following criteria to show that he or she has exceptional ability:

A degree relating to the area of exceptional ability
At least ten years of full-time experience in the area
A license to practice the profession
A high salary or other remuneration for services
Membership in professional associations
Evidence for recognition for achievements or significant contributions in the area.

An individual with exceptional ability will be held to a lower standard than a priority worker of extraordinary ability (First Category). The Labor certification requirement may, however, apply to this category.

Third Category – Skilled workers, professionals, and other workers (28.6% of the worldwide employer-based preference level, plus any numbers not used in the first and second preference categories).

Fourth Category – Special Immigrants (7.1% of the worldwide level)
Visas under this category will be available primarily to religious workers.

Fifth Category – Employment Creation Immigrants (7.1% of the worldwide level with some additional restrictions)

This category provides visas for foreign investors entering the US for the purposes of establishing a new commercial enterprise. A general rule of a capital investment of \$1 million will be required. The investment must create at least ten full-time jobs for US workers, not including the investor and his or family. The Act establishes a program to prevent fraud under this category by providing for conditional permanent resident status. The investor can apply to have the condition removed after two years by showing that the investment has been sustained for that period of time.

FAMILY SPONSORED IMMIGRATION

Relatives such as parents, spouses, children over the age of 21, and siblings are potential sponsors under the family sponsorship provisions. Labor certification is not required prior to the filing of a family-sponsored petition. Depending upon the status of the relative sponsor, backlogs can vary dramatically under these provisions.

C. DIVERSITY VISAS

The Congressionally mandated Diversity Immigrant Visa Program makes available up to 55,000 diversity visas (DV) annually, drawn from random selection among all entries to persons who meet strict eligibility requirements from countries with low rates of immigration to the United States. The law and regulations require that every diversity visa entrant must have at least a high school education or its equivalent or have, within the past five years, two years of work experience in an occupation requiring at least two years' training or experience.