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Dentons United States Immigration Guide 2014

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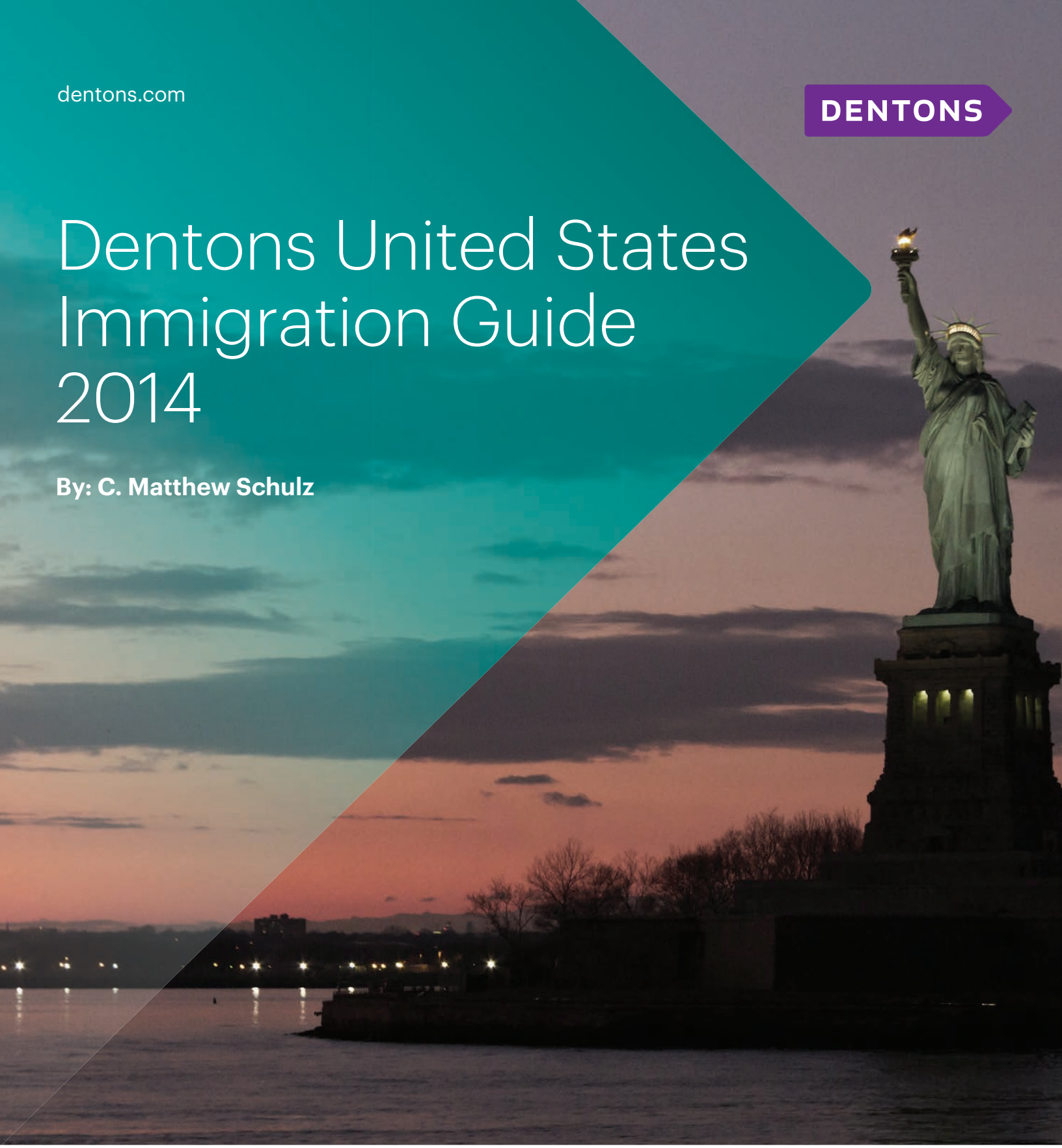

Immigration and mobility, and the issues surrounding them, touch every aspect of your business. We understand and guide multinational clients as they do business in the US, providing creative solutions to moving and maintaining talent.

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Introduction

Dear Reader,

United States immigration law is a hot topic.

There are competing interests vying for reform in Congress, and the Administration has been active in implementing regulatory changes. **Change is happening, regardless of whether proposed comprehensive immigration reform legislation becomes law.**

The improving American economy and decreasing levels of unemployment underscore the need for US employers to have access to the best and brightest talent from around the world in order to keep growing successfully. At the same time, the US government is aggressively enforcing immigration laws, with highly publicized cases involving criminal, as well as civil, penalties common. **Employers need to know the existing rules and how they are applied, as well as future trends and creative strategies needed for success. Dentons professionals can provide that.**

US immigration laws, policies, and attitudes balance many competing interests, including economic, social, political, security and humanitarian. They are often driven by current events, but also reflect historical patterns.

The result is a complex set of rules. There are not enough visas for everyone and every situation. Detailed knowledge of the regulations, how they are applied, and an understanding of the facts of a specific case will often result in success, even if success favors those who think creatively.

Our Global Mobility practice helps multinational employers navigate the local laws of the countries where they do business, including immigration, as well as employment, compensation, tax and other related legal disciplines. While US immigration is the focus of this publication, Dentons has additional resources for every point in your business lifecycle, when you need us.

Yours sincerely,
C. Matthew Schulz
United States Immigration Head

Government agencies

Immigration laws in the United States are primarily federal and the relevant United States government agencies involved in various aspects of immigration include:

- **Department of Labor (DOL)**. This agency processes permanent and temporary alien employment certifications required for certain nonimmigrant and immigrant visas. This agency also has investigation and enforcement authority.
- **Department of State (DOS)**. American embassies and consular posts outside the United States are operated by this agency, which processes nonimmigrant, immigrant visa and waiver applications.
- **Department of Justice (DOJ)**. This agency's responsibilities include the administrative immigration courts and enforcement of rules against immigration-related unfair employment practices.
- **Department of Homeland Security (DHS)**. This is the department-level federal agency that includes:
  - **Citizenship and Immigration Services (USCIS)**. This agency is primarily responsible for adjudicating nonimmigrant and immigrant visa petitions, as well as naturalization petitions.
  - **Customs and Border Protection (CBP)**. This agency is primarily responsible for the control of the borders, including pre-flight inspection units based outside the United States. It's officers determine whether to admit or deny entry to non-United States citizens. This agency has the ability to process certain visa status and waiver requests.
  - **Immigration and Customs Enforcement (ICE)**. This is the primary investigatory and enforcement arm of the Department of Homeland Security.

Employer immigration compliance

Summary

There are civil and criminal penalties for employers who fail to comply with United States immigration laws. Employers are well advised to implement and maintain polices and practices with regular trainings and audits, to ensure compliance.

Key considerations

Employment of authorized workers

Anyone who recruits, hires or continues to employ a foreign national not authorized for such employment in the United States is subject to penalties.

Timely verification of employment eligibility

Employers must complete Form I-9 each time anyone is hired to perform labor or services in the United States in return for wages or other remuneration. This requirement applies to new employees hired after November 6, 1986. The I-9 must be completed before or within three days of beginning work.

Form I-9 is for employees, not independent contractors. That said, an employer is subject to the same penalties and requirements for hiring a foreign national to perform labor or services in the United States with actual knowledge that the individual is not authorized for such employment.

Employees must submit government-acceptable documentation of identity and employment eligibility.

Employers may, but are not required to, retain copies of these documents with the Form I-9. Employers who retain copies must do so for all employees, or risk violation of anti-discrimination laws.

Retention of employment verification records

Employers must retain a completed Form I-9 for as long as the individual works for the employer.

Form I-9 must be retained after termination for either three years after the date of hire, or one year after the date employment is terminated, whichever is later.

Inspection

Inspection of I-9 records can be done by designated agencies. The government is required to provide employers a minimum of three days notice prior to inspecting retained I-9 records.

Unlawful discrimination

Immigration anti-discrimination provisions prohibits four types of unlawful conduct:

1. Citizenship or immigration status discrimination;
2. National origin discrimination;
3. Unfair documentary practices during Form I-9 process (document abuse); and
4. Retaliation.

Admissibility

In general, anyone who is not a United States citizen must be qualified as admissible to be issued a visa and/or allowed to enter the United States, either temporarily on a nonimmigrant visa, permanently on an immigrant visa, or as permanent resident returning from an absence abroad.

Grounds of inadmissibility

Failure to prove nonimmigrant intent

Nonimmigrant intent must generally be proved by all nonimmigrants, except for the H-1B, L or V visas and their accompanying family members.

Failure to prove eligibility

Nonimmigrants and immigrants must submit sufficient information to prove eligibility to receive a visa and enter the United States. Examples:

- Incomplete application and/or further documentation is required. Applicants should be informed what is needed and how to provide it, along with a denial decision.
- Administrative processing must be completed. Applicants should be given a letter stating this and next-step instructions after the administrative processing is complete

