

**Canadian Bar Association
The National Citizenship and Immigration Law Conference**

**THE GOOD, THE BAD AND THE UGLY OF US IMMIGRATION
Part 1 - *A Discussion of the Basic and More Advanced Considerations
of Five Non-Immigrant Options Available to Canadians***

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Table of Contents

I.	INTRODUCTION.....	3
II.	THE ‘B-1’ BUSINESS VISITOR	3
	1. Basics Considerations	
	2. More Advance Considerations	
	3. Comments	
III.	THE ‘TN’ TRADE NAFTA PROFESSIONAL.....	5
	1. Basic Considerations	
	2. More Advance Considerations	
	a. <i>The Management Consultant</i>	
	b. <i>The Computer Systems Analyst</i>	
	c. <i>The Scientific Technician</i>	
	3. Comments	
IV.	THE ‘L-1’ INTRA-COMPANY TRANSFER.....	8
	1. Basic Considerations	
	2. More Advance Considerations	
	a) <i>US Legislative Update - Changes to the ‘L’ Intra- Company Transfer Rules</i>	
	b) <i>Spouses</i>	
	c) <i>Long Term Considerations</i>	
	3. Comments	
V.	THE ‘E’ TREATY TRADER/ INVESTOR.....	9
	1. Basic Considerations	
	2. More Advanced Considerations	
	a) <i>Nationality</i>	
	b) <i>How Much is Enough?</i>	
	c) <i>Application Processing</i>	
	d) <i>Duration</i>	
VI.	H-1B SPECIALTY OCCUPATION	11
	1. Basic Considerations	
	2. More Advanced Considerations	
	3. Comments	
VII.	Closing Remarks.....	12

I. INTRODUCTION

Canadians doing business or working in the United States enjoy non-immigrant admission categories and simplified procedures not available to nationals of other countries. Canadians are also exempt from most visa requirements. In the world of business time is money and this time saving can be a godsend – particularly when a corporate client is anxiously awaiting the arrival of a new recruit or transferee or a small business person has secured his or her first major contract in the United States. Instead of filing a petition at a Regional Service Center, as is normally required, and waiting on average 6 to 10 weeks for approval from the Bureau of Immigration and Citizenship Services (BICS), and then sending the prospective employee to a US Consulate abroad for visa issuance, under the NAFTA many Canadians are able to have their petition adjudicated at a border Port of Entry or airport Pre-Flight inspection facility only hours before departing for the United States. As such, the adjudication, that might otherwise take months, can very often be finalized in a matter of days.

Canadians do, of course, like other foreign nationals, require authorization to work in the United States. While the NAFTA does offer several advantages it does not *always* fit a client's requirements. It is therefore important to know that there are other useful non-immigrant options available to Canadians. Moreover, even where a NAFTA option does fit it is important to remember that in the post-September 11th era, borders and airports have become increasingly security sensitive places; NAFTA-based entries to the United States must therefore be thoroughly thought-out and carefully prepared.

This article is a summary of both the basic and the more advanced considerations of five (5) of the most useful non-immigrant categories available to Canadians who want to do business, work or relocate to the United States. I introduce each of these non-immigrant categories – the 'B' Business Visitor, the 'TN' or Trade NAFTA professional, the 'L' Intra-company transfer, the 'H-1B' Specialty Occupation and the 'E' Treaty Trader/ Investor - with an overview of the basic considerations. There are also more advanced considerations that the attorney needs to be aware of in using the various US non-immigrant categories to his or her client's advantage. As such, in the more advanced considerations segment of each category, I turn to a discussion of some of the strategic and long-term considerations associated with each non-immigrant category. I have also included comments relating to the benefits and drawbacks generally associated with the five non-immigrant category.

