B-1 Business Visitors

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Global businesses and businesspersons have an ongoing need to transact business internationally with minimal restrictions. Key company personnel must have the flexibility to travel to foreign countries to conduct business affairs, often on short notice. For these people entering the United States, the nature of the business activity and the duration of the intended stay in the United States will determine available visa options. Immigration lawyers must know the laws, regulations, informal policy directives, and other guidance relating to business visitors in order to properly advise clients. Furthermore, since officers at different consulates and ports of entry retain substantial discretion and enforce the law differently, immigration lawyers must familiarize themselves regarding local interpretations, procedures, and prejudices. In today's post-election climate of restrictive immigration policies, the role of the immigration lawyer to help clients navigate through the ever-changing process is more important than ever.

The B-1 business visitor visa allows businesspersons to enter the United States on relatively short notice. This article provides an overview of this classification.

AUTHORITY

Statutory Authority

The Immigration and Nationality Act of 1952[1] (INA) defines an individual in B nonimmigrant classification as:
Page 182

[1] Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (*codified as amended* at 8 USC §1101 *et seq*.).

> An alien (other than one coming for the purpose of study or performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocations) having a residence in a foreign country, which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure.[2]

[2] INA §101(a)(15)(B).

Visitors for business may use the B-1 visa classification or the Visa Waiver Program.

Visa Waiver Program

The Visa Waiver Program (VWP)[3] allows certain individuals to enter the United States for business or tourism without a visa if certain conditions are satisfied. These conditions require that the traveler is:

[3] The Visa Waiver Program (VWP) allows citizens of certain countries to visit the United States for a period not to exceed 90 days. INA §217(a).

- staying in the United States for 90 days or less;[4]
- traveling for business, pleasure or transit only;
- holding a return or onward ticket;
- in possession of a compliant passport from a VWP country;[5]
- not a dual citizen of Iran, Iraq, Sudan or Syria or has not travelled to Iran, Iraq, Sudan, Syria, Libya, Somalia or Yemen on or after March 11, 2011[6]; and
- not inadmissible to the United States.

[4] No extension may be granted. 8 Code of Federal Regulations (CFR) §214.1(c)(3)(i).
[5] From April 1, 2016, all travelers using the VWP must have an Electronic Passport (e-Passport).
[6] Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, part of the Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015).

There are now a total of 38 countries whose citizens are eligible for visa-free travel.[7] Citizens from these countries must satisfy passport requirements, obtain Electronic System for Travel Authorization (ESTA) clearance, and be enrolled in the U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) program.[8]

[7] Andorra, Australia, Austria, Belgium, Brunei, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovak Republic, Slovenia, South Korea, Spain, Sweden, Switzerland, Taiwan and the United Kingdom. 8 CFR §217.2(a). In 2012, the VWP was expanded to include Taiwan 77 Fed. Reg. 64409 (2013); and in 2014, Chile, 79 Fed. Reg. 17852 (2014). DOS, Visa Waiver Program (VWP), *available at* http://www.esta.us/visa_waiver_countries.html.
[8] DOS, Visa Waiver Program (VWP), *available at* http://www.esta.us/visa_waiver_countries.html.

On December 18, 2015, the *Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015* became law as part of the *Consolidated Page 183 Appropriations Act 2016*.[9] This new law made certain nationals ineligible to travel to the United States under the VWP. The Act prohibits VWP nationals who are also nationals of Iran, Iraq, Sudan, or Syria to travel to the United States under the VWP.[10] Additionally, citizens of VWP countries who have travelled to the aforementioned countries, on or after March 11, 2011, shall not be permitted to travel under VWP.[11] The exclusion was extended in February 2016 to include Libya, Somalia, and Yemen.[12] The ESTA application questions have been amended to reflect these new restrictions.[13]

[9] Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, part of the Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015).
[10] *Id.*
[11] *Id.*
[12] Following the initial rollout of the new restrictions, and pursuant to the Act, the Secretary of Homeland Security had sixty days to determine whether additional countries or areas of concern should be subject to

the travel or dual nationality restrictions under the Act. It was determined that Libya, Somalia, and Yemen would be included as countries of concern; however, no additional dual-nationality restrictions were implemented for those countries.
[13] The ESTA questions were amended or modified several times to reflect the continuing changes and are currently as follows: Have you traveled to, or been present in, Iraq, Syria, Iran, Sudan, Libya, Somalia, or Yemen on or after March 1, 2011?; Have you ever been issued a passport (or national identity card for travel) by any other country?; Are you now a citizen or national of any other country?; Have you ever been a citizen or national of any other country?; CBP Global Entry program number, if applicable. DOS, Visa Waiver Program Improvement and Terrorist Travel Prevention Act Frequently Asked Questions, *available at* https://www.cbp.gov/travel/international-visitors/visa-waiver-program/visa-waiver-program-improvement-and-terrorist-travel-prevention-act-faq.

The new restrictions allow for some waivers, decided on a case-by-case basis, which may benefit individuals who have travelled to the affected countries to remain eligible to enter the United States under the VWP. Generally, those who were engaged in military service or other official duties for VWP countries will not be affected by the change. Other exceptions include: international organizations; sub-national governments on official duty; regional organizations; humanitarian non-governmental organizations (NGO); and journalists for reporting purposes. Furthermore, visitors will be permitted to travel under VWP if they travelled to Iraq or Iran for 'legitimate business-related purposes.'[14] Those who maintain Global Entry program membership will not be affected by the change. In addition, effective April 2016, all VWP travelers must have an electronic passport with an integrated chip containing biometric information.[15] If a passport does not qualify for travel under the VWP, the anticipated stay is longer than 90 days, or the individual is inadmissible to the United States, then the individual must apply for a B-1/B-2 visa to enter the United States for tourist or business purposes. All travelers applying for admission under the VWP must comply with ESTA, which became mandatory for Page 184 VWP travelers on January 12, 2009.[16] Under ESTA, travelers for business or pleasure who plan to enter the United States under the VWP must submit an online ESTA application in order to obtain a clearance for travel to the United States under the VWP.[17] Failure to complete the online application and obtain travel authorization may prevent the traveler from boarding or cause significant delays in entering the United States. He or she may also be refused admission at the port of entry (POE). Similarly, travelers who complete an ESTA application and receive an "Authorization Approved" message are not guaranteed entry to the United States—the approval only authorizes the traveler to board the aircraft.