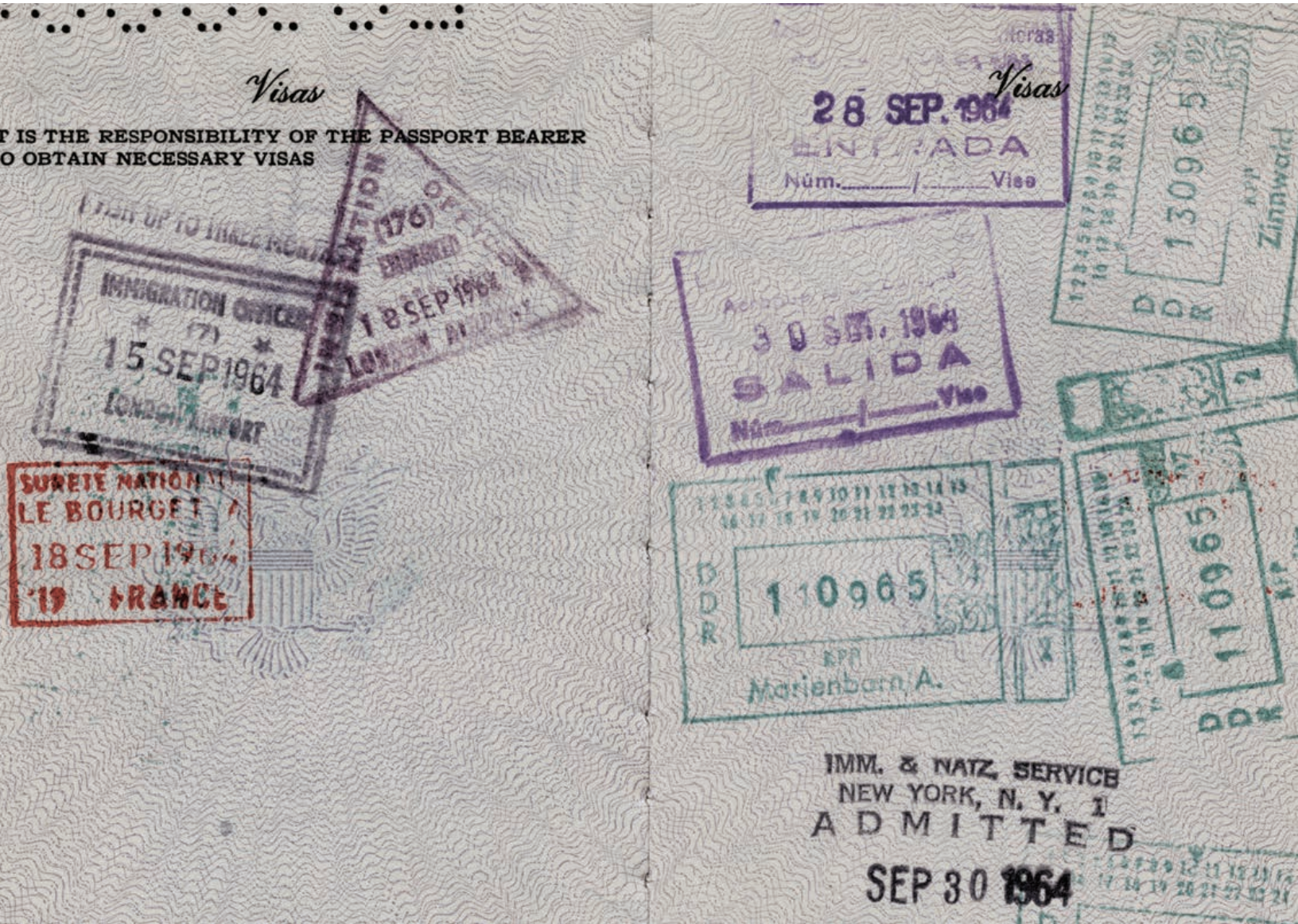
Other grounds

There are other grounds of inadmissibility related to:

- Health;
- Crime;
- Public security;
- Public benefits;
- Past immigration violations and other categories.

Waivers

Waivers of inadmissibility may be available under limited circumstances.



Temporary, nonimmigrant visas

B-1 Business Visitor Nonimmigrant Visa

Summary

The B-1 business visitor visa is appropriate for short business trips that do not involve productive, employment-type activity.

In general, B-1 visa applications are made at American consular posts outside the United States, however this requirement is waived for citizens of Canada. In addition, this requirement may also be waived for citizens of countries participating in the Visa Waiver Program. More information about the Visa Waiver Program, including a list of participating countries, can be found at the United States State Department web site at http://travel.state.gov/content/visas/english/visit/visa-waiver-program.html.

Duration

The maximum period of visa validity is 10 years. The maximum length of an stay in the United States is six months, but the Customs and Border Protection officer has the authority authorize visitors to remain in the US for periods of less than six months. An extension of stay for up to six months may be requested. Visa Waiver Program visitors are admitted for up to 90 days only and are not allowed to apply for an extension or change of visa status from within the US.

Key considerations

The B-1 business visitor visa is appropriate for short business trips that do not involve productive, employment-type activity.

1. Nonimmigrant intent

The requirement for B-1 business visitors to prove nonimmigrant intent is the most frequent reasons why American consular posts deny B-1 visas and Customs and Border Protection officers deny entry to the United States. To show nonimmigrant intent, B-1 business visitors must demonstrate the following:

- A residence outside the United States that they do not intend to abandon;
- Ties outside the United States. They must have ties outside the US, such as permanent employment, meaningful business or financial connections, close family ties, or social or cultural associations that indicate a strong inducement to return to the country of origin;
- The intention to enter the US for a period of specifically limited duration consistent with the legally permitted duration listed above.

2. Qualifying business purpose

The following business purposes are acceptable for B-1 business visitors:

- Engage in commercial transactions that do not involve gainful employment in the United States (such as a merchant who takes orders for goods manufactured abroad);
- Negotiate contracts;
- Consult with business associates;
- Litigate;
- Participate in scientific, educational, professional, or business conventions, conferences or seminars;
- Undertake independent research;
- Board director of a United States corporation coming to attend a meeting of the board or to perform other functions resulting from membership on the board;
- Seeking investment in the United States, including an investment that would qualify the individual for status as an E-2 treaty investor visa holder, however productive labor and active participation in the management of the business is not permitted using the B-1 visa;
- Coming to install, service or repair commercial or industrial equipment or machinery purchased from a company outside the United States or to train United States workers to perform such services. 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 United States source. This does not apply to someone seeking to perform building or construction work, whether on-site or in-plant, except if supervising or training other workers engaged in building or construction work, but not actually performing any such building or construction work;
- Artist coming to paint, sculpt, etc., who is not under contract with a United States employer and who does not intend to regularly sell such art work in the United States; and
- Training limited to merely and exclusively observing the conduct of business or other professional or vocational activity, provided the individual pays for expenses. Hands-on training that involves productive work is not permitted.

There are also special rules for certain religious visitors, volunteers, professional athletes, foreign airline employees, musicians, still photographers, international competitors, and domestic employees of United States citizens residing outside the United States or foreign

nationals temporarily in the United States on qualifying nonimmigrant visas.

3. Employment in the United States is prohibited

B-1 business visitors are generally not authorized to receive compensation from any source in the United States.

Consular officers and immigration inspectors will often inquire about the arrangements made by the business visitor to pay for the expenses of the visit and return abroad in order to prove no intention to obtain unlawful employment in the United States.

Although B-1 business visitors may not receive a salary from a United States source for services rendered in connection with activities in the United States, an expense allowance or reimbursement is permitted for expenses incidental to the temporary stay not exceeding the actual reasonable expenses incurred in travel and living expenses for meals, lodging, laundry, and other basic services.

An honorarium payment and associated incidental expenses for usual academic activities (which can include lecturing, guest teaching or performing in an academic sponsored festival) if: (1) The activities last no longer than nine days at any single institution or organization; (2) Payment is offered by a qualifying institution or organization; (3) The honorarium is for services conducted for the benefit of the institution or entity; and (4) The individual has not accepted such payment or expenses from more than five institutions or organizations over the last six months.

Accompanying family members

The spouse and any unmarried children under the age of 21 are eligible to apply for the B-2 visa. The derivative visa for family members has the same validity periods as the principal visa holder.

F-1 Student Visa

Summary

F-1 students are automatically authorized to work part-time, on-campus while school is in session, and full-time on-campus during semester breaks and summer vacation. F-1 students may not work on-campus more than 30 days prior to the actual start date of classes. F-1 students transferring schools cannot work on campus until the receiving school has jurisdiction over the student's Student and Exchange Visitor Information System (SEVIS) records. Other employment must be authorized, either by the government or through the designated school official.

Employment that does not require authorization

Part-time, on-campus employment while school is in session

Employment must be on campus, either directly for the school or for a business providing services for the students, such as the book store or cafeteria. The employment may not exceed 20 hours per week. The employment may be at an off-campus location if the employer is educationally affiliated with the school (such as at a research institute) and if the employment is an integral part of the student's educational program.

Full-time, on-campus employment during summer vacation

The employment must be on-campus, either directly for the school for a business providing services for the students such as the book store or cafeteria. The employment may be at an office location if the employer is educationally affiliated with the school. The student must hold a valid I-20, having satisfactorily completed the most recent academic year. The student must be registered or intend to register for the next regular academic year.

Employment that requires authorization

Part-time, off-campus employment while school is in session

The student must have completed one full academic year in good standing. The employment may not be more than 20 hours per week while school is in session. The employer must have filed a labor-and-wage attestation stating that it has actively recruited US citizens or US permanent residents for the position for at least 60 days, and that the student worker will be accorded the same wages and working conditions as US workers similarly employed. The student must obtain specific employment authorization through the designated school official for this kind of employment. The designated school official grants the employment authorization directly, and notifies the government afterward.

Full-time, off-campus employment while school is not in session

The student must have completed one full academic year in good standing. The employment may not be more than 20 hours per week while school is in session. The employer must have filed a labor-and-wage attestation stating that it has actively recruited United States citizens or permanent residents for the position for at least 60 days, and that the student worker will be accorded the same wages and working conditions as United

States workers similarly employed. The student must obtain specific employment authorization through the designated school official for this kind of employment. The designated school official grants the employment authorization directly, and notifies the government afterward.

Off-campus employment based on unforeseen economic hardship

The student must have completed one full academic year in good standing. The employment must not be more than 20 hours a week while school is in session. The student must submit documentation of unforeseen economic hardship. Reasons may include: loss of financial aid or on-campus employment through no fault of the student; substantial fluctuations in the currency exchange rate; unforeseen increases in tuition and/or living costs; or unexpected change in the student's source of financial support. In cases of economic hardship, the employer does not need to submit a labor-and-wage attestation. The student must obtain specific employment authorization from the government directly, after obtaining certification from the designated school official that on-campus employment is insufficient or otherwise unavailable.

Curricular practical training

May be recommended for up to one year by the designated school official. After the school official's recommendation, the student must obtain employment authorization from the government. The student must have been in F-1 status for at least nine months and be in good academic standing before obtaining curricular practical training, unless the student is enrolled in a graduate studies program that requires immediate participation in curricular practical training.

Optional practical training (OPT)

May be carried out either before the completion of the degree program ("pre-completion") or after ("post-completion"). May be recommended for up to one year by the designated school official, provided that the employment directly relates to the student's degree program. F-1 students are eligible for a new one-year period of post-completion optional practical training when a student changes to a higher educational level. A student can get one year of OPT after completing a Bachelors, then get an additional one year OPT for Masters, and then a third year, if the student completes a Doctorate. After the school official's recommendation, the student must obtain employment authorization from the government. Post-completion OPT must be requested prior to the completion of the course requirements or prior to the completion of the course of study. For students requesting summer vacation OPT after the first year of study, the application to the government may be made up to 90 days prior to the completion of the first academic year.

STEM optional practice training

An additional 17 months of employment authorization is available to F-1 students who earned STEM (science, technology, engineering, or math fields) degrees from American universities, so long as they are employed with a company enrolled in the government's e-Verify program.

Other considerations

F-1 employees are generally exempt from FUTA and FICA withholding on their payroll taxes (See IRS Publication #15).

Accompanying family members

The spouse and any unmarried children under the age of 21 are eligible to apply for the F-2 visa. The derivative visa for family members generally has the same validity periods as the principal visa holder.

E-1 and E-2 Treaty Trader or Investor Visa

Summary

E-1 visas are for individuals coming to the United States to manage trading activity primarily between the United States and their country. E-2 visas are for individuals coming to the United States to manage a business investment in the United States. Both E visas are available to individuals who own 50 percent or more of the United States business. Both E visas are also available to qualified employees of such businesses.

Duration

Generally issued to owners and managers for up to five years initially, except that only a one or two year duration is initially granted if the sponsoring company does not have a developed history of trade or investment in the United States prior to the visa request. Extension intervals are for up to five years. There is no limit on the number of extensions permitted.

Both E visas are also issued to individuals who have skills essential to the United States business, but often only for one or two years. Extensions in such cases are not usually granted.

Key considerations for E-1 Treaty Trader Visa

An E-1 treaty trader is an individual coming to the United States to carry out a substantial volume of trade primarily

between the United States and the country of citizenship.