II. THE 'B-1' BUSINESS VISITOR

1. Basics Considerations

In the past it was not uncommon for Canadians to say they were traveling to the United States to 'visit with family or friends', on a 'vacation' or simply for a 'business meeting' irrespective of their actual intended activities in the US. To some extent, this attitude persists today. However, from the US government perspective, the events of 9/11 have put to an end any tolerance for this former status quo. In the new age of security, the norm is questioning and investigation designed to uncover the exact motive of a traveler's proposed visit to the US. It is now especially important that attorneys, clients and employees have an accurate understanding of what can and can not be legitimately done as a Business Visitor in the US.

A Business Visitor is a foreign national who has a residence in a foreign country that he or she has no intention of abandoning. He or she is visiting the United States temporarily for business. Accordingly, the Business Visitor must be able to establish that he or she will:

- Maintain a foreign residence that has not been abandoned (i.e. sold, rented to someone else, etc.);
- Enter the United States for a specific finite period of time; and
- Seek admission solely to engage in legitimate activities relating to business.

Generally speaking, US authorities rely on a distinction between ordinary work for hire and activities incidental to international commerce. In order for an activity to be considered a business activity (as opposed to "work") the activity must relate to international business. As such, the principal place of business and the place where profits

will primarily accrue should be in the foreign country. Similarly, the foreign national's salary should normally come from outside the United States.

The term "business" is defined in the US government's Foreign Affairs Manual (also referred to as the Manual). The Manual defines "business" as conventions, conferences, consultations and other legitimate activities of a commercial or professional nature not involving local employment or labor for hire. The Manual also says specifically that B-1 status is clearly available to a foreign national who is entering the United States to engage in commercial transactions that do not involve gainful employment in the US (such as a merchant who takes orders for goods manufactured abroad); negotiating contracts; consulting with business associates; litigating; participating in scientific, educational, professional or business conventions, conferences or seminars; or undertaking independent research.

The NAFTA has broadened the scope of permissible B-1 activities for Canadian citizens (although not for Canadian Permanent Residents). The NAFTA provisions are available in addition to the normal B-1 provisions discussed above. Appendix 1603.A.1 of the NAFTA sets out the following additional permissible Business Visitors activities:

Research and Design - Technical, scientific and statistical researchers conducting independent research or research for an enterprise located in the territory of another Party.

Growth, Manufacture and Production - Harvester owner supervising a harvesting crew admitted under applicable law. Purchasing and production management personnel conducting commercial transactions for an enterprise located in the territory of another Party.

Marketing - Market researchers and analysts conducting independent research or analysis or research or analysis for an enterprise located in the territory of another Party. Trade fair and promotional personnel attending a trade convention.

Sales - Sales representatives and agents taking orders or negotiating contracts for goods or services for an enterprise located in the territory of another Party but not delivering goods or providing services. Buyers purchasing for an enterprise located in the territory of another Party.

Distribution - Transportation operators transporting goods or passengers to the territory of a Party from the territory of another Party or loading and transporting goods or passengers from the territory of a Party, with no unloading in that territory, to the territory of another Party. With respect to temporary entry into the territory of the United States, Canadian customs brokers performing brokerage duties relating to the export of goods from the territory of the United States to or through the territory of Canada. With respect to temporary entry into the territory of Canada, United States customs brokers performing brokerage duties relating to the export of goods from the territory of Canada to or through the territory of the United States. Customs brokers providing consulting services regarding the facilitation of the import or export of goods.

After-Sales Service - Installers, repair and maintenance personnel, and supervisors, possessing specialized knowledge essential to a seller's contractual obligation, performing services or training workers to perform services, pursuant to a warranty or other service contract incidental to the sale of commercial or industrial equipment or machinery, including computer software, purchased from an enterprise located outside the territory of the Party into which temporary entry is sought, during the life of the warranty or service agreement.

