

# IMMIGRATION ISSUES:

PLANNING TO WORK IN THE U.S.

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**NIXON PEABODY**<sub>LLP</sub>  
ATTORNEYS AT LAW



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## About the Swedish-American Chamber of Commerce, Inc.

The Swedish-American Chamber of Commerce, Inc. in New York (SACC New York) is a private membership organization that was founded in 1906. As the first and leading Swedish-American Chamber, SACC New York provides a vast array of services aimed at promoting and advancing business relations between the U.S. and Sweden. By leveraging its unique network and Swedish-American business related experience, SACC New York is well-positioned to assist and facilitate in various business matters. We are here to help you stay informed and connected!

In addition to producing various publications such as the newsletter In New York, the Membership Directory and information booklets, SACC New York focuses on three areas of operation: Membership, Events, and Business Services.

### About Business Services

Business Services distinguishes the Chamber as a leader in knowledge sharing and consulting services to Swedish businesses interested in the U.S. market. Our consultants can assist with everything from business referrals to the most complex advisory services. Whether you want to open a new business, develop an existing business, find distributors or potential partners, or simply investigate foreign business practices, we are at your disposal!

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## About Nixon Peabody LLP

Nixon Peabody LLP is recognized as a Global 100 law firm—one of the largest in the world. But what sets us apart regardless of our size is our relationships—with each other and with our clients. At Nixon Peabody, we work effectively across offices and practices because we know and like each other. Clients and recruits alike have observed our rapport, and they want to be part of it. Working together as one firm, we bring our best resources to our clients’ business needs.

With approximately 700 attorneys collaborating across major practice areas across the U.S. and in European and Asian commercial centers, the firm’s size, diversity, and advanced technological resources enable it to offer comprehensive legal services to individuals and organizations of all sizes in local, state, national, and international matters. Our clients range from Fortune 500 corporations to global banking and finance institutions, name-brand retailers, emerging entrepreneurs, and world-class research institutions.

Our attorneys adhere to the highest standards of legal excellence and service. We are widely respected for the depth of our industry knowledge and for being responsive, efficient, and easy to work with. Employing innovative and client-centered approaches, the firm helps clients anticipate and capture opportunities, prepare for and manage risks, and forecast and overcome obstacles. Clients depend on Nixon Peabody to have a go-to team tailored to their needs right here at the firm, around the corner, and across the globe. From investment opportunities in China and trademark issues in Palo Alto to complex financing in New York, we’ve got our clients covered.

Nixon Peabody recently received top honors in the 2011–2012 *U.S. News/Best Lawyers* “Best Law Firms” rankings. In total, 38 practices were recognized nationally, while the firm’s Corporate, Real Estate, Real Estate Litigation, Franchise, Land Use & Zoning, and Labor & Employment practices were recognized at the prestigious National Tier One level.

### Our Immigration Team

Nixon Peabody’s Immigration team provides up-to-the-minute practical and cost-effective solutions to companies and foreign



nationals in order to meet their business immigration objectives. The team is comprised of attorneys, immigration specialists, and paralegals from across the firm’s offices. Our services are comprehensive and include developing creative solutions for the global migration of critical staff and hiring of foreign nationals. We have provided strategic advice on all aspects of business immigration law to clients in a wide array of industries, including utilities, energy, health care, manufacturing, environmental, life sciences, technology, publishing, shipping, and education.

### Securing the right to work in the U.S.

Our attorneys have significant experience representing clients before various federal agencies in all manner of immigration proceedings, including nonimmigrant visa petitions, consular visa applications, labor certification proceedings, and immigrant visa petitions. In the past five years, we have helped employers secure green cards and H-1B, O-1, TN, and other work visas for hundreds of current and prospective employees, from the CEO level to the new graduate applying for an entry-level position, from more than 80 countries. In addition, our team has counseled on employment authorization compliance, avoiding employer sanctions, and related employment tax issues. Of necessity, we have become deeply knowledgeable in expediting what can be expedited and providing straight answers to clients when patience is the only path.

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## Immigration Issues: Planning to Work in the U.S.

From the recent college graduate seeking her first real job to the investor planning a new business to the seasoned corporate manager transferring to an executive position, each foreign national moving to the U.S. will follow a different path to employment-authorized status. In the alphabet soup lingo of USCIS, it might be H-1B status, or E status, or an L-1A visa. There are many questions:

- Which one to choose?
- Who is eligible?
- How to qualify?
- How long does it take?
- How do I obtain a green card?
- When can I become a U.S. citizen?

