Guide to

International Business

Expansion to the U.S.

INVEST BUFFALO NIAGARA

Carolyn Powell

Business Development Director, International
Invest Buffalo Niagara

1-800-916-9073 x104
calendly.com/inbnpowell
cpowell@buffaloniagara.org

INVEST
BUFFALO NIAGARA

257 West Genesee Street, Suite 600
Buffalo, NY 14202

BUFFALONIAGARA.ORG

Letter from Carolyn

There are many advantages for an international business to expand into the United States, including access to the large U.S and Canadian markets and a Made in the USA label. Expanding to Buffalo Niagara in New York State also has advantages including low cost hydropower and 0% corporate state income tax for manufacturers.

However, with an international expansion, there are also many challenges. That's where Invest Buffalo Niagara comes in. Invest Buffalo Niagara offers complimentary project management services which includes helping companies understand how to set up their business structure in the U.S., understand U.S. tax and accounting strategies, and learn about the local workforce and real estate options.

Our organization has helped **118 international companies** expand to the U.S. We lean on our extensive network of experts in their respective fields across our region to inform and assist these companies. This International Guide to U.S. Business Expansion is a compilation of their proficiency.

Flip through this book, use what you need, and give me a call. We are here and happy to help.

Come grow your business with us.

Table of Contents

Market Access Map

BI-NATIONAL REACH

The perimeter of the area shaded in green indicates a **proximity to 39% of the U.S. population and 61% of the Canadian population.**

Strategically located on the Canadian-American border our bi-national gateway for commerce facilitates **$82.5 billion in annual trade** between Canada and the United States.

Expanding into the U.S. Checklist

International businesses considering a business expansion have good reason to rank Buffalo Niagara at the top of their prospect list. Invest Buffalo Niagara has business development managers who provide a single point of contact to a roster of experts in every key area needed to successfully analyze and consider a U.S. business expansion. Since 1999, Invest Buffalo Niagara has helped over 100 international companies successfully expand their businesses to Buffalo Niagara. Our services are free of charge and confidential.

Legal

- ○ Immigration
- ○ Incorporation
- ○ Tax structure
- ○ Intellectual property (patents, branding, trademarks, etc.)
- ○ Real estate contracts and purchases

Accounting and Tax

- ○ Tax structure
- ○ State and federal requirements and filings
- ○ Tax reporting and timelines

U.S. Banking

- ○ U.S. deposits
- ○ Checking and savings accounts
- ○ Inter-company financial transfers
- ○ Loan programs

Site Selection

- ○ What sites are available in the region?
- ○ What are the current market rates?
- ○ What site best meets my long and short term needs?
- ○ Committing to a real estate site (letters of intent, lease signing)

Workforce

- ○ Wage rate data
- ○ Employment and recruiting
- ○ Employee benefits and medical coverage
- ○ Training programs

Utilities

- ○ What are your requirements of this new facility?
- ○ Is the site that you are considering able to handle that need?
- ○ How can a site be upgraded?
- ○ Energy efficiency programs

Incentives

- ○ State tax credits and grants
- ○ County loans and tax abatements
- ○ University partnerships
- ○ NYSERDA (New York State Energy Research and Development Authority)
- ○ Low-cost renewable power

Misc.

- ○ Insurance (for the new facility and to cover the move)
- ○ Plant layout and efficiency

Logistics in Buffalo Niagara

For international companies looking to grow their business in the U.S., the Buffalo Niagara Region offers a strong logistics network and comprehensive options for warehousing and distribution in North America.

Our region is a shipping and logistics hub that provides access to the Canadian and U.S. market, with the ability to reach 40% of the North American population within one day's drive. Our region is home to seven international ports of entry, four automobile border crossings, two rail border crossings and one water port. Because of Buffalo Niagara's proximity to Canada, it is also home to a wealth of expertise on cross-border issues and a broad spectrum of cross-border services required for successful entry to the U.S. marketplace for our international partners including: Customs brokerage expertise, 3PL warehousing services, trucking and distribution services, and international legal and financial assistance.

This comprehensive infrastructure is all designed to help international goods and services successfully enter the vast U.S. marketplace, including 30% of the total trade conducted between the world's two largest trading partners, Canada and the United States. For our international partners, this means their supplies and goods can easily and efficiently cross international borders and be in the hands of tens of millions of consumers in as little as one day!

As an international company considering U.S. expansion, shipping supplies to the U.S. will be an important aspect of your business. One of the best methods to receive goods from international suppliers is through the Port of New York and New Jersey. This port is the gateway to one of the most concentrated and affluent consumer markets in the world. It is the largest port on the East Coast, and the third-largest in the nation. In 2016, the Port of New York and New Jersey handled 3,602,508 cargo containers, valued at nearly $200 billion. These volumes allowed the port to maintain its position as the busiest on the East Coast with nearly 30% of the total market share.

There are multiple ways to move goods to Buffalo Niagara from the NY/NJ ports. Use their rail system or transport your goods via truck using the extensive roadway network throughout the state and region. The NY/NJ ports are located under 643 kilometers from Western New York, a less than 6-hour drive to most parts of the region. Once the product is finished and ready for the end user, Buffalo Niagara is within 804 kilometers (or a 10-hour drive) of 40% of the North American population.

For more information on this topic and logistics in Buffalo Niagara, please contact Peter Sigurdson, Regional Sales Manager at Sonwil Distribution. He can be reached at psigurdson@sonwil.com or 1-866-884-7980.

Did you know?

Buffalo Niagara offers Seven International Ports of Entry

4 HIGHWAY | 5,914-kilometer network of major interstates, state routes and local arterial roads is a critical factor in enabling effective connections for the region's economy.

2 RAIL | Served by four Class I railroads, one Class II (or Regional) railroad, and three Class III (or Short Line) railroads. Considered one of the largest railheads in the U.S.

1 PORT | The Port of Buffalo, the first major U.S. Port of Call encountered when entering the Great Lakes, consists of 28 terminals. The Port features a 208-metric ton American crawler crane and a heavy-duty front-end loader.

Legal Considerations

"The ongoing support of Invest Buffalo Niagara and the accomplished workforce of WNY will ensure our success here."

– Hany Tadrus, TexWeb, Inc

See full story on page 35

Steps to Incorporating a Business in New York State

When deciding to enter the U.S. market, the following are certain entity structure factors that are crucial for foreign companies to consider before expanding.

Foreign companies have several options when forming an entity in the U.S. In choosing the correct choice of entity, foreign companies should consider the purpose of the entity, the industry the company is in, types of securities issued, management issues, U.S. based investors or partners, and many tax issues (from flow through to double tax to tax rates, tax treatment upon liquidation, allocation of profits to losses, state tax issues, payroll and self-employment tax issues, sale of the business or assets issues, etc.). Such companies can form an entity through a subsidiary corporation of the foreign company, a branch of the foreign company, a limited liability company, a joint venture, or a partnership. Each structure has its advantages and disadvantages that depend on each company's specific circumstances. It is important for foreign companies to consult with U.S. legal, tax, and immigration counsel prior to determining the entity structure that is most beneficial for its plans to enter the U.S. market. Most often, a foreign company will form a corporate subsidiary (C-Corp) where that entity pays U.S. federal and state income taxes on its taxable income, with the other structures having an allocation approach to taxable income. A C-Corp can give an international company many legal protections, but also reduce their overall tax risks and costs.

The following is a brief review of the necessary steps for incorporating a business in the State of New York. *Please note that it is advisable to consult with an attorney on all matters pertaining to incorporation.*

Step 1: Name Search/Reservation

To form a corporation in New York State, it must first be determined whether or not the proposed name of the new corporation is already in use by an existing corporation, limited partnership or limited liability company. This determination can be made by forwarding a written request for a name search, along with a $5.00 fee per name submitted, to the New York State Department of State, Division of Corporations, One Commerce Plaza, 99 Washington Avenue, Albany, New York 12231. In addition, company names on file with the New York Department of State can be searched for free online at **http://www.dos.ny.gov/corps/bus_entity_search.html**. Requests for name availability cannot be handled by phone. Searching the availability of a corporate name, however, does not reserve the name.

A new corporation cannot use a name that is not "distinguishable" from that of an existing corporation, limited partnership or limited liability company on file with the Department of State. A corporation's name cannot contain those certain prohibited words set forth in Section 301(a)(1) of the of the Business Corporation Law. If the name chosen is available, it is advisable that it be reserved during the completion of your business plan. The name can be reserved for a period of sixty (60) days by filing an Application for Reservation of Name. The fee for reserving a name is $20.00.