General Service - Professionals engaging in a business activity at a professional level in a profession set out in Appendix 1603.D.1. Management and supervisory personnel engaging in a commercial transaction for an enterprise located in the territory of another Party. Financial services personnel (insurers, bankers or investment brokers) engaging in commercial transactions for an enterprise located in the territory of another Party. Public relations and advertising personnel consulting with business associates, or

attending or participating in conventions. Tourism personnel (tour and travel agents, tour guides or tour operators) attending or participating in conventions or conducting a tour that has begun in the territory of another Party. Tour bus operators entering the territory of a Party: with a group of passengers on a bus tour that has begun in, and will return to, the territory of another Party; to meet a group of passengers on a bus tour that will end, and the predominant portion of which will take place, in the territory of another Party; or with a group of passengers on a bus tour to be unloaded in the territory of the Party into which temporary entry is sought, and returning with no passengers or reloading with the group for transportation to the territory of another Party. Translators or interpreters performing services as employees of an enterprise located in the territory of another Party.

Canadians with B-1 status do not require a visa and are therefore not required to attend at a US Consulate abroad before entering the United States. Business Visitors are admitted to the United States for the amount of time reasonable to complete their schedule. The maximum period of stay is a period of one year. In the absence of documentation to the contrary, Canadians are often admitted by default for a period of six (6) months. Of course, anyone wishing to enter the U.S. bears the burden of proving that they are eligible for the desired status and not subject to the grounds of inadmissibility under any provision of the law. We will consider some of these issues in Part 2 of this paper.

2. More Advance Considerations

There are some fundamentally grey areas relating to the B category. The Business Visitor visa category, or B-1, is not meant to create a “catch-all” classification. However, the distinction between who can enter the United States as a Business Visitor and who needs work authorization, and accordingly is determined to be entering the U.S. to perform “skilled or unskilled labor”, is blurred. The US position is that Business Visitors engage in activities to trade goods, provide services or pursue investment activities, but not “work”. A Business Visitor in the United States performs legitimate activities other than skilled or unskilled labor. As Business Visitors cannot engage in employment or “work”, they cannot receive a salary (or any form of remuneration) from a U.S source for activities undertaken during their stay. In short, the permissible activities that I have identified above are not exclusive; the question of eligibility hinges on the difference “business” versus “work”. But this distinction is not a simple one.

There are a number of activities that may reasonably be interpreted as legitimate Business Visitor activities by some and as work by others. Generally speaking, it is important to clearly articulate the case for a Business Visitor entry. Alternatively or additionally, one should consider the viability of obtaining Non-Immigrant status for the employee thereby allowing him or her to enter and re-enter the United States with a reasonable degree of certainty.

3. Comments

The primary benefit of B-1 status, particularly for Canadians, is the ease and speed with which it can be obtained. Clearly the drawback of the B-1 is the last minute uncertainty the many travelers face at the airport or border.

Remember that the above information is only meant as a guideline to understanding some of the more common types of activities properly considered for B-1 Business Visitor status. There are specific types of B-1 entries, such as the After Sales Services provisions, either NAFTA or non-NAFTA based that can be a great asset where the applicant lacks formal education and is therefore not eligible for a TN, lacks experience with the company precluding L eligibility, and /or his or her services are needed on short notice in the US. Such B-1 entries require special consideration.

III. THE ‘TN’ TRADE NAFTA PROFESSIONAL

1. Basic Considerations

Perhaps the best quick fix immigration tool is TN (or Trade NAFTA –Professional) status. Canadians apply at an airport Pre-flight inspection facility or a border Port-of -Entry. TN preparation can be done in a matter of days – in some cases hours - and adjudication can often take less than an hour. To qualify the recruit or transferee must have the required professional credentials (education and/ or experience) and intend to perform the duties of an

approved profession. Some of the most common approved professionals are the Computer Systems Analyst, the Engineer, the Accountant, the Graphics Designer and the Management Consultant. Schedule 2 of the NAFTA contains a complete list of the approved professions and outlines the education, credentials and experience requirements for each.

Typically a Bachelor's degree is required but there are instances, depending on the particular profession, where a successful applicant might have a combination of a two year Post-Secondary Diploma or Certificate and three years of related experience. There are also some instances where an applicant can qualify on the basis of experience alone. Applicants will typically be required to present documentation proving their educational and experience as well as the suitability of the employment offer in the United States.

There is no limit to the total period of stay in the United States allowed under the TN category but the initial period for admission is limited to a maximum of one (1) year.