1. Treaty

There must be a bilateral agreement between the United States and the country of citizenship of at least 50% of the owners of the business in the United States.

The United States Department of State website has a current list of countries with E-1 and/or E-2 agreements with the United States at http://travel.state.gov/content/visas/english/fees/treaty.html.

2. Citizenship

The visa applicant and the owners of the United States business must hold citizenship in the treaty country.

If a corporation's stock is sold exclusively on a stock exchange in the country of incorporation, the United States State Department presumes that the nationality of the corporation is that of the location of the exchange.

3. Trade

The business activities must qualify as trade.

Trade requires an actual exchange, in a meaningful sense, of qualifying commodities, such as goods, moneys, or services. An exchange of a good or service for consideration must flow between the two treaty countries and must be traceable or identifiable. Title to the trade item must pass from one treaty party to the other.

The trade must be international in scope. Purely domestic business is not trade.

Services can qualify as trade. The provision of the service must be the purpose of the business. The service must itself be the commodity that the enterprise sells to clients. Examples include international banking, insurance, transportation, tourism, communications, and news gathering activities. Essentially, any service commonly traded in international commerce qualifies.

4. Substantial

The volume of trade must be substantial.

The trade must be a continuous flow that should involve numerous transactions over time. The focus is primarily on the volume of trade conducted, but United States consular officers are instructed to also consider the monetary value of the transactions. Although the number of transactions and the value of each transaction will vary, greater weight is given to more numerous transactions of larger value.

Smaller trading companies can qualify by demonstrating a pattern of transactions of value. Proof of numerous transactions, although each may be relatively small in value, may establish the requisite continuing course of international trade. Income derived from the international trade that is sufficient to support the treaty trader and family is considered favorably when assessing substantiality.

5. Trade with treaty country

Trade must be principally between the United States and the treaty country.

Over 50 percent of the total volume of the international trade conducted by the treaty trader regardless of location must be between the United States and the treaty country. The remainder of the trade may be international trade with other countries or domestic trade.

6. Role

If the visa applicant is the 50 percent or higher owner of the United States business, then the applicant must be in a position to develop and direct the enterprise.

Otherwise, the visa applicant must be an employee who will either serve in an executive/supervisory position or possesses skills essential to the firm's operations in the United States.

7. Nonimmigrant intent

The visa applicant must intend to depart the United States when the E-1 status terminates.

An applicant for an E visa need not establish intent to proceed to the United States for a specific temporary period of time. Nor does an applicant for an E visa need to have a residence in a foreign country which the applicant does not intend to abandon. The applicant may sell the residence and move all household effects to the US. The applicant's expression of an unequivocal intent to return when the E status ends is normally sufficient, in the absence of specific indications of evidence that the applicant's intent is to the contrary. If there are such objective indications, consular officers are instructed to make further inquiry to assess the applicant's true intent. An applicant might be a beneficiary of an immigrant visa petition filed on his or her behalf, yet still satisfy the consular officer of intent to depart the United States upon termination of status, and not stay in the United States to adjust status or otherwise remain in the United States regardless of legality of status.

Key considerations for E-2 Treaty Investor Visa

An E-2 treaty investor is an individual coming to the United States because of a substantial business investment made in the United States by individuals from the country of citizenship.

1. Treaty

There must be a bilateral agreement between the United States and the country of citizenship of at least 50 percent of the owners of the business in the United States.

The United States Department of State website has a current list of countries with E-1 and/or E-2 agreements with the United States at http://travel.state.gov/content/visas/english/fees/treaty.html.

2. Citizenship

The visa applicant and the owners of the United States business must hold citizenship in the treaty country.

If a corporation's stock is sold exclusively on a stock exchange in the country of incorporation, the US State Department presumes that the nationality of the corporation is that of the location of the exchange.

3. Investment

Either the investment is already done or actively in the process of being done.

The investor must demonstrate possession and control of the capital assets, including funds invested. The investor may have received the invested funds by any legitimate means (e.g., savings, gift, inheritance, contest) and must have control and possession over the funds. Inheritance of a business does not constitute an investment. The source of the funds need not be outside the United States.

Investment connotes the placing of funds or other capital assets at risk, in the commercial sense, in the hope of generating a financial return. Investment in non-profit organizations does not qualify. If the funds are not subject to partial or total loss if business fortunes reverse, then it is not a qualifying investment.

If the funds were obtained through indebtedness, the following criteria must be followed:

1. Indebtedness such as mortgage debt or commercial loans secured by the assets of the enterprise cannot count toward the investment, as there is no requisite element of risk. For example, if the business in which the investor is investing is used as collateral, funds from the resulting loan or mortgage are not at risk, even if some personal assets are also used as collateral.
2. Only indebtedness collateralized by the investor's own personal assets, such as a second mortgage on a home or unsecured loans, such as a loan on the investor's personal signature may be included, since then the investor risks the funds in the event of business failure.

At risk funds in the E-2 context include only funds in which personal assets are involved, such as personal funds, other unencumbered assets, a mortgage with the investor's personal dwelling used as collateral, or some similar personal liability. A reasonable amount of cash, held in a business bank account or similar fund to be used for routine business operations, may be counted as investment funds.

Funds or assets to be invested must be committed to the investment, and the commitment must be real and irrevocable. For example, a purchase or sale of a business that qualifies for E-2 status in every respect may be conditioned upon the issuance of the visa. Despite the condition, this qualifies as a solid commitment if the assets to be used for the purchase are held in escrow for release or transfer only on the condition of visa issuance being met. The investor must have reached an irrevocable point of investing to qualify.

The enterprise must be close to the start of actual business operations, and not simply in the stage of signing contracts or scouting for suitable locations and property. Mere intent to invest, or possession of uncommitted funds in a bank account, or even prospective investment arrangements entailing no present commitment, does not qualify.

Payments of leases or rents for property or equipment may be calculated toward the investment in an amount limited to the funds devoted to that item in any one month. However, the market value of the leased equipment is not representative of the investment and neither is the annual rental cost (unless it has been paid in advance) as these rents are generally paid from the current earnings of the business.

Payments to purchase equipment and inventory may be calculated in the investment total. The value of goods or equipment transferred to the United States (such as factory machinery shipped to the United States to start or enlarge a plant) may be considered an investment. The investor must demonstrate that the goods or machinery will be put, or are being put, to use in an ongoing commercial enterprise. The investor must establish that the purchased goods or equipment are for investment and not personal purposes.

Intellectual property may also be considered capital assets to the extent to which the value can reasonably be determined. Where no market value is available for a copyright or patent, the value of current publishing or manufacturing contracts generated by the asset may be used. If none exist, the opinions of experts may be submitted.

4. Commercial business

The United States business must be a real and operating commercial enterprise.

The enterprise must be a real and active commercial or entrepreneurial undertaking, producing some service or commodity. It cannot be a passive investment, a paper organization or an idle speculative investment held for potential appreciation in value. Undeveloped land or stocks held without the intent to direct the enterprise do not qualify.

5. Substantial

The amount of the investment must be substantial. No set minimum amount of investment is designated. Instead, an investment qualifies as substantial if the amount of capital is:

- Substantial in a proportional sense, i.e., substantial in relationship to the total cost of either purchasing an established enterprise, or creating the type of enterprise under consideration;
- Sufficient to ensure the treaty investor's financial commitment to the successful operation of the enterprise; and
- Of a magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise.

6. Marginality

The investment must be more than a marginal one solely for earning a living for the owner investor.

A marginal enterprise is an enterprise that does not have the present or future capacity to generate more than enough income to provide a minimal living for the investor and family. An enterprise that does not have the capacity to generate such income but that has a present or future capacity to make a significant economic contribution is not a marginal enterprise. The projected future capacity should generally be realizable within five years from the date normal business activities commence.

7. Role

If the visa applicant is the 50 percent or higher owner of the United States business, then the applicant must be in a position to develop and direct the enterprise. Otherwise, the visa applicant must be an employee who will either serve in an executive/supervisory position or possesses skills essential to the firm's operations in the United States. In evaluating the executive and/or supervisory element, United States consular officers will consider the following factors:

- The job title, the place in the firm's organizational structure, the duties of the position, the degree of ultimate control and responsibility for the firm's overall operations or a major component thereof, the number and skill levels of the employees to be supervised, the level of pay, and executive or supervisory experience;
- Whether the executive or supervisory element of the position is a principal and primary function and not an incidental or collateral function. For example, if the position principally requires management skills or entails key supervisory responsibility for a large portion of a firm's operations and only incidentally involves routine substantive staff work, an E classification would generally be appropriate. Conversely, if the position chiefly involves routine work and secondarily entails supervision of low-level employees, the position could not be termed executive or supervisory; and
- The weight to be accorded a given factor, which may vary from case to case. For example, the position title of "vice president" or "manager" might be of use in assessing the supervisory nature of a position if the applicant were coming to a major operation having numerous employees. However, if the applicant were coming to a small two-person office, such a title in and of itself would be of little significance.

If not an owner or a manager, then the employee must hold skills essential to the enterprise. This visa is intended for specialists and not for ordinary skilled workers. There are exceptions. Some skills may be essential for as long as the business is operating. Others, however, may be necessary for a shorter time, such as for a start-up.

- Long-term need. The employer may show a need for the skills on an on-going basis when the employee will be engaged in functions such as continuous development of product improvement, quality control or provision of a service otherwise unavailable.
- Short-term need. The employer may need the skills for only a relatively short (e.g., one or two years) period of time when the employee's job relates to start-up operations of either the business or a new activity by the business or to training and supervision of technicians employed in manufacturing, maintenance and repair functions In assessing specialized skills and their essentiality, consular officers are instructed to consider:
  - Degree of proven expertise of the alien in the area of specialization;
  - The uniqueness of the specific skills;
  - The function of the job to which the alien is destined;
  - The salary such special expertise can command;
  - The period of training needed to perform the contemplated duties and, in some cases, the length of experience and training with the firm; and
  - The availability of US workers qualified to perform skills.

8. Nonimmigrant intent

The visa applicant must intend to depart the United States when the E-2 status terminates.

An applicant for an E-2 visa need not establish intent to proceed to the United States for a specific temporary period of time. Nor does an applicant for an E visa need to have a residence in a foreign country which the

applicant does not intend to abandon. The applicant may sell the residence and move all household effects to the United States.

The applicant's expression of an unequivocal intent to return when the E status ends is normally sufficient, in the absence of specific indications of evidence that the applicant's intent is to the contrary. If there are such objective indications, consular officers are instructed to make further inquiry to assess the applicant's true intent. An applicant might be a beneficiary of an immigrant visa petition, yet still satisfy the consular officer of intent to depart the United States upon termination of status, and not stay in the United States to adjust status or otherwise remain in the United States regardless of legality of status.

Accompanying family members

The spouse and any unmarried children under the age of 21 are eligible to apply for the E-1 or E-2 visa. The derivative visa for family members has the same validity periods as the principal visa holder. The E-1 or E-2 spouse is eligible to work and can apply for an Employment Authorization Document after arrival in the United States.

E-3 Free Trade Agreement Specialty Occupation Worker Visa

Summary

Only citizens of Australia can qualify for the E-3 visa.