To assist foreign nationals planning to work in the U.S., we are presenting an overview of the most common employment-based categories, eligibility criteria, and the application process, together with other information pertinent to foreign nationals. In most cases it is the prospective employer who prepares the application and files it on behalf of the prospective foreign national employee. In some situations, it is the foreign national who will file on his or her own behalf.

Regardless of the particular category or process involved, planning is critical. USCIS is taking an ever more strict approach and employers and foreign national employees need to be prepared to provide significant documentation and to deal with potentially lengthy processing times. While frustrating at times, it is critical to enter the U.S. in the appropriate status as failure to do so can have consequences for both the employee and the employer.

### E: The Treaty-Trader and the Treaty-Investor

#### E-1 Treaty-Trader Status Eligibility

E-1 non-immigrant visas can be used by a company's principals (owners) or by employees performing certain functions in cases

where the company is involved in significant trade between the U.S. and the country of majority ownership.

To qualify for E-1 status, specific criteria, as outlined below, must be met:

1. A Treaty of Commerce and Navigation must exist between the U.S. and the country of the trading company's nationality.
2. The treaty trading company must have the same nationality as the treaty country. The country of incorporation is irrelevant to the nationality requirement; the nationality is determined by actual ownership. The company must be at least 50% owned and controlled by nationals of the treaty country. (Shareholders who hold permanent residence in the U.S. cannot be counted toward this 50%. In the case of parent/subsidiary relationships, the 50% ownership rule must be traced through to the parent company's ownership.)
3. The employee or principal coming to the U.S. must be a national of the same treaty country through which the trading company qualifies based on its ownership.
4. The treaty trading company must be engaged in "substantial trade" that is principally between the U.S. and the treaty country. Trade includes exchange, purchase, or sale of goods or services, although this has been interpreted to include international banking, insurance, transportation, tourism, and communications activities. There is no specific minimum dollar value to qualify as "substantial." Rather, this is determined by a number of factors, including volume and monetary value, number of transactions, and continued course or frequency of trade.
5. At least 50% of the total volume of the trading company's international trade must be between the U.S. and the treaty country. The remaining 50% may be domestic trade or international trade with other countries.
6. The treaty trader must be a principal (owner) of the company or an employee who fills a key role within the company, such as an executive/supervisory position or an essential employee with special qualifications (expertise or proprietary knowledge).

## E-2 Treaty-Investor eligibility

E-2 Treaty Investor non-immigrant visas can be used by a company's principals (owners) or by certain types of employees, in cases where there has been a significant investment in the U.S.

To qualify for E-2 status, specific criteria must be met:

1. A Treaty of Commerce and Navigation or Bilateral Investment Treaty must exist between the U.S. and country of the investment company's nationality.
2. The investment company must have the same nationality as the treaty country. The nationality is determined by ownership. The investment company must be at least 50% owned and controlled by nationals of the treaty country. Shareholders who hold permanent residence in the U.S. cannot be counted toward this 50%. In the case of parent/subsidiary relationships, the 50% ownership rule must be traced through to the parent company's ownership.
3. The employee or principal coming to the U.S. must be a national of the same treaty country through which the investment company qualifies based on its ownership.
4. The investment must be **“active and substantial”**: to be **active**, the investment must be a real operating business enterprise, which generates services or goods. “Passive” investments, such as undeveloped real estate or stock holdings, would not qualify. If the enterprise is not yet in operation, financial commitments must have been made and all preparations must be near completion. While purchase/sale of a business may be conditioned upon issuance of a visa, funds must be considered to be “irrevocably committed” (e.g., held in an escrow account.)
5. The investment must be made with personal funds or assets, or with borrowed funds for which the individual (or parent company) is personally at risk. While the investor may also use a mortgage or loans secured by the commercial assets of the investment enterprise itself, these funds would not be counted toward meeting the definition of “substantial” investment. Loans

that are secured by an investor's personal assets, or unsecured loans (e.g., loans made on a personal signature) may be included. In calculating the total investment amount, payments for rent or lease of property or equipment may be taken into account, but limited to the cost for one month (not annual). In addition, the investment may include equipment purchases and the value of inventory, as well as goods or equipment transferred to the U.S. if they will be used by the investment business. While there is no specific minimum dollar amount required for the investment, to qualify as **substantial**, the investment must meet two tests:

- (1) The “proportionality test,” and
  - (2) The “marginality test.”
6. The Treaty Investor or employee must fill a key role within the company. A primary treaty foreign national (investor) must have control to direct and develop the business. This can generally be shown by more than 50% ownership, or a partnership with veto power.