[14] For Iran, 'legitimate business-related purposes' is defined in accordance with the Joint Comprehensive Plan of Action (July 14, 2015).
[15] DOS, Visa Waiver Program (VWP), *available at* https://travel.state.gov/content/visas/en/visit/visa-waiver-program.html.
[16] 73 Fed. Reg. 67353 (Nov. 13, 2008).
[17] Effective September 8, 2010, VWP travelers must pay operational and travel promotion ESTA fees ($14 USD total) online via credit or debit card. 75 Fed. Reg. 47701 (Aug. 9, 2010).

In late 2016, following a Notice in the Federal Register, the Department of Homeland Security (DHS) added an optional social media question to the ESTA form, requesting that applicants for ESTA provide them with their social media identifier and platform. DHS has stated that this additional vetting will assist them in determining admissibility, identifying threats and processing waivers of inadmissibility.[18]

[18] 81 Fed. Reg. 40892.

Before traveling, attorneys should advise VWP applicants that they will not be permitted to apply for a change of status or extension of status beyond the 90-day limit. In addition, VWP travelers should be aware that they have waived their right to a hearing if they are found inadmissible at the port of entry or removable after VWP admission.[19]

[19] INA §217(b). The right to an asylum hearing cannot be waived. 8 CFR §§217.4(a) and (b).

B-1 Visa—Regulatory Authority, Agency Guidelines, and Policy Considerations

B-1 visa applicants must clear two separate stages of inquiry. The first stage of inquiry occurs upon application for a visa with the U.S. embassy or consular office. U.S. consular officers review these applications and are likely to use Department of State (DOS) regulations and the *Foreign Affairs Manual* (FAM) as sources of authority.[20] The second stage of inquiry occurs upon inspection for admission at a U.S. POE or pre-flight inspection station. Officers of U.S. Customs and Border Protection (CBP) inspect and admit arriving persons. CBP officers may use not only DOS regulations and the FAM, but also DHS regulations, *Operations Instructions* (OIs), and the internal *Inspector's Field Manual* (IFM).[21] CBP management asserts that its inspectors are trained on all sources, including the more expansive FAM. Page 185

[20] *See* 22 CFR §41.31; 9 *Foreign Affairs Manual* (FAM) 402.2. Note that the FAM is not a set of regulations and is more properly considered a reference source.
[21] *See* Department of Homeland Security (DHS) regulations, 8 CFR §214.2(b). Although legacy Immigration and Naturalization Service (INS) *Operations Instructions* (OIs) are available for public review, the *Inspector's Field Manual* (IFM) is not; however, the latter is available through an AILALink subscription. *See* agora.aila.org.

U.S. consular officers must balance two competing mandates when reviewing visa applications: (1) facilitating U.S. policy objectives, which include the promotion of international travel and the free movement of individuals to the United States for cultural, social, and economic purposes;[22] and (2) serving as the initial gatekeeper to the United States by screening all visa applicants for eligibility with consideration of the general presumption that all applicants are intending immigrants, not mere visitors,[23] as well as the rationale that the requirements of the B-1 visitor classification should protect the U.S. labor force from "business visitors" who actually would perform work in the United States.[24] CBP officers perform a similar function at the ports of entry. They also serve as a check against incorrect or corrupt visa issuance.

[22] 9 FAM 402.2-2(F).
[23] INA §214(b); 9 FAM 402.2-2(F).
[24] *See*, *e.g.*, *Matter of Lawrence*,15 I&N Dec. 418 (BIA 1975) (Canadian who manages U.S. real estate business is ineligible for B-1); *Matter of Neill*, 15 I&N Dec. 331 (BIA 1975) (mechanical engineer who provides professional consulting services in the United States is ineligible for B-1); *see also Matter of Hira*, 11 I&N Dec. 824 (BIA 1966; AG 1966) (citing U.S. Supreme Court ruling that entry for "business" does not include entry to perform labor).

Consulates infrequently apply the pertinent authorities in a uniform manner. Various factors affect a given consulate's visa issuance policies, such as a high rate of fraud or overstays for a particular nationality, poor economic conditions in the country, and the unreliability of government-issued documents. Moreover, as discussed later in this article, it is critical to have up-to-date information on enhanced security measures and the status of security advisory opinions currently required for citizens of predominantly Muslim countries, as the processing of such security clearances could significantly impact the timing of visa issuance.[25]

[25] *See* DHS Press Release, "Secretary Napolitano Outlines Five Recommendations to Enhance Aviation Security," AILA Doc. No. 10011261, (outlining the secretary's recommendation to re-evaluate and modify the criteria and process used to establish "No-Fly" and "Selectee" lists in response to the attempted attack on Dec. 25, 2009).

Consulates in countries whose citizens are eligible to enter the United States under the VWP are often especially skeptical of B-1 visa applications and require applicants to present concrete evidence regarding why they cannot conduct their business visit within 90 days. Other consulates, such as those located in India, are particularly suspicious that highly educated computer professionals will in fact go to work once in the United States and, therefore, require lots of evidence to show that the professionals are not intending to work, and that their visit will benefit a company in India or abroad. This suspicion is heightened if there is an unavailability of H-1B visa quota numbers.

