

Founder:

Harry M. Weiss*, 1932-2008

A Patent, Trademark & Copyright Firm

Jeffrey D. Moy*

Farley I. Weiss

Mark H. Weiss

Karen J.S. Fouts*

Veronica-Adele R. Cao*

Of Counsel:

Jessica J. Weiss

**Registered Patent Attorney*



Las Vegas, Nevada Office

3753 Howard Hughes Parkway, #200

Las Vegas, Nevada 89169

Tel (702) 784-7682 | Fax (702) 784-7601

Boca Raton, Florida Office

7100 W. Camino Real, Ste. 302-20

Boca Raton, FL 33433

888-689-1862 x 204 | Direct: 561-948-

3433

WEISS & MOY P.C.

Attorneys and Counselors

4204 N. Brown Avenue

Scottsdale, Arizona 85251-3914

Tel (480) 994-8888 | Fax (480) 947-2663

Web Site: www.weissiplaw.com

Understanding Business Immigration

Jessica J. Weiss, Esq. Immigration Attorney

Cell: 602-380-2772, please contact on my cell if you need to reach me right away.

Long Term Business Immigration Strategies

E-1/E-2 INA Sec 101(a)(15)(E)

Qualifications for E-1:

1. Must have a treaty between the US and treaty country.
2. There must be trade between the US and the foreign applicant's home country.
3. Trade must exist as a continuing course in the international market place.
4. Over 50% of the trade volume must be between US and treaty country.

Qualifications for E-2

1. Must have a treaty between the US and the foreign applicant's home country.
2. Must show that he or she has either made a substantial investment (no set amount).
Substantial Investment is tested by the Proportionality Test.
3. Investor must own 50% of US business or more with a few exceptions to the rule.
4. Enterprise must be more than marginal-investment must return enough income to provide more than just a living for the applicant and his family.

Issues to watch for, Treaty Investor can't:

1. Just invest funds in a bank account;
2. Possess uncommitted funds in a bank account; and
3. Carry on prospective investment arrangements entailing no present commitment.

EB-5 Immigrant Investors

Qualifications:

1. Person must have invested or is in the process of investing at least \$1,050,000 dollars or at least \$800,000 if investing in a targeted employment area. Targeted Employment areas are rural area or an area that has experienced high unemployment of at least 150 percent of the national average. INA Sec 203 (b)(5)(B)(ii).
2. Investment must benefit the US economy
3. Create full-time employment for at least 10 U.S. workers. Keep in mind the troubled business exception can eliminate the requirement to create 10 jobs if company qualifies. See definition below.

Troubled Business Exception: If one invests in a troubled business one need not create 10 jobs but must maintain the jobs there at the time, but if that doesn't occur one could lose conditional resident status.

4. Manage day to day operations of the business or directly manage it through establishing business policies for ex. as a corporate officer of the company.

Regional Centers- Pilot Program: 8 CFR 204.6

Qualifications:

1. Investor does not need to create 10 jobs directly, as long as he can demonstrate that the regional center has indirectly created 10 more jobs and improved the regional productivity.
2. Investor must invest \$1 million dollars or \$800,000 in qualifying regional centers new commercial enterprise or a troubled business within the area of the designated regional center.

Private and governmental agencies can be certified as regional centers if they meet certain criteria. The Regional Center must be involved in the promotion of economic growth, improved regional productivity job creation and increased domestic capital investment. 8 CFTR Sec 204.6

Organizer of the Regional Center must submit a proposal to USCIS showing:

1. How the regional center plans to focus on the geographical region and how it will achieve its economic growth within the region.
2. A bona fide business plan with credible estimates and assumptions for market conditions, project costs and timelines.
3. How jobs will be created directly or indirectly through capital investment
4. The amount and source of the capital committed and efforts made to start the project.

Application Process:

Three Steps:

1. Investor must get Form I-526 petition approved;
2. Then File Form I-485 to adjust status in the US or file to get an immigrant visa abroad- if approved two year conditional resident card is given to applicant and if they have a spouse and children under 21, they will get dependent E status; and
3. Then, File Form I-829 to remove the conditional status of the petition within 90 days prior to the two year anniversary of the green card.