Canadians with TN or derivative status do not require a visa and are therefore not required to attend at a US Consulate abroad before entering the United States.

2. More Advanced Considerations

Who can the TN status holder work for in the US? The regulations are surprisingly accommodating. The TN status holder can work for a US company, his or her Canadian or Mexican employer or be filling a contract for services between a Canadian or Mexican company and a US Company.

The TN requires that professionals fit into pre-determined professional categories and that they meet very specific pre-determined educational and experience requirements. While most of the TN professional categories are fairly self-explanatory, some are not. I have identified some of the more complicated professional categories below:

a) *The Management Consultant*

The educational requirement for a Management Consultant is a Bachelor's degree or five years of experience in consulting or a related field. The Management Consultant is one of only two TN professionals not required to have a post-secondary education. As such it seems that many Canadians without formal education try to "squeeze" in as Management Consultants. As a result of this perceived abuse, the Management Consultant category is well known for attracting BCIS scrutiny.

In the absence of a degree, the TN Management Consultant's experience is likely to be very carefully reviewed. In addition to the standard documentation, for Management Consultants I always document the required five years of experience in consulting or in the related field. Such documentation typically includes letters of reference or recommendation from prior employers. If the Consultant is self-employed, the documentation might alternatively consist of letters from existing or former clients that attest to the type of related services that he or she has provided.

The key to putting together a successful TN Management Consultant application is to start with an understanding of the duties of a Management Consultant and to ensure the best possible fit with the applicant's duties. A Management Consultant is someone who "provides services which are directed toward improving the managerial, operating, and economic performance of private or public entities..." Generally speaking, Consultants are not "hand-on" and are not involved in the "day-to-day" operations of a company'. Rather they look objectively at the company's activities to identify areas of improvement. In doing so, they "advise" and "recommend" courses of action. The Dictionary of Occupational Titles (DOT) is particularly helpful in preparing TN applications; the Occupational Outlook Handbook (OOH) is also a sound recourse. Irrespective of the source, the key to success is not only to reference accepted consulting duties but to clearly explain and detail the applicant's responsibilities in this language.

b) *The Computer Systems Analyst*

It is extremely important that the attorney carefully consider the duties, past and present, of the employee before assuming that he or she will satisfy the TN requirements of a Computer Systems Analyst (CSA). Be aware that Computer Programmers; Computer Scientists, Web Designers and a host of other IT professionals do not automatically meet the requirements of the TN Computer Systems Analyst. In the world of TNs, the Computer Systems Analyst is a specific profession with specific educational and experience requirements and specific anticipated duties.

With respect to the CSA's duties, I always review and very carefully reference the corresponding DOT or OOH description(s). With respect to the education, although not actually spelt out in the NAFTA, practically speaking, CSAs are expected to have related education. So, part of the attorney's job is to assess the applicant's degree or diploma to ascertain whether it is sufficiently related. This task is not always easy. In the years since the NAFTA was enacted the IT industry has evolved dramatically. This is not the case for the corresponding NAFTA provisions. While an applicant with a completely unrelated Bachelor's degree who learned the profession on the job probably will not succeed, it is the attorney's role to see that the applicant with an arguably related degree is presented in the most compelling manner possible.

c) *The Scientific Technician*

There are two main areas of concern for this category. First, because there is no post-secondary education requirement, it is difficult to prove the applicant's requisite knowledge. The knowledge required is vague: "theoretical knowledge of the discipline" and "an ability to solve practical problems in the discipline, or the ability to apply principles of the discipline to basic or applied research". I have found that the best approach is to rely on the applicant's past performance by providing related letters of reference or recommendation. Of course, the extent to which the attorney is able to assist the company in setting out the employee's knowledge in their letter of support may also be crucial. Note however that in a Field Guidance Memo dated November 7, 2002 (then) INS states that "theoretical knowledge should have been acquired through the successful completion of at least two years of training in a relevant educational program". As such, although not impossible, one can anticipate difficulty in proving this aspect of qualification where the applicant lacks formal education.