As is true for all visa issuance, the applicant's prior immigration history is relevant to the consular officer's decision of whether to grant the requested visa. If an applicant has ever been refused entry into the United States, it is unlikely that he or she will be approved for a B-1 visa. Likewise, if an applicant has spent a great deal of Page 186 time in the United States in B-1 status or under the VWP, consular officers will likely suggest that the applicant seek a visa authorizing employment.

Since the assumption is that the applicant is entering the United States for legal purposes, a visa will obviously be denied when the consular officer knows or has reason to believe that the applicant will engage in unlawful conduct.[26]

[26] 9 FAM 402.2-2(E).

THREE BASIC REQUIREMENTS OF THE B-1 CATEGORY

According to the statute, the B-1 visa is suited to the visitor who has an unabandoned foreign residence; intends to visit only temporarily; and intends to engage only in permitted business activities.

Unabandoned Foreign Residence

The first requirement for B-1 classification is proof of an unabandoned foreign residence, considered "the principal, actual dwelling place in fact…."[27] The focus of the inquiry should be the applicant's intent. If, at the conclusion of the contemplated visit, the applicant intends to resume (or establish) a residence abroad, the applicant is eligible for the visa. The residence need not be the exclusive residence of the applicant; it may be shared with another individual.[28] The residence need not be the applicant's former residence, but instead may be a residence the applicant intends to establish in the future.[29] Where the applicant already owns a residence in the United States, or is the beneficiary of an immigrant petition, the applicant should be able to demonstrate eligibility for the B-1 visa by presenting other evidence indicating the residence abroad is the principal place of abode to which the applicant will return at the end of the temporary visit.

[27] 9 FAM 402.2-1(B) (1)(a), 402.2-2(C).
[28] 9 FAM 402.2-2(C).
[29] 9 FAM 402.2-2(C).

Entry for a Temporary Period

The second requirement for B-1 classification is proof that the proposed entry is temporary.[30] Before issuing a B-1 visa, the consular officer must be satisfied that the intended stay has a specific time limitation.[31] Where the proposed stay is potentially limitless, the B-1 classification is inappropriate.[32] The applicant may prevent such an inference by presenting evidence of "specific and realistic plans" for the visit, adequate means to pay for the visit and leave the United States, and evidence of meaningful business, family, and other connections that will induce him or her to leave the United States at the end of the temporary visit.[33] The "mere suspicion" that an applicant may be induced to remain permanently in the United States is, in itself, Page 187 insufficient to warrant visa refusal if the applicant's present intent is to return to a foreign residence.[34]

[30] 9 FAM 402.2-2(B) (1)(b).
[31] 22 CFR §41.31(a)(1); 9 FAM 402.2-2(D).
[32] *Matter of Lawrence*, 15 I&N Dec. 418 (BIA 1975).
[33] 22 CFR §41.31(a)(3); 9 FAM 402.02-02(D), 402.02-02(C).
[34] 9 FAM 402.2-2(C).

Permitted Business Activities

The third and perhaps most contentious requirement of B-1 classification is proof that the proposed temporary visit is solely for purposes of engaging in permitted business activities.[35] B-1 business visitors may be admitted to engage in business, but not for the purpose of "local employment or labor for hire."[36] The contentiousness stems from the occasional difficulty in distinguishing between permissible business activities and impermissible labor or employment. The FAM says that the primary focus should be whether the principal place of business and actual accrual of profits are in the foreign country.[37] Activities of a commercial or professional nature permitted under the B-1 business visitor status include, but are not limited to:[38]

[35] 9 FAM 402.2-2(B)(1)(c).
[36] 22 CFR §41.31(b)(1).
[37] 9 FAM 402.2-5(A) (citing *Matter of Hira*, 11 I&N Dec. 824 (BIA 1966; AG 1966)).
[38] 9 FAM 402.2-5(B).

- Engaging in commercial transactions which do not involve gainful employment;
- Negotiating contracts;
- Consulting with business associates;
- Litigating;
- Participating in scientific, educational, professional or business conventions, conferences or seminars; and
- Undertaking independent research.

PROVING ELIGIBILITY FOR THE B-1 VISA

In support of an application for the B-1 visa, the applicant should:[39]

[39] 9 FAM 402.2-2(A)–((F). A useful analysis is presented in A. Paparelli and S. Wehrer, "The Incredible Rightness of 'B'ing—Prudent and Practical Uses for the B-1 and WB Business Visitor Categories," 2 *Immigration & Nationality Law Handbook* 105 (AILA 2000–01) (available only with an AILALink subscription).

- Demonstrate sufficient ties to his or her home country, such as permanent employment, meaningful business or financial connections, close family ties, or other commitments that indicate a strong inducement to return abroad. The FAM states that questionable cases cannot be resolved by the applicant's offer to leave dependents abroad.[40] Despite this note, consular officers may well be persuaded to issue a visa if dependents are remaining in the home country, and the authors advise submitting such evidence as part of the application; Page 188
- Present "specific and realistic plans" for the entire period of the contemplated visit;
- Establish with reasonable certainty that the departure from the United States will take place upon completion of the temporary visit (the period of time projected for the visit must be consistent with its stated purpose);
- Not express the proposed period of stay in terms of remaining for the maximum period allowable by U.S. authorities;
- Be prepared to explain how the trip is being paid for. While a B-1 may not receive a salary from a U.S. source for services rendered in connection with the B-1 visit, a U.S. source may provide the B-1 with a reasonable expense allowance or reimbursement for expenses incidental to the temporary stay, such as travel, meals, lodging, and basic services[41];
- Have adequate funds available to avoid unlawful employment in the United States;
- Show adequate provision for support of any dependents while the applicant is in the United States if the applicant is the family's principal wage earner; and

- Demonstrate that the proposed temporary visit is solely for purposes of engaging in permitted business activities. The FAM cites *Matter of Hira* as the clearest definition of appropriate B-1 activity.[42] Whenever possible, the B-1 applicant should be prepared to show why the activities will be incidental to work that will principally be performed outside the United States, and why the principal place of business and the actual place of accrual of profits, if any, will be in the country outside the United States.