If a name is reserved, the filing receipt issued by the Department of State for the Application for Reservation of Name must accompany the Certificate of Incorporation when presented to the Department of State for filing.

Step 2: Certificate of Incorporation

The next step is to complete and file a Certificate of Incorporation. The Certificate of Incorporation must be signed by one or more incorporators and must contain the name of the corporation, names and addresses of the incorporators, the stock issuance and structure, purpose of the corporation, address for the corporation's registered agent and county in New York where the corporation's offices will be located. The incorporation filing fee is $125.00 (not including legal fees). The filing fee is due at the time of filing. Payment of fees may be made by cash, check, money order, MasterCard, Visa or American Express. Checks and money orders should be made payable to the "Department of State." In addition, a certified copy of the filed Certificate of Incorporation may be obtained from the Department of State by submitting a written request along with the Certificate of Incorporation, as well as a $10.00 fee per certified copy.

The Certificate of Incorporation can be filed by mail with the New York State Department of State, Division of Corporations, One Commerce Plaza, 99 Washington Avenue, Albany, New York 12231, or by fax, or by using the New York Department of State Online-Filing System. The Department of State offers optional expedited filing options, which cost an additional, non-refundable fee.

Step 3: Filing Receipt and Filed Certificate of Incorporation

If the Certificate of Incorporation is approved for filing, a Filing Receipt and filed copy of the Certificate of Incorporation will be issued by the Department of State. The corporation exists upon issuance of the filed Certificate of Incorporation. Corporations that want to do business in more than one state must also comply with each state's individual statutes regarding qualifications to do business, as well as all other applicable federal and state laws and regulation

Step 4: Corporate Formalities

Once the business is incorporated, certain corporate formalities must be respected. Accordingly, an organizational meeting should be scheduled to elect directors and officers, establish by-laws, properly capitalize the corporation and issue share certificates. Care should be taken not to comingle corporate and personal funds and the corporation has to have a separate bank account. Moreover, New York law requires that a meeting of the shareholders of the corporation be held annually for the election of directors and the transaction of other business. In addition, the board of the directors of the corporation has to meet regularly. The secretary of the corporation should record the minutes of the meetings of the directors and shareholders and maintain such minutes in the corporation's minute book.

Doing Business Under An Assumed Name in New York ("D/B/A")

Corporations in New York are required by statute to conduct activities under its name as set forth in its filed Certificate of Incorporation. If a corporation desires to conduct activities under a name other than its true legal name, a certificate complying with Section 130 of the General Business Law must be filed with the New York State Department of State.

A domestic or foreign New York corporation may conduct or transact business under an assumed name (commonly referred to as a D/B/A) by filing a Certificate of Assumed Name pursuant to Section 130 of the General Business Law. A fillable Certificate of Assumed Name form and instructions may be obtained on the New York State Department of Corporations website.

In addition to the $25.00 New York Department of State filing fee, an additional county filing fee is collected based on the county or counties in which the corporation does business or intends to do business. The county filing fee is $25.00 for each county, except for the counties of New York, Kings, Queens, Bronx and Richmond, for which the additional fee is $100.00 for each county.

The completed Certificate of Assumed Name, together with the appropriate filing fee should be forwarded to the New York Department of State, Division of Corporations, One Commerce Plaza, 99 Washington Avenue, Albany, New York 12231.

Step 5: Employer Identification Number (EIN)

The Internal Revenue Service requires that businesses operating as a corporation obtain an employer identification number (EIN). An EIN, also known as a Federal Tax Identification Number, is a nine-digit number assigned by the IRS and used to identify taxpayers who are required to file various business tax returns. The online application available on the IRS website is the preferred method for customers to apply for and obtain an EIN; however, customers can also apply by completing an Application for Employer Identification Number (Form SS-4) and sending it to the IRS by fax or mail. There is no cost to obtain an EIN.

For more information on this topic, please contact Carolyn Powell, Business Development Director, International at Invest Buffalo Niagara (content reviewed by legal experts). She can be reached at cpowell@buffaloniagara.org or 1-800-916-9073 x104.

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 U.S. temporarily to carry on limited activities for the benefit of his or her foreign employer. While in the U.S., 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 U.S. worker.

The B-1 visa classification is often used by sales personnel to enter the U.S. to solicit sales of foreign-made products. The sales person, however, is not allowed to sell products that are made by a U.S. subsidiary of the foreign employer. This category may also be used to perform certain after-sales activities pursuant to a contract of sale.

The B-1 visa is also often used by executives and managers of foreign companies to enter the U.S. to do certain preliminary work necessary to start-up a business in the U.S. Such activities would include meeting with lawyers and accountants, opening bank accounts and entering into contracts and leases for the new U.S. company. The executive or manager, however, cannot be actively involved in the management of the U.S. business without proper work authorization. This would be considered local employment in the U.S. with the benefit directly accruing to the U.S. company.

Most business visitors must apply for a B-1 visa at a U.S. Consulate. However, Canadian citizens andcitizens 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 full-time outside the U.S. 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 U.S. temporarily to render services to a related U.S. 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, equipment, 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 U.S. 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 U.S. and in at least one other country for the duration of the employee's stay in the U.S.

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 U.S. 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 U.S. investment, the financial ability of the foreign entity to pay the beneficiary and the financial ability to commence doing business in the U.S.

The L-1 visa can be issued for up to 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 U.S. 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 U.S. 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 of an L-1 employee, classified as L-2, is 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 he/she may apply to accept employment just by virtue of their L-2 status. Children of an L-1 employee under 21 years of age are also classified as L-2 and may attend school, but may not apply for employment authorization.

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

1. The H-1B Category

The H-1B visa category can be utilized to bring individuals to the U.S. 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. Please note that this category is requiring careful documentation that one's bachelor's degree is closely linked and required for the role.

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 meansthat the U.S. employer will have to attest to the U.S. Department of Labor that certain employment 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 U.S. Citizenship and Immigration Service 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.

USCIS recently issued a regulation that allows 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.

2. The TN Category

The North American Free Trade Agreement ("NAFTA") contains immigration provisions allowing certain Canadian and Mexican professionals to enter the U.S. under a TN visa to work for a U.S. employer. The TN visa is valid for up to three years with the ability to obtain three-year extensions. To be eligible under this category, the Canadian or Mexican 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 include: accountants, engineers, scientists, 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.

TN dependents (TDs) are not eligible to seek employment authorization. If they wish to work in the U.S., they must secure work-permitted status independent of their spouse or parents TN. TN dependents do not have to be citizens of Mexico or Canada in order to be eligible for a TD visa; they need only to prove their relationship to the TN holder by Marriage or Birth Certificate.

D) Treaty Traders (E-1 Visa)

The E-1 Treaty Trader visa is available to citizens of countries that maintain treaties of commerce and navigation with the United States, including Canada.

In order to qualify for this visa, the treaty trader must: be a national of a country with which the United States maintains a treaty of commerce and navigation; carry on substantial trade with the U.S.; and carry on principal trade between the U.S. (must be at least 50% of all international trade, not including domestic) and the treaty country which qualified the treaty trader for E-1 classification.

Trade is generally defined as the existing international exchange of items of trade for consideration between the United States and the treaty country. Items of trade include but are not limited to: goods, services, international banking, insurance, transportation, tourism, technology and its transfer, and some news-gathering activities. Substantial trade means that it's an amount sufficient to ensure a continuous flow of service between the U.S. and the treaty country through "numerous transactions over time."

The treaty trader application is filed at the U.S. Consulate abroad and is issued for up to a five-year period. An E-1 nonimmigrant who travels abroad will generally be granted an automatic two-year period of readmission when returning to the U.S. Requests for an extension of status may be granted in increments of up to five years at an embassy or two years if filing with USCIS via mail with no maximum limit to the number of extensions which may be granted. All treaty traders, however, must maintain an intention to depart the United States when their status expires or is terminated.

E) TREATY INVESTOR (E-2 Visa)

Nationals of certain countries having treaties of commerce with U.S. 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. Among other countries, citizens of China, India, Russia and Brazil are not eligible for an E visa as these countries do not maintain treaties of commerce with the U.S. 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 U.S. business. The U.S. 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 U.S. must also be a citizen of the treaty country.

An application must show that an investor 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 proportional to the total value of the particular enterprise in question; or an amount normally considered necessary to establish a viable enterprise of the type contemplated. The investment is measured by the amount that the investor has "at risk" in the U.S. business. Indebtedness such as mortgage debt or commercial loans secured by assets of the U.S. 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 U.S. workers. The investor must also demonstrate that he or she has assets or income from other sources that will continue after the investment 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 U.S. 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. Applications may also be filed for managers or executives of the U.S. enterprise or "essential employees" given they individually qualify and they possess the same nationality of the business in the U.S.