Second, the Scientific Technician cannot work independently. He or she must work in direct support of a designated professional. The trick here is to identify the professional in the company letter of support, evidence his or her professional credentials and then set out the applicant's reporting relationship to the professional. In terms of documentation, provide a copy of the professional's degree and, where possible, designation. I might also include pre-existing documentation evidencing the company's reporting structure.

3. *Comments*

The main benefit of the TN is that it can be quickly and easily obtained, thereby allowing last minute work in the US. The main drawback of the TN is that applicants must be pigeon-holed into specific professional categories; these categories, in turn, tend to be narrowly defined as are their prerequisite educational requirements.

With respect to the professional categories, the TN was not intended to assist a great number of professionals; for example, Business Management, Marketing and Human Resources positions are not included. Generally speaking the TN does not lend itself to Managers. The TN simply was not intended to cover a number of individuals that we normally consider 'professionals. Regarding the duties of approved professionals, the definitions of the duties tends to be out of sync with contemporary business norms.

With respect to the educational requirements, let's look turn our attention once again to the Computer Systems Analyst. In today's market, it is quite common to see computer professionals who are either self-taught or who have accumulated a number of industry respected certifications over their career. Yet, in order to qualify as a Computer Systems Analyst under the NAFTA, the applicant must have a Bachelor's degree (now usually interpreted as required to be in a related field) or a post-secondary diploma (interpreted as having a minimum of 2 years duration) and three years of experience. In short, even if the applicant's duties fit neatly within one of the pre-determined professionals categories you may still find that his or her educational background does not. It has

been many years since the TN educational requirements were agreed upon, and in the time that has passed they have not changed and as such do not reflect current industry norms.

As an additional word of caution, note that satisfying the temporary intent requirement may become an issue with each repeat TN extensions or renewal. As well, the TN is not considered a good launching pad for US permanent residence or the "Green Card".

IV. THE 'L-1' INTRA-COMPANY TRANSFER

1. Basics Considerations

The L-1 is the non-immigrant status that allows companies to temporarily transfer Executives and Managers ("L-1A") and those having "Specialized Knowledge" ("L-1B") to a related company in the United States. L-1 status is available to all nationals; however Canadians may take advantage of simplified provisions under the NAFTA. The main advantage of the NAFTA L-1 is that it can be apply at an airport Pre-Flight inspection facility or at a border Port -of -Entry. In avoiding the Regional Service Center process, the petition approval period is reduced from 6-8 weeks (assuming the absence of premium processing) to a matter of a few hours.

In order to qualify, the corporate client petitioner must establish that the employee beneficiary has worked in an executive, managerial or specialized knowledge capacity outside the United States in a full-time capacity for the foreign parent, branch, affiliate or subsidiary for at least one year within the previous three years. The attorney should also establish that the beneficiary is entering the United States to work for the same company or a parent, affiliate or subsidiary, in an executive, managerial or specialized knowledge capacity.

The L-1A can be issued for a total of up to seven (7) years; the L-1B can be issued for a total of up to five (5) years although the initial period of admission is a maximum of three 930 years in either case. Spouses and unmarried minor children can be admitted in L-2 status for the same term as the L-1 A/B holder. Spouses of L-1 holders are permitted to work in the US upon approval of an Employment Authorization Document (EAD); however this benefit does not extend to the L-1 status holder's children.

Canadians with L-1A or L-1B or derivative status do not require a visa and are therefore not required to attend at a US Consulate abroad before entering the United States.

2. More Advance Considerations

a) US Legislative Update - Changes to the 'L' Intra- Company Transfer Rules

In recent years there has been a political back lash against the L category – a growing sense that the category is open for abuse. Perhaps in response, on December 8th, US President Bush signed into law a bill that reforms the intra-company 'L' non-immigrant category. The new law which aims largely to prevent L-1 holders from being "outsourced" places restrictions on the work location of certain L-1B 'specialized knowledge' intra-company transfers. It also strikes from the books a provision that previously permitted a minimum six-month work requirement for L-1 blanket petitions. Previously, beneficiaries under the L-1 blanket program could qualify after as little as six (6) months employment outside of the United States. The law also now mandates that the Department of Homeland Security maintain statistics for L-1B petitions and creates a new fee of USD\$500 called a "Fraud Prevention and Detection Fee".