[40] 9 FAM 402.2-2(B).
[41] 9 FAM 402.2-5(F)(1).
[42] *Matter of Hira*, 11 I&N Dec. 824 (BIA 1966) (Hong Kong-based tailor who entered the United States to measure customers made valid B-1 entry because principal place of business and accrual profits were located outside the U.S.).

B-1 STATUS FOR WORKERS IN THE UNITED STATES

Although normally excluded from entering the United States to perform skilled or unskilled labor, applicants who intend to work may be issued B-1 visas and be admitted into the United States in valid B-1 status if they fall into one of the following categories: [43]

[43] *See generally* 9 FAM 402.2-5(C)–(G)(5).

- Ministers on an evangelical tour, ministers of religion who exchange pulpits with American counterparts, members of religious denominations entering the United States temporarily to perform missionary work, members of charitable organizations, and participants in voluntary service programs; [44] Page 189
- Members of boards of directors of U.S. corporations may enter the United States "to attend a meeting of the board or to perform other functions" derivative of board membership;[45]
- Personal or domestic employees of U.S. citizens residing abroad or temporarily assigned to the United States;[46]
- Personal or domestic employees of certain aliens in nonimmigrant status;[47]
- Certain yacht crewmen and coasting officers;[48]
- Certain professional athletes;[49]
- Investors "seeking an investment in the United States" that would qualify them for E-2 classification, as well as investors who are examining or monitoring potential investments and pursuing an EB-5 immigrant classification, as long as they do not perform productive labor or actively participate in the management of the business while in the United States in B status;[50]
- Horse racing personnel, such as "jockey, sulky driver, trainer, or groomer,"[51] or
- Outer Continental Shelf employees.[52]

[44] 9 FAM 402.2-5(C)(1)–(2).
[45] 9 FAM 402.2-5(C)(3).
[46] 9 FAM 402.2-5(D)(1)–(2).
[47] 9 FAM 402.2-5(D)(3).
[48] 9 FAM 402.2-5(C)(5)–(6).
[49] 9 FAM 402.2-5(C)(4).
[50] 9 FAM 402.2-5(C)(7).
[51] 9 FAM 402.2-5(C)(8).
[52] 9 FAM 402.2-5(C)(9).

OTHER BUSINESS ACTIVITIES CLASSIFIABLE AS B-1

While the following categories generally may be classified under another nonimmigrant class (*e.g.*, E, H, F), consular officers may issue B-1 visas for the following classes of visitors, as well:

- Commercial or industrial workers coming to the United States to install, service, or repair commercial or industrial equipment or machinery purchased from a company outside the United States, or to train U.S. workers to perform such services. However, in such cases, the contract of sale must specifically require the seller to provide such services or training, and the visa applicant must possess specialized knowledge essential to the seller's contractual obligation to perform the services or training, and must receive no remuneration from a U.S. source.[53] U.S. consulates and ports of entry have become increasingly critical of applicants seeking B-1 visas and/or entry under this category and often require the presentation of documentation evidencing the applicant's specialized knowledge, Page 190 source of remuneration, and particularly, a copy of the contract requiring the provision of services;
- In the building or construction industry, only applicants coming to the United States for purposes of supervising or training other workers engaged in building or construction work may be classified as B-1 visitors. Those who actually perform building or construction work, whether onsite or in-plant, are precluded from admission in B-1 status;[54]
- Applicants coming to the United States merely and exclusively to observe the conduct of business or other professional or vocational activity, provided they pay the expenses for their visit.[55] Consulates and U.S. POEs also have become increasing critical of applicants seeking a B-1 visa and/or entry into the United States for purposes of observing the conduct of a business, often questioning whether practical, on-the-job training is a component of the assignment;
- Foreign airline employees working in an executive, supervisory, or highly technical capacity, where there is no applicable E visa treaty;[56] and
- Certain foreign medical school students pursuing an elective clerkship at a U.S. medical school hospital.[57]

[53] 9 FAM 402.2-5(E)(1).
[54] 8 CFR §214.2(b)(5); 22 CFR §41.31(b); 9 FAM 402.2-5(E)(1).
[55] 9 FAM 402.2-5(E)(3)(c).
[56] 9 FAM 402.2-5(E)(2).
[57] 9 FAM 402.2-5(E)(3)(b).

This list is not exhaustive. Counsel should be alert to new FAM instructions, as well as occasional memoranda released by DHS agencies.[58]

[58] *See* 9 FAM 402.2-5(E)(1)–(7) for a listing of other acceptable B-1 categories.

B-1 IN LIEU OF H-1B OR H-3

The B-1 in lieu of H-1B visa category enables foreign nationals employed by a foreign company to engage in temporary professional activities in the United States, provided the employee continues to be employed and paid by the foreign employer. The B-1 in lieu of H-3 option allows overseas workers to participate in professional training programs in the United States.[59]

[59] 9 FAM 402.2-5(F).

The B-1 in lieu of H-1B visa classification historically has been deemed a "disfavored" visa category on the grounds that it blurs the line between the business visitor category and the H-1B nonimmigrant visa category and is often seen as a means of circumventing the high demand and limited supply of H-1B visas. The application of this rule is subject to interpretation and discretion on the part of both consular officers and CBP officers.[60] Page 191

[60] *See* Legacy INS Memorandum, J. Williams, "Business Visitor Field Guidance," AILA Doc. No. 03040190 (indicating that a B-1 in lieu of H-1B or H-3 applicant may be disqualified from admission if coming to perform services that are inherently part of the U.S. labor market or for which a U.S. worker would have to be hired).