Removal of Conditional Status- Critical aspects to develop during the two year conditional period:

Must show:

1. Commercial enterprise was established;
2. Individual invested or was in the process of investing the required capital;
3. Investment created or will create 10 full time jobs; and
4. Sustained the actions required for removal of conditions during the persons residence in the US, substantially invested the capital investment required and has continually maintained this investment during the conditional period.

EB-5 Issues

1. **A single new commercial enterprise may be used for investor by more than one investor if each petitioning investor has invested the required amount and each investment results in the creation of a least 10 full-time positions for qualifying employees. A new commercial enterprise may be used for investor/employment creation classification even though there are several owners of the enterprise including persons not seeking classification. All capital invested is identified and all invested capital has been derived by lawful means.**

A new commercial enterprise is defined as: 1. Create an original business, 2. Purchase and restructure an existing business or 3. Expand and change net worth or number of workers in a business so that there is a 40% increase in net worth or the number of employees.

2. **Pool arrangements- All investors must identify the source of their funds and that they are derived by lawful means.**
3. **Investor must be involved in the management of the enterprise not merely passive investor.**
4. **Capital must be contributed- if capital is given in exchange for a note, bond, convertible debt, obligation or any other debt arrangement then it doesn't constitute contribution for capital. Capital doesn't include loans. Indebtedness secured by assets owned by the entrepreneur may be considered capital, as long as the investor is personally and primarily liable for the debts and the assets of the enterprise upon**

which the petition is based are not used to secure any of the indebtedness. Promissory notes constitute capital as long as they are secured by the petitioners' personal assets.

Be careful, that although initial application for conditional residence is approved often applicants have trouble removing the conditional status as they don't continue to maintain all the legal requirements for EB-5 purposes

L-1 Intra-company Transferee (L-1A) and Specialized Knowledge Capacity (L-1B) **INA Sec 101(a)(15)(L)**

Qualifications:

1. Beneficiary will need to demonstrate one year of full-time employment abroad (in the three years preceding the application for admission in L-1 status) with a parent, branch, affiliate or subsidiary of the U.S. organization in a managerial or executive capacity.
2. US and foreign entity must be "doing business as an employer in the United States"
3. US and Foreign company must be 51% or more owned and controlled by the same person(s) or entities in equal or similar proportions for each company.
4. If a new office is being opened then it is essential that it is shown physical premises exist and that they aren't in the L-1 applicant's home.

Strategy Points:

- A. **Keep in mind the entire time the foreign national is in the US they must keep the US and foreign company abroad open and actively doing business as defined above.**
- B. **If L-1A Beneficiary will not manage employees he may manage independent contractors, this can enhance his case as well.**
- C. **L-1A Beneficiary may be a functional manager, managing "essential function within the organization." INA Sec 101(a)(44)(A)(iii)..**
- D. **If L-1A manager is managing a small number of people, a first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional. 8 CFT Sec. 214.2(l)(ii)(B).**

Issues on L Visa- Successor-in-Interest

To continue the L status, if the US company is purchased by another company, to qualify as a successor in interest, the successor must have acquired all the assets and have assumed all the liabilities of the predecessor organizations.

How long can you stay in L Status?

1. Initial L-1A for new office is good for one year
2. Extension L-1A is good for three years
3. Maximum time in L-1A is 7 years if new office originally, but if established for over one year at time file L-1A then 6 years is the maximum time in this status.

Permanent Residents- EB1-3, Employment Based

Qualifications for this category are similar to those for L-1A. New Office L-1A cases can't get permanent residence the first year they have L-1A's only after the L-1A extension is approved.

H-1B- Workers in Specialty Occupations

Qualifications:

1. The position being hired for must be a specialty occupation;
2. Beneficiary meets the requirements for a specialty occupation; and
3. Beneficiary meets all state licensing requirements, so upon issuance of H-1B that can immediately start to work. Interim permits sometimes will work for H-1B purposes.