It is unlikely that this is the last of the legislative efforts to limit the L-1. Educational requirements, duration reductions, and an annul cap of 35,000 are among the possible curtailing changes that have gained support. It is therefore particularly important that the attorney stays abreast of legislative changes in this area.

b) Spouses

Effective January 16, 2002, the *Immigration and Nationality Act* was amended to permit the employment of L-1 intra-company transferee spouses. Unlike most other US non-immigrant categories, the spouses of L-1 status

holders are permitted to work in the US. By comparison, in the absences of independent qualification, the spouse's of TN and H-1B Specialty Occupation status holder's are not permitted to work.

c) Long Term Considerations

Executives and managers who qualify for L-1A status, whether under the NAFTA, or the regular procedures, are subsequently in a position to qualify for US permanent residence under an advantageous and abbreviated process. The L-1A is therefore a good route to US Permanent Residence.

3. Comments

There are many benefits of L-1 status. The L can be a quick and effective way to bring an employee to the United States. The L-1 holder's employment is not presently subject to a yearly quota and there are no geographical limitations within the United States as to where the employee can work. The main drawback of the L is that it is of no help to new hires regardless of their seniority and/or value to the client company.

There are also a number of more complicated fact scenarios such as the "initial L", the requirements imposed upon the first-time L employee coming to the US to manage a new US office, and the "blanket L" program (referenced above) that are beyond the scope of this article. Note as well that the L-1 category is not available in situations where the foreign business ceases operations in the home country and seeks to transfer all its operations to the United States.

V. THE 'E' TREATY TRADER/ INVESTOR

1. Basic Considerations

The E visa is useful for business owners, managers and employees who wish to remain in the US for extended periods of time in order to oversee or work at an enterprise that is engaged in trade between the US and a foreign state (E-1); or that represents a major investment in the US (E-2).

A treaty must exist between the United States and the foreign country of which the applicant is a national. Majority ownership or control of the investing or trading company must be held by nationals of the foreign country. In order to qualify, the company or the individual engaged in trade or investment in the US must have the same nationality as the treaty country. The "nationality" of the company engaged in trade or investment is the nationality of those persons who own at least 50% of the stock of the corporation.

There are additional requirements for E-1 traders. Specifically, the trading company must be engaged in substantial trade that is international in scope and principally between the United States and the treaty country. The trade must be sufficient to ensure the flow of international trade between the US and the treaty country. Trade may include goods, services, international banking, insurance monies, transportation, communications, data processing, advertising, accounting, design and engineering, management consulting tourism, technology transfer, and some news gathering activities. There must also be a demonstrated on-going trade relationship prior to filing.

The E-2 treaty investor visa is available to nationals of the treaty country who are engaging in investment in the United States. The investor must show that he or she has invested or is actively in the process of investing a substantial amount of capital in a real and operating commercial enterprise, other than a marginal one solely to earn a living for the investor and his or her dependents. The investor must also be in a position to "develop and direct" the enterprise.

The concept of investment connotes the placing of funds or other capital assets at risk, in the commercial sense, in the hope of generating a return. If the funds are not subject to partial or total loss if business fortunes reverse, then it is not an investment. The rules relating to the investment are detailed and complex. Suffice to say, funds must be committed and personally at risk in order to qualify, and the enterprise must be an active and substantial investment.

The enterprise must also be a real and active commercial or entrepreneurial undertaking, producing a service or commodity. By way of example, a shell company, passive investment, or uncommitted funds will not qualify as they do not require the intent to direct or develop a commercial enterprise.