The policy on annotating visas to reflect that they were B-1 in lieu of H-1B was inconsistent and, though the annotation was supposed to be uploaded to the Consular Consolidated Database (CCD), officers often only granted a standard B-1 visa. The individual traveler would then be required to present him- or herself at the POE and explain the nature of his visit to the CBP officer. In early 2017, the FAM was updated to reflect a new policy on annotating B-1 in lieu of H-1B visas to state "B-1 IN LIEU OF H, PER 9 FAM 402.2-5(F)"[61]

[61] 9 FAM 402.2-5(F)(b).

Without the annotation, it is possible that the visa holder might be sent to secondary inspection since CBP inspectors at primary inspection may not have sufficient time to access and review information in the CCD to determine that a particular B-1 traveler is qualified to enter as a B-1 in lieu of H-1B; therefore, practitioners are advised to review the visa issued and contact the post if they fail to annotate the visa correctly.

This visa category is particularly appropriate for employees of foreign companies engaged in collaborative efforts with U.S. companies on professional projects of a commercial, scientific, or technical nature for which assistance from experienced foreign employees may be required on a short-term basis to carry out important project activities.

Whether the foreign and U.S. companies have common ownership or stand as separate business entities is not material. It is essential, however, that the foreign enterprise function as a real, operating enterprise in the foreign country, as opposed to operating as a "job shop" in which a shell company sends foreign workers to the United States for project work, thereby avoiding the proper channels for obtaining an employment-based visa. DOS is well aware that some foreign employers are "job shops" functioning essentially as employment agencies, particularly in the technology industry.[62] A self-employed professional may face a special challenge in qualifying for the B-1 in lieu of H option based on the fact that there is no foreign entity linked to the applicant. However, if the self-employed person can demonstrate that he will be required to return to his home country to carry out substantial, on-going assignments and projects for customers, he may be able to satisfy the consular officer that he is "B-1 in lieu of H" eligible. Such an application would have to be well-documented and carefully presented.

[62] 58 Fed. Reg. 40026 (July 26, 1993).

The B-1 in lieu of H-3 applicant must present evidence to the consular officer demonstrating that: (1) the training is not available in his or her home country; (2) that the training will benefit his or her career abroad; and (3) that the training neither includes productive employment nor displaces a U.S. worker. Further, the applicant Page 192 cannot receive a salary or other remuneration from a U.S. source except for an expense allowance or reimbursement for incidental expenses.[63]

[63] *Id*.

The FAM requires that employee remuneration is "foreign-sourced" and the employee is "customarily" employed by the foreign firm.[64] The FAM does not indicate whether "customary employment" requires a substantial history of employment or whether newly-hired employees can pursue this visa classification. In practice, in some jurisdictions this threshold is met if at a minimum the employee is on the payroll of the foreign entity as of the day of the consular interview.

[64] 9 FAM 402.2-5(F)(a)(2).

The applicant must be able to demonstrate that he or she would otherwise satisfy H-1B visa requirements by virtue of possessing the requisite education credentials or history of employment. When presenting the case to the consular officer, the presumption of immigrant intent stands.[65] Therefore, the applicant must be

prepared to demonstrate sufficient ties to the home country through records of property holdings, financial, family, and employment. Applicants should also be aware that although they will engage in employment-related activities in the United States, they may not be eligible to apply for a Social Security number or driver's license in the United States.

[65] INA §214(b).

The significant challenge to global companies with respect to this visa category is the lack of uniform and consistent consular interpretation. Some consulates are not inclined to grant this visa or will request an advisory opinion before proceeding.[66] Consulates in certain countries, however, recognize the economic value of this visa category to global companies and are willing to facilitate economic activity by supporting the movement of employees in the B-1 in lieu of H category. They further understand the barriers to cross-border commerce imposed by the annual H-1B numerical limitation. Lawyers are well advised to use local knowledge to ascertain whether a particular consulate is flexible in its approach to this visa category.

[66] 9 FAM 402.2-5(H).

Business Visitors Under NAFTA[67]

[67] *Codified in relevant part* at INA §214(e).

Citizens of Canada and Mexico seeking temporary entry, who otherwise meet the existing requirements under INA §101(a)(15)(B), including but not limited to requirements regarding the source of remuneration, may be admitted as business visitors under the North American Free Trade Agreement (NAFTA).[68] NAFTA expands the range of appropriate B-1 activities to include research and design, marketing, sales, and other activities that otherwise would not be permitted unless the person holds a working visa. Page 193

[68] 8 CFR §214.2(b)(4).

A business visitor is permitted to enter the United States pursuant to NAFTA if the purpose of the visit is in one of the following phases of the normal business cycle:[69]

[69] 8 CFR §214.2(b)(4)(i)(A)–(G).

- Research and Design—technical, scientific, and statistical researchers;
- Growth, Manufacture, and Production—harvester owner supervising a harvesting crew; purchasing and production management personnel;
- Marketing—market researchers and analysts; trade fair and promotion personnel;
- Sales—sales representatives and agents negotiating contracts; buyers;
- Distribution—transportation operators; customs brokers;
- After-Sales Service—installers, repair and maintenance personnel, and supervisors possessing specialized knowledge essential to the seller's contractual obligations; and
- General Service—professionals, management, financial services, public relations, and tourism personnel.

