B-1 VISITOR VISA COMPLIANCE GUIDE:

The B-1 visa has been in the media spotlight in recent years due to suspicion of misuse by some employers. Most recently, the technology giant Infosys agreed to pay the U.S. Government $35 million, the largest immigration-related fine in history, because of allegations that it instructed foreign employees to lie about the purpose of their trips to the United States. This Employer Compliance memorandum is intended to assist employers understand what is a B-1 visa and when is it appropriate to send foreign employees to the U.S. on a B-1 visa or the visa waiver program. In addition, this memo summarizes the penalties that the US Government may impose if there is a finding that an employer has violated the Immigration & Nationality Act by knowingly hiring unauthorized foreign workers and failing to maintain mandatory employment verification documentation.

WHAT IS A B-1 VISA?

A B-1 business visa is the most common type of visa to conduct business in the United States. Although most prospective visitors must apply for a B-1 visa at a U.S. Consulate, some foreign nationals can enter the U.S. for up to 90 days in B-1 status without a visa under a Visa Waiver Program (VWP). Canadian citizens also are visa exempt and may apply for admission in B-1 status directly at a Class A port-of-entry.

B-1 business visitors are admitted to the United States for a limited period of time for the purpose of engaging in commercial or professional activity, but not for employment or "local labor for hire." Generally, a B-1 business visitor may not be compensated from a U.S. source; however, a U.S. source may provide an expense allowance that does not amount to actual compensation. Authorized B-1 business activity includes attending conventions, meetings, and other commercial or professional activities. The H-1B specialty worker, L-1 intracompany transferee, and the E treaty trader or investor visas usually are more appropriate for foreign nationals who wish to pursue temporary employment in the U.S. For those who desire to enter the U.S. to conduct business and not for local employment, the B-1 visa offers expedited processing and simpler requirements than employment visas. Significantly, B-1 status requires nonimmigrant intent and strong ties to one's home country, while H-1B and L-1 status do not have that requirement.

PERMISSIBLE B-1 ACTIVITY

B-1 visitors must seek admission only to engage in business related activities. Examples of permissible B-1 activities include:

- Engaging in commercial transactions that do not involve employment in the U.S., such as negotiating contracts and consulting with business associates.
- Litigation.
- Attending conventions, conferences, or seminars.
- Undertaking independent research.
- Participation in volunteer internships, or observing the conduct of business, professional or vocational activities, such as temporary "elective clerkships" for foreign medical students.
- Participation in volunteer programs, such as the service programs of recognized nonprofit and religious organizations.
- Investigation of the possibility of establishing a U.S. company or investment which may qualify the B-1 visitor for L-1 intracompany transfer or E treaty investor or treaty trader status in the future.
- participation as a professional entertainer in certain cultural programs sponsored by a foreign country.

- utilization of U.S. music recording facilities for the distribution and sale of recordings outside the U.S.
- taking photographs.
- creating art for regular sale outside the U.S.

Some foreign nationals who will perform actual labor for compensation in the U.S. may be admitted as B-1 visitors, including:

- Members of Boards of Directors of U.S. corporations coming to the U.S. to attend a board meeting or to perform other functions of board membership.
- Members of religious, or charitable organizations participating in a volunteer service program. Only reimbursement for expenses is permitted, however a minister on an evangelical tour may receive unlimited "offering at an evangelical meeting."
- Certain foreign nationals who would be eligible for H-1B specialty worker or H-3 trainee or J-1 exchange visitor status, such as foreign nationals who will receive reimbursement but not remuneration from a U.S. source for services or participation in training.
- Certain commercial or industrial workers servicing equipment purchased outside the U.S.; workers training U.S. workers to perform such services; supervisors or trainers of building or construction workers; and employees of foreign exhibitors at international expositions.
- Personal or domestic servants of U.S. citizens residing abroad visiting the U.S. temporarily; servants of some U.S. citizens temporarily assigned to the U.S.; and the servants of some foreign nationals in nonimmigrant status.
- Certain professional athletes who compete for prize money only.
- Under the North American Free Trade Agreement (NAFTA), citizens of Canada or Mexico as agents, buyers, and manufacture, production, marketing, sales, distribution, and service personnel.
- Certain artists, other than photographers, who do not regularly sell their artwork in the U.S.
- Individuals coming to institutions of higher education and research provided they are engaged in traditional academic activities such as lecturing, demonstrating, etc., and that the duration of the activity is for nine days or less. Such individuals cannot receive more than six of these payments in any six-month period.

VISA WAIVER COUNTRIES INCLUDE:

Andorra, Australia, Austria, Belgium, Brunei, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, South Korea, the United Kingdom.

EVIDENCE REQUIRED TO SUPPORT B-1 STATUS

Persons intending to apply at a U.S. Consulate for B-1 visas should provide documentation about the purpose of their trip, their intention to return home, and their finances. Specifically, an applicant for B-1 status must have a residence in a foreign country which he or she has no intention of abandoning. Consular officers are required by law to presume that all B-1 visa applicants have immigrant intent unless demonstrated otherwise. B-1 applicants must affirmatively demonstrate nonimmigrant intent.