The E-3 Free Trade Agreement nonimmigrant visa category is designed for professionals or members of the "specialty occupations" who are citizens of countries with qualifying Free Trade Agreements. The general criterion for classification in this category is that the job offered must normally require a bachelor's or higher degree. The prospective employee must hold at least a US bachelor's degree or the equivalent to that degree. The degree must be in the field required for the job.

Duration

The E-3 visa is initially granted for up to 24 months. Extensions in increments of up to 24 months at a time are available, with no limit on the total number of extensions.

Key considerations

1. Numerical limits

Supply and demand.

The supply of new E-3 visas that can be granted each year is limited. The Free Trade Agreement provides for 10,500 for citizens of Australia. The fiscal year starts October 1.

2. Specialty occupations

The job must be in a "specialty occupation," which is defined as jobs where:

1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
3. The employer normally requires a degree or its equivalent for the position; or
4. The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Examples of specialty occupation jobs include, but are not limited to: engineer, architect, certified public accountant, physician, lawyer, and pharmacist.

Examples of jobs not considered to qualify include: paralegal, nurses' aide or LVN, business manager, administrative assistant, banker, pilot and translator. None of these occupations regularly requires a four-year degree in the field in order to do the job. Although many business managers may have degrees in business administration, this degree is not generally considered a normal requirement in the United States for that occupation.

The educational training and the proposed job duties must be related. A financial analyst or portfolio manager may have a background in finance or in economics. A marketing manager may have a degree with a major in marketing. This kind of specialized training, but not a more general business administration major, is usually accepted. If a certain situation is unclear, the CIS will often look to the Department of Labor as an authority for job duties and requirements normally required by employers in the United States.

3. Personal qualifications

To qualify for the E-3 visa category, the prospective employee must hold a bachelor's or higher degree from an American university, or the equivalent. Equivalent means the achievement of a level of knowledge, competence and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the

specialty occupation. Every three years of employment in progressively more responsible positions in the specialty occupation are considered by regulation as equivalent to one year of academic training.

An applicant without a US bachelor's degree must demonstrate the equivalent. There are five ways to demonstrate this level of achievement:

1. an evaluation from a official acting within a university program for granting college-level credit for training and/or work experience;
2. results of nationally-recognized college-level equivalency examinations, such as the College Level Examination Program (CLEP);
3. an evaluation of the person's academic credentials by an independent credentials evaluation service specializing in foreign educational credentials;
4. if the individual belongs to a nationally-recognized professional association or society for the specialty that only grants membership to those who have achieved a certain level of competence, this would be taken as showing the individual has achieved the equivalent of a US four-year degree; or
5. the individual may present evidence that the equivalent of the degree has been acquired by a combination of education, specialized training, and/or employment experience in the field. Usually an independent credentials evaluation service will make this determination, although it is not binding on the government.

There are a number of independent evaluation services whose evaluations are regularly accepted. These evaluations can be obtained quickly and are a popular way to prove an individual's personal qualifications.

In addition to the academic qualifications, the individual must be fully qualified to lawfully perform the duties of the position offered. In occupations that require licensure or professional credentials (e.g., doctor, dentist, lawyer, CPA, architect, registered nurse), the individual must already hold such qualification before the E-3 visa request can be filed.

4. Labor Condition Application

A US Department of Labor certified "LCA" or labor condition application must be filed with the visa petition. This requires the employer to promise to pay compensation and benefits at least equal to the higher of the prevailing wage paid to similarly employed workers and to maintain a public disclosure file containing related information. Additional obligations may apply to "dependent" employers who have a high ratio of E-3 to total employees in the United States.

5. Nonimmigrant intent

Applicants must prove nonimmigrant intent.

6. Other requirements

The employer must agree to pay the cost of the employee's transportation to the home country if the employer terminates employment earlier than the date requested. The employer also agrees to notify the government if there is a material change of circumstances, such as pay reductions, change of work site, change of duties, etc.

Accompanying family members

The E-3 visa is available to the spouse and unmarried children under the age of 21 who accompany or follow to join the E-3 worker in the United States. Employment is not authorized for E-3 family members.

H-1B Specialty Occupation Worker Visa

Summary

The H-1B nonimmigrant visa category is designed for professionals or members of the "specialty occupations". The general criterion for classification in this category is that the job offered must normally require a bachelor's or higher degree. The prospective employee must hold at least a US. bachelor's degree or the equivalent to that degree. The degree must be in the field required for the job.

Duration

The H-1B petition is initially granted for up to three years. A maximum of six years is generally possible, with extensions in increments of up to three years at a time. Additional extensions beyond the sixth year are sometimes possible. After the maximum stay in H-1B status, the individual must depart the US for at least one year before qualifying again for H-1B status.

Key Considerations

1. Numerical limits

Supply and demand.

The supply of new H-1B visa petitions that can be granted each year is limited. The law generally provides for 65,000 new H-1B petition approvals each fiscal year. An additional 20,000 is available only to individuals who earned graduate degrees at American universities. The fiscal year starts October 1.

The demand by United States employers for H-1B workers is greater than the supply of new H-1B visa petitions

available. For over a decade, employer and professional groups have tried to get the United States Congress to increase the quota, but success.

What to do? Employers and professionals must act quickly. Identify F-1, J-1 or other employees who need to secure new H-1B visa petitions. Invest $1,000 more for the government's 15-day processing to get quick decisions. Recruit H-1B professionals away from other companies and work harder to retain your existing H-1B employees, since they will become harder to replace and will be in demand with other employers. Consider alternative visas that are not subject to quota limitations, like the TN, O-1, L-1, etc. Also consider alternative visas where the demand is typically less than the supply, resulting in year round availability, like the H-1B1 Free Trade Agreement visas for citizens of Singapore and Chile, and the E-3 visa for citizens of Australia.

The numerical limits apply only to new H-1B visa petitions. H-1B visa petition extensions, including change of employer, are generally not limited. Individuals counted against the new H-1B visa petition quota in the past may be exempt on future petitions, even if not currently in H-1B visa status, under certain conditions.

Note that new H-1B petitions filed by institutions of higher learning, affiliated research organizations, nonprofit research organizations and government research organizations are not counted against the quota.

2. Specialty occupations

For an H-1B visa petition to be approved, the job must be in a "specialty occupation," which are defined as jobs where:

1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
3. The employer normally requires a degree or its equivalent for the position; or
4. The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Examples of specialty occupation jobs include, but are not limited to: engineer, architect, certified public accountant, physician, attorney, and pharmacist.

Examples of jobs not considered to qualify include: paralegal, nurses' aide or LVN, business manager, administrative assistant, banker, pilot, and translator. None of these occupations regularly requires a four-year degree in the field in order to do the job. Although many business managers may have degrees in business administration, this degree is not considered a normal requirement in the United States.

The educational training and the proposed job duties must be related. A financial analyst or portfolio manager may have a background in finance or in economics. A marketing manager may have a degree with a major in marketing. This kind of specialized training, but not a more general business administration major, is usually accepted. If a certain situation is unclear, the CIS will often look to the Department of Labor as an authority for job duties and requirements normally required by employers in the United States.

3. Labor Condition Application

A United States Department of Labor certified "LCA" or labor condition application must be filed with the visa petition. This requires the employer to promise to pay compensation and benefits at least equal to the higher of the prevailing wage paid to similarly employed workers and to maintain a public disclosure file containing related information. Additional obligations may apply to "dependent" employers who have a high ratio of H-1B to total employees in the United States.

4. Personal qualifications

To qualify for the H-1B visa category, the prospective H-1B employee must hold a bachelor's or higher degree from an American university, or the equivalent. Equivalent means the achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty occupation. Every three years of employment in progressively more responsible positions in the specialty occupation are considered by regulation as equivalent to one year of academic training.

An applicant without a US bachelor's degree must demonstrate the equivalent. There are five ways to demonstrate this level of achievement:

1. an evaluation from a official acting within a university program for granting college-level credit for training and/or work experience;
2. results of nationally-recognized college-level equivalency examinations, such as the College Level Examination Program (CLEP);
3. an evaluation of the person's academic credentials by an independent credentials evaluation service specializing in foreign educational credentials;

4. If the individual belongs to a nationally-recognized professional association or society for the specialty that only grants membership to those who have achieved a certain level of competence, this would be taken as showing the individual has achieved the equivalent of a US four-year degree; or
5. Finally, the individual may present evidence that the equivalent of the degree has been acquired by a combination of education, specialized training, and/or employment experience in the field. Usually an independent credentials evaluation service will make this determination, although it is not binding on the government

There are a number of independent evaluation services whose evaluations are regularly accepted. These evaluations can be obtained quickly and are a popular way to prove an individual's personal qualifications.

In addition to the academic qualifications, the individual must be fully qualified to lawfully perform the duties of the position offered. In occupations that require licensure or professional credentials (e.g., doctor, dentist, lawyer, CPA, architect, registered nurse), the individual must already hold such qualification before the H-1B visa petition can be filed.

5. Other requirements

The employer must agree to pay the cost of the employee's transportation to the home country if the employer terminates H-1B employment earlier than the date requested. The employer also agrees to notify the government if there is a material change of circumstances, such as pay reductions, change of work site, change of duties, etc.

Accompanying family members

The H-4 visa is available to the spouse and unmarried children under the age of 21 who accompany or follow to join the H-1B worker in the United States. Employment is not authorized for H-4 visa holders.

H-1B1 Free Trade Agreement Specialty Occupation Worker Visa

Summary

Only citizens of Chile and Singapore can qualify for the H-1B1 visa.

The H-1B1 Free Trade Agreement nonimmigrant visa category is designed for professionals or members of the "specialty occupations" who are citizens of countries with qualifying Free Trade Agreements. The general criterion for classification in this category is that the job offered must normally require a bachelor's or higher degree. The prospective employee must hold at least a US bachelor's degree or the equivalent to that degree. The degree must be in the field required for the job.

Duration

The H-1B1 visa is initially granted for up to 18 months. A maximum of six years is generally possible, with extensions in increments of up to 18 months at a time. Additional extensions beyond the sixth year are sometimes possible. After the maximum stay in H-1B1 status, the individual must depart the US for at least one year before qualifying again for H-1B1 status.

Key considerations

1. Numerical limits supply and demand

The supply of new H-1B1 visa petitions can be granted each year is limited. The Free Trade Agreement provides for 1,400 new H-1B1 visas each fiscal year for citizens of Chile and another 1,400 for citizens of Singapore. The fiscal year starts October 1.

2. Specialty occupations

For an H-1B1 visa petition to be approved, the job must be in a "specialty occupation," which are defined as jobs where:

1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
3. The employer normally requires a degree or its equivalent for the position; or
4. The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Examples of specialty occupation jobs include, but are not limited to: engineer, architect, certified public accountant, physician, lawyer and pharmacist.

Examples of jobs not considered to qualify include: paralegal, nurses' aide or LVN, business manager, administrative assistant, banker, pilot and translator. None of these occupations regularly requires a four-year degree in the field in order to do the job. Although many business

managers may have degrees in business administration, this degree is not considered a normal requirement in the United States.