### “Proportionality test”

The “proportionality test” requires that the amount invested be a significant proportion of the total value of the business enterprise in the U.S. or a significant proportion of the starting cost of the business, if new. The required proportion varies inversely in relation to the value of the business; generally, the smaller the total value or cost of the business, the larger the percentage of investment required. The Foreign Affairs Manual (which outlines guidelines for Consular Officers) provides examples of a “sliding scale” that may be considered. A slightly different sliding scale for proportionality has been outlined in proposed regulations, although these have not been finalized. Following is a summary of these two scales:

Value of Business or Starting Costs	Minimum Percentage of Investment Required (%) (Foreign Affairs Manual)	Minimum Percentage of Investment Required (%) (Proposed Regulations)
\$50,000	90–100%	
\$100,000	75–100%	
Less than \$500,000		75%
\$500,000–\$1 million	50–60%	
\$500,000–\$3 million		50%
More than \$3 million*		30%
\$10 million	30%	
\$100 million	10%	

\* Multi-million dollar investments are not bound by the 30% scale in the proposed regulations.

There may be circumstances where a business might otherwise meet the “proportionality test.” The Department of State advises Consular Officers that assessing proportionality requires judgment taking into account all factors. The scales do provide general guidelines, however, of the percentage investment that may be needed to meet the proportionality test. As noted above, only funds for which the investor is **personally at risk** may be counted toward the proportionality test.

The value or cost of an established business is generally the purchase price, considered as the fair market value. In the case of a new business, the value or cost will depend on the type of business, and should reflect the actual cost required to become operational. A service-oriented business, such as a consulting firm, will generally require a smaller total initial investment than a manufacturing business. The treaty investment applicant will need to provide evidence of the actual costs normally required for start-up of that type of business, such as letters from chambers of commerce, data from trade associations, or documentation from other similar businesses.

## “Marginality test”

To meet the “marginality test,” the investment generally may not be in a business that will only return enough income to provide a living **solely** for the investor and his or her family. Rather, the business must have the capacity, or potential, to generate income that is significantly greater than subsistence. The business may generate minimal income, yet still qualify if it offers employment opportunities for other U.S. workers. The Foreign Affairs Manual notes that during the “start-up” years of a new business or change in ownership, businesses may “not generate a great amount, if any, of profit” and judgment is required. In some cases, an investor may also meet the “marginality test” by providing evidence of other sources of income, apart from the investment, such as interest or rental income from assets abroad.

An employee treaty foreign national must meet criteria as an executive/supervisor or an essential employee with special qualifications (expertise or proprietary knowledge). The definition of “executive/supervisory” status takes into account factors such as job title, organizational structure, job duties, degree of control and responsibility; number and skill level of employees supervised, pay level, and qualifications; and experience of the proposed treaty employee.

In determining whether an applicant has “essential specialized skills,” factors such as the following are considered: degree of expertise in the field, uniqueness of the specific skills, specialized knowledge of the company’s job functions, and salary. In the case of “essential” employees, the company must also document the length of time that such skills are needed. In general, a long-term need (on-going) may be proven when the employee(s) are involved in continuous development of product improvement, quality control, or other functions where the skills or service are unavailable in the U.S. A short-term need (up to about two years) may be more appropriate where the employee(s) are required for start-up operations, and/or for training and supervision of technical employees.

## Applying for an E Visa

Processing time for E visas can vary, sometimes as fast as a few weeks up to several months or more, depending on the particular consulate's backlog, and whether it involves a company making an initial application for E-1 or E-2 status. Applications are submitted directly to the U.S. consulate in the treaty country, i.e., the U.S. consulate in Stockholm for Swedish citizens or in Tokyo for Japanese citizens.

While the initial supporting documentation required for an E visa is somewhat complex, once the company has been approved, it is relatively straightforward to get E approval for other employees in the future, provided that they meet the qualifications as executive/supervisory or essential employee. The following supporting documents are required with an E visa application:

- Evidence of ownership of the company, with documentation of nationality (copies of passports), stock certificates, or reports from a certified professional accountant.
- Descriptive information about the company, such as Articles of Incorporation, evidence of authorization to do business, annual reports, brochures, financial statements, and/or business plan.
- (For E-1) Evidence of the volume of trade conducted, including the percentage of trade between the U.S. and the country of nationality. Specific financial data is required on international imports and exports (dollar value, volume, and number of transactions), as well as domestic (U.S.) sales and production. This data must be supported by documentation such as contracts with customers, invoices, sales reports, shipping records, and/or financial statements.
- (For E-2): Evidence of the investment amount and financial transactions to document the investors ownership and control of the investment funds, and their lawful transfer to the U.S. (bank statements indicating transfer of funds from abroad to the U.S.; contracts, receipts, or other evidence of purchases of property, equipment, or inventory; receipts for other start-up costs, etc.).
- (For E-2): Evidence of the value of the business (in the case of purchase or investment in an existing business) or evidence to show that the amount invested is sufficient and reasonable for

start-up of that type of business. This could include letters from chambers of commerce or trade commissioners, or financial documentation from the company abroad as evidence of prior start-up costs.