Issues to watch for:

1. If H-1B beneficiary owns more than 5% of the company, it must be disclosed. Immigration recently discourages self-employment for H-1B purposes.
2. Be careful if H-1B Beneficiary is applying for a management position, more difficult to get approved. Management is not necessarily considered a profession.

TN- Option for Canadian Citizens (TN-1) or Mexican Citizens (TN-2)

Qualifications

1. TN Beneficiary must fit into one of the professions enumerated in the North American Free Trade Agreement (NAFTA) 8 CFR Sec 214.6
 2. US Employer ready to hire them, can't be self-employed 8 CFR Sec 214.6(b)
 3. Has a bachelor's degree, except if Scientific Technician or Management Consultant
- Canadians can apply for TN at the border and TN extensions- granted for three years now.

Other temporary working visas

H-2 Temporary Workers

Temporary or seasonal agricultural workers. 8 CFR Sec 214.2(h)(5)(i).

Seasonal need- services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature.

O and P Non-immigrants

O category

- is for highly talented or acclaimed foreign nationals in sciences, arts, education, business or athletics. They must demonstrate extraordinary ability sustained at a national or international level. There is a list of ten criteria that one needs to meet only three of the criteria. In summary, if one has awards/certificates, articles and newspapers, strong reference letters from peers and other leaders in the field, a strong case can be made in this category.

P category is for performing entertainers and athletes.

The standard is a lot lower than for O status and is used for more temporary stays in the US.

EB-1 Permanent Residence aka a green card

- is available for individuals in the O category and sometimes in the P category. Process entails filing I-140 petition via premium processing if available, if not file this petition and regular processing times prevail, then at the same time one can file the I-485 part if in the US. If not in the US, once I-140 is approved, one can file for an immigrant visa abroad at the US Consulate in their home country usually.

R – Religious Workers- Individuals working in a religious capacity can work in the US part-time, full time or even as a volunteer. It is possible to get permanent residence through this type of work but there are set criteria to apply.

Short Term Business Immigration Strategies

Visa Waiver/B Visa- 22 CFR Sec 41.31(a)

Options: Use B-1 if:

1. New venture in the US and applicant needs to enter to develop his business
2. Applicant works for another company in US and planning to quit with that employer to develop new business in US
3. Attending conventions, conferences, consultations, negotiations and meetings.

Use Visa Waiver:

1. If applicant is coming to the US for a short period of time for business or pleasure and doesn't have time to apply for a B visa at a US Consulate abroad; and
2. Applicant has no need to extend their status, as usually visa waiver applicants can't extend status in the US, with a few exceptions.

What activities are considered business?

1. Exploring new business opportunities- no actual labor can be performed
2. Negotiating contracts
3. Other activities of a commercial or professional nature as well 22 CFR Sec. 41.31

What activities are not considered business?

1. Do not allow the applicant to hold themselves out as a representative of the company in order to gather financing for the company
2. Making definite office space for the B-1 visitor at the US company office
3. Obtaining business cards
4. Allowing press releases to be issued to announce the applicant's position in the US company unless indicate employment is prospective.

How do you qualify for a B Visa?

1. Demonstrate that the applicant is visiting temporarily; and
2. Show a foreign residence they have no intention of abandoning. Maintain ties with your home country. INA Sec. 101(a)(15)(B)

Evidence of ties with applicant's home country can include family members abroad, a home abroad, or other business or personal ties abroad such as bank accounts and insurance policies

Keep in mind if it looks like the B-1 visitor is working for the company then he probably is, even volunteer work that will be reimbursed once the proper working visa is issued, is not allowed. Only volunteer work with no strings attached is allowed.

Caveat

All legal information contained in this mini-review is consistent with the most current laws and cases in the Immigration field. However, when a situation arises and the facts need to be applied to the law, additional research and other laws or exceptions to the laws may apply. It is recommend that an Immigration Attorney be consulted when actual legal assistance is needed for Immigration purposes. My goal is to give you an overview of the business immigration visas available so that all opportunities that come your way will not be lost if they hinge on immigration matters.