The educational training and the proposed job duties must be related. A financial analyst or portfolio manager may have a background in finance or in economics. A marketing manager may have a degree with a major in marketing. This kind of specialized training, but not a more general business administration major, is usually accepted. If a certain situation is unclear, the CIS will often look to the Department of Labor as an authority for job duties and requirements normally required by employers in the United States.

3. Personal qualifications

To qualify for the H-1B1 visa category, the prospective H-1B1 employee must hold a bachelor's or higher degree from an American university, or the equivalent. Equivalent to means the achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty occupation. Every three years of employment in progressively more responsible positions in the specialty occupation are considered by regulation as equivalent to one year of academic training.

An applicant without a US bachelor's degree must demonstrate the equivalent. There are five ways to demonstrate this level of achievement:

1. an evaluation from a official acting within a university program for granting college-level credit for training and/or work experience;
2. results of nationally-recognized college-level equivalency examinations, such as the College Level Examination Program (CLEP);
3. an evaluation of the person's academic credentials by an independent credentials evaluation service specializing in foreign educational credentials;
4. If the individual belongs to a nationally-recognized professional association or society for the specialty that only grants membership to those who have achieved a certain level of competence, this would be taken as showing the individual has achieved the equivalent of a US four-year degree; or
5. Finally, the individual may present evidence that the equivalent of the degree has been acquired by a combination of education, specialized training, and/or employment experience in the field. Usually an independent credentials evaluation service will make this determination, although it is not binding on the government

There are a number of independent evaluation services whose evaluations are regularly accepted. These evaluations can be obtained quickly and are a popular way to prove an individual's personal qualifications

In addition to the academic qualifications, the individual must be fully qualified to lawfully perform the duties of the position offered. In occupations that require licensure or professional credentials (e.g., doctor, dentist, lawyer, CPA, architect, registered nurse), the individual must already hold such qualification before the H-1B1 visa petition can be filed.

4. Nonimmigrant intent

Unlike the H-1B visa, H-1B1 applicants must prove nonimmigrant intent.

5. Other requirements

The employer must agree to pay the cost of the employee's transportation to the home country if the employer terminates H-1B1 employment earlier than the date requested. The employer also agrees to notify the government if there is a material change of circumstances, such as pay reductions, change of work site, change of duties, etc.

Accompanying family members

The H-4 visa is available to the spouse and unmarried children under the age of 21 who accompany or follow to join the H-1B1 worker in the United States. Employment is not authorized for H-4 visa holders.

J-1 Exchange Visitor Visa

Summary

The J-1 nonimmigrant visa is available for a broad range of cultural, educational, training, research and other purposes. Students, teachers, researchers, au pairs and trainees are just a few examples.

Duration

The maximum period of duration and the availability of extensions, if any, depends on the specific type of exchange visitor program.

Key considerations

1. Program sponsor

The J-1 visa requires acceptance by a United States Department of State-designated J-1 exchange program.

2. Home residence requirement

The two-year home country residence requirement requires some, but not all, J visa holders to depart the United States, return to the home country, and be physically present there for at least two years before being eligible for either permanent residence or most nonimmigrant visas.

Those subject to the two-year requirement are exchange visitors whose SEVIS DS-2019 indicates:

- The exchange program was financed, partly or wholly, directly or indirectly, by either the United States or the home-country government;
- The exchange program was to provide the exchange visitor with skills which are needed in the home country, as identified by the "Exchange Visitor Skills List"; or
- The exchange visitor received graduate medical education or training.

It is often possible to obtain a waiver of the two year home country residence requirement.

3. Permitted uses of J-1

Student

- Full-time, secondary or post-secondary program
- English language training at postsecondary accredited institution
- Limited to the length of time necessary to complete the degree program; and
  - for undergraduate and pre-doctoral training, not to exceed 18 months; or
  - for post-doctoral training, not to exceed 36 months.

Short-Term Scholar

- Professor, research scholar, or similar education/ accomplishments
- Coming to lecture, observe, consult, train, or demonstrate special skills
- Coming to a research institution, museum, library, or postsecondary accredited institution
- Length of time not to exceed 4 months

Trainee

- Participant in a structured training program conducted by the selecting sponsor
- Length of training program not to exceed 18 months

Teacher

- Teaching full-time in primary or secondary accredited educational institution

Professor

- Coming to primarily teach, lecture, observe, conduct research, or consult at postsecondary educational institution, museum, library, or similar institution
- Length of time not to exceed three years

Research Scholar

- Coming to primarily conduct research, observe, or consult on research project
- Coming to a research institution, corporate research facility, museum, library, or postdoc research project
- Coming to a research institution, corporate research facility, museum, library, or
- postsecondary accredited educational institution or similar type of institution
- May also teach or lecture unless disallowed by the sponsor
- Length of time not to exceed three years

Specialist

- An individual who is an expert in a field of specialized knowledge or skill coming to the United States for observing, consulting, or demonstrating special skills

International Visitor

- A recognized or potential leader, selected by the US Information Agency for consultation, observation, research, training, or demonstration of special skills in the United States

Government Visitor

- An influential or distinguished person, selected by a US federal, state, or local government agency for consultation, observation, training, or demonstration of special skills in the United States

Camp Counselor

- An individual selected to be a counselor in a summer camp in the United States who imparts skills to American campers and information about his or her country or culture.

4. Health insurance requirement for exchange visitors

All exchange visitors in the US are required to maintain health and accident insurance for the time they are participating in an exchange program. There are minimum requirements for the insurance.

Accompanying family members

The spouse and any unmarried children under the age of 21 are eligible to apply for the J-2 visa. The derivative visa for family members has the same validity periods as the principal visa holder. The J-2 spouse is eligible to work, but must first apply for an Employment Authorization Document after arrival in the United States.

L-1 Intracompany Transfer Nonimmigrant Visa

Summary

The L-1 intracompany transfer visa allows experienced employees from outside the United States to be temporarily employed in the United States at a related office. The L-1A is for individuals who will be employed in a primarily executive or managerial capacity. The L-1B is for those who will be employed in a capacity primarily involving specialized knowledge.

Duration

Generally issued for up to three years initially. Only a one year duration is initially granted if the sponsoring company has not regularly and continuously maintained an office in the United States for at least one year prior to the visa request. Extension intervals are for up to two years. With all possible extensions, the L-1A authorizes seven years in the United States and the L-1B five years.

Key considerations

An L-1 intracompany transferee is an individual who, within three years preceding the time of application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive , or involves specialized knowledge.

1. Intracompany relationship

A qualifying intracompany relationship must exist between the sponsoring company in the United States and the employer outside the United States. There are a number of legal relationships between companies possible, such as a branch of the same employer or a parent, affiliate, or subsidiary as defined below.

"Parent" means a firm, corporation, or other legal entity which has subsidiaries.

"Branch" means an operating division or office of the same organization housed in a different location.

"Subsidiary" means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

"Affiliate" means: (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity, or (3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

2. United States job

The job offered in the United States must be primarily in a managerial, executive, or specialized knowledge capacity as defined below.

"Managerial" capacity means an assignment within an organization in which the employee primarily: (1) Manages the organization, or a department, subdivision, function, or component of the organization; (2) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision

of the organization; (3) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and (4) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

"Executive" capacity means an assignment within an organization in which the employee primarily: (1) Directs the management of the organization or a major component or function of the organization; (2) Establishes the goals and policies of the organization, component, or function; (3) Exercises wide latitude in discretionary decision-making; and (4) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

"Specialized knowledge" capacity means special knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

3. Experience abroad

For a continuous period of at least one year during the three year period preceding the filing of the visa petition, the individual must have been employed outside the United States in a capacity that was primarily executive, managerial, or involving specialized knowledge.

Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted towards fulfillment of that requirement.

4. Business activities

The companies in and outside the United States must have employees engaged in the regular, systematic, and continuous provision of goods and/or services. The mere presence of an agent or office in the United States and abroad is insufficient.

Special "new office" rules apply to startups that have been doing business in the United States for less than one year. These rules generally require documentation that: sufficient physical premises to house the new office have been secured; the new office has the financial ability to pay the employee and commence doing business in the United States; and, in the case of L-1A requests, the new office within one year of the approval of the petition will support an executive or managerial position.

5. Special rules for business owners

If the individual is an owner or major stockholder of the company, the petition must be accompanied by evidence that the services are to be used for a temporary period and evidence that the individual will be transferred to an assignment outside the United States upon the completion of the temporary services in the United States.

Accompanying family members

The spouse and any unmarried children under the age of 21 of the L-1 employee are eligible to apply for the L-2 visa. The L-2 has the same validity periods as the L-1A and L-1B. The L-2 spouse is eligible to work and can apply for an Employment Authorization Document after arrival in the United States.

O-1 Extraordinary Ability Nonimmigrant Visa

Summary

The O-1 nonimmigrant visa is for individuals of extraordinary ability in the sciences, education, business or athletics. The O-1 is also for individuals of extraordinary ability in athletics, the arts, motion picture or television industries.

There is also an O-2 visa for certain individuals that may accompany O-1 visa holders, and the O-3 visa for qualifying family members.

Duration

Validity is for the amount of time needed to accomplish the event or activity in the US, but is not to exceed 3 years. There is also a grace period of up to 10 days before the validity period begins and 10 days after the validity period ends. Note, however, that the individual may only engage in employment during the validity period of the petition. Furthermore, an extension of stay may be authorized in increments of up to 1 year to continue or complete the same event or activity for which the individual was admitted, plus an additional 10 days to get personal affairs in order.

Key considerations

1. Extraordinary ability

Extraordinary ability means a level of expertise indicating

that the individual is one of the small percentage who have arisen to the very top of the field of endeavor. The individual must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of:

- Receipt of a major, internationally recognized award, such as the Nobel Prize;
- or at least three of the following forms of documentation:
  1. Receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
  2. Membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
  3. Published material in professional or major trade publications or major media about the individual, relating to the individual's work in the field for which classification is sought;
  4. Participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;
  5. Original scientific, scholarly, or business-related contributions of major significance in the field;
  6. Authorship of scholarly articles in the field, in professional journals, or other major media;
  7. Past employment in a critical or essential capacity for organizations and establishments that have a distinguished reputation; or
  8. Either has or will command high compensation.

2. Job requires extraordinary ability

Only jobs utilizing the individual's extraordinary ability will qualify to support an O-1 visa petition. Copies of any written contracts between the proposed employer and the individual or a summary of the terms of the oral agreement under which the individual will be employed must be provided. Furthermore, the supporting evidence must state the nature of the events or activities in which the individual will be engaged, including the beginning and ending dates for the events or activities, and a copy of any itinerary for the events or activities (the last item is more relevant for individuals of extraordinary ability in athletics, the arts, motion picture or television industries).

3. Advisory opinion

Consultation with an appropriate United States peer group (which could include a person or persons with expertise in the field), labor and/or management organization regarding the nature of the work to be done and the individual's qualifications should be submitted with the petition. A qualified peer group is a group that is comprised of practitioners of the individual's occupation. If there is a collective bargaining representative of an employer's employees in the occupational classification for which the individual is being sought, such a representative may be considered the appropriate peer group for purposes of consultation. Consultations are advisory and are not binding on the government. A consulting organization may submit a letter of no objection in lieu of the above if it has no objection to the approval of the petition. If the advisory opinion is not favorable, the advisory opinion must set forth a specific statement of facts which supports the conclusion reached in the opinion. Advisory opinions must be in writing and must be signed by an authorized official of the group or organization.

