

V. SHORT-TERM BUSINESS VISITORS: TEMPORARY VISAS

§ 12:25 Temporary B-1 business visitor visas—Basic concepts

Research References

West's Key Number Digest, Aliens " 53.9

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<sup>17</sup>INA § 101(a)(15)(E)(iii).

<sup>18</sup>9 FAM § 41.51, n. 16.1.

<sup>19</sup>9 FAM § 41.51, n. 16.1(c), 3 to 4.

<sup>20</sup>9 FAM § 41.51, n. 16.9, 16.10.

<sup>21</sup>9 FAM § 41.51, n. 16.6.

<sup>22</sup>INA § 212(e)(6); 9 FAM § 41.51, n. 18; Memorandum of USCIS Acting Assoc. Dir. Domestic Operations Michael Aytes "Processing Guidelines for E-3 Australian Specialty Occupation Workers and Employment Authorization for E-2 Dependent Spouses," (Dec. 15, 2005).

<sup>23</sup>9 FAM § 41.51, n. 16.1(d).

<sup>24</sup>9 FAM § 41.51, n. 17.2.

Am. Jur. Legal Forms 2d, International Business Transactions § 150A:9

The most frequently used visa for short business trips to the United States is the B-1. Unlike applicants for H-1B and L visas who must first receive advance approval by the DHS, B-1 applicants may apply directly with a U.S. consulate.<sup>1</sup>

Foreign nationals are eligible for a B-1 visa if they: (1) intend to visit the United States temporarily while maintaining a foreign residence; and (2) intend to enter for business activities.<sup>2</sup> The B-1 visa is expressly unavailable, however, for those coming to the United States to perform skilled or unskilled labor or for those coming to study or work as a representative of foreign press, radio, film, or other information media.<sup>3</sup>

Before issuing a B-1 visa, a consular officer must be satisfied of the following: (1) the applicant intends to leave the United States at the end of the temporary stay; (2) the applicant has permission to enter a foreign country at the end of the temporary stay; and (3) adequate financial arrangements have been made to enable the applicant to carry out the purpose of the visit to and departure from the United States.<sup>4</sup>

B-1 business visitor visas should be distinguished from B-2 pleasure visitor visas. B-2 visas are appropriate for foreign nationals who wish to enter the United States temporarily for recreation, tourism, a family visit, medical treatment, and the like.<sup>5</sup> B-2 holders may not engage in business activities in the United States.

### § 12:26 Specific requirements for B-1 business visitors

#### Research References

West's Key Number Digest, Aliens ☞53.9

Am. Jur. Legal Forms 2d, International Business Transactions § 150A:9

#### *Intent to Return to Foreign Residence After Temporary Stay*

In evaluating an application for a B-1 visa, the consular officer must determine whether or not the applicant intends to stay temporarily in the United States and whether or not the applicant is maintaining a foreign residence to which he or she intends to return. In making this determination, consular officers are required to consider:

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#### [Section 12:25]

<sup>1</sup>Applications are filed on Department of State Form DS-156 and, when applicable, Form DS-157.

<sup>2</sup>8 U.S.C.A. § 1101(a)(15)(b).

<sup>3</sup>8 U.S.C.A. § 1101(a)(15)(b).

<sup>4</sup>22 C.F.R. § 41.31(a).

<sup>5</sup>22 C.F.R. § 41.31(b)(2).

- (1) whether adequate funds are available to avoid unlawful employment by the foreign national;
- (2) the credibility of the proposed arrangement for support of the foreign national's trip;
- (3) whether the foreign national has specific and realistic plans for all of the contemplated visit;
- (4) whether the projected period of time for the visit jibes with the proffered purpose of the trip and any time-frame limitations of the persons to be visited;
- (5) whether the applicant has shown "reasonably good and permanent employment, meaningful business or financial connections, close family ties, or social or cultural associations which will indicate a strong inducement to return abroad"; and
- (6) evidence of adequate support for the family remaining abroad where the applicant is the family's principal wage earner.<sup>1</sup>

*Entering for Business Purposes*

DOS regulations define "business activities" in the B-1 context as "conventions, conferences, consultations, and other legitimate activities of a commercial or professional nature." Business activities do not, however, include "local employment or labor for hire."<sup>2</sup> Except for covering reimbursement of expenses, a U.S. source may not provide compensation to the B-1 visitor. The Board of Immigration Appeals has articulated a three-prong test for determining whether a foreign national is entering for business purposes. Each of these questions should be answered in the affirmative:

- (1) is there a clear intent on the part of the foreign national applicant to continue his or her foreign residence and not to abandon his or her existing domicile;
- (2) are the principal place of business and the actual accrual of profits predominantly in the foreign country; and
- (3) are the various entries into the United States of a plainly temporary nature?<sup>3</sup>

The DOS takes the position that foreign nationals are as "clearly classifiable" as B-1 visitors for business if they plan to enter the United States to:

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**[Section 12:26]**

<sup>1</sup>9 FAM § 41.31, n. 2.1 to 2.7.