Significantly, Canadian visitors (including business visitors) do not require a visa to enter the United States.[70] To gain admission, Canadians and Mexicans seeking status as business visitors should present proof of citizenship in the case of Canadian applicants, and valid entry documents, such as a passport and visa, or Mexican border crossing card, in the case of Mexican applicants.[71] In addition, the Canadian NAFTA business visitor should present a description of the purpose of the entry, as well as evidence demonstrating that he or she is engaged in one of the occupations or professions set forth in Appendix 1603.A.1 to Annex 1603 of NAFTA.[72] Canadians and Mexicans engaged in an occupation or profession not listed in Appendix

1603.A.1 to Annex 1603 will not be precluded from temporary entry if they otherwise meet the existing requirements for admission as prescribed.[73]

[70] 8 CFR §§212.1(a)(1), 1212.1(a)(1).
[71] 8 CFR §§212.1(c), 1212.1(c).
[72] 8 CFR §214.2(b)(4).
[73] 8 CFR §214.2(b)(4)(ii).

Thus, for example, a businessperson employed by a Mexican or Canadian company may enter the United States to conduct preliminary market research prior to the time when that company incorporates in the United States, or for the purpose of attending a trade fair.[74] Again, the business visitor should carry a letter from the foreign employer explaining the purpose of the visit and other relevant evidence such as the trade fair brochure and/or proof of registration.

[74] 8 CFR §214.2(b)(4)(i)(C).

A Canadian computer professional, for instance, may enter the United States if he or she has proprietary knowledge of his or her employer's systems, and if the employer has a contract with a U.S. company requiring "post-sales" service. This Canadian should have a company letter describing this specialized knowledge and a copy of the Page 194 pertinent contract.[75] While this remains the law, entry from Canada under this category has become more and more difficult without Trade NAFTA (TN) status or some other status authorizing U.S. employment.

[75] 8 CFR §214.2(b)(4)(i)(F).

The Executive Orders and Extreme Vetting

On March 17, 2017, the Secretary of State released a cable titled *Implementing Immediate Heightened Screening and Vetting of Visa Applicants.* The cable provides guidance for implementing section 2 of the Presidential Memorandum,[76] which states:

[76] *See* Protecting the Nation from Terrorist Attacks by Foreign Nationals, Exec. Order No. 13780, 82 Fed. Reg. 13209 (2017).

> The Secretary of State and the Secretary of Homeland Security, in consultation with the Attorney General, shall, as permitted by law, implement protocols and procedures as soon as practicable that in their judgment will enhance the screening and vetting of applications for visas and all other immigration benefits, so as to increase the safety and security of the American people. These additional protocols and procedures should focus on:[77]

[77] *See* Cable 25814, "Superseding 17 STATE 24324: Implementing Immediate Heightened Screening and Vetting of Visa Applications" (Mar. 17, 2017). *See also* Cable 23338, "Guidance to Visa-Issuing Posts" (Mar. 10, 2017); Cable 24324, "Implementing Immediate Heightened Screening and Vetting of Visa Applications" (Mar. 15, 2017); and Cable 24800, "Halt Implementation" (Mar. 17, 2017).

> (a) preventing the entry into the United States of foreign nationals who may aid, support, or commit violent, criminal, or terrorist acts; and
>
> (b) ensuring the proper collection of all information necessary to rigorously evaluate all grounds of inadmissibility or deportability, or grounds for the denial of other immigration benefits.

This more rigid approach toward the vetting of visa applicants focusses, in short, on identifying particular populations and undertaking more social media checks.

This vetting process will be implemented through consular officers' use of the new Form DS-5535, which was released by the Department of State in May 2017.

Form DS-5535

Form DS-5535 is a supplemental questionnaire that a consular officer may ask an applicant to complete as part of the visa application process. It is not mandatory for all applicants at the time of writing this article.

The three-page questionnaire requests that applicants provide their passport data and travel history, including countries to which applicants have travelled during the past 15 years. The questionnaire also requires applicants to disclose the source of the funds used to finance those trips. In addition to the travel history information, the form asks for the applicant's past 15 years of addresses, employment positions, and spouses. To the surprise of many, it also asks for the applicant's user names or user Page 195 handles in social media accounts in the past five years. The new vetting procedures are currently authorized until November 2017, but will likely extend beyond this timeframe. [78]

[78] *See* Supplemental Questions for Visa Applicants, 82 Fed. Reg. 20956 (2017), *available at* https://www.federalregister.gov/documents/2017/05/04/2017-08975/notice-of-information-collection-under-omb-emergency-review-supplemental-questions-for-visa. *See also* link to DS-5535 form: http://www.nafsa.org/_/File/_/amresource/DS5535.pdf.

While it is important for clients to know about this requirement, unless you believe your client is at risk of greater scrutiny as part of this extreme vetting directive, it is not necessary to complete the form in advance of or in preparation for the visa interview.

VISA APPLICATION PROCESS

An applicant for a B-1 visa must take the following steps to apply for a visa. Each consulate will have specific guidance, but similar principles will be followed:

Step 1: The applicant for a B-1 visa must schedule a visa appointment. All appointments are now booked through online portals which require the establishment of an account and payment of a visa application fee.

Step 2: Complete Form DS-160, Online Nonimmigrant Visa Application. The form should be carefully prepared as officers rely heavily on this information to form their opinion of the visa candidate. The form is handed to the officer on the day of the visa interview.[79]

[79] While a detailed discussion related to potential grounds of inadmissibility is beyond the scope of this article, practitioners are reminded to pay special attention to questions on the Form DS-160 related to criminal convictions and previous immigration violations and advise their clients accordingly.

Detailed procedures regarding the method of scheduling appointments, paying the visa application fee, and other consulate-specific instructions may be found on each consulate's website. In some limited cases, the interview may be waived.

Step 3: The responsible attorney should include an attorney letter outlining the basis for eligibility. The attorney should also advise on all supporting documentation required for the interview, including evidence of ties to the home country and proof of sufficient funds to support the visit.

Step 4: The attorney should hold a preparation session for the visa application to ensure he or she is familiar with security procedures at the embassy and the type of questions that are likely to be asked at the interview.