- Applicants for B-1 status should have evidence of ties abroad, which may include permanent employment, business or financial connections, family ties, and social or cultural associations, that will assist in demonstrating intent to return to a foreign country.

- B-1 visas are more likely to be issued to applicants from financially and political stable countries, and to applicants with substantial financial resources.

B-1 visitors enter the U.S. for a specifically limited duration.

- Applicants for B-1 status must provide specific and realistic plans for the entire period of their contemplated visit.
- Although the "temporary" period of time required for B-1 visa status is not specifically defined, it does signify a limited period of stay. In practice, the period of time permitted will be defined by the purpose of the business visit.
- Applicants for B-1 status will generally be admitted for 30 days, unless they can articulate to the immigration officer a reason for a longer period of stay. The maximum period of admission generally is six months. Consular officers and immigration officers must be satisfied that applicants will depart upon completion of the visit.
- Although most business visits are approved for a period of less than three months, it is possible to obtain a period of admission of twelve months on initial entry. Extensions of stay may be granted for six months at a time if necessary.
- An applicant's proposed length of stay in the U.S. should not be defined by the maximum period allowable under U.S. law, but rather should be consistent with the time-frame limitations offered by business contacts, relatives, or friends, and with other information provided to the consular officer and/or immigration officer.

Applicants for B-1 status must demonstrate that adequate financial arrangements have been made to enable them to fulfill the purpose of their visit to the U.S. without unlawful employment, and to ensure their departure from the U.S.

- A detailed letter from the applicant's overseas employer is essential. This letter must state the purpose of the applicant's business travel to the U.S., their salary, position, how long they have been employed, and the purpose and expected duration of their U.S. visit.
- Applicants for B-1 status must also be prepared to provide evidence of support of spouse and children, or other dependents, in the country of foreign residence during the period of their stay in the U.S.

An applicant's prior U.S. immigration history is relevant to the consular officer's decision whether to issue a B-1 visa. A supervisory consular officer reviews all refusals. Some refused applications may be reactivated by reapplication.

B-1 visa holders would be well advised to bring all documentation previously offered to a consular officer in support of issuance of a B-1 visa with them for possible examination by an immigration officer upon arrival.

OTHER ISSUES

A B-1 visa is automatically invalidated if the visa holder overstays or otherwise violates the terms of his or her nonimmigrant visa status. Such persons must apply for new visa stamps in their home countries, barring extraordinary circumstances. Persons who overstay their admission under VWP cannot enter without a visa in the future.

If an immigration officer believes that an arriving foreign national is not entitled to be admitted, or has committed a misrepresentation, the immigration officer can order a foreign national summarily "removed." There is no appeal from that removal order, and the consequence of such an order is inability to enter the United States for five years. A B-1 visa holder confronted with the threat of removal can request that the application for admission be withdrawn, but granting such a request is in the immigration officer's discretion. The only other alternative, if appropriate, is to request asylum. A foreign national who has been ordered

removed can later apply for a waiver of the removal bar. Also note that foreign nationals who overstay admission for more than 180 days and voluntarily depart cannot reenter the United States for three years, and foreign nationals who overstay admission for one year or more cannot reenter for 10 years.

B-1 IN LIEU OF H-3 VISA

This unique visa category is distinct from the traditional B-1 visa category in that it allows for some hands-on training activities. (As stated above, traditional B-1 visas are generally only appropriate for business activities such as meetings and conferences, and hands-on activities are generally prohibited.) On the other hand, the "B-1 in lieu of H-3" visa category is distinct from the H-3 and J-1 visa categories in terms of the nature, scope, and duration of training which is authorized. Generally, the longer the period of stay and the more hands-on training, the more appropriate a J-1 or H-3 becomes.

However, in order for a "B-1 in lieu of H-3" visa to be a legitimate option, the amount of "hands-on" or on-the-job training generally must be limited. While the law and regulations do not quantify the amount of hands-on training that is permissible, it is our opinion that it is best to configure a training program such that the hands-on portion of the training remains below 25%. In addition, to increase the likelihood of approval, we normally suggest that the initial length of the training program be limited to 3 months or less.

Finally, the "B-1 in lieu of H-3" option does involve some risk, as there is always a possibility the U.S. Consulate and/or U.S. Customs and Border Protection ("CBP") at the U.S. port of entry will take the position that this visa type is not appropriate. Should this occur, it may be necessary to secure another visa type.

EMPLOYER SANCTIONS

The potential liability for failure to take and maintain Forms I-9 could be substantial. Current U.S. law sets penalties for "substantive" violations (which includes failure to produce a Form I-9) at $110 to $110 *per violation.* In addition, should the Department of Homeland Security conclude that an employee employed unauthorized foreign workers in B-1 status, the Government could determine that an employer knowingly employed individuals without authorization. Penalties for knowingly employing individuals who are not authorized for employment range from fines of $375 to $16,000 *per violation*. Should the Department of Homeland Security determine that an employer engaged in a "pattern or practice" of failure to comply or knowingly hiring or continuing to employ unlawful workers, it can request an injunction against the employer, which range from "cease and desist" orders to fines and debarment from participation in federal countracts.