- (For E-2): Evidence of prospects for the investment such as sales contracts, market research studies, or past financial or payroll records, etc.
- Data on the nationality and visa/citizenship status of all company employees, including a list of those in executive, supervisory, and specialist positions, with an indication of visa types.
- Documentation of the applicant's proposed responsibilities and qualifications with evidence meeting the required definitions for "executive/supervisory" or "essential skills."
- Evidence of qualifications of the principals and/or employees, including a job description, resume, diplomas, membership in professional or trade associations, or other credentials.

Treaties or equivalent arrangements providing for both **trade and investment (E-1 and E-2) status** are in effect with the following countries:

Argentina	Germany	Oman
Australia	Honduras	Pakistan
Austria	Iran	Paraguay
Belgium	Ireland	Philippines
Bolivia	Italy	Poland
Bosnia and Herzegovina	Japan	Serbia
Canada	Jordan	Singapore
Chile	Korea (South)	Slovenia
China (Taiwan only)	Kosovo	Spain
Colombia	Latvia	Suriname
Costa Rica	Liberia	Sweden
Croatia	Luxembourg	Switzerland
Denmark	Macedonia	Thailand
Estonia	Mexico	Togo
Ethiopia	Montenegro	Turkey
Finland	Netherlands	United Kingdom
France	Norway	Yugoslavia <sup>1</sup>

Treaties conferring only **E-2 treaty investor status** exist with the following countries:

Albania	Ecuador	Morocco
Armenia	Egypt	Panama
Azerbaijan	Georgia	Romania
Bahrain	Grenada	Senegal
Bangladesh	Jamaica	Slovak Republic
Bulgaria	Kazakhstan	Sri Lanka
Cameroon	Kyrgyzstan	Trinidad & Tobago
Congo (Brazzaville)	Lithuania	Tunisia
Congo (Kinshasa)	Moldova	Ukraine
Czech Republic	Mongolia	

Treaties conferring only **E-1 treaty-trader status** exist with the following countries:

Brunei	Greece	Israel
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For many countries, E visas may initially be issued for up to five years, although this varies. In the case of new E visas, consular officers may also sometimes limit the initial E visa to less than five years, particularly for new companies in the U.S.

Once the E visa has been approved, the individual may enter the U.S. for an initial period of only two years, which is extended for two full years upon each reentry to the U.S. The period of stay in the U.S., as well as the visa itself, can be extended almost indefinitely, as long as the treaty trading requirements are maintained and the alien meets other E requirements.

Under E status, the alien must have “temporary intent” to reside in the U.S. The alien need not maintain a foreign residence, but must express an “unequivocal intent” to return abroad when E status ends (with any approved extensions).

## L-1: The International Executive/Manager or Specialized Knowledge Employees

L-1 is a temporary status available for certain international executives and managers or for employees with specialized knowledge who are transferring to the U.S. L-1 status can be used for intracompany

transferees of established multinational corporations or for the start-up of a new company in the U.S., if the appropriate relationship exists with a company abroad, as defined below.

L-1 status can be requested for an initial period of three years, except that the initial period is limited to one year in the case of “new offices” (those which have not been doing business in the U.S. for at least a year). This period may then be extended in two-year increments, for a maximum of five years for individuals approved on the basis of “specialized knowledge” (L-1B) and seven years for those approved as managers or executives (L-1A). A spouse and children (under age 21) will be eligible for L-2 status, which will permit them to live or study in the U.S. Spouses will be eligible for employment in the U.S. with additional authorization from the U.S. Citizenship & Immigration Services (USCIS).

After the five or seven year limit, individuals in L status must remain abroad for at least one year before returning to the U.S. in L status again. Depending on the circumstances, some individuals decide to obtain permanent residence status (a “green card”) prior to expiration of L status—fairly straightforward for those in L-1A status. Also, in certain cases L status can be extended beyond the five or seven year limit, without remaining abroad for a year, if the individual can document that he/she spends less than half of his/her time in the U.S.