Step 5: At the visa appointment, the applicant should be prepared to present a valid passport, confirmation of Form DS-160 submission, a fee receipt (where applicable), photos (where applicable), proof of an unabandoned foreign residence, proof of access to sufficient funds, and evidence that the proposed entry is for a temporary period solely for purposes of engaging in permitted Page 196 business

activities. B-1 applicants should bring with them a detailed letter from the inviting U.S. business or organization along with relevant business documents to demonstrate a bona fide business purpose for the visit. The visa may be issued for a maximum of 10 years with multiple entries during those 10 years (depending on nationality). In some cases, the visa may be issued for less than 10 years and for limited entries in accordance with reciprocity schedules between the United States and the country of the applicant's nationality. The consul has discretion to issue a visa for less than the maximum time allowed.

Although most B-1 visas are approved at the visa appointment, applicants may encounter increased visa processing delays due to security checks, administrative processing, and recent DOS directives. Consular officers are no longer required to interview 80 percent of NIV applicants within three weeks.[80] Consular posts have been directed to "generally not schedule more than 120 visa interviews per consular adjudicator/per day" and acknowledge that, "limiting scheduling may cause interview appointment backlogs to rise."[81] Counsel should stress to the visa applicant and business associates the importance of having contingent plans in case the visa is delayed.

[80] Exec. Order No. 13802, 82 Fed. Reg. 28747 (June 26, 2017), amending Exec. Order No. 13597, 77 Fed. Reg. 3373 (Jan. 24, 2012).
[81] Department of State Cable, "Implementing Immediate Heightened Screening and Vetting of Visa Applications" (Mar. 15, 2017).

In addition, as of this publication, B-1 applicants from the six predominantly Muslim Travel Ban countries—Iran, Libya, Somalia, Syria, Sudan, and Yemen—must establish a "bona fide relationship" with a person or entity.[82] While the bona fide relationship standard is not clearly defined, the Court has stated that the relationship with an entity must be "formal, documented, and formed in the ordinary course…"[83] B-1 applicants from the six travel ban countries, as well as those who may be perceived by the U.S. government to be security risks, must be carefully advised about visa processing procedures, B-1 criteria, and increased visa scrutiny.

[82] *Trump v. IRAP*, No. 16-1436 (June 26, 2017).
[83] *Id*.

Practitioners must be prepared to act swiftly in the event that the visa application is denied. The lawyer should consult with the applicant to gather all the facts to determine whether a request for reconsideration or resubmission is appropriate.[84] If the application was denied for lack of documents under INA §221(g),[85] the applicant is permitted to submit additional evidence to support the visa approval. If the visa was denied under another provision, the applicant is normally required to complete a new DS-160 and resubmit the application.[86] In some circumstances, it may be Page 197 appropriate for counsel to contact the supervising officer or chief consular officer to request a review and reconsideration of the preliminary decision.[87] If the refusal involves a novel legal question, counsel may request an advisory opinion from the Visa Office.[88]

[84] *See* INA §212(b); 22 CFR §§40.6; 9 FAM 306.2.
[85] INA §221(g); 9 FAM 306.2.
[86] 9 FAM 306.2.
[87] 22 CFR §41.121.
[88] 9 FAM 304.3.

It is important to note that a denial based on INA §221(g) *is* considered a denial for purposes of answering questions on both the ESTA form and the Form DS-160. Applicants should fully disclose any visa denials, even if they are ultimately overcome with a successful visa issuance. In many cases, this would not prevent an applicant from travelling under the VWP (if otherwise eligible).

ADMISSION, EXTENSION, AND CHANGE OF STATUS

Once the B-1 visa has been issued by the consulate, the visitor may apply for entry into the United States. However, it is important to advise the visitor that he or she is still subject to inspection prior to admission at the POE by CBP.[89] Visitors should be fully prepared to re-demonstrate eligibility under the core B-1 requirements and present documentation corresponding to the business visit. In determining eligibility, CBP officers are instructed to consider the core B-1 requirements, the source of remuneration, and the actual place of accrual of profits related to the proposed business activities.[90] When admitted, the business visitor is given Form I-94, Arrival/Departure Record, endorsed with the class and period of admission. Visitors who use a visa to enter the United States are subject to the US-VISIT[91] program at the port of entry.

[89] INA §235; 8 CFR §§235, 1235.
[90] IFM §15.4(b)(1).
[91] 69 Fed. Reg. 467 (Jan. 5, 2004).

USCIS regulations stipulate the limitations on the period of admission.[92] A B-1 may be admitted for no more than one year. The period of admission of the B-1 is clarified in the *Operations Instructions* to be a "period of time which is fair and reasonable for completion of the purpose of the trip."[93] Inspectors are instructed: "Arbitrarily small admission periods needlessly increase the volume of extension applications and should be avoided. Ordinarily, B-1 admission should be granted for the time requested or longer, in order to reduce needless extension requests."[94]

[92] 8 CFR §214.2(b).
[93] OI 214.2b.
[94] IFM §15.4(b)(1). A proposed rule seeking to limit the default period of admission to 30 days, and the maximum period of admission to one year, appears to be shelved for the time being (67 Fed. Reg. 18065 (Apr. 12, 2002)).

Despite this guidance, we routinely see business visitor entry applicants limited to just a few weeks as deemed appropriate for the particular activity. However, applicants who indicate that they are entering the United States to engage in Page 198 permissible business activities under the Business Visitor category, and go on vacation, are typically admitted for six months.

A B visitor may apply to USCIS on Form I-539, Application to Extend/Change Nonimmigrant Status, for extensions of stay in six month increments.[95] An extension of stay may not be approved if the extension was filed after the previously accorded status expired, except that failure to file the extension before the previously-accorded status expired may be excused at the discretion of USCIS when the following is found: (1) the delay was due to extraordinary circumstances; (2) the delay was beyond the control of the applicant; (3) the delay was commensurate with the circumstances; (4) the applicant has not otherwise violated status; (5) the applicant remains a bona fide nonimmigrant; and (6) the noncitizen is not subject to removal proceedings.[96]

[95] 8 CFR §214.2(b)(1).
[96] 8 CFR §214.1(c)(4).