The phrase "substantial amount of capital" within the context of an E-2 investment is set out in the Code of Federal Regulations as an amount which is substantial in relationship to the total cost of either purchasing an established enterprise or creating the type of enterprise under construction; 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. The attorney should therefore be able to demonstrate that the enterprise passes the marginality test - that it has the potential to generate sufficiently more than enough income to provide for a living for the status holder and his or her family and that it will expand job opportunities and generate other sources of income.

E visas issued to Canadians are generally valid for a period of up to five (5) years; however, in practice there are a number of restricting factors. Please refer to the more advanced considerations section below for discussion.

The dependent spouse and minor child of an E-1 treaty trader or E-2 investor are entitled to the same classification as the principal status holder; the nationality of the spouse or child is immaterial. Dependents may remain in the United States for the duration of the principal status holder's stay. Since 2002, the spouses of treaty traders and investors have been permitted to obtain employment authorization.

2. More Advanced Considerations

a) Nationality

Foreign country nationality must be held by each employee or principal of the commercial enterprise who seeks E status under the treaty. The rule is that the principal investor or trader (the primary treaty applicant) and the employees of the treaty enterprise must have the same nationality as the treaty enterprise. Note that Canadian permanent residents are not eligible for E-1 or E-2 visas unless their country of citizenship has entered into its own treaty of commerce and navigation or bilateral investment treaty with the United States.

The rules encompass 50-50 joint-venture companies. The nationality of the person(s) owning the corporate stock is their country of citizenship. If the treaty enterprise is owned by several other corporations, the ownership of each corporation must also be determined; this process must be followed all the way back to the ultimate owners, so that their nationality can be determined. Note additionally that foreign nationals who are also US Permanent Residents cannot be counted toward determining 50% ownership.

b) How Much is Enough?

For the most part, the E-2 definition of substantial investment relates to a "proportionality test" described in the Foreign Affairs Manual. In order for an investment to be substantial, it must be proportional to the total value of the commercial enterprise. The definition also requires a sufficient investment to support the likelihood that the enterprise will be successful.

The Foreign Affairs Manual does not set out a minimum required investment for E-2 eligibility. Instead, the Foreign Affairs Manual provides several examples of acceptable proportionality at various levels of investment. However, in practice it seems that the quantum of the investment is also considered. Some attorneys insist that the U.S. Consulate in Toronto has applied a *de facto* minimum threshold of USD \$50,000.00 in the past. While there is a reference in the Foreign Affairs Manual to an investment of USD \$50,000.00 (it requires a percentage of investment approaching 90-100% of the total value of the business) to my knowledge the US Consulate General in Toronto does not promote a minimum investment amount.

c) Application Processing

E visa applications are atypical. Unlike most other non-immigrant status options, Canadians must obtain an actual visa from a US Consulate. In Canada, all E visas are adjudicated at the US Consulate General in Toronto.

The reported processing time is presently 4 weeks, however this period is calculated from the log-in date and there is presently a delay in logging applications into the system. Processing times for E visas is therefore approximately 6 – 8 weeks. Of course, if the applicant has a criminal record the case will take longer; security issues will almost always delay processing of the application. Moreover, all E visa applicants must now attend a Consular interview in person.

d) Duration

Although Canadians may obtain E visas valid for up to five years, treaty traders and investors may not be admitted for an initial period of more than two years and may not be granted extensions of stay in increments of more than two years. Therefore, a Canadian in treaty trader or investor status with a five (5) year visa will initially be admitted for only two (2) years. He or she can then apply for an extension of stay of two (2) years or simply leave the United States and seek reentry with the valid visa for an additional two (2) years. It is important to remember however, that a Consular Officer may decide to grant an E visa for a shorter period of time and that a BCIS Officer at an airport Pre-flight inspection facility or a border Port-of-Entry is in no way obligated to grant an I-94 Arrival /Departure card for the duration of the entire visa.

There is no limit on the number of extensions allowed under this category.