<sup>2</sup>22 C.F.R. § 41.31(b)(1).

<sup>3</sup>70 Interpreter Releases 239, 240 (Feb. 22, 1993); *Matter of Hira*, 11 I. & N. Dec. 824, 1966 WL 14373 (B.I.A. 1966) (disapproved of by, *International Union of Bricklayers and Allied Craftsmen v. Meese*, 616 F. Supp. 1387 (N.D. Cal. 1985)); In the *Matter of B—* and *K—*, 6 I. & N. Dec. 827, 1955 WL 8762 (B.I.A. 1955).

- (1) engage in commercial transactions which do not involve gainful employment in the United States (such as a merchant who takes orders for goods manufactured abroad);
- (2) negotiate contracts;
- (3) consult with business associates;
- (4) litigate;
- (5) participate in scientific, educational, professional, or business conventions, conferences, or seminars; or
- (6) undertake independent research.<sup>4</sup>

Although the INA specifically precludes B-1 foreign nationals from performing “skilled or unskilled labor,” the DOS permits B-1 aliens to “pursue employment incidental to their professional business activities.”<sup>5</sup> Examples of such incidental employment may include:

- (1) participating in religious and charitable activities, such as voluntary service programs benefiting local communities in the United States;<sup>6</sup>
- (2) serving as a members of a board of directors for a U.S. corporation and attending meetings of the board and performing other functions resulting from board membership;<sup>7</sup> and
- (3) seeking investment opportunities in the United States which could qualify the foreign national for E-2 nonimmigrant status, while refraining from performing productive labor or actively participating in the management of the business prior to receiving a grant of E-2 status.<sup>8</sup>

Finally, the DOS permits the issuance of B-1 visas for certain categories of business activities where H-1B or other visas might also be available. For example, B-1 visas are authorized for:

- (1) workers coming to the United States to install, service, or repair commercial or industrial equipment purchased from a foreign company or to train U.S. workers to perform such services;<sup>9</sup>

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<sup>4</sup>9 FAM § 41.31, n. 5.

<sup>5</sup>9 FAM § 41.31, n. 6.

<sup>6</sup>9 FAM § 41.31, n. 6.1.

<sup>7</sup>9 FAM § 41.31, n. 6.2.

<sup>8</sup>Operations Instructions of the Immigration and Naturalization Service § 214.2b.

<sup>9</sup>9 FAM § 41.31, n. 7.1(a). Except for construction supervisors or trainers, foreign nationals seeking to perform building or construction work do not qualify for B-1 status. 9 FAM § 41.31, n. 7.1(b); see *International Union of Bricklayers and Allied Craftsmen v. Meese*, 616 F. Supp. 1387 (N.D. Cal. 1985).

- (2) foreign nationals coming to observe the conduct of business or other professional or vocational activity;<sup>10</sup> and for
- (3) foreign nationals who qualify for H-1B [or H-3 for training] visas where they “will receive no salary or other remuneration from a U.S. source other than an expense allowance or other reimbursement for expenses incidental to their temporary stay.”<sup>11</sup>

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<sup>10</sup>9 FAM § 41.31, n. 7.4-2.

<sup>11</sup>9 FAM § 41.31, n. 8. The future availability of B-1 visas for otherwise qualified H-1B beneficiaries is in doubt because of the requirement that a labor condition application be certified prior to securing H-1B status. As of this writing, however, the “B-1 in lieu of H-1B” visa is still available.

**[Section 12:27]**

<sup>18</sup> U.S.C.A. § 1153(b).

<sup>2</sup>The fourth preference relates to special immigrants, such as religious workers, certain former employees of the United States Government, or certain former employees of international organizations and is not relevant to this discussion. 8 U.S.C.A. §§ 1153(b)(4), 1101(a)(27).

<sup>3</sup>See § 12:19.