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; including employment creation through investment in a U.S. business
- A close relationship to a U.S. citizen or U.S. permanent resident
- 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 is usually required to first obtain a labor certification. This is a multistep process whereby the employer "tests the market" to determine that no qualified U.S. workers are available to fill the position and then seeks a determination from the Department of Labor that their efforts warrant hiring a foreign national worker in a permanent capacity. This is lengthy process, which requires the employer to advertise, recruit and reject (if appropriate) U.S. citizens or permanent resident who apply for the position.

After labor certification is issued, or if the worker is exempt from labor certification, the employer will file a preference petition with U.S. 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 or green card. 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 U.S. Consulate from outside the U.S. (generally referred to as "visa processing"). Second, if he or she is already working in the U.S. under a temporary visa, the application may be filed with U.S. Citizenship and Immigration Services (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 have increased.

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.

First Category – Priority Workers

Priority Workers are defined as follows:

- Aliens with extraordinary ability in the sciences, arts, education, business or athletics
- Outstanding researchers and professors
- 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, multinational 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. 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.

Third Category

Skilled workers, professionals (possesing at least a bachelor's degree), and other workers.

Fourth Category

Special Immigrants Visas under this category will be available primarily to religious workers.

Fifth Category

Employment Creation Immigrants This category provides visas for foreign investors entering the U.S. 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 U.S. 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.

B) 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.

For more information on this topic, please contact Carolyn Powell, Business Development Director, International at Invest Buffalo Niagara (content reviewed by immigration experts). She can be reached at cpowell@buffaloniagara.org or 1-800-916-9073 x104.

Comparison Chart:
L-1 Intra-Company Transferee and E-2 Treaty Investor

	L-1 STATUS : INTRACOMPANY TRANSFEREES	E-2 STATUS : TREATY INVESTORS
SUMMARY	Allows managers/executives (L-1A) and specialized knowledge employees (L-1B) to "transfer" to an affiliated U.S. company. Applicant must have one year of full-time employment with parent, subsidiary, affiliate, or branch office outside the U.S. before eligible for L-1 transfer.	Allows nationals of treaty countries to invest a substantial amount of capital in a new or existing U.S. business. Investment must be "at-risk" in the commercial sense. Investor must plan to direct and develop the enterprise. Managers and essential employees may also apply for E-2 status.
PROCEDURE	Canadian citizens can apply for status in-person at a port-of-entry for immediate decision. All other nationalities must file a paper-based application at a USCIS Service Center; upon approval, applicant must attend visa interview at U.S. Consulate/Embassy abroad.	E-2 visa applications are submitted to U.S. Consulate/Embassy abroad. Processing time for government review varies by location (generally 2-8 weeks). Applicant must attend in-person visa interview. Applications may also be filed with USCIS for foreign nationals currently in the U.S.
GOVERNMENT FEES	• $460.00 petition filing fee; • $500.00 anti-fraud fee (first-time L-1 applicants); • $6.00 I-94 card (Canadian) or • $1,410.00 Premium Processing *(if applying through mail).*	• $205 visa application ("MRV") Consulate fee; • Reciprocity fees vary per nationality ($40 Canadian). • $460 petition fee if filing by USCIS.
DURATION	Initial approval period of up to three years (existing U.S. business) or one year (new office). Extensions may be granted. • L-1A – total stay of seven years in U.S. • L-1B – total stay of five years in U.S. Renewals beyond 5/7 year limit available to individuals in U.S. less than 183 days per year.	Visas issued up to five years depending on consular post. Applicant admitted to the U.S. for two-year periods not to exceed visa validity date. Extensions possible so long as the applicant continues to comply with all visa requirements.
DEPENDENTS	Spouses and children under age 21 may be admitted to the U.S. in dependent L-2 status. Spouses may apply for U.S. employment authorization; children may attend school.	Spouses and children under age 21 may be admitted to the U.S. in dependent E-2 status. Spouses may apply for U.S. employment authorization; children may attend school.
CAN I OBTAIN A GREEN CARD?	Permits "dual intent" meaning individual may apply for permanent residency ("green card") and hold nonimmigrant status simultaneously. Managers and executives may file immigrant petition without first obtaining a PERM labor certification approval; this streamlines the green card process.	E-2 status does not permit dual intent. An E-visa applicant must intend to depart from the United States upon expiration/termination of status. Green cards may be an option in limited circumstances.
REQUIRED DOCUMENTATION	Petitions require extensive corporate documents of both foreign and U.S. companies, applicant's qualifying employment abroad, and credentials for position in the U.S.	Petitions require extensive financial documentation proving substantial, at-risk investment in the U.S. and source of funds. New business requires business plan with five-year financial and hiring projections showing creation of jobs for U.S. workers.

Global Entry Program

For those traveling either internationally or domestically, one of the worst parts of the trip can be delays caused by government security checks. Many unpleasant images come to mind—long lines, crying or impatient children, irritated travelers pressed together in unpleasant conditions. But recently, the U.S. government has been making a concerted effort to streamline and improve conditions for travelers, including through its Global Entry program.

Major benefits of being approved for Global Entry include:

- Avoiding lengthy processing times at airports and land and sea ports of entry to the U.S.
- Access to expedited entry benefits in certain countries other than the U.S.
- Never having to fill out annoying Customs Declaration forms when returning to the U.S.
- Gaining access to the "TSA Pre" program at more than 200 U.S. airports. In addition to speeding your entry, this means you don't need to remove your shoes, laptops, liquids, belts, and light jackets.

To apply for Global Entry, **create an account at https://ttp.cbp.dhs.gov**, complete your Global Entry application through the site (including uploading necessary documents proving your citizenship), and await conditional approval. You will then be asked to schedule an in-person interview, at which you will pay a $100 fee. The timing of this process varies based on the level of activity at CBP. Once you receive final approval, your card usually arrives within two weeks.

A few tips for applying for and using Global Entry:

- Before applying, gather information on your residences, employment, and international travel for the past five years.
- You should use your PASS ID (Trusted Traveler Number) located on the back of your Global Entry card when booking flights. This allows the Transportation and Security Administration (TSA) to confirm you ahead of time as a Trusted Traveler.
- You will still need your passport or permanent resident card when traveling internationally by air, and cannot use your Global Entry card in NEXUS or SENTRI lines at other U.S. ports of entry

Countries currently participating in Global Entry include the following: Argentina, Canada (members of NEXUS only), Colombia, Germany, India, Mexico, Netherlands (no new applications possible new program in progress, but no ETA available), Panama, Singapore, South Korea (members of Smart Entry Service), Switzerland, Republic of China (Taiwan), United Kingdom, and United States (U.S. citizens and lawful permanent residents). Please note that Netherlands does participate in this program but no new applications are being accepted, a possible new program is in progress, but no ETA is available yet.

Note that other Trusted Traveler programs also exist to help speed travel between the U.S. and certain other countries, including NEXUS and SENTRI. Entries using the NEXUS and SENTRI expedited travel lanes at land border ports of entry is only permitted for those enrolled in these programs.

If you'd like more information on options to speed your travel, CBP has published a video on how they are "improving to keep you moving," at **https://www.cbp.gov/newsroom/video-gallery/2015/01/how-expedite-your-entry or cbp.gov/travel**. There is also a list of FAQ's for Global Entry on the CBP website at **https://www.cbp.gov/travel/trusted-traveler-programs/global-entry/frequently-asked-questions**, and a handy Global Entry Guide available at **https://www.cbp.gov/sites/default/files/documents/globalentry-info-guide.pdf**.

For more information on this topic and immigration categories in the U.S., please contact Elizabeth Klarin, Counsel at Lippes Mathias Wexler Friedman LLP. She can be reached at eklarin@lippes.com or toll free at 1-866-853-5104.

Importing Goods into the U.S.

Recent policies, tariffs and continued aggressive enforcement by U.S. Customs and Border Protection (CBP) mean it is more important than ever for non-U.S. companies to be familiar with the legal standards for complying with U.S. customs laws and regulations governing the importation of merchandise into the U.S. The imposition of duties on steel and aluminum articles, goods of Chinese-origin and Executive Order 13785 ("Establishing Enhanced Collection and Enforcement of Antidumping and Countervailing Duties and Violations of Trade and Customs Laws"), signed by President Trump in 2017, have only increased the stakes in the event of non-compliance.