In a routine processing case where the petition is accompanied by a written opinion from a peer group, but the peer group is not a labor organization, the government will forward a copy of the petition and all supporting documentation to the national office of the appropriate labor organization. If there is a collective bargaining representative of an employer's employees in the occupational classification for which the individual is being sought, that representative is considered the appropriate labor organization. In those cases where it is established that an appropriate peer group, including a labor organization, does not exist, the government shall render a decision on the evidence of record.

4. What if there is a strike?

The O visa regulations provide detailed instructions about the negative impact of a strike or labor dispute on O visa status. This situation arises if the United States Department of Labor certifies to the United States Citizenship and Immigration Services agency that a strike or other labor dispute involving a work stoppage of workers is in progress in the occupation at the place where the individual is to be employed, and that the employment of the beneficiary would adversely affect the wages and working conditions of United States citizens and lawful resident workers.

5. Early termination

If the employment of an O-1 or O-2 visa holder is terminated for reasons other than voluntary resignation, the employer whose offer of employment formed the basis of the visa status and the petitioner that filed the visa petition (if different) are jointly and severally liable for the reasonable cost of return transportation of the individual to the last place of residence prior to entry into the United States.

Accompanying family members

The spouse and any unmarried children under the age of 21 of the O-1 or O-2 employee are eligible to apply for the O-3 visa. The O-3 has the same validity periods. The O-3 spouse is not eligible to work in the United States.

TN Professional Nonimmigrant Visa

Summary

The TN professional worker visa classification is appropriate for citizens of Canada or Mexico sponsored by a United States employer to come to the United States to engage in employment in one of the professions included in the North American Free Trade Agreement ("NAFTA").

Duration

TN status is valid for up to three years. Extensions are available in increments of up to three years. There is no limit on the number of extensions possible.

Key considerations

1. Citizenship

Only Canadian and Mexican citizens can be granted TN visa status.

2. Job offer in NAFTA profession

A United States employer must offer employment in one of the NAFTA professions. Here is the complete list of the NAFTA professions:

Profession	Minimum Education Requirements or Alternative Credentials
General	
Accountant	Baccalaureate or Licenciatura Degree; or C.P.A., C.A., C.G.A. or C.M.A.
Architect	Baccalaureate or Licenciatura Degree; or state/provincial license
Computer Systems Analyst	Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience
Disaster Relief Insurance Claims Adjuster (claims Adjuster employed by an insurance company located in the territory of a Party, or an independent claims adjuster)	Baccalaureate or Licenciatura Degree, and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims; or three years experience in claims adjustment and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims
Economist	Baccalaureate or Licenciatura Degree
Engineer	Baccalaureate or Licenciatura Degree; or state/provincial license
Forester	Baccalaureate or Licenciatura Degree; or state/provincial license
Graphic Designer	Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience
Hotel Manager	Baccalaureate or Licenciatura Degree in hotel/restaurant management; or Post-Secondary Diploma or Post-Secondary Certificate in hotel/restaurant management, and three years experience in hotel/restaurant management
Industrial Designer	Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience
Interior Designer	Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience
Land Surveyor	Baccalaureate or Licenciatura Degree; or state/provincial/federal license
Landscape Architect	Baccalaureate or Licenciatura Degree
Lawyer (including Notary in the Province of Québec)	LL.B., J.D., LL.L., B.C.L. or Licenciatura Degree (five years); or membership in a state/provincial bar
Librarian	M.L.S. or B.L.S. (for which another Baccalaureate or Licenciatura Degree was a prerequisite)
Management Consultant	Baccalaureate or Licenciatura Degree; or equivalent professional experience as established by statement or professional credential attesting to five years experience as a management consultant, or five years experience in a field of specialty related to the consulting agreement

Profession	Minimum Education Requirements or Alternative Credentials
Mathematician (including Statistician)	Baccalaureate or Licenciatura Degree
Range Manager/Range Conservationist	Baccalaureate or Licenciatura Degree
Research Assistant (working in a post-secondary educational institution)	Baccalaureate or Licenciatura Degree
Scientific Technician/Technologist	Possession of: (a) a theoretical knowledge of any of the following disciplines: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology or physics; **and** (b) the ability to solve practical problems in any of those disciplines, or the ability to apply principles of any of those disciplines to basic or applied research
Social Worker	Baccalaureate or Licenciatura Degree
Sylviculturist (including Forestry Specialist)	Baccalaureate or Licenciatura Degree; or Post-Secondary
Technical Publications Writer	Diploma or Post-Secondary Certificate, and three years experience
Urban Planner (including Geographer)	Baccalaureate or Licenciatura Degree
Vocational Counsellor	Baccalaureate or Licenciatura Degree
Medical/Allied Professional	
Dentist	D.D.S., D.M.D., Doctor en Odontologia or Doctor en Cirugia Dental; or state/provincial license
Dietitian	Baccalaureate or Licenciatura Degree; or state/provincial license
Medical Laboratory Technologist (Canada)/Medical Technologist (Mexico and the United States)	Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience
Nutritionist	Baccalaureate or Licenciatura Degree
Occupational Therapist	Baccalaureate or Licenciatura Degree; or state/provincial license
Pharmacist	Baccalaureate or Licenciatura Degree; or state/provincial license
Physician (teaching or research only)	M.D. or Doctor en Medicina; or state/provincial license
Physiotherapist/Physical Therapist	Baccalaureate or Licenciatura Degree; or state/provincial license
Psychologist	State/provincial license; or Licenciatura Degree
Recreational Therapist	Baccalaureate or Licenciatura Degree
Registered Nurse	State/provincial license; or Licenciatura Degree
Veterinarian	D.V.M., D.M.V. or Doctor en Veterinaria; or state/provincial license
Scientist	
Agriculturist (including Agronomist)	Baccalaureate or Licenciatura Degree
Animal Breeder	Baccalaureate or Licenciatura Degree
Animal Scientist	Baccalaureate or Licenciatura Degree
Apiculturist	Baccalaureate or Licenciatura Degree
Astronomer	Baccalaureate or Licenciatura Degree
Biochemist	Baccalaureate or Licenciatura Degree
Biologist	Baccalaureate or Licenciatura Degree
Chemist	Baccalaureate or Licenciatura Degree

Profession	Minimum Education Requirements or Alternative Credentials
Dairy Scientist	Baccalaureate or Licenciatura Degree
Entomologist	Baccalaureate or Licenciatura Degree
Epidemiologist	Baccalaureate or Licenciatura Degree
Geneticist	Baccalaureate or Licenciatura Degree
Geologist	Baccalaureate or Licenciatura Degree
Geochemist	Baccalaureate or Licenciatura Degree
Geophysicist (including Oceanographer in Mexico and the United States)	Baccalaureate or Licenciatura Degree
Horticulturist	Baccalaureate or Licenciatura Degree
Meteorologist	Baccalaureate or Licenciatura Degree
Pharmacologist	Baccalaureate or Licenciatura Degree
Physicist (including Oceanographer in Canada)	Baccalaureate or Licenciatura Degree
Plant Breeder	Baccalaureate or Licenciatura Degree
Poultry Scientist	Baccalaureate or Licenciatura Degree
Soil Scientist	Baccalaureate or Licenciatura Degree
Zoologist	Baccalaureate or Licenciatura Degree
Teacher	
College	Baccalaureate or Licenciatura Degree
Seminary	Baccalaureate or Licenciatura Degree
University	Baccalaureate or Licenciatura Degree

3. Personal qualifications

The individual must have the personal qualifications required by the NAFTA profession. This may include academic degree, employment experience, and/or licensure depending upon the professional.

4. Nonimmigrant intent

The individual must be entering temporarily, and must have residence outside the United States, and no intent to abandon.

Accompanying family members

TD visa status is available to the spouse and unmarried children under the age of 21 who accompany or follow to join the TN worker in the United States. Employment is not authorized for individuals with TD visa status.

Permanent, immigrant visas

Visa availability, quotas, and waiting times

With some exceptions, only a limited number of immigrant visas are available each year. The supply is limited by country of birth, not citizenship or residence. The supply is also limited by immigrant visa category. With those two qualifications, the visas are generally issued on a first come, first served basis that relies on the immigrant's "priority date". The priority date tends to be the earlier of the date the United States Department of Labor first received the immigrant's alien employment certification application or immigrant visa petition. There are special rules that sometimes allow a subsequently filed petition use of a priority date for an earlier petition filed.

In some immigrant visa categories, there is either no limit to the supply or the supply is normally greater than the demand, making these immigrant visas always available. Examples are the family-based Immediate Relative and the employment-based First Preference immigrant visa categories.

There are also other categories where the supply is normally greater than the demand for most countries of birth. This is generally true for the employment-based Second Preference immigrant visa categories for all countries of birth except India and mainland China, which experience long waiting periods.

Otherwise, the demand is greater than the annual supply. The best way to estimate the waiting period is a United States government publication called the "Visa Bulletin".

Visa Bulletin

The United States Department of State Department publishes its monthly Visa Bulletin online at http://travel.state.gov/visa/bulletin/bulletin_1360.html.

Employment-based immigrant EB visas

Summary

There are many employment-based immigrant visas, some of which do not even require a sponsoring United States employer.

Employment-based immigrant visas allow companies to obtain skills not readily available in the United States labor market. There are also employment-based visas to attract individuals with extraordinary, outstanding or exceptional abilities. Religious denominations use employment-based immigrant visas. American workers benefit from employment-based immigrant visas that rewards a qualifying business investment that creates a sufficient number of jobs for United States workers.

Key considerations

Ability to pay the wage offered

For those employment-based immigrant visas that require an offer of employment with a United States employer, the sponsoring company must usually prove the ability to pay the wage offered.

Employment-based First Preference EB1 Visa categories

The Individual of Extraordinary Ability Immigrant Visa EB1A

This immigrant visa category is for individuals of "extraordinary ability in the sciences, arts, education, business or athletics, which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation." The legal definitions are purposely broad to potentially apply to a number of situations. The general rule is that the individual must have risen to the very of the field of endeavor.

This is one of the few immigrant visa categories where prospective immigrants petition for themselves to immigrate. There is no requirement to have a sponsoring employer, although the immigrant must show the intention to use the extraordinary ability in the United States.

Key considerations

To establish eligibility, the immigrant must prove extraordinary ability, either through:

- Receipt of the Nobel Prize or similar award of international recognition;
- or at least three of the following:

1. Receipt of lesser national or internationally recognized prizes or awards for excellence in the field of endeavor.
2. Membership in associations in the field that require outstanding achievements of their members as judged by recognized national or international experts in their disciplines or fields.
3. Published material about the individual in professional or major trade publications or other major media, relating to the individual's work in the field for which classification is sought.
4. Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field.
5. Original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.
6. Authorship of scholarly articles in the field published in professional or major trade publications or other major media.
7. Display of the individual's work in the field at artistic exhibitions or showcases.
8. Leading or critical role for organizations or establishments that have a distinguished reputation.
9. Has or will receive high compensation for services in relation to others in the field.
10. Commercial successes in the performing arts.