VI. H-1B SPECIALTY OCCUPATION

1. Basics Considerations

Although not exclusively a category for Canadians, H-1B status has, in the past, served many Canadians as a valuable tool of last resort. H-1B petitions are typically filed on behalf of professionals. Professionals are people who hold at least a Bachelor's degree or the equivalent in a specialized field of knowledge relating to their employment, where holding such a degree ordinarily is considered a prerequisite to entering the field. The actual position being offered must require the services of a professional. Examples of job classifications that may qualify for H-1B status are Engineers, Accountants, Chemists, Computer professionals, and some business professionals. Note that H-1B status is not available for foreign trained physicians unless they fit within one of the prescribed exceptions.

The application process involves three steps. First, a Labor Condition Attestation (LCA) must be filed with the Department of Labor by the petitioning US employer. Among other statutory requirements, the employer must certify that the H-1B beneficiary will be paid the prevailing wage. Once the LCA is certified, the US employer must file an H-1B petition with a Regional Service Center. In the absence of premium processing, service centers typically take six to eight weeks to adjudicate H-1B petitions. Most beneficiaries then must also obtain the requisite H-1B visa endorsement at a US Consulate abroad. Canadians are exempt from this third step and are, therefore, eligible to work in the United States at least two to three weeks before most of their fellow H-1B status colleagues. However, the H-1B will not be adjudicated at an airport Pre-Flight inspection facility or border Port -of -Entry.

An employee may generally remain in H-1B status for a total of six (6) years; H-1B status can be issued in increments of up to three (3) years at a time. An extension of the H-1B beyond the six (6) year period is available under very specific circumstances. Spouses of H-1B holders and unmarried minor children may be admitted to the US in H-4 status but they are not entitled to work.

2. More Advanced Considerations

To properly handle an H-1B based US immigration law practice also requires a detailed knowledge of the portability and other related provisions as well as public access file requirements. Since the H-1B classification is subject to a yearly quota and this has greatly curtailed its usefulness in recent years, I have not included a detailed discussion of the H-1B in this paper. Suffice to say; new legislation signed by US President George W. Bush in January of this year confirms that the present congressional cap of 65,000 H-1B petitions per year will remain; but 20,000 H-1B beneficiaries who have earned a Master's Degree from a US institution of higher education will not be subject to the cap. The provision allowing for up to 20,000 additional petitions is effective March 8, 2005.

As well, the fee for H-1B petitions will be raised from USD\$1000.00 to USD\$1500.00. However, employers with no more than 25 full-time employees employed in the U.S. are responsible for half of the fee.

3. Comments

The H-1B is a means of bringing certain new employees to the United States to work. The criterion is fairly straight-forward, and as a result the outcome of most petitions is relatively certain. A major drawback of the H-1B is that it can not be adjudicated at a Port-of-Entry or at Pre-Flight Inspection and that that, in the absence of premium processing, the service center petition filing will often take months for adjudication. Of course, the biggest drawback of the H-1B in recent years has been its lack of availability. For this reason, Canadians, more so than ever, are prone to exhausting all other non-immigrant options before resorting to the H-1B.

CLOSING REMARKS

This article is intended as a general overview and discussion of five of most commonly used US non-immigrant categories available to Canadians. As each non-immigrant category has its own specific set of requirements, restrictions, considerations and advantages and disadvantages it is always important to consider every aspect of the individual employee's situation - his or her qualification, logistical restraints - as well as his or her and the company's future joint future plans, before deciding how to proceed.

Finally, when contemplating a routine US business visitor entry or perhaps a TN application it is important to understand that the scope of a client's US immigration needs can easily extend beyond the parameters of the NAFTA. For instance, in the case of a straight forward L-1A intra-company transfer of a senior Manager, the application process might well be proceeding smoothly until the client requests that his or her spouse work in the United States during the family's stay. The required employment authorization application can not however be processed at an airport or border; it must be approved before the spouse can work in the US. The NAFTA-based transfer now necessitates advice on US immigration law proper. Similarly, when advising on L intra-company transfer strategies for a large company, it would be a disservice to the client not to offer advice about the blanket L program. When contemplating the law of the foreign jurisdiction it is incumbent on each of us to ensure that we have the appropriate licensing, insurance and experience to provide the advice and service required.

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