Non-U.S. companies with U.S. subsidiary or branch operations may be importing into the U.S. directly from overseas suppliers, as well as from parent and affiliated companies. Many non-U.S. companies that have not yet established a presence in the U.S. can act as non-resident importers in the U.S., a strategy that allows them to better serve U.S. customers. For any non-U.S. companies with U.S. importing activities, U.S. customs laws and regulations, as well as CBP's investigation and enforcement activities, can pose significant challenges and risks.

U.S. customs laws and CBP regulations require all businesses and individuals to exercise "reasonable care" when importing merchandise into the U.S. However, "reasonable care" is not defined in these laws and regulations. In general, a lack of reasonable care can (and often does) lead to CBP imposing administrative monetary penalties on importers and others involved in the transaction that CBP alleges failed to meet this legal standard. CBP regularly exercises its monetary penalty power over non-U.S. companies.

For CBP to assess an administrative monetary penalty, the underlying violation must involve the introduction or entry of merchandise into U.S. commerce by means of a material and false act or statement (oral, written or electronic), or a material omission. "False" does not require intent; essentially, it means in error or incorrect. "Material" means information that tends to affect the decision by CBP to admit and release goods from its custody ("clear customs") or assess accurate duties, taxes and fees. Penalties can also be imposed against those who aid and abet a violation of the customs laws and regulations.

Unlike Canada Border Services Agency's (CBSA) Administrative Monetary Penalty System (AMPS) or sanctioning systems of other countries, CBP's administrative penalties are not assessed according to a schedule that provides importers with some certainty as to the risk and potential exposure in the event of a violation or series of violations. Instead, CBP penalties can range from a maximum of two (2) times the unpaid duties (for simple negligence) to four (4) times (for gross negligence, generally meaning recklessness) to the U.S. domestic value of the imported merchandise (for fraud, where intent is shown by direct or circumstantial evidence). Each civil penalty case is determined by reviewing aggravating and mitigating factors. CBP administrative monetary penalties can also be limited to accrued interest on unpaid or underpaid duties, taxes and fees by submitting a full and complete voluntary prior disclosure of the infringements.

Meeting the reasonable care standard can be shown by evidence that the importer consulted with a U.S. customs broker, legal counsel familiar with customs laws and CBP regulations, or by other means. Generally, documentary evidence, including sworn statements, will be required to demonstrate that an importer or other party involved with the importation exercised reasonable care to defend against CBP's allegations of a violation. The statute of limitations for negligence and gross negligence penalties is five (5) years from the time of entry, while the limitations period for a fraud penalty is five (5) years from the date the fraudulent activity is discovered. Therefore, complete and accessible documents will be necessary to defend a CBP civil penalty proceeding.

Non-U.S. companies, business owners, and individuals who are involved with U.S. importing activities are not immune to CBP's civil penalties if they fail to meet the reasonable care standard. The case might involve a non-U.S. company acting as a non-resident importer that is assessed CBP monetary penalties for not declaring pencils imported into the U.S. from China as subject to U.S. antidumping/countervailing duties. It could also involve a non-U.S. company facing potential penalties for importing figure skating dresses into the U.S. and, in good faith but wrongly, declaring the dresses qualified as duty-free under the North American Free Trade Agreement (NAFTA). In both instances, and many others, CBP will pursue administrative monetary penalties against the non-U.S. company for importing practices that violated the "reasonable care" standard.

One recent concern arises from a CBP binding ruling issued in September 2018. The ruling relates to goods that qualify as duty-free under NAFTA rules of origin, but because key components originated from China, CBP found the item imported into the U.S. (an electric motor) was of Chinese-origin. Because of this, the item was subject to additional punitive duties imposed in 2018 by the Trump administration. Similar imported goods might also be subject to an additional punitive duty rate of 10% or 25%, depending on the U.S. tariff classification (HS) code.

In the ruling, the compliance risk relates to satisfying CBP's "substantial transformation" standard for determining country of origin. Although the CBP ruling involved a NAFTA rule of origin issue in parallel to a more general country of origin issue, this same standard applies regardless of where finished goods are produced or assembled from foreign materials and components. Currently, this risk includes importing goods into the U.S. from countries such as Vietnam and Thailand, which are attracting more attention as importers of goods to the U.S. look to diversify or find alternative sourcing outside of China to avoid the additional punitive duties. As might be expected, many suppliers, middlemen and importers are becoming creative in seeking to avoid these duties – and CBP is prepared to investigate and assess civil penalties where evasion is found to exist, as well as refer matters to the U.S. Department of Justice for potential criminal prosecution. Importers need to perform the necessary research and due diligence to remain compliant and out of CBP's crosshairs.

For more information on this topic and importing goods into the U.S., please contact Jon P. Yormick, Special Counsel at Phillips Lytle LLP. He can be reached at jyormick@phillipslytle.com or 1-716-847-7006.

Made in the U.S.A.? Better make sure.

Any product expressly or impliedly touted as “Made in the USA” must be “all or virtually all” manufactured in the United States. Failure to meet this standard may result in an uncomfortable, and perhaps costly, run-in with the U.S. Federal Trade Commission (FTC), whose charge is “to prevent deception and unfairness in the marketplace.” The FTC defines “all or virtually all” to mean that “all significant parts and processing that go into the product must be of U.S. origin. That is, the product should contain no — or negligible — foreign content.”

Just last month, the FTC issued “closing letters” to two companies that had “overstated the extent to which” their products were made in the United States. Closing letters are administrative tools the FTC uses to exact significant remedial measures, including removing unqualified U.S.-origin claims from all online marketing materials, introducing qualified claims such as “Made in the USA with Some Imported parts,” updating trade show materials, and communicating compliance to business partners. In exchange for demonstrated compliance, the FTC typically agrees to close out its pending investigation, unless public interest requires further action. Even so, it is not uncommon for a closing letter to warn that the agency “will continue to monitor the Company’s advertising closely.”

So, what can you do to reduce the risk of running afoul of the FTC?

- Visit the FTC website to understand the law. (https://www.ftc.gov/tips-advice/business-center/guidance/complying-made-usa-standard)
- Carefully calculate how much of your manufacturing costs are linked to U.S. parts and processing because a big red flag for the FTC is a product whose imported components either account for a significant proportion of the product’s manufacturing cost or are essential to the product’s functionality.
- Keep reliable evidence supporting your “Made in the U.S.A.” claim.
- If appropriate, consider using qualified claims to indicate that your product is not entirely of domestic origin.

For more information on this topic, please contact John G. Horn, Partner at Harter Secrest and Emery LLP. He can be reached at jhorn@hselaw.com or 1-800-828-6522.

Patents and Trademarks

Intellectual property ("IP") can be a valuable asset in support of a business expansion into the U.S. Two common forms of IP protection are patents and trademarks. A patent protects your company's inventions or discoveries, while a trademark serves as an identification of the source of your goods or services, often through the use of brand names, taglines and logos.

Companies should be aware that both patents and trademarks are national rights that start and stop at international borders. Patents and trademarks issued in countries outside of the U.S. are not directly enforceable in the U.S. Protecting your IP in the U.S. (and all countries where you plan on doing business) should be a priority.

Always Consider Trademark Protection

Trademark rights in the U.S. are based on the actual use of a mark in commerce. Certain common law rights to a trademark are immediately acquired upon the use of a mark in the U.S., but the scope of these rights can diverge from state to state and are limited to the specific geographic regions of use. A much greater set of rights is obtained through federal registration with the U.S. Patent and Trademark Office, including nationwide priority and the right to bring an infringement lawsuit in federal court. Federal registration will also help prevent the registration of another confusingly similar mark by a competitor.

In the context of business growth, you want to be sure at an early stage that your preferred brand names will not risk infringing the rights of a third party in your planned area of expansion. The trademark prosecution process will help you identify potential issues with confusingly similar brands that are already established in the marketplace. One of the first steps prior to filing a trademark application should involve performing a search for any existing use of your desired name and close variants. The search process can vary from simple to comprehensive in scope, depending on your business needs at the time.

Far too many companies need help correcting deficient trademark applications that were filed by individuals or through various non-legal services, so when it comes to filing for trademark protection, it is generally recommended that companies engage qualified legal counsel at the outset. Companies can expect, on average, to pay an attorney approximately $1,500-$2,000 total per trademark application from start to initial registration. Trademarks are a cost-effective means for building value in your brand (and by extension, your company).