Accompanying family members

The spouse and unmarried children under the age of 21 are eligible to apply to immigrate.

The Outstanding Professor or Researcher Immigrant Visa EB1B

The EB1B immigrant visa is designed for outstanding academic professors and researchers who can demonstrate a high level of accomplishment in their fields. The category is available to individuals who can demonstrate they are recognized internationally as outstanding in a specific academic area, have at least 3 years of teaching or research in that field of endeavor, and will teach or carry out research in that field in the United States.

The immigrant must have at least three years of teaching and/or research experience and be able to demonstrate outstanding achievements in the field of endeavor. There must be an offer of employment in the field. If the offer of employment is from an accredited university, then it must be for a tenure or tenure-track position. Otherwise the employment offer must be for a permanent research position with an employer that has at least three full-time researchers and has achieved documented accomplishments in that field. Self-sponsorship is not permitted.

Key considerations

In order to qualify, the following requirements must be satisfied:

At least two of the following:

1. Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field;
2. Membership in associations in the academic field that require outstanding achievements of their members;
3. Published material in professional publications written by others about the individual's work in the academic field;
4. Participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field;
5. Original scientific or scholarly research contributions to the academic field; and
6. Authorship of scholarly books or articles in scholarly journals with international circulation) in the academic field.

There must be an offer of employment for the immigrant to work in the field of endeavor. The employment offer must come from either:

- an institution of higher education and be a tenure or tenure-track position; or
- a company with an established research department that already employs at least three full-time researchers and has documented achievements by the company's research staff.

Accompanying family members

The spouse and unmarried children under the age of 21 are eligible to apply to immigrate.

The Multinational Manager or Executive Immigrant Visa EB1C

The EB1C immigrant visa allows experienced employees from outside the United States to immigrate in order to be employed in the United States at a related office. The EB1C is for individuals who have been employed abroad and will be employed in the United States primarily in an executive or managerial capacity.

Key considerations

The multinational manager or executive is an individual who, within three years preceding the time of application for admission into the United States, has been employed abroad continuously for at least one year in the past three years by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and will be employed at a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is primarily managerial or executive.

1. Intracompany relationship

A qualifying intracompany relationship must exist between the sponsoring company in the United States and the employer outside the United States. There are a number of legal relationships between companies possible, such as a branch of the same employer or a parent, affiliate, or subsidiary as defined below.

"Parent" means a firm, corporation, or other legal entity which has subsidiaries.

"Branch" means an operating division or office of the same organization housed in a different location.

"Subsidiary" means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

"Affiliate" means: (1) One of two subsidiaries both of which are owned and controlled by the same parent

or individual, or (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity, or (3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

2. United States job

The job offered in the United States must be primarily in a managerial or executive capacity.

Managerial capacity means an assignment within an organization in which the employee primarily:

1. Manages the organization, or a department, subdivision, function, or component of the organization;
2. Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
3. Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
4. Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

"Executive" capacity means an assignment within an organization in which the employee primarily:

1. Directs the management of the organization or a major component or function of the organization;
2. Establishes the goals and policies of the organization, component, or function;
3. Exercises wide latitude in discretionary decision-making; and
4. Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

3. Experience abroad

For a continuous period of at least one year during the three year period preceding the filing of the visa petition, the individual must have been employed outside the United States in a capacity that was primarily executive or managerial.

Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted towards fulfillment of that requirement.

4. Business activities

The companies in and outside the United States must have employees engaged in the regular, systematic, and continuous provision of goods and/or services. The mere presence of an agent or office in the United States and abroad is insufficient.

The United States employer petitioning for the immigrant must have been continuously doing business in the United States for at least one year.

Accompanying family members

The spouse and unmarried children under the age of 21 are eligible to apply to immigrate.

Employment-based Second Preference Immigrant Visa EB2

The employment-based, second preference category is designed for two different types of immigrants:

- Members of the professions holding advanced degrees; and
- Individuals of exceptional ability

Either a United States Department of Labor certified alien employment certification is required or a national interest waiver can be requested.

Professional with an advance degree

There must be a United States employer offering a job that requires an advance degree. Either the United States Department of Labor must have issued an alien employment certification or the United States Citizenship and Immigration Services agency must have granted a national interest waiver. A professional with an advanced degree is someone coming to do a job that normally requires — and who has a degree above — a four-year baccalaureate in a specific field of study. The degree must be awarded by an accredited American university or at least the equivalent awarded by a foreign institution. An individual with a four-year degree, plus five years of subsequent employment experience may be considered to have the equivalent of an advance degree for EB2 purposes.

Exceptional ability in the sciences, arts, or business

There must be a United States employer offering a job that requires an advance degree. Either the United States Department of Labor must have issued an alien employment certification or the USCIS agency must have granted a national interest waiver. An individual of exceptional ability in the sciences, arts, or business must be able to show a degree of expertise significantly above that ordinarily encountered. The government requires at least three of the following kinds of documentation:

- An official academic record showing that the individual has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
- Evidence in the form of letter(s) from current or former employer(s) showing that the individual has at least ten years of full-time experience in the job offered;
- A license to practice the profession or certification for a particular profession or occupation; Evidence that the individual has commanded a salary, or other remuneration for services that demonstrates exceptional ability;
- Evidence of membership in professional associations; or
- Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

National interest waiver (NIW) of the alien employment certification application

The normal job offer and alien employment certification (AEC) requirements may be waived if the individual's immigration will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States. The visa petition can be filed by an employer or the prospective immigrant can self-sponsor. The national interest waiver requires proof that:

1. the individual will work in an area of substantial intrinsic merit, such as:
   - Improvement of the US economy and/or the creation of jobs;
   - Improvement of wages and working conditions;
   - Improvement of education and training programs for children and underqualified workers;
   - Improvement of health care;
   - Research would substantially exceed the research of others in the field;
   - Provision of affordable housing for the young, elderly and/or poor;
   - Improvement of the environment and/or productive use of natural resources;
   - Contribution of culturally unique art forms; or
   - Request from an interested US government agency and/or companies benefiting from the research or work.
2. the benefit of that work will be national in scope; and
3. the individual will serve the national interest to a substantially greater degree than would an available US worker having the same minimum qualifications.

There are special NIW rules for physicians working in medically underserved areas and at VA (Veterans Affairs) facilities. This type of request can be filed by either an organization requesting the NIW on behalf of a physician or by a physician filing an extraordinary ability petition.

Accompanying family members

The spouse and unmarried children under the age of 21 are eligible to apply to immigrate.

Employment-based Third Preference Visa EB3

The employment-based, third preference category is designed for individuals who are "skilled workers, professionals, and other workers."

In all cases, there must be a job offer by a United States employer. The employer must obtain an alien employment certification (AEC) from the United States Department of Labor.

Skilled workers

The skilled worker category is for jobs that require at least two years of training or experience. The immigrant must have that training or experience.

Professionals

The professional category is for jobs that require at least a baccalaureate degree in a specific field. The immigrant must have at least that US baccalaureate degree or its foreign equivalent.

Other workers

The other worker (EB3W) category is for occupations requiring less than two years training or experience. The immigrant must have that training or experience.

Accompanying family members

The spouse and unmarried children under the age of 21 are eligible to apply to immigrate.

Employment-based Fourth Preference Immigrant Visa EB4

EB4 immigrant visa petitions can only be filed by nonprofit religious denominations. Qualified religious worker immigrants must have been a member for the past two years in a religious denomination having bona fide nonprofit, religious status in the United States. The religious worker immigrant must also have carried out the vocation or other qualifying religious work for that same two years.

Key considerations

Ministers

The term minister refers to individuals "duly authorized by a recognized religious denomination to conduct religious worship and to perform other duties usually performed by authorized members of the clergy of that religion."

Religious professional workers

Religious professional workers are individuals who hold at least the equivalent of a US baccalaureate in a field where such education is normally required for employment. They must be coming to the US for employment in that professional capacity. This may include nurses, teachers, among others.

Religious vocational or occupational workers

Religious vocational or occupational workers are those who take religious vows. This includes nuns and monks. It may also include others who pursue religious vocations in other capacities, such as liturgical workers, religious instructors, counselors, cantors and catechists, workers in religious hospitals or religious health care facilities, missionaries, religious translators or broadcasters. It is only meant to include traditional religious functions and not all types of jobs with religious employers, such as janitors, maintenance workers and clerks.

Religious denomination

A religious denomination is defined as "a religious group or community of believers having some form of ecclesiastical government, a creed or statement of faith, some form of worship, a formal or informal code of doctrine and discipline, religious services and ceremonies, established places of religious worship, and religious congregations, or comparable indicia of a bona fide religious denomination."

Nonprofit tax status

Only religious organizations exempt from taxation under Section 501(c)(3) of the United States Internal Revenue Code can sponsor a religious worker immigrant visa.

Accompanying family members

The spouse and unmarried children under the age of 21 are eligible to apply to immigrate.

Employment-based Fifth Preference Immigrant Visa EB5

Individuals who invest and create jobs in the United States can apply for themselves to immigrate through the employment-creation investor immigrant visa (EB5) classification. There are specific requirements regarding the amount of the required investment and the number of jobs that must be created, and there are exceptions that lower these requirements to encourage investments in targeted areas. The EB5 results initially in permanent residence on a conditional period for two years, after which that condition can be removed.

Key Considerations

1. Employment creation

The investment must create full-time employment for at least 10 US workers. A job that requires at least 35 hours per week is full-time. The employment of part-time workers will be considered, but only in terms of the full-time equivalent (e.g., 2 part-time workers at 17.5 hours per week are equal to 1 full-time worker).

In generally, only employees of the investment will be considered. There is an exception to this rule for investments in regional centers designated by the government. The exception includes jobs created directly and indirectly as a result of the investment. There is another exception for investment in troubled businesses.

Only jobs created for US workers are considered. United States workers are citizens, permanent residents or other immigrants authorized for such work (e.g., refugees, asylees, etc.). Jobs held by the investor, the spouse or children will not be considered, nor will jobs held by nonimmigrant visa holders or foreign nationals in the US without lawful status.

All 10 US workers need not be already employed at the time the EB5 petition is filed. Instead, a comprehensive business plan can be submitted that shows the need for the 10 workers within a two and one-half year period after the petition is granted.

2. New commercial enterprise

The investment must be in a new commercial enterprise. The enterprise is considered new if it was established after November 29, 1990. Any for-profit operation engaged in business will be considered a commercial enterprise, regardless of the form of legal entity (e.g., corporation, limited liability company, proprietorship, partnership, etc.). Non-commercial activities - such as non-profit corporations or investment in a personal home - do not qualify.

There are special rules to encourage investments in troubled businesses. To qualify, the business must have been in existence for at least 2 years and incurred a net loss for accounting purposes equal to at least 20 percent of the business net worth during the 12- or 24-month period before the EB-5 petition was filed. Further, the investor must show that the number of existing employees will be maintained at no less than the pre-investment level for at least two years. Note that there is no requirement to create 10 new jobs, but there must be at least 10 qualifying jobs within a two and one-half year period after the petition is granted.

