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# EUROPE UPDATE

## Europeans in America, How Hard Can It Be? - ESTA, B, H-1B, B-1 in Lieu of H-1B, and O Visas

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Since so many foreigners regularly come to the United States on business, or to work, one may think that it is relatively easy to immigrate to the United States. It is actually not. We frequently get calls from companies wanting to send their employees to the United States for reduced periods to work temporarily in the United States. To the chagrin and surprise of many, it is not possible, however, for a non-American to travel to the United States to take care of a situation that requires immediate attention and hands-on work.

**Business vs. Working**

The first consideration worth making is to note the difference between "working" in the United States and coming to the United States "on business". Work, as Merriam-Webster explains, is to "perform duties regularly for wages or salary". On the other hand, business indicates more fluid activities, such as engaging in commercial or mercantile activities, transactions or dealings. To come to the United States to work, the visitor needs a "work" visa. Conversely, an ESTA or "visitor" visa may suffice if coming to the United States on business.

**ESTA vs. B-1 Visa**

Citizens of EU member states coming to the United States temporarily on business have two options: the Electronic System for Travel Authorization[1] "ESTA" and the Visitor for Business visa classification "B-1".

ESTA allows visitors for business to perform the same activities authorized with a B-1 visa without the hassle of getting a visa at their local US Consulate, but for a shorter period of time – only up to 90 days instead of 183 days. The uncertainty both ESTA and B-1 holders have is in regard to permissible activities. What activities in the United States are actually permissible?

Though there is a list, it is not exhaustive and many of the activities listed are ambiguous, leaving the business visitor in limbo. Authorized B-1/ESTA activities include attending conferences and conventions, negotiating contracts, presenting at board meetings, and, interestingly, installing, servicing, and maintaining equipment purchased abroad – as long as the original contract between the buyer and seller of the equipment includes a provision to that effect. Therefore, it is important for sellers to include a clause in the purchase agreement indicating that they -- the foreign company -- are responsible for installing, servicing, and maintaining the equipment sold to the US customer.

Employers frequently believe (or want to believe) that getting a B-1 visa for their employees doing business in the United States -- as opposed to simply coming on an ESTA -- adds a layer of "legality" to the business activities to be performed in the United States. This is not so. In addition, applying for a B-1 visa may actually complicate matters.

A denial of a B-1 visa -- or a denial of any visa for that matter -- materially changes an applicant's profile, which causes the existing ESTA to expire or to be a red flag in a future ESTA application. Consequently, the well-intentioned request of a temporary visa may leave the employee not only without a B-1 visa, but it may also leave him without an ESTA. Six months will need to pass before the applicant may obtain one again!

A recurrent issue for EU businesspeople when requesting an ESTA or B-1 visa is the destination of previous travel. Having visited or coming from certain "restricted" countries may make an individual ineligible for ESTA and, when requesting a visa, cause the applicant to be placed into automatic "Administrative Processing". If this is the case, the applicant will be vetted and the visa will be delayed, anywhere from two weeks to ten months is possible.

**H-1B Visa as a Work Permit**

For citizens of an EU member state coming to the United States to work, there are other non-immigrant visa classifications that, assuming that certain prerequisites are satisfied, may allow them to work in the United States. The application and processing time for these visas, however, is considerably longer than for an ESTA or a B-1 visa. The article entitled US Visa Options for Foreign Businesses and Entrepreneurs -– E and L Visas on page

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32 of this Newsletter, discusses the E1/2 and L-1 visas. Other options, however, are available.

The ultimate non-immigrant professional classification is the H-1B visa. This visa allows foreign professionals to work in the United States. Unfortunately, this visa category brings with itself a myriad of hurdles to overcome. First, it is a numerus clausus classification. Every year there are more applications than visas available; accordingly, approximately 40% to 50% of H-1B petitions are returned due to lack of availability, meaning an H-1B visa is not available for these professionals.

Therefore, if an employer seeks to bring a foreign professional employee to the United States immediately, this will not be possible with an H-1B visa as the maximum number of visas issued will often already have been exhausted. Also, to obtain an H-1B visa one must evidence that he is a professional that is going to perform a professional job (specialty occupation) in a field coinciding with his college degree. Although there has been much litigation regarding this last issue, USCIS holds tight to its point of view. In real life, many businesspeople either do not have the equivalent of a US degree or have a degree in a field not matching the position at issue. Even if the applicant does have such a degree, it has become increasingly difficult to prove that certain professional occupations, such as engineering or accounting, are indeed professional specialty occupations. As a result, employees seeking to work in the United States on an H-1B should be prepared for a relatively expensive, uncertain, and long processing time.

**B-1 in Lieu of an H-1B Visa**

Employees may be able to overcome the lack of H-1B visas by applying for a B-1 in lieu of H-1B visa. Here again, however, we face the issue of a college degree in a specialty occupation. The advantage of a B-1 in lieu of an H-1B visa over the H-1B visa is that there is no quota for the former.

It is worth keeping in mind that the B-1 in lieu of an H-1B visa is a "mutt" of a classification – it has some of the characteristics of a B-1 visa and some of the characteristics of an H-1B visa.

An employee with a B-1 in lieu of an H-1B visa can stay in the United States only for up to six months and must be paid by the foreign company in the foreign country. The employee may, however, engage in hands-on active work at the US location. Another distinct advantage of a B-1 in lieu of an H-1B visa is that the processing is done directly at the US Consulate in the foreign country. This means the applicant does not need to file a petition with USCIS, which is a great advantage from a timing perspective.

Many consular officers, unfortunately, are not very familiar with the B-1 in lieu of an H-1B visa classification. Therefore, the request needs to be well documented and the applicant needs to be prepared to "educate" the interviewer at the US Consulate.

**O-1 Visa**

If the employee does not qualify for an E-1/2 or for an L-1A/B visa (discussed in US Visa Options for Foreign Businesses and Entrepreneurs – E and L Visas on page 32 of this Newsletter) or an H-1B visa, the applicant may be eligible for an O-1 visa. An O-1 classification is for people with extraordinary abilities in business or the sciences. Though there are guidelines for an O-1 visa, the Immigration and Nationality Act does not define the extent of the extraordinary ability necessary. An O-1 visa application is filed with the USCIS in the United States. The procedure is quite expensive, time-consuming, and USCIS Adjudicating Officers are given great leeway with their decision making.

**Lack of Treaty Between United States and European Union**

Since there is no treaty for the movement of people between the United States and the European Union, EU nationals have fewer options available than do Canadians and Mexicans. Accordingly, a good practice is to ask clients whether the individual that is to go to the United States may have dual citizenship with Canada or Mexico. If so, a Trade Agreement (TN) visa classification could be obtained, which provides a lot of flexibility. Unfortunately, most clients do not have this option available to them.

After reviewing all of these classifications, we conclude that it may be easier to bring personnel who are already




US Permanent Residents (Green Card Holders) to the United States, even if the personnel is needed only for a limited time. This, however, brings with it a lot of other issues that are beyond the scope of this article.

[1] *This is the only advantage citizens of EU member states have over citizens of many other countries.*