Consider Patent Protection If It Makes Sense For Your Business

An international company that has developed a new product may be able to obtain protection for its invention by securing a U.S. patent. Patents can be very valuable because they allow companies to stop others from making, using, selling or importing the underlying invention. However, patents can also be expensive to draft, prosecute and maintain, exceeding $10,000 in all but the most simple cases.

Accordingly, if your business is considering patent protection, you need to determine how patents fit in with your broader business goals. Are you looking to strike licensing deals? Do you want to aggressively enforce your rights in the industry? Are you looking to use patents as a shield against bigger market players? Is the goal to use patents to help attract institutional investment? All of the above?

While it is recommended that companies file for patent protection prior to any public disclosure, use or offer for sale of the invention, U.S. patent law may also allow an application to be filed within a one-year grace period of the initial public disclosure. Additionally, companies may consider filing provisional patent applications in the U.S., which can initially be cost-effective and will reserve filing dates for a one-year period.

It can be helpful to consult with a U.S. patent attorney that has both the background technological knowledge that is required to understand your invention, as well as familiarity with the broader business strategies of your company.

For more information on this topic, please contact Brendan S. Lillis, attorney at Phillips Lytle LLP. He can be reached at blillis@phillipslytle.com or 1-716-847-7058.

Checklist for International Purchasers of Commercial Property

The process of purchasing commercial or industrial real property in the U.S. can differ slightly from how you currently complete your real estate due diligence. Here are some key considerations for international investors when entering the U.S. market:

1. The Purchase Contract

Your Purchase Contract should include the following vital pre-Closing protections/conditions:

- a) Authorization to perform structural and financial due diligence.
- b) The right to review all title work for the property.
- c) The right to perform an engineering inspection and Phase 1 Environmental Report in order to identify any unknown conditions.
- d) The right to cancel the Purchase Contract if unable to obtain adequate financing.
- e) Other potential contingencies if the purchase will require public financing.

2. Choice of Purchasing Entity

One of the most important decisions an international Purchaser will make is the type of entity or organization to form to own the real property. There are many options to consider which may or may not be suitable depending on the investor's home country. For example, Canadian investors often choose, due to income tax and liability considerations, a limited partnership. A limited partnership offers liability protection to its limited partners (who are often the Canadian investor(s)) while its general partner (usually a U.S. Corporation owned by a Canadian entity) bears the full liability for all debts and obligations. From an income tax standpoint, gains or losses pass through directly to the individual limited partners. These choices of entities are different from the typical US real estate investor who uses a limited liability company (LLC). In Canada, the Canadian Revenue Agency treats LLC's as a C type corporation, thus negating the pass-through benefits that a US investor would have with an LLC.

That being said, a limited partnership may not be the right choice for all international investors. Other vehicles (including an irrevocable trust or other non-partnership entity) may be the better option in certain scenarios. In addition, the recent amendments to the U.S. Tax Law and the corresponding reduction in the corporate tax rate could also play a significant role in an investor's choice of entity. An international investor will need to confer with a US based certified public accountant and its local accounting firm to determine the optimal form of entity to be used to purchase the US based real property.

3. Timing

Once the choice of entity analysis described above is complete, the typical timeline for purchasing U.S. commercial real property is approximately 60 to 90 days from contract signing.

These are just a few of the items to consider when entering the U.S. industrial real estate market. We would be happy to work with you to establish the most effective plan for your purchase.

For more information on this topic, please contact Thomas M. Gordon, Partner at Gross Shuman P.C. He can be reached at tgordon@gross-shuman.com or 1-866-893-2003.

Accounting Considerations

"We see great potential for our product in the US market and a great opportunity to develop that potential right here in the Buffalo Niagara region."

- Robert Pike, Welded Tube

See full story on page 36

New York State Tax Benefits for Manufacturers

Doing business in the U.S. can be confusing, with every state offering different incentives programs and processes to apply for those programs. But New York State has made it easier for manufacturing companies by building incentives right into the tax structure. **Qualified manufacturers in New York State have a 0% state corporate income tax rate and are eligible for a 20% real property tax credit.**

To qualify, a manufacturer must have property in New York that is principally used by the taxpayer in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture, or commercial fishing and during the tax year more than 50% of its gross receipts are derived from the sales of goods produced by these activities.

To be eligible for the zero percent tax rate the manufacturer must have either:

- **Property located in New York with an adjusted basis for federal income tax purposes at the close of the taxable year of at least $1 million; or**
- **All of its real and personal property is located in New York.**

The zero percent tax rate applies to the business income tax base and is only available for qualified manufacturing corporations taxed under Article 9-A, franchise tax on business corporations.

The real property tax credit for qualified manufacturers mentioned above is a credit equal to 20% of real property taxes paid during a tax year for real property located in New York and principally used in manufacturing. The property can be owned or leased by the taxpayer. Leased property must be leased from an unrelated third party. The lease must be in writing and require the lessee to pay the real property taxes. The lessee must make the real property tax payment directly to the taxing authority.

For those that are not qualified manufacturers, the tax rate on business income is 6.5%

This tax structure encourages businesses to expand and grow in New York and it doesn't stop there. New York offers a number of attractive incentive programs available at the state and local levels to help businesses locate and grow here. **Additionally, there is no sales tax on machinery, equipment, tools or supplies used in manufacturing, and New York State does not have a personal property tax on inventories, machinery, or equipment, either.**

For more information on this topic, please contact Andrew J. Toth, CPA, Partner at Tronconi Segarra & Associates LLP. He can be reached at atoth@tsacpa.com or 1-716-633-1373.

Niagara Falls, USA

Research and Development Credits

Misconceptions about the research and development (R&D) credit can often cause businesses to overlook potential benefits. Too often, these benefits remain unexplored and unused by companies. Here are the top three reasons why management should reconsider evaluating this incentive:

Benefits may be available throughout a business life cycle

Whether a business is in its infancy or mature, the R&D credit may allow more immediate benefits than previously available. Certain businesses with fewer than five years of gross receipts may offset the FICA employer portion of payroll tax. For 2018, this equates to 7.65% of an employee's first $128,400 of salaries and wages. This allows cash otherwise earmarked for payroll taxes to then be available for other immediate needs. The credit may be calculated in one of two ways, which allows mature companies to receive benefits even if not previously explored.

Broad spectrum of costs may be eligible

Qualifying research expenditures may arise from wages, supplies and contractors. Wages include direct and certain indirect supervision. Supplies includes materials used to develop and test assumptions, including prototypes. Contractor expenses include a percentage of amounts paid to third parties that directly impact the R&D qualified activities. This work must be performed by companies within the United States.

Benefits available to more than a few industries

Many businesses face similar challenges as well as market pressures to remain competitive. Often, considerable effort is allocated to activities designed to develop new, improved or more reliable parts, products or processes. The key to tying these initiatives to the R&D credit is to make sure that the activities meet the "Four-Part Test". Activities must meet all criteria to qualify for the R&D credit.

- Uncertainty: Demonstrate that there is technical uncertainty at the onset
- Permitted purpose: Methods to create or increase functionality of a part, product or process
- Experimentation: Multiple iterations is required to evaluate whether desired result has been achieved
- Technical in nature: Reliance on principles of a hard science (e.g. engineering) is required to address technical uncertainty

For more information on this topic, please contact Courtland "Cory" Van Deusen V, CPA, Partner at Lumsden McCormick LLP. He can be reached at cvandeusen@LumsdenCPA.com or 1-888-586-7336.

Taxing Foreign Companies Selling into the U.S.

As companies engage in online sales through both distributors and direct sales, they need to pay attention to the changing tax structures jurisdictions are implementing to tax these sales. Although a company may not have a physical presence in a state or even in the U.S., they may still be required to file taxes if they have large enough sales volumes. Companies should review their business activities in the U.S. to determine whether their sales exceed the sales tax nexus thresholds, which vary state to state. If so, this could pull your corporation into U.S. tax filings even if you do not have a U.S. Corporation established. State and local governments are not bound by U.S. treaties or permanent establishment rules and may impose tax filing requirements on any foreign companies doing business within their jurisdictions.