3. Role of the investor

The individual investor must be personally engaged in the investment and cannot hold a merely passive role. The requirement can be satisfied either through involvement in daily management or at the policy level. Serving as a corporate officer or board director can satisfy this requirement. Involvement equivalent to a limited partner under the Uniform Limited Partnership Act is generally sufficient as a minimum role.

4. Investment

The individual must have invested or be in the process of investing capital. This can be in the form of cash, equipment, inventory or other tangible property. Loans to the business cannot be considered, except that debts for which the investor is personally and primarily liable do qualify (e.g., signed promissory note secured by the individual's personal assets). Merely injecting cash into the business account will not be considered and the funds must be commercially at risk.

If applicable, promissory notes are valued at fair market value, must be paid after 2 years, and any security must be perfected. Bank accounts cannot be used security. Third party guarantees to investors are prohibited.

The individual must be able to show that the capital invested was lawfully acquired. This generally involves personal and business tax returns and other documents identifying the source of the investor's funds. Money earned while in the US in unlawful status is not considered.

In general, the amount of the investment must be at least $1,000,000. Amounts of at least $500,000 qualify, however, if the investment is in a targeted employment area. These are rural areas or an area that has experienced high unemployment of at least 150 percent of the national average. Each state determines the targeted employment areas for that state.

5. Benefit to US economy

Only investments that benefit the US economy will qualify. This requirement is generally satisfied through the

jobs created and the goods or services provided in the US. Letters from local government officials, chambers of commerce, or similar documents are often used.

Conditional residence

The approval of an EB5 petition results in permanent residence status on a conditional basis for 2 years. The investor must file a petition to remove the conditional basis within the 90-day period immediately prior the end of the conditional basis of residence status. Failure to file during this period results in automatic termination of resident status. The investor must be able to show the creation of the required number of jobs and that the required amount of investment remained at risk in the enterprise until the conditional basis of residence status is removed.

Termination of resident status

During the conditional residence period, residence status will be terminated if the government determines that the investment was made to evade US immigration laws, the investor failed to sustain the required investment, or the investor otherwise did not conform to the EB5 requirements.

Accompanying family members

The spouse and unmarried children under the age of 21 are eligible to apply to immigrate based the investment and are subject to the same conditional residence status rules.

Other immigrant visa categories

Family-based immigrant visa IR and FB categories

Adult citizens and permanent residents of the United States can sponsor certain family members to immigrate to the United States.

The availability and waiting time to immigrate through family relationships varies greatly. The country of birth of the immigrant, the family relationship, and the status of the sponsoring relative as a citizen or permanent resident are all factors that come into play. The United States Visa Bulletin provides information about current waiting times for FB categories subject to quota limitations.

IR categories are not subject to quota limits, making these immigrant visas available as quickly as government processing is completed.

- IR-1 Spouse of a citizen.
- IR-2 Unmarried child under age 21 of a citizen.
- IR-3 Parent of a citizen.
- FB-1 Unmarried child age 21 or older of a citizen parent.
- FB-2A Spouse or unmarried child under 21 of a permanent resident spouse or parent.
- FB-2B Unmarried child age 21 or older of a permanent resident spouse or parent.
- FB-3 Married child of a citizen parent.
- FB-4 Brother or sister of a citizen.

Diversity Visa

The Diversity Immigrant Visa Program makes available up to 55,000 diversity immigrant visas annually, randomly selected from entries by persons who meet strict eligibility requirements from countries with low rates of immigration to the United States.

The time period to apply, and the countries of birth that qualify, are subject to change for each application year.

Accompanying family members

The spouse and any unmarried children under the age of 21 are eligible to apply to immigrate.

Citizenship

Summary

United States citizenship is most frequently obtained through birth in the United States or through naturalization—the process through which lawful permanent residents may eventually become citizens. In addition, United States law recognizes that a child born abroad may acquire citizenship automatically at birth through one or both United States citizen parents. There are also provisions that sometimes allow an adopted foreign-born child to acquire citizenship. Furthermore, citizenship may be derived by a minor child when one or both parents become naturalized citizens.

Naturalization

Key considerations

Naturalization is the process through which residents may apply for citizenship and be eligible for a passport. There are a number of requirements that must be satisfied:

1. Continuous residence

The applicant must reside continuously in the United States for at least five years after becoming a permanent resident. Any single absence from the United States for six months or more may break the continuity of residence and restart the five year count.

2. Physical presence

The applicant must be actually physically present in the United States for at least 2.5 years during the period of continuous residence. Any portion of a day spent in the United States counts as a full day.

3. State residence

The applicant must have resided in the state where naturalization is requested for at least 90 days prior to application.

4. Good moral character

The applicant must have been a person of good moral character for at least the period of continuous residence. Certain arrests, convictions, etc., may prevent the applicant from satisfying this requirement.

5. English language

The applicant will be examined on the ability to read, write and speak English. There are some exceptions for the elderly and disabled.

6. Exam

The applicant will be examined on knowledge of United States government, geography, history, etc. The government makes a list of the 100 authorized questions and answers available for study in advance.

7. Oath

The applicant will be required to take an oath of allegiance to the United States. There are some exceptions for religious and moral objection reasons.

Spouses of citizens

If the applicant has been married to and living with a citizen spouse for at least the past three years, then the period of continuous residence and actual physical presence required for naturalization is reduced to 3 years and 1.5 years, respectively.

Spouses of citizens employed abroad

In general, naturalization to become a US citizen requires that the applicant first maintain resident status and live in the US for a certain number of years. This requirement is waived in qualifying cases where the applicant is the spouse of a US citizen employed abroad. This allows a green card holder to apply for US citizenship on the same day that permanent resident status is granted.

To be eligible, the applicant must prove that the citizen spouse is stationed abroad for a period of not less than one year, pursuant to an employment contract or orders, and assumes the duties of employment, that the applicant intends to reside abroad with the citizen spouse; and to take up residence in the United States immediately upon the termination of the employment abroad.

Military service

There are special naturalization provisions for qualified members and veterans of the United States military and their family.

Acquisition

If the parents were citizens at the time the child was born, the child may have acquired citizenship at birth automatically. The laws on acquisition changed in 1934, 1941, 1952, and 1986. The law that applies is the one in effect when the child was born. The rules differ depending on whether both parents were citizens, one parent was a citizen, whether the parent(s) ever resided in the United States and at what age, and whether the child is legitimate or illegitimate.

Children born after November 14, 1986

If both parents are citizens, one of the parents must have resided in the United States or its possessions at any time prior to the child's birth.

If one parent is a citizen and one a national, the citizen parent must have been physically present in the United States for at least one year continuously at any time prior to the child's birth.

If one parent is a citizen and one an alien:

1. If the child was born abroad, the citizen parent must have been physically present in the United States or its possessions for at least five years prior to the child's birth, at least two of which were after the parent turned 14.
2. If the child was born in a United States possession, the citizen parent must have been physically present in the United States or its possessions for a continuous period of one year at any time prior to the child's birth.

If the child is the illegitimate child of a citizen mother, the mother must have been physically present in the United States or its possession for a continuous period of one year at any time prior to the child's birth.

If the child is the illegitimate child of a citizen father, the father must have been physically present in the United States or its possessions for five years prior to the child's birth, at least two of which were after the father turned 14; and: (A) before the child turns 18, either (1) the child is legitimate, (2) the father acknowledges paternity in writing under oath, or (3) paternity is established by a court; and (B) the father must agree in writing to support the child financially until age 18.

Derivation

Derivation means that the minor automatically becomes a citizen when the parent or parents naturalize. The laws differ over time, depending on when the parent or parents naturalized. Through derivation, a minor is a citizen and can apply directly for a United States passport.

About Dentons

Dentons is a global firm driven to provide a competitive edge in an increasingly complex and interconnected world. It was formed in March 2013 by the combination of international law firm Salans LLP, Canadian law firm Fraser Milner Casgrain LLP (FMC) and international law firm SNR Denton. Dentons is built on the solid foundations of these three highly valued law firms. Each built an outstanding reputation and valued clientele by responding to the local, regional and national needs of a broad spectrum of clients of all sizes—individuals; entrepreneurs; small businesses and startups; local, regional and national governments and government agencies; and mid-sized and larger private and public corporations, including international and global entities.

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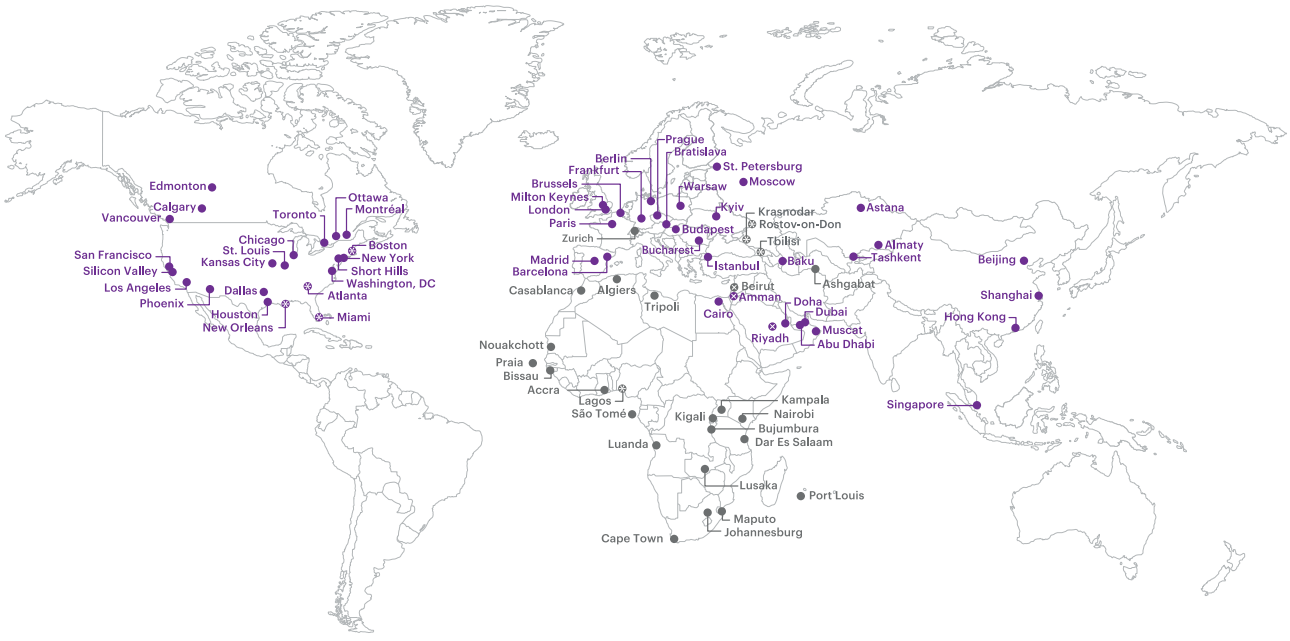
Our Locations



Legend
Offices, associate offices[x] and facilities*
Associate firms and special alliances*