An extension may not be approved for an applicant who has failed to maintain status.[97] An applicant is considered lawfully present after the initial period of admission expires while an extension is pending if the application was timely filed and the applicant is maintaining status.[98] A second extension filed after expiration of the initial period of admission, while an extension is pending but before the approval of that extension, will not extend the period of lawful presence if the first extension is not granted.[99]

[97] *Id*.
[98] Legacy INS Memorandum, J. Podolny, "Interpretation of Period of Stay Authorized by Attorney General in Determining Unlawful Presence Under Section 212(a)(9)(B)(ii)," (Mar. 27, 2003), AILA Doc. No. 03042140.
[99] *Id.*

A non-VWP visitor may file to change to most other nonimmigrant visa classifications so long as the applicant is not violating status and the application for change of status is timely filed. As in the case of an untimely extension application, an untimely request for a change of status may be excused if: (1) the delay is due to extraordinary circumstances; (2) the delay is beyond the control of the applicant; (3) USCIS finds the delay commensurate with the circumstances; (4) the applicant has not otherwise violated status; (5) the noncitizen remains a bona fide nonimmigrant; and (6) the noncitizen is not subject to removal proceedings.[100]

[100] 8 CFR §248.1(b)(1).

When requesting changes of status, however, it is imperative for the applicant to prove that he did not intend to engage in the activity requested in the application for a change of status at the time when he initially applied for the B-1 visa at a consulate abroad and then entered the United States in B-1 status. Changes of status sought shortly after U.S. entries are subject to heightened scrutiny in this regard, and could pose a danger of ultimate visa denial at a consulate abroad. Page 199

CORPORATE MANAGEMENT OF B-1 VISITORS

As this article has discussed, there are numerous uses for the B-1 visa as authorized by law. Likewise, there are equally as many ways of abusing the B-1 visa category by using it to enter the United States to engage in unauthorized business activities. The corporate human resources (HR) manager has long been vexed by the surprise business visitor whose presence is only revealed after he has been "working" at a company site for many months. These unannounced visitor situations can readily occur since the corporate immigration office is not required to be involved in the entry of the visitor and does not have to file any application with USCIS. In many cases, no letter of invitation is prepared and if an invitation letter is prepared, it may have been completed by a remote manager without notice to the corporate immigration office.

With the increased pace of worksite enforcement actions, the risk that a business visitor will come in contact with U.S. Immigration and Customs Enforcement (ICE) in the context of such an enforcement action has greatly increased. In fact, since fiscal year 2009, ICE has audited more than 6,000 employers and imposed more than $76 million in financial sanctions.[101] If the company's HR department has no knowledge of the name of the visitor, the date of his arrival, his relationship to the company, the purpose of his travel, and his U.S. business activities, the risk that the company can be swept up into a "knowing hire" investigation for employing unauthorized workers is greatly increased—especially when there are large numbers of such visitors.

[101] J. Napolitano, Testimony before the United States House of Representatives Committee on the Judiciary (Oct. 26, 2011), *available at* https://www.dhs.gov/news/2011/10/25/testimony-secretary-janet-napolitano-united-states-house-representatives-committee.

With the goal of limiting this risk by developing a system to monitor the travel of all business visitors, Halliburton developed a web-based Foreign National Business Visitors program on its internal database. Through the use of this program, the company is able to have a permanent record of the visit of every traveler to a Halliburton site pursuant to an invitation from a U.S. employee. Some of the information captured in a visitor record includes the name, address, and citizenship of the employee, the dates of entry and exit, and the purpose of the visit, as evidenced by the letter of invitation that is automatically generated from the program by the inviting U.S. employee.

In designing such a program, Halliburton undertook the following steps:

- Develop detailed written policies that illustrate the company's desire to comply with applicable law and educate employees to reinforce the importance of compliance with B-1 visitor regulations;
2. Prepare a user's training guide, Frequently Asked Questions, sample letters of invitation for all situations, and arrange for help desk support;

3. Design a visitor consent, which can be completed online to ensure the visitor understands his privacy rights and consents to limited disclosure of his personal Page 200 information to the legal and HR departments as well as the manager who will issue the invitation letter; and
4. Design an internal program that will automatically generate a letter of invitation after data relating to the visitor, the U.S. manager and the purpose of travel is entered into the system.

Since rolling out its program, Halliburton has benefited through enhanced compliance and record-keeping, simplified tax reporting, and the peace of mind that comes from knowing that the chances of a "surprise visitor" turning up unannounced have been greatly reduced.[102]

[102] J. Haughton, "The Halliburton Portlet: Monitoring Foreign National Business Visitors," 27–2 *Immigration Law Today* 18–21 (Mar./Apr. 2008).

CONCLUSION

B-1 business visitors are vital to U.S. participation in the global economy. In order to properly counsel clients, immigration lawyers must know the definitions of "business," "commerce," and "employment" under the INA, as well as regulations, agency, local consular, port, and court interpretations. Practitioners must also familiarize themselves with the specific regulatory criteria for B-1 applicants used by consular officers and CBP inspectors, and outlined in the FAM and the CBP *Operations Instructions*, respectively.

But more than this, practitioners must now apply a real-world analysis in an attempt to predict whether an officer will admit an applicant without a visa that permits employment. This is particularly important in light of the consequences of refused entry, which can include incarceration and barriers to future entries. In this analysis, we must ask the real world question—"Is the applicant a temporary business visitor, or is he or she really working in the United States to the benefit of a U.S. employer?" If the answer falls on the side of U.S. employment, the applicant should be advised to seek a nonimmigrant status that permits employment.