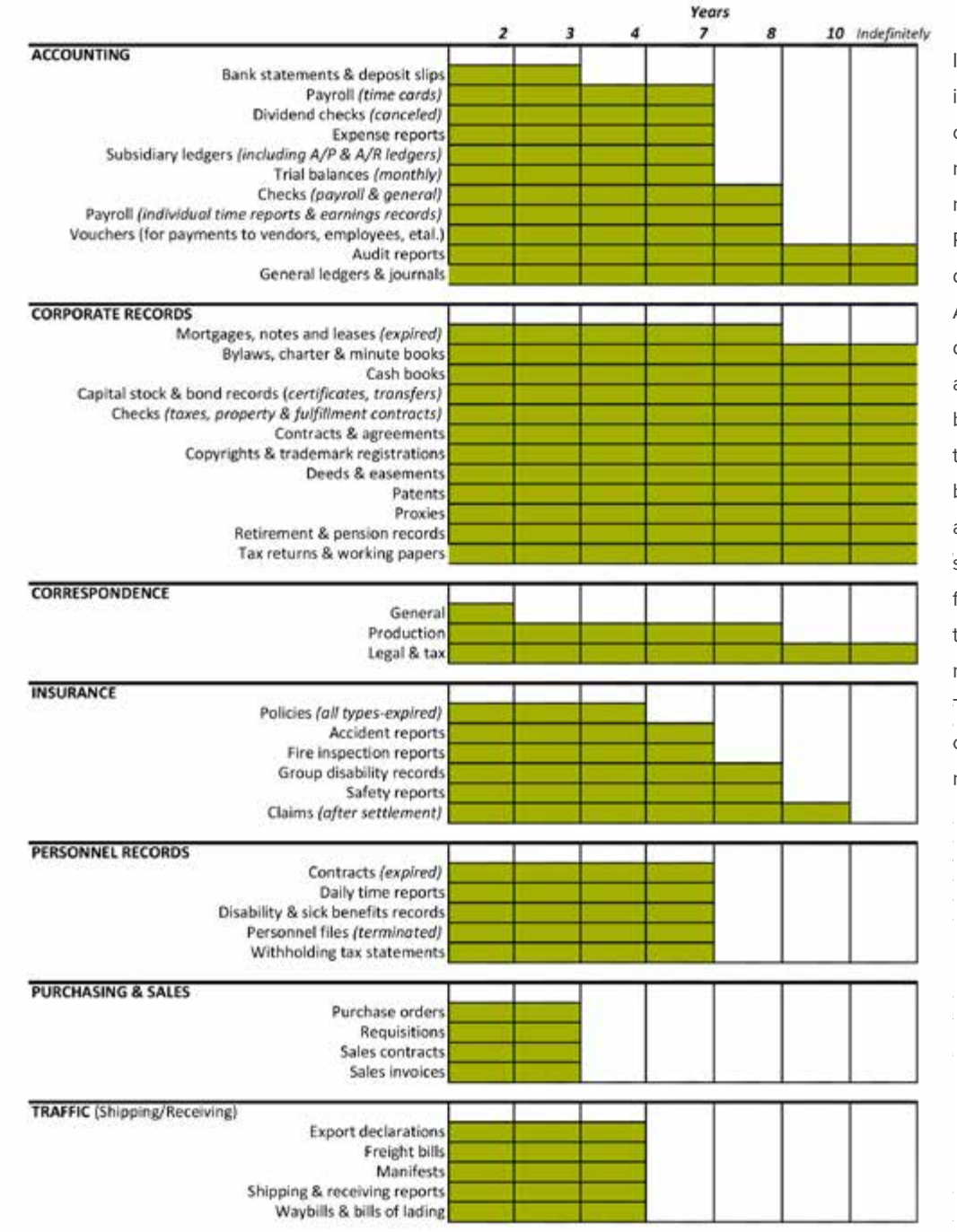
In the aftermath of the U.S. Supreme Court's landmark decision in South Dakota v. Wayfair, Inc. which overturned the decades-old physical presence standard for sales tax nexus, many states are moving quickly to enact new sales tax filing, requiring "remote sellers" who engaged in more than 200 or more separate transactions or exceeded $100,000 of annual sales in the state to register and collect sales tax. A remote seller is any business that sells products or services to customers in a state using the internet, mail order, or telephone without having physical presence in that state.

Over the past two years, several states have already passed legislation on economic nexus thresholds for sales tax. Since the Supreme Court's decision, even more states have enacted legislation or have issued new regulations or administrative guidelines, updating their sales tax filing requirements in an effort to compel remote sellers to collect and remit tax on sales to customers in their states.

Please note that not all states are applying the same economic nexus thresholds for sales tax. These policies vary by state, and we are anticipating additional guidance from these states' taxing authorities regarding sales tax collection implications for remote sellers.

For more information on this topic, please contact Andrew J. Toth, CPA, Partner at Tronconi Segarra & Associates LLP. He can be reached at atoth@tsacpa.com or 1-716-633-1373.

Record Retention Timeline for Businesses



International companies expanding into the U.S. should be aware of U.S. policies, procedures and requirements for maintaining records and important documents. Record retention guidelines may differ slightly between countries. All businesses must maintain documents and records, allowing accounting of business activities to be performed. Whether for an audit, tax return, or strategic planning, businesses must gather, summarize and analyze facts and figures to support financial documents. After financial statements are issued and tax returns are filed, companies must continue to retain records. This list offers general guidance compiled from federal and state resources.

For more information on this topic, please contact Mark Janulewicz, CPA, Partner at Lumsden McCormick LLP. He can be reached at mjanulewicz@LumsdenCPA.com or 1-888-586-7336.

Human Resources

"Western New York is a fantastic place to live and work. You can find hard working, sincere and dedicated employees here. I am blessed to have Buffalo as a place to learn, work and enjoy."

- Vijay Kumar, Aesku Diagnostics

See full story on page 34

Peace Bridge to Canada

HR Considerations When Entering the U.S.

If you are a foreign company looking to expand into the U.S. and you will have U.S. employees, it will be beneficial for you to know some of the human resources differences that apply for the U.S. It is important to establish policies and procedures that focus on employees and comply with federal & state labor laws. U.S. laws can vary from state to state. Although there are several similarities between U.S. HR policies and other countries, here are a few of the more commonly asked questions asked by firms entering the U.S. market:

1) Can a U.S. employee be dismissed without minimum notice or "pay in lieu of notice" (severance)?

Answer – Yes. "At will employment" exists in most states in the U.S. This allows an employer to dismiss an employee, usually for good reason, without the obligation of paying severance or minimum notice as is required in other countries.

In some states, if an employer requires notice of termination, then the employer is required to give the same notice to the employee or pay out the time covered by the notice period.

2) What are the minimum vacation periods and mandatory holidays in the U.S.?

Answer – There aren't any. Decisions as to how many vacation days or the paid holidays that an employee earns are at the discretion of the employer and can be designed to meet the needs of the company as well as the employees. U.S. employers will typically offer employees a standard number of holidays and vacation/personal time as a recruiting and retention tool but again these are not government mandated. Typical holidays offered by local manufactures/distributors are New Years, Memorial Day, Fourth of July, Labor Day, Thanksgiving, and Christmas.

3) How is medical insurance obtained?

Answer – Employee benefits play an increasingly important role in the lives of employees and their families and can have a significant financial and administrative impact on a business. Employee benefits in the US are handled differently than most countries. Health insurance plans and premiums can vary dramatically across the U.S. Typically; the company will negotiate with insurance plan providers to determine the best plans for that worksite. The employer then determines how much of the premium will be company-paid based on financial capabilities and what they need to be competitive to recruit the caliber of employees they need.

Based on your employment size, there can be mandates for minimum employer contributions toward the premium.

4) What are the allowable payroll frequencies in the U.S. (weekly, biweekly, etc)?

Answer – Similar to Canada, the choices can be weekly, bi-weekly, semi-monthly, and monthly. It is important to know which one to use based on the state in which you have operations. For example, in New York State – laborers are mandated to be paid no less than weekly while administrative staff can be paid bi-weekly.

5) Can I mandate that my workers receive their pay via direct deposit?

Answer – No. You cannot mandate that employees receive their pay via direct deposit only. A company is required to provide a live paycheck if preferred by the employee.

6) What are the mandatory U.S. policies for medical and/or maternity leave?

Answer – In the U.S., it depends on the state you are in and the number of employees you have. On a federal level, employers with over 50 employees, maternity and medical leave are covered by a 12 week "UNPAID" time frame under the Family Medical Leave Act. Employers have the availability to allow employees to use accrued vacation/sick time as well as crafting their own policies as to what benefits will be made available during the employees leave. These policies should ensure equal treatment of employees so as to avoid being seen as discriminatory.

Some states and cities have new paid leave policies that are being rolled out and can vary in their design. These policies affect all size employers. A well-crafted paid time off policy can usually accommodate some of these requirements but not all of them.

7) What is the minimum wage rate in the U.S.?

Answer – Minimum wage varies by state in the U.S. While the federal minimum wage is $7.25, some states set a higher minimum wage through state legislation. In New York State, the minimum wage will be $11.10 effective 12/31/18 (higher rates for NYC and Long Island/Westchester).

There are also "minimum" salary thresholds for exempt employees (salaried) that need to be met or the employee is deemed non-exempt and are entitled to overtime pay.

For more information on this topic, please contact John H. Bradley, Vice President WNY at Alcott HR. He can be reached at johnb@alcotthr.com or 1-888-425-2688.

Independent Contractor or Employee? Why Getting It Right Matters

Treating workers as independent contractors has many benefits for employers, including avoiding the cost of payroll taxes and benefits and not having to deal with the administrative requirements associated with employees. These benefits make independent contractor status an attractive alternative to classifying a worker as an employee, if the worker meets the legal tests for independent contractor status. Unfortunately, many employers mistakenly believe that simply calling a worker an independent contractor or having the worker sign an "independent contractor agreement" satisfies the legal requirements for independent contractor status. Rather, whether a worker is properly classified as an independent contractor or employee depends on the nature of the relationship between the worker and the company as determined under applicable law. Employers who misclassify a worker as an independent contractor face significant federal and state monetary liabilities and penalties. These penalties can be imposed not only on the company but also on the individuals responsible for the misclassification. Therefore, an employer must conduct a careful analysis before classifying a worker as an independent contractor.

Independent Contractor v. Employee

Several federal and state laws apply in determining whether a worker is an employee or independent contractor. The most important are the federal Internal Revenue Code ("IRC') enforced by the IRS, and the federal Fair Labor Standards Act ("FLSA") enforced by the United States Department of Labor ("DOL"). The IRC applies what is called the "right to control" test to determine employee or independent contractor status. The "right to control" test looks at whether the company for which the worker is performing services has the right to control or direct the worker to such a degree that he or she is an employee. It consists of 20 factors that are analyzed to determine the company's control over the worker's behavior (e.g., where, when and how the work is performed), the financial control the company has over the worker (e.g., whether the worker is paid by the hour or by the job, whether the worker can realize a profit or loss, and whether the worker makes his/her services available to others), and the nature of the relationship (e.g., is there a written independent contractor agreement, how integral are the worker's services to the company and the permanency of the relationship). The FLSA uses what is called the "economic reality" test to determine whether a worker is economically dependent on the company for which he or she renders services so as to qualify as an employee. The "economic reality" test consists of only six enumerated factors but in actuality they incorporate all of the IRC's "right to control" factors. Thus, both tests essentially use the same factors and a worker classified as an employee or independent contractor under one will in most cases be classified the same under the other statute. No one factor is controlling and the importance of a factor will depend on the position at issue and the circumstances under which the services are rendered. Even the existence of a written independent contractor agreement and both parties' desire for independent contractor status will not be determinative of the issue as the agency or court will look behind any such arrangement to determine the parties' actual relationship.

Legal Consequences of Misclassification

In addition to having to pay back payroll taxes, the employer's share of FICA contributions and unemployment taxes, and accompanying civil penalties, companies that misclassify a worker as an independent contractor can be liable for unpaid overtime, retirement benefits, medical claims, stock options and any other economic benefit that the worker would have been entitled to if he or she had been properly classified. In addition, if this issue is determined in a lawsuit, the employer may be liable for the worker's attorneys' fees. That is why it matters to get it right when classifying a worker as an independent contractor.

For more information on this topic, please contact James R. Grasso, Partner at Phillips Lytle LLP. He can be reached at jgrasso@phlllipslytle.com or 1-716-847-5422.

International Success Stories

"There is a lot that goes into an International expansion into the U.S. Start with us to help manage you through the process."

- Tom Kucharski, President & CEO
  Invest Buffalo Niagara

BUFFALO NIAGARA SUCCESS STORY

Kemper Systems picks Buffalo Niagara for U.S. expansion

COMPANY OVERVIEW:

Kemper System, a German-based manufacturer of Kemperol, a liquid resin based waterproofing and surfacing system, sought to establish a North American-based production headquarters to increase its competitiveness in the U.S. market. Location, specifically market access, was crucial in their site location decision as Kemper desired to significantly shorten the eight-week lead time to ship product from Europe to the United States. The company also wanted to be close to their large customer base in the U.S. Northeast.

Kemper required a move-in ready site and a competitive incentive package as they were also considering Florida and North Carolina. Furthermore, the availability and cost of the local workforce was a key factor in the decision-making process. The company requested detailed labor statistics to familiarize itself with the availability and cost of labor in Buffalo Niagara.

ORIGIN COUNTRY:
Germany

PROJECT TYPE:
Advanced Manufacturing

JOBS: 30 new

INVESTMENT: $3,336,600

REQUIREMENTS:

- Available workforce
- Move-in ready site
- Market access

INCENTIVES:

- Refundable Tax Credits
- Workforce assistance

PROJECT SOLUTION:

Invest Buffalo Niagara (InBN) worked closely with Kemper System to detail Buffalo Niagara's bi-national market access and ensure the company had an accurate picture of labor wages and availability. A key piece of that was InBN facilitating discussions between Kemper and the NYS Department of Labor. This connection proved extremely valuable during the hiring process as the Department of Labor assisted with job placement, establishing appropriate pay ranges to attract talent, and helping the company connect with workers recently laid off by a local company. Working with a local realtor, Kemper purchased an appropriate site for its project, a 4,180 square meter vacant plant in West Seneca. Through connections made by InBN, Kemper worked with local economic development partners and New York State to secure incentives for their project and cement their decision to locate in Western New York. Kemper will create 12 new jobs and invest over $3.3 million as it begins production.

BUFFALO NIAGARA SUCCESS STORY

Aesku NY, Inc. joins growing Buffalo Niagara life sciences cluster

ORIGIN COUNTRY:
Germany

PROJECT TYPE:
Life Sciences

JOBS: 31

INVESTMENT: $2,800,000

REQUIREMENTS:

• University collaboration

INCENTIVES:

• STARTUP-NY

COMPANY OVERVIEW:

Aesku NY, Inc. is a spin-off of Wendelsheim, Germany-based AESKU. DIAGNOSTICS, a research-focused supplier of innovative and efficient products and services for the early detection, diagnosis, and prognosis of autoimmune diseases. Founded in 2000, the company has grown to be a leader in the field of autoimmunity, launching over 140 products in over 80 countries worldwide. The company has small U.S.-based operations in both Atlanta, Georgia and Oakland, California, the latter of which is its domestic headquarters.

The German parent company, experiencing very positive growth, recognized a need for expansion of both its research & development and manufacturing operations. Due to a personal connection between University at Buffalo (UB) faculty member Vijay Kumar and an AESKU executive, the Buffalo Niagara region came into consideration. However, AESKU leadership had to be convinced that the Buffalo Niagara region was the ideal location for this project, competing with its current domestic locations and a strong challenge from the company's global headquarters in Germany.

PROJECT SOLUTION:

After several months of discussion, two New York State initiatives lined up to make this an easy decision for AESKU. First, the company was selected to be a member of the newly established New York Genomic Medicine Network, a collaboration between the NY Genome Center in Manhattan and UB, specifically its Center for Computational Research. This network links the medical community in New York City with the computational infrastructure at UB and the research community at Roswell Park Comprehensive Cancer Center, as well as private sector partners such as Aesku.

To seal the deal for Buffalo Niagara, Aesku was accepted among the first round of START-UP NY companies, a State incentive program that eliminates all state-taxes for a 10-year period and encourages companies to partner with academic institutions. Aesku had a natural partner in UB and has established its newest offices and laboratories on the Buffalo Niagara Medical Campus, projecting to create 31 new jobs and invest approximately $2.8M in new equipment.

BUFFALO NIAGARA SUCCESS STORY

TexWeb, Inc. expands to the U.S.A. in the Buffalo Niagara region of New York State

ORIGIN COUNTRY:
Egypt

PROJECT TYPE:
Advanced Manufacturing

JOBS: 10

INVESTMENT: $1,900,000

REQUIREMENTS:

- Made in U.S.A. label
- Proximity to Canada

INCENTIVES:

- Low cost hydropower
- Refundable Tax Credits

COMPANY OVERVIEW:

Petrolift Inc. is based in Cairo, Egypt and is a leading manufacturer of web slings and lifts for industrial applications in the oil and gas industry. Petrolift has been operating in Cairo since 1999, and holds a number of existing customers in the United States and Canada. The majority of its customers are based in Houston, Texas and Calgary and Alberta, Canada.

After 15 years of successful business in Cairo, Petrolift wanted to expand its manufacturing operation into the U.S. marketplace under a new subsidiary, TexWeb, Inc.

PROJECT SOLUTION:

A key driver to expanding into the United States is to acquire a “Made in USA” label for its products. In its consideration of U.S. locations, the company began exploring Buffalo Niagara due to its geographic proximity to Canada. The company saw great benefit in locating to a region that allowed easy access to two international markets.

Using an international checklist for assisting foreign companies, Invest Buffalo Niagara arranged meetings and introductions to immigration attorneys for acquisition of the proper work visas; accounting expertise for state and federal tax reporting and filings, U.S. banking establishment, human resource management, and state and local incentive providers.

Through Invest Buffalo Niagara’s application coordination, Empire State Development offered an Excelsior Tax Credit incentive of $142,000 over 10 years. The incentive offer helped solidify the owner’s decision to do the expansion project.

TexWeb found a 3,251 square meter, multi-tenant building in Eden, NY. The company has made major rehabilitations to its new facility and purchase specialized equipment, resulting in an investment of approximately $1.6 million. Within its first year of operation, TexWeb created 10 new jobs that required skills in fabrication of synthetic materials and the ability to operate heavy machinery.

BUFFALO NIAGARA SUCCESS STORY

Welded Tube brings steel back to Bethlehem site in Buffalo, New York

ORIGIN COUNTRY:
Canada

PROJECT TYPE:
Advanced Manufacturing

JOBS: 121

INVESTMENT: $48,000,000

REQUIREMENTS:

- Low cost hydropower
- Proximity to Canadian border
- Available workforce
- Supply chain

INCENTIVES:

- Brownfield Tax Credits
- Refundable Tax Credits
- Property Tax Abatement
- Sales Tax Exemption
- Low cost hydropower
- Utility Infrastructure Grant

COMPANY OVERVIEW:

Headquartered in Concord (Toronto), Ontario, Welded Tube is a manufacturer of steel tubing, whose process is comprised of taking flat steel and forming it into round tubing 10 to 22cm in diameter, in custom lengths. The tubes are used for well casings and for other purposes at natural gas drilling sites, a growing market as drilling activity has grown rapidly in shale formations in Ohio and Pennsylvania. The company currently employs more than 600 people in North America.

PROJECT SOLUTION:

The major driver for Welded Tube's expansion in the United States was its goal of increasing U.S. sales by having a "Made in the U.S.A." label. The project had been more than a year in the making, with Invest Buffalo Niagara officials establishing contact with Welded Tube through a lead from Empire State Development's Canadian office.

Access to electricity and low cost hydropower were key to successfully bringing Welded Tube to the region. Both National Grid and the New York Power Authority played a major role in supplying an abundant amount of power at an affordable rate. A low cost site within close proximity to the Canadian border, available productive workforce, and a strong vendor supply chain were also instrumental in the completion of this project.

Invest Buffalo Niagara facilitated meetings between the company and our partners; Empire State Development Corporation, Erie County Industrial Development Agency, National Grid, New York Power Authority, the Department of Labor, National Fuel, City of Lackawanna, Erie County, Phillips Lytle and Lumsden McCormick who assisted Welded Tube with incentives, workforce recruitment, power, site related issues, cross border due diligence, and immigration. With the help of Invest Buffalo Niagara, Welded Tube began its real estate search in an attempt to locate a site that met all of their requirements.

After touring several sites, Welded Tube decided to invest approximately $48 million on the construction of a new facility on 18.2 hectares of the long dormant Bethlehem Steel site in the Tecumseh Business Park in the City of Lackawanna.

Welded Tube's $50 million investment will occur in three phases, and consists of the construction of a 9,290 square meter manufacturing facility that will house a state of the art pipe mill. Future phases of the plan call for construction of a 3,158 square meter hydro testing facility and a 2,787 square meter pipe threading and coupling facility. The project will bring a total of 121 new jobs to Buffalo Niagara with an average salary of $40,000.

BUFFALO NIAGARA SUCCESS STORY

Greenpac's global search ends in Niagara Falls, New York

ORIGIN COUNTRY:
Canada

PROJECT TYPE:
Advanced Manufacturing

JOBS: 108

INVESTMENT: $400,000,000

REQUIREMENTS:

- Affordable, clean power

INCENTIVES:

- Brownfield Tax Credits
- State Tax Credits
- Energy Efficiency Grant
- Property Tax Abatement
- Sales Tax Exemption
- Utility Infrastructure Grant

COMPANY OVERVIEW:

Norampac / Greenpac is the largest containerboard producer in Canada and the eighth largest in North America. The company is also a major manufacturer of corrugated products. In 2008, Invest Buffalo Niagara and Norampac representatives discussed the company's desire to build a new facility that would construct new corrugated box products from recycled fibers. With 43 operating units throughout the world the company could have sited this project anywhere.

PROJECT SOLUTION:

The company's commitment to environmentally friendly policies and green practices dictated their desire to locate the project on a former brownfield site, which in turn posed challenges in ensuring the overall affordability. The new process was going to be extremely energy and water intensive, making low-cost hydropower an important component, along with a reliable water supply and sufficient wastewater capacity. The company not only sought hydropower for its low cost, but because it is a source of clean power. Greenpac hoped to maintain a manufacturing process that was entirely "green" while creating its corrugated box product. Gap financing was also an issue.

Invest Buffalo Niagara staff assisted the company with site selection, utilities, workforce and access to and coordination of incentives. Empire State Development narrowed the financing bridge for the company by ensuring the eligibility and delivery of $60 million in brownfield tax credits and $9 million in Empire Zone credits that were pledged to the company prior to the program's expiration. New York State Energy Research and Development Authority provided a $3.7 million incentive for the purchase of high-efficiency equipment. The Niagara County Industrial Development Agency helped make the project more manageable through a payment in lieu of taxes arrangement, resulting in a sales tax savings of $8 million and $450,000 in mortgage recording tax abatements. Energy costs were minimized through a 10 megawatt hydropower allocation from the New York Power Authority. National Grid also provided a $500,000 capital investment/utility infrastructure grant. In one of the final pieces to come together, the City of Niagara Falls Water Board was able to address all water and wastewater treatment concerns.

Greenpac employment will indirectly be supported by an additional 130 jobs across the region resulting in an estimated combined wage and benefit impact of over $13.5 million annually. The total value of the goods and services produced by these 238 jobs is estimated to be approximately $63.8 million annually.

BUFFALO NIAGARA SUCCESS STORY

Bridgestone APM parks expansion in Western New York

ORIGIN COUNTRY:
Japan

PROJECT TYPE:
Advanced Manufacturing

JOBS: 60 new

INVESTMENT: $15,330,000

REQUIREMENTS:

- Site near Canadian port of entry

INCENTIVES:

- Low cost hydropower
- Property Tax Abatement
- Sales Tax Exemption
- Refundable Tax Credits

COMPANY OVERVIEW:

Bridgestone APM produces a foam product that is used in car seats and automotive energy absorbent pads. Due to a large customer base in Canadian automotive assembly plants, Bridgestone was considering Western New York as well as other locations near the Canadian border to better serve those customers. This expansion location also needed to be close to an important Bridgestone facility in the Midwest. Bridgestone APM is a division of Bridgestone, based in Tokyo, Japan where the project decision-makers were based.

PROJECT SOLUTION:

Invest Buffalo Niagara (InBN) was contacted by a U.S. based site selector as he was assisting his client in scouting the best cross-border location for their next U.S. facility. Western New York was competing with other regions, so InBN built a strong business case for Bridgestone to locate here. InBN provided information on our ideal location just miles from the Canadian border, as well as workforce and wage data on our affordable and highly skilled workforce. InBN also coordinated Bridgestone's site search, first by searching for an existing building that could fit their needs. With no existing options available, we presented three different build-to-suit options and connected the company to local real estate developers to construct and lease back their customized facility. InBN also made connections to local economic development partners and New York State for assistance with low-cost power, possible tax abatements, and other incentives.

Ultimately, Bridgestone APM decided on Buffalo Niagara for its new location. Bridgestone APM purchased 11 acres to construct a 65,000 sq. ft. building in Sanborn, NY that can expand to 9,290 square meters. The site is located only 14.5 kilometers away from the Canadian border. The project is expected to create 60 new jobs, with a $12 million capital investment in the construction of the building and over $5 million in equipment for the plant.

INVEST
BUFFALO NIAGARA

Come grow your business with us.

257 West Genesee Street, Suite 600, Buffalo, NY 14202
1.800.916.9073 **BUFFALONIAGARA.ORG**