The requirements for L-1 status are as follows:

1. *Employment by a company abroad, for at least one year in the three years prior to transfer to the U.S., in a position that meets the USCIS definition of either a managerial or executive (for L-1A status) or requires “specialized knowledge” (for L-1B.)*

An “executive” directs management of an organization, or a major component or function, establishes organizational goals and policies, exercises a wide latitude of discretionary decision making, and receives only general supervision or direction from higher level executives, board of directors, or shareholders. A “manager” generally has responsibility to direct an organization, department, subdivision, or function; supervises, manages, and controls work of other professional,

supervisory, or managerial employees; has authority for (or effectively recommends) decisions to “hire and fire” and other significant personnel matters; and exercises discretionary authority over day-to-day operations. A manager generally has a number of other managers or professionals reporting to him/her, except in the case of a “functional manager,” responsible for managing and directing the activities of an essential function of the organization (e.g., finance/ marketing, etc.).

An individual who does not meet those definitions may be able to qualify for L-1B status, based on “specialized knowledge” of the company’s products and its application in international markets, and/or an advanced level of knowledge of processes and procedures of the company.

The one year of employment needs to have been full-time; part-time employment cannot be counted or aggregated. Also, the one-year period of employment must have been continuous (without breaks in employment). Any time spent in the U.S. (e.g., as a business visitor), will not interrupt the continuity of the one-year period, but cannot be counted toward completion of the one-year minimum.

2. *The company abroad must intend to continue to do business abroad during the entire period of the L-1 transfer.* The USCIS defines “doing business” as the regular, systematic, and continuous provision of goods and/or services (not just the presence of an agent or office).
3. The company abroad must provide evidence that it is a qualifying organization for purposes of sponsoring someone to the U.S. in L-1 status. In general, this requires that one company that is party to the transfer must have “effective control” over the other company. The foreign and U.S. employers must usually be the same company (e.g., a branch office), a parent/subsidiary, or affiliate. Under certain circumstances the appropriate relationship can be established based on ownership of the foreign and U.S. companies by the same group of individuals, with a controlling interest, holding approximately the same proportion of shares.
4. The position to be held in the U.S. must also meet the USCIS

definition for executive, managerial, or “specialized knowledge,” as discussed above. (The individual could meet the definition of manager/executive abroad and “specialized knowledge” for the U.S. position, or vice versa.)

## L-1 Process

Approval of L-1 status initially requires submission to the USCIS of a Petition (Form I-129 and L supplement), employer support letter, and supporting documents described below. The processing time for approval by the USCIS is usually about 8–12 weeks after submission, assuming that all materials are satisfactory. Expedited processing is available via USCIS Premium Processing, upon payment of an additional fee of \$1,225 to USCIS. With Premium Processing, a response is guaranteed within 15 days after receipt of the Petition and supporting documents. Canadians can submit their petitions at a U.S. port-of-entry for same-day adjudication and do not require a visa stamp.

### **New Office Documentation (if U.S. entity has been in operation for less than 12 months):**

1. Financial statements or annual report for the company abroad, and, to the extent available, for the company in the U.S.
2. Documentation of establishment of U.S. Corporation (Articles of Incorporation, Federal EIN Certificate).
3. Documentation of the ownership and control of the company abroad and the company in the U.S. (annual report, proof of stock ownership including share certificates, stock ledger).
4. In cases of complex ownership structure (two or more levels), a corporate organizational chart showing the ownership and control.
5. Business Plan and Feasibility Study for the establishment of the new U.S. office (describing the proposed nature and organization of the office, the size of the investment, the financial ability to commence doing business in the U.S. including 1-, 3-, and 5-year projections).
6. Documentation of existence of U.S. office premises (commercial

lease, photos of office space, invoices for furnishings and/or equipment, floor plans).

7. If available, documentation of U.S. corporate bank account.
8. Organizational charts showing the individual's current position abroad, and proposed position in the U.S.
9. Job description for position abroad and in the U.S.
10. The individual's resume or C.V. and documentation of educational credentials.
11. Letter or affidavit from employer abroad attesting to employment dates and position held and payroll records for at least one full year.
12. Employer support letter outlining the criteria/requirements for L-1 status as applicable to the individual's case (we prepare this).
13. Filing fee of \$325.00 and fraud fee of \$500.00, payable to Department of Homeland Security.

## Export controls compliance

In response to several recent incidents involving theft of trade secrets, corporate espionage, and export controls violations by foreign nationals working in the U.S., the Department of Homeland Security is seeking to exert more control over certain foreign nationals. As part of the L-1 petition, employers must now certify whether an export control license is required for the employee. Employers with established export controls compliance programs should review existing procedures to ensure proper compliance with this immigration-specific requirement and take steps to ensure compliance. This may be a new area of inquiry for other employers and we are able to provide guidance in specific cases.

## L-1 Visa Issuance

Once the L-1 Petition is approved by the USCIS, the individual will then need to obtain an L-1 visa in his/her passport from a U.S. Consulate (Embassy) abroad. This generally takes only about one to

three days, depending on the Consulate, although some consulates do take longer, 3 to 4 weeks.

## Work Authorization for Spouses of E and L Visa Holders

Spouses of foreign nationals holding visas in several categories are authorized for employment in the U.S. These spouses are eligible for "open market" employment, meaning that with proper authorization they are able to work anywhere in the U.S., in any type of position. This provision does not extend to children. The categories include:

- E-1 treaty traders,
- E-2 treaty investors,
- E-3 specialty occupations (Australians only),
- L-1A international executives and managers, and
- L-1B specialized knowledge

Work authorization is not automatic. The spouse must apply for and receive an Employment Authorization Document ("EAD") from U.S. Citizenship and Immigration Services before starting work. In order to obtain work authorization, the spouse must submit his or her application to the USCIS Service Center with jurisdiction over the spouse's place of residence, including the following:

- Form I-765, Application for Employment Authorization,
- a filing fee of \$380,
- the spouse's and the principal's Form I-94 Arrival-Departure Records and visas as evidence of status,
- the marriage certificate evidencing the spousal relationship, and
- a copy of the Form I-797 approval notice for the L or E principal's petition, if applicable.

Employment authorization will be limited to the period of admission of the E or L spouse, and will be for a maximum of two years at

a time. It can be extended as long as the E or L spouse remains in valid status.

Processing of EAD applications is currently taking approximately 90 days at most USCIS Service Centers.

## H-1B: Specialty Occupations

The H-1B non-immigrant visa category is intended for temporary employees in “Specialty Occupations.” This is defined as occupations requiring theoretical and practical application of highly specialized knowledge, generally requiring a baccalaureate or higher degree in the field. The H-1B visa can be requested initially for a period of up to three years, with extensions possible for a total length of stay of six years.

A U.S. employer must petition USCIS to employ the individual in H-1B status, and must provide evidence of the employer’s ability to pay at least the prevailing wage.

A new H-1B visa can be very difficult to obtain, as there are only 65,000 available each year and in recent years, they have all been claimed before the end of the year. An additional 20,000 H-1B visas are set aside for graduates of U.S. universities with at least a master’s degree or higher.

Certain occupations are normally considered by USCIS to qualify as “specialty occupations,” including professions such as engineers, lawyers, accountants, or teachers. For other occupations, particularly business-related positions, the determination may be made on a case-by-case basis, taking into account factors such as the following (while not all of these criteria need be met, the more that apply, the stronger the case):

- Complexity of job duties,
- Whether employer requires a bachelor’s degree in a particular field for other similar positions,
- Whether a degree in a particular field is required for similar positions in the industry,

- Whether position involves supervision of other professional-level employees and/or responsibility for significant budget or sales revenue, and/or
- Whether the employee’s salary level is commensurate with professional standing.

In addition, the individual applying for H-1B status must show that he or she meets the job requirements and has a minimum of a U.S. baccalaureate degree, or equivalent. If the degree was obtained abroad, an educational credentials evaluation is required.

## H-1B process

There are three steps to obtaining H-1B status:

1. Labor Condition Application (LCA);
2. Petition for Non-immigrant Worker (H-1B); and
3. Application for H-1B visa a) through a U.S. Consulate abroad, or b) change of status requested through the H-1B Petition, or c) entry at the border (Canadians only).

## Labor Condition Application (LCA)

The H-1B Labor Condition Application must be certified by the Department of Labor, Employment and Training Administration Office, before an H-1B petition can be filed with USCIS. The LCA requires that the employer certify that the H-1B employee will be paid the higher of the actual wage or salary paid by the employer for that job, and the prevailing wage determined by the Department of Labor.

## H-1B petition for non-immigrant worker

This petition and supporting documentation must be submitted to USCIS with the basic filing fee of \$325.00. There is an anti-fraud fee of \$500.00 as well as additional fees for training that must be paid by the employer. If the employer has fewer than 25 employees, the additional training fee is \$750.00. If there are 25 employees or more, that fee is \$1,500.00. The petition requires the following:

- Agreement by employer to the terms of the labor condition application for the duration of the individual’s authorized period of stay in the U.S., and
- Agreement by employer to be liable for the reasonable costs of return transportation of the foreign national abroad if the foreign national is dismissed before the end of the period of authorized stay.

The employer support letter should include information about the company, including evidence of ability to pay the proposed salary, a description of the job being offered, job requirements (which substantiate the professional nature of the job), a description of the foreign national’s background and qualifications (again substantiating professional status), and the terms and conditions of employment, including hours, salary, and any other compensation, and period of temporary employment (up to three years initially). Supporting documentation would include the following:

- Descriptive and financial information about the company, such as annual report or tax return, brochures, or articles;
- Job description;
- Copy of the foreign national’s curriculum vitae or resume;
- Documentation of the foreign national’s educational credentials, such as diploma and/or transcript; and
- Copy of the certified Labor Condition Application.

Processing can take six to twelve weeks or more, depending on DOL and USCIS backlogs. Premium processing is available, guaranteeing a response within 15 days, upon payment of an additional expedite fee of \$1225 to USCIS.

## Export controls compliance

In response to several recent incidents involving theft of trade secrets, corporate espionage, and export controls violations by foreign nationals working in the U.S., the Department of Homeland Security is seeking to exert more control over certain foreign nationals. As part of the H-1B petition, employers must now certify

whether an export control license is required for the employee. Employers with established export controls compliance programs should review existing procedures to ensure proper compliance with this immigration-specific requirement and take steps to ensure compliance. This may be a new area of inquiry for other employers and we are able to provide guidance in specific cases.

## Issuance of H-1B Visa and Entry to the U.S.

After USCIS approves the petition, the prospective employee may apply for the H-1B visa at a consulate abroad. Canadians need not obtain a visa, and can apply for entry at a border crossing post or pre-flight clearance post. Individuals currently in the U.S. in another valid non-immigrant status (e.g., F-1 student) may apply for a change of status to H-1B at the time the petition is filed. If approved, the individual could begin employment without leaving to obtain an H-1B visa. If the individual later leaves the U.S., he/she would need to obtain a visa before reentering.

## The “Green Card”: Immigrant Visa/Permanent Residence

Permanent resident status, symbolized to many people by the so-called “green card,” gives foreign nationals the right to live and work in the U.S. without time limitations or restrictions. To qualify for an employment-based green card, the foreign national must, in most cases, have a job offer for full-time permanent (or indefinite) employment and must meet the job requirements. The employer must be able to pay the proposed salary and both the foreign national and the employer must intend for the foreign national to undertake the position. In all cases the foreign national must intend to reside in the U.S. permanently. A green card is not appropriate (and ultimately is likely to be revoked) in cases where a foreign national intends to maintain his/her residence abroad and simply wants easier and unrestricted access to the U.S.

The process is quite lengthy, and depending on the category of green card as well as the foreign national’s citizenship, can take from two to eight years to complete. If the employee leaves the employer or changes jobs, then in most cases the employee will have to begin the process again.

## Qualifying

The first three employment-based preference categories include:

1. The first employment-based preference category is designated for “priority workers”:
  - Multi-national managers and executives, previously employed by, and being transferred to the U.S. by a parent, subsidiary, or affiliate abroad (no labor certification required);
  - Outstanding professors or researchers with universities or private employers with research departments (no labor certification required); and
  - Aliens of “extraordinary ability” in the sciences, arts, education, business, and athletics (no labor certification or offer of employment required).
2. The second employment-based preference category includes:
  - Aliens of “exceptional ability” in the sciences, arts, or business; and
  - Advanced-degree professionals (master’s degree or above, or bachelor’s degree with at least five years of progressive professional experience).

For both groups, a job offer and labor certification are required unless a “national interest” waiver is approved by the USCIS (see below).

3. The third employment-based preference category includes:
  - Professionals not qualifying in the second preference category,
  - Skilled workers (positions requiring at least two years of training/experience), and
  - Unskilled workers.

## Process

For most categories, there are three steps to obtain permanent residence:

1. Labor certification (unless exempt),
2. Immigrant petition, and
3. Immigrant visa or adjustment of status to permanent residence.

### Labor Certification — PERM

For those categories requiring labor certification, the first step toward a green card will be to obtain Labor Certification from the Department of Labor (“DOL”) using a process known as “Program Electronic Review Management” (“PERM”). This requires proof by the employer that:

- Qualified U.S. workers are unavailable to fill the position offered to the foreign national, and
- The employment of the foreign national in the position will not adversely affect the wages and working conditions of U.S. workers in similar positions.

In one sense, the PERM system is philosophically similar to our federal income tax system. As taxpayers, we file our income tax return, making declarations, representations, and attestations about our income, our deductions, and our treatment of items. We submit only the Form 1040 and our signature promising that it is correct. We do not include any supporting documentation, and we do not send in all of our various scraps of paper that we call our tax records. Occasionally, we are notified that the Internal Revenue Service wants to see our tax records, and we are asked to provide all of the necessary backup details in an audit of our return. The PERM system operates in a similar way, in that an application for labor certification can be certified without documentation, but an audit is always possible and for certain occupations, likely.

Here are a few highlights of PERM:

- Form 9089, Application for Permanent Employment Certification, is submitted to the DOL processing center, electronically, after appropriate recruiting has been completed by the employer.
- If recruiting for a “professional occupation,” where a bachelor’s degree is the normal industry-wide entry level requirement, additional recruiting steps are specified as required before submission.
- All recruitment must include the name of the employer, among other requirements.
- Special requirements can be included if they meet the “business necessity” standard.
- The employer must obtain a prevailing wage determination from the Department of Labor to be used in the application.
- A U.S. worker who does not meet the specified minimum requirements for the position may be rejected.
- A U.S. worker is considered qualified if the worker can acquire the skills necessary to perform the duties involved during a reasonable period of on-the-job training.
- If an employer is notified that the application will be audited, the backup documentation must be furnished to DOL within 30 days.

As part of the recruitment process, an employer must document numerous efforts to recruit for the position, including newspaper advertisements, job fairs, Internet postings, recruitment services, and in-house postings, all in accordance with the applicable regulations. The employer must maintain records of its recruitment activities, collect resumes, interview applicants, and prepare written documentation related to the objective reasons for rejecting any U.S. applicants. The evidence of recruitment (tear sheets and copies of job postings) as well as a detailed recruitment report are retained by the employer in the event of an audit.

If the recruitment successfully identifies a qualified U.S. worker, then the process cannot go forward. In this case, the employer may be able to re-test the market a few months later.

Once DOL has certified the application the employer can file its Immigrant Petition on behalf of the foreign national.

## Exemption from Labor Certification

As discussed above, foreign nationals in the first employment-based preference category are exempt from labor certification:

*Extraordinary Ability.* Individuals in this category must demonstrate “extraordinary ability” in the sciences, arts, education, business, or athletics, through sustained national or international acclaim. To qualify in this group requires a level of expertise indicating that the individual is at the top of the field of endeavor. At least three of the following types of evidence are required:

1. Nationally or internationally recognized prizes or awards for excellence in the field;
2. Membership in associations in the field, which require outstanding achievement of members;
3. Published material in professional publications or major media about the individual;
4. Participation as a judge of work of others in the field;
5. Original scientific or scholarly contributions of major significance in the field;
6. Authorship of scholarly articles in professional journals or major media;
7. Evidence of high salary in relation to others in the field; or
8. Other comparable evidence.

*Outstanding Professors and Researchers:* This category is primarily oriented to academic institutions, but can also apply to private employers

offering a research position in an academic field. The position must involve a tenured or tenure-track teaching or research position in the individual's field, or a research position with no fixed term, with an expectation of "permanent" (or indefinite) employment. If for a private employer, the department or division of the employer must employ at least three persons full-time in research positions, and must have achieved documented accomplishments in the field (such as patents or articles by employees in professional journals).

To qualify for this category, the individual must be recognized internationally as outstanding in the academic field, and must have at least three years of experience in teaching or research (teaching/research toward a degree requirement can be counted only if research is recognized as "outstanding" or if the individual had full responsibility for courses taught). In addition, documentation must be provided similar to that required for the "extraordinary ability" category (although only two, rather than three, of the criteria must be met).

*National Interest Waiver:* This category is limited in application and use. The following factors determine whether admission would be in the "national interest":

- The alien's admission will improve the U.S. economy;
- The alien's admission will improve wages and working conditions of U.S. workers;
- The alien's admission will improve educational and training programs for U.S. children and under qualified workers;
- The alien's admission will improve health care;
- The alien's admission will provide more affordable housing for young, aged, or poor U.S. residents;
- The alien's admission will improve the U.S. environment and lead to more productive use of the national resources; and/or
- The alien's admission is requested by an interested U.S. government agency.

While not all factors would necessarily apply to a particular situation, the greater the number, the stronger the case. Also, cases that have been approved for the waiver are often supported by documentation such as letters from high-level officials in government or major non-government agencies, or from key executives in major corporations. The documentation must point to the individual's past track record as evidence of the potential for future impact in the U.S. Some "national interest waivers" have been approved for research positions, but the research must significantly impact the U.S.

## Immigrant Petition

For most categories of employment-based green cards, the Immigrant Petition (Form I-140) is submitted to USCIS with the following supporting documents:

- Company support letter;
- The approved labor certification, or evidence (with supporting documentation) that the individual meets one of the categories that is exempt or eligible for waiver from the labor certification requirement (this is usually quite extensive);
- The most recent company annual report, or similar documents that provide evidence of the employer's ability to pay the salary offered;
- A detailed job description;
- Documentation of the alien's credentials, including resume, diploma and/or transcript, and other applicable materials; and
- Filing fee of \$580.

## Immigrant Visa/Adjustment of Status to Permanent Residence

Once the Immigrant Petition has been approved