CHAPTER 6
IMMIGRATION

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Any tourist, student, or business leader who has dealt with United States immigration understands that a carefully planned trip can be ruined if the same attention is not paid to visa application and immigration processes. They are also aware that many denials seem to be made with little or no consideration of the facts.

Although U.S. visa and immigration authorities will allow a person to attempt visa processing independently and although many do succeed, others encounter problems which are sometimes irreparable. Particularly since the September 11, 2001 terrorist attacks, the United States has been increasingly tough on individuals seeking entry into the country. We strongly recommend seeking professional advice for this process.

Entering the U.S. from abroad involves at least two, and often three, separate and independent steps, each of which requires approval.

For those seeking approval of employment in the U.S., the first step is typically to file a petition in the United States with U.S. Citizenship and Immigration Services (USCIS). Tourists and business "visitors" can skip this first step. Before seeking admission, however, a traveler should also be sure to have a passport that is valid for at least the entire period of the planned visit and, for people from some countries, at least six months more.

If USCIS approves, then the next step (or first step for a visitor) is to apply for travel authorization. For many people, this can be accomplished by applying for a visa from the Department of State (DOS) at an embassy or consulate.

The final step is entry into the U.S. itself, which is determined by another government entity, the Bureau of Customs and Border Protection (CBP).

1. VISAS – ASSESSING NEED AND GETTING ONE

A. Travel without a Visa

Under the Visa Waiver Program, many global citizens (including Japanese, many Europeans and some South Americans) may generally travel to the U.S. for business or pleasure without a visa and may stay for no more than 90 days at a time. A full list of participating countries is available at the following website link here. Those who want to stay in the United States for more than 90 days must apply for a visa and be interviewed at the U.S. embassy or one of the U.S. consulates in their respective countries of origin. Visitors from China always need a visa. Canadian business and pleasure visitors can be admitted without a visa for six months at a time.

Everyone, except Canadians, planning to travel to the U.S. without a visa, must first electronically register using the Electronic System for Travel Authorization (ESTA). Registration is possible at any time prior to travel, although it is recommended that travelers apply when they begin preparing travel plans. Information, including fact sheets in several foreign languages, is available at the following link: http://www.cbp.gov/travel/international-visitors/esta.

Individuals who have been present in Iran, Iraq, Libya, Somalia, Sudan, Syria, or Yemen (or other countries designated by the Department of Homeland Security (DHS) as supporting terrorism or "of concern") at any time on or after March 1, 2011, are not eligible to participate in the Visa Waiver Program. Those individuals may still be eligible to travel to the U.S., but they must apply for an actual visa and submit to an interview at a U.S. consulate. There are some exceptions to these restrictions.

Also excluded from the Visa Waiver Program are individuals who are "nationals" of Iran, Iraq, Sudan, or Syria. Nationality is not the same as citizenship. It typically depends on the laws of the designated country. A person can be a national of a particular country, even if he or she has never resided in that country and/or does not have a passport issued by that country.

B. Getting a Visa

If a visa is required, the application form and translated versions are accessible at: https://ceac.state.gov/genniv/.

All visa applications require payment of a non-refundable application fee, which changes regularly. It is important to plan ahead because it may take 30 days or longer before the interview is held and then, sometimes an equal or longer time for the completion of required security investigations. A visa will not be issued, if ever, until the process is complete.

A consular officer only has a short time to interview each applicant and consider the application. Leaving a good initial impression is absolutely essential. The more obvious it is to the officer that the applicant understands the visa standards and has taken the process seriously, the greater the likelihood for success. Every applicant must complete all required forms and pay the required fees. Careful preparation requires time and effort. This is especially important for applicants who speak little or no English. If their paperwork is in order, they have less need to explain their circumstances at the interview and minimize the risk of misunderstanding.

Each application should be prepared individually. Some people choose to include a "letter of invitation" from a U.S. entity or individual which includes inviting the person to the U.S. and describing the reason for the visit, even though this is not required. Many applications that are denied use "form" letters of invitation that are vague and not specifically prepared for the individual or for the particular visit. The consular officer has a lot of discretion and often uses instinct to assess an

applicant's honesty and the legitimacy of the request. The applicant's purpose for coming to the U.S. must be clear. Inconsistencies, even by mistake, can cause an application to be denied. A person who appears to be secretive or unwilling to openly discuss the purpose of the visit will often be denied a visa.

2. TYPES OF VISAS

A. B-1 Status (Temporary Business Visitor)

B-1 status is for temporary business visitors. Employees of businesses located outside the U.S. may apply to enter the country in what is called "B-1" status to continue to perform work for the employer abroad. The business activity need not be temporary, but the particular visit must be of a short duration.

B-1 status is for legitimate activities of a commercial or professional character. It does *not* allow employment by a U.S. entity. Acceptable activities for B-1 classification include negotiating contracts, consulting with business associates, and attending conventions, conferences, or seminars. Construction workers are not generally admissible in B-1 status, but certain individuals may be authorized to enter to supervise or train others engaged in building or construction work.

The person engaging in acceptable business activities must continue to be paid by the non-U.S. employer and should not have expenses paid by a U.S. business or individual, except limited payments for living and incidental expenses while in the U.S.. It *is* permissible, however, for a member of a board of directors of a U.S. corporation to enter the country to attend a board of directors meeting using a B-1 visa and to receive compensation for that purpose.

The American Consulate has the authority to issue a B-1 visa that can often be used for multiple entries during its validity, which can be for up to ten (10) years depending on the citizenship of the applicant. A visa can be used to seek entry into the United States while it is valid. Its validity has nothing to do with the period of stay in the United States that can be granted by the border inspector. CBP can grant an admission, if presented with a valid visa, for a period of up to one year, although six (6) months is more commonly the maximum granted. This distinction between the period of validity of a visa and the period a person is authorized to stay in the United States is important. If presented with a visa that will be valid for just one more day, the CBP officer has the authority to authorize an admission for up to one year. Extensions of stay may be sought for additional increments of up to six months. Spouses and children who accompany B-1 business visitors may apply for B-2 visas.

B. L-1 Status (Intracompany Transfer)

A foreign entity with operations in the U.S. (such as a subsidiary, affiliate or joint venture) can apply to temporarily transfer key employees into the U.S. This status is available to executives, managers, and certain technical staff who have worked for a foreign entity outside the U.S. for one continuous year within the three years preceding the filing of the petition. The "L-1" status can allow up to seven[1] years of U.S. employment if the business, the job, and the individual meet minimum qualifications. This seven-year period is not granted all at once, but instead in shorter periods. In many cases a qualified L-1 visa holder can shift to permanent resident status quite easily.

The foreign entity and its U.S. counterpart must be in a "qualifying relationship," such as parent-subsidiary, affiliate, joint venture, or simply part of the foreign entity operating in the United States. The jobs that the individual performed abroad and will perform in the United States must meet government definitions as "executive capacity," "managerial capacity," or requiring "specialized knowledge."

In most cases, L status is applied for from USCIS by mail. The government charges fees for the filings, which exceed $800 for the first submission. Decisions are usually reached within about 30 - 90 days. The government will review the filing within 15 calendar days if the petitioner pays a "premium processing fee." If approved, the approval notice for the individual must be submitted as part of the second step (the visa application process with the embassy or consulate) for both the individual and any family members and, if visas are issued, the approval notice must also be presented to the CBP at the time the person seeks entry to the U.S. A visa processing fee is charged for L status. L visas are not required for Canadians.

The spouse and/or qualified children of a person approved for L-1 status may apply for L-2 status. One advantage for a spouse in L-2 status is that, with proper authorization, the spouse can also work. Obtaining that work authorization requires submission of a form and a fee after being admitted to the United States in L-2 status.

C. E- 3, H-1B and H-1B1 Status (Specialty Occupations)

These statuses are available to foreign nationals who come to the United States to temporarily work in "specialty occupations." These are jobs generally requiring the theoretical and practical application of highly specialized knowledge. That essentially means a bachelor's degree, or an equivalent amount of education and/or work experience, is a minimum qualification for the job. Most people think of these statuses in terms of computer-related occupations and other professions for which college degrees are issued. But they can be used for a wide variety of jobs, so long as the government can be convinced of the job complexity.

<u>H-1B: Available to Citizens of All Countries</u>

[1] For "specialized knowledge" L-1 visa holders, the maximum stay allowed is five years.

The current challenge with the H-1B classification is that only people who already have that classification can be hired; a person who has not already applied for or been approved for employment with that classification cannot get it until October 2017 unless the employer or employee has exemption from the numerical limitation. Only 78,200 new H-1B's are available for each fiscal year, and they can all be allocated within as little as a few days.

H-1B1: Available to Citizens of Chile and Singapore

The H-1B1 status, almost identical to the H-1B referenced above, is available to citizens of Chile, who have 1,400 available each year, and Singapore, who have 5,400 available each year. To date, the government has never allocated the maximum available each year, so they are available throughout the year.

E-3: Available to Citizens of Australia

Australian citizens have a virtual equivalent to the H-1B in the form of the E-3 status, which is open for applications year-round because the 10,500 limit has never been fully approved.

All three of these classifications require multiple government filings and approvals, starting in the U.S. with the Department of Labor certifying labor conditions and wages. After that, the processes diverge. H-1B status must be approved in the U.S. by USCIS. The H-1B1 and the E-3 statuses can be approved at U.S. consulates as a part of the visa application or, for a person already in the U.S. in some other status, by USCIS. Government-charged filing fees in the U.S. start as low as $825 for an H-1B1 or an E-3, and $1,575 for an H-1B in 2016. Visa fees are in addition to those charges. There can be a difference between the time period approved for the "status" (which is the time period a person is granted to stay in the US) and the time period for the visa (which is the travel document associated with the status). Status approval of an H-1B1 is for up to one year at a time and, for an E-3, it is for up to two years at a time. Both are renewable indefinitely. An H-1B status can only be approved for as many as six years, in three year increments.

The spouse and qualified children of a person approved for one of these statuses may be granted an equal period of stay. They cannot be authorized for employment unless the spouse is in H-1B status pursuing, and far along enough in, the process of seeking a "green card".

D. E Status (Treaty Traders and Investors)

Treaties between the U.S. and some countries, such as Japan and Canada, can authorize E status: treaty traders and/or treaty investors. In each case, the business entity and the visa applicant must be from the same qualified country. For example, a Japanese employer may apply for an E visa for a Japanese citizen. To be considered a Japanese employer for this purpose, the company must basically be owned at least 50%, directly or indirectly, by a Japanese corporate entity or by

Japanese citizens. The proposed position for the visa applicant must be to serve in an executive or supervisory capacity, or to provide an essential service.

Those who qualify may be granted an E-1 or E-2 visa, and each entry into the U.S. using that visa is for a two-year period. These types of visas can be renewed repeatedly, giving the visa holder the ability to remain in the U.S. for as long as the requirements continue to be met. Updated financial and business information must be provided whenever a new visa is sought.

Treaty Trader (E-1) status is available to qualifying entities whose trade between the U.S. and the visa-holder's country equals or exceeds 50% of its international trade. The trade, which can be in goods, services, or technology, must be considered "substantial" by the U.S. government, but there is no clear definition of that term. Treaty Investor (E-2) status is available to investors if the investment is substantial, "at risk," and is used by an operating enterprise to generate significantly more income than just to provide a living to the E-2 visa holder. A substantial amount of supporting documentation must be submitted to seek qualification for these visa categories.

In either case, the E process is most often initiated outside the U.S. at a U.S. Consulate, although it can be started in the U.S. for a person already in the U.S. in another status. Filing at a U.S. Consulate requires submission of a nonimmigrant visa application and E Visa Supplement, along with the regular visa processing fee. The time required for processing can vary substantially; filing well in advance of anticipated travel is advised.

Applying for a change of status (from one nonimmigrant status to E status) while in the U.S. requires a submission to USCIS, along with a filing fee and, if a review is sought within 15 calendar days of filing, a premium processing fee. Approvals through the mail-in process result in approval of a two-year status. It is important to note that, if the approval of E status occurs while in the U.S., the person must eventually apply for an E visa to be able to reenter the U.S. from most foreign travel. That application process must be completed with the Department of State at a consulate abroad. The Department of State is not obligated to approve an E visa simply because the status was previously approved by USCIS in the U.S.

The spouse and any dependent children of a person holding E status can be granted the same status. The spouse can apply for employment authorization after entry into the U.S. and paying the required fee.

3. CONCLUSION

This chapter covers only some of the issues a person should consider when planning a trip to the United States for pleasure, study, or work. Careful preparation and clear presentation of the information supplied to U.S. authorities can help reduce problems that occur in the complicated and time-consuming visa processes.

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