

US Business Immigration Spring 2009

Introduction

This briefing outlines some of the visa applications that can be made to temporarily visit or work in the US.

The US operates a strict system for obtaining work authorisation. The process to secure an appropriate visa may take months and involve several government agencies including the Department of Homeland Security (DHS), which includes US Citizenship and Immigration Services (USCIS), the Bureau of Customs and Border Protection (CBP) and the Bureau of Immigration and Customs Enforcement (ICE), the Department of Labor (DOL) and the Department of State (DOS). However, certain overseas nationals and companies may benefit from visa categories designed to promote international trade and commerce between their countries of nationality and the US.

Visitors

Visitors may enter the US on the Visa Waiver Program (VWP) if they hold a compliant passport from Andorra, Australia, Austria, Belgium, Brunei, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, or the United Kingdom, has been authorized to travel under CBP's Electronic System for Travel Authorization (ESTA) and is otherwise qualified. Visitors entering on the visa waiver are admitted for 90 days and may not extend their stays.

If ineligible to enter the US on the VWP, or if a visit will last longer than 90 days, a visitor may enter the US with a visitor's visa. Visitors' visas may be issued as multiple entry B-1/B-2 visas and may be valid for travel for up to ten years. A visitor entering in either B-1 or B-2 status may be admitted to the US for up to six months and may be eligible to apply for an extension of stay for another six months or a change of status.

All visitors must demonstrate that they are entering the US for a temporary period and that they have a residence abroad which they have no intention of abandoning.

Exchange visitors

J-1 visas may be utilised by certain business trainees and interns to gain experience which will be used in the J-1 visa holder's home country on completion of the programme. Certain J-1 visa holders are subject to a two year home residency requirement which must be met before the J-1 holder may be granted another US work visa. These include applicants whose programmes are financed by their governments or the US government and those whose country of nationality has a skills list which includes the area of the training programme or internship.

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A trainee or intern seeking a J-1 visa must participate in an exchange visitor programme monitored by the DOS. J-1 applications are made at a US embassy or consulate and must include evidence of the programme's validity. J-1 visas for trainees are granted for up to 18 months and J-1 visas for interns are granted for up to 12 months.

Intra-company transfers

L-1 visas are available for certain intra-company transfers. A transferee must, among other requirements, have at least twelve months' experience in the last three years in a managerial, executive or specialised knowledge capacity with a related company outside the US. Generally, L-1 visas are issued for an initial period of three years. Employees transferring to a US office that has been doing business in the US for less than one year will initially be granted L-1 status for one year. L-1A managers or executives may extend their stays in the US for a total of seven years, and L-1B specialised knowledge workers may extend their stays for a total of five years.

L-1 petitions are submitted to a USCIS service centre in the US. Petitions must include documentation providing evidence of the relationship between the US company and the employer abroad, evidence that the employee has the required experience for the US position, and evidence that the US position is managerial or executive or requires specialised knowledge.

Certain organisations may apply for blanket L status for themselves and for some or all of their related companies. To secure a blanket L approval, a company must demonstrate, among other requirements, that the petitioner has three or more domestic and foreign branches, subsidiaries or affiliates. Once a company has secured blanket L status, employees may apply for L visas at a US embassy or consulate directly. Individual petitions to USCIS are not required.

Treaty traders and investors

The US and certain countries, including the UK, have entered into treaties of friendship, commerce and navigation. E-1 and E-2 visas are available for the employment of executives, supervisors or employees with special qualifications who are citizens of the same treaty country as the ultimate owners of the US organisation. E-1 visas are available for employees of companies involved in substantial trade with the US. E-2 visas are available for employees of companies which have invested a substantial amount of capital into a bona fide enterprise in the US. Investors themselves are also eligible for E-2 visas to develop and direct the investment in the US.

Applications for E-1 and E-2 visas should be made at US embassies and consulates abroad and generally do not require USCIS approval. E visas may be granted for periods of up to five years and may be extended indefinitely as long as the requirements for E status continue to be met.

Speciality occupations

H-1B visas are for suitably qualified professional employees who will be filling positions in the US that require degrees or equivalent experience, and involve the theoretical and practical application of areas of specialised knowledge. H-1B visas are granted for three-year periods, with a maximum time limit of six years except in certain specified circumstances. H-1B visas are subject to an

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annual cap of 65,000. Certain petitions are exempt from the H-1B cap including up to 20,000 petitions for beneficiaries who have earned master's degrees or higher from US universities and petitions for employment at qualifying non-profit research organisations.

H-1B visa petitions involve filings to the DOL, USCIS and DOS. An employer must certify that the H-1B worker will receive at least the prevailing wage for the position. An employer must also confirm certain employment conditions of the H-1B and US workers.

Free trade agreement professionals

In 2004, the US signed free trade agreements with Chile and Singapore which created the H-1B1 category for nationals of these countries. The criteria for this category are similar to the H-1B but unlike the H-1B, the US employer does not have to file a petition with USCIS before the employee may be issued the visa. There are numerical limits of 1,400 for nationals of Chile and 5,400 for nationals of Singapore. H-1B1 visas may be issued for up to 18 months and may be extended.

Australian specialty workers

In May 2005, the E-3 Australian specialty worker category, was introduced. E-3 visas are available for Australian nationals who possess degrees or equivalent experience and will be performing work in the US in specialty occupations which require relevant degrees or equivalent experience or training. E-3 visa applications are made at a US embassy or consulate and must be submitted with a labor condition application certified by the DOL. E-3 visas may be valid for up to two years and may be renewed indefinitely.

E-3 visas are subject to an annual cap of 10,500.

Aliens of extraordinary ability or achievement

The O-1 category is reserved for those who are able to demonstrate extraordinary abilities in the sciences, arts, education, business, athletics, films or television. To qualify for O-1 status, evidence establishing that the person has sustained national or international acclaim and recognition is normally required. Such evidence may include documentation confirming receipt of a major internationally recognised award, or lesser awards, membership or participation in prestigious organisations or events, published materials by or about the person, contributions of major significance in the area of expertise, and a high salary. A person seeking O-1 status should be entering the US to engage in his area of expertise and is normally required to obtain an advisory opinion from a relevant US based peer group to confirm the level of achievement reached.

O-1 petitions are submitted to USCIS. O-1 status may be renewed indefinitely as long as the person continues to meet the O-1 criteria.

NAFTA professionals

Under the North American Free Trade Agreement, suitably qualified Canadian and Mexican citizens may work in the US in TN status in one of 63 enumerated professions. To qualify, the applicant must demonstrate that the position in the US requires specific qualifications and that he possesses these qualifications.

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TN applications may be made to CBP at the port of entry, or if the Canadian or Mexican is already in the US in an appropriate status, a change of status application may be submitted to USCIS. TN status is granted for temporary employment for periods of three years. Extensions are available.

Further assistance

This document briefly outlines some of the ways in which overseas nationals may work the US. However, it is not exhaustive. Individuals should seek specialist advice regarding any specific enquiries they may have about their own circumstances.

Laura Devine Solicitors

Laura Devine Solicitors is a leading immigration firm, ranked in the top tier of the Legal 500 and Chambers directories, and advises on all aspects of UK and US immigration and nationality law. Should you have any queries on the above or any other immigration matter, please contact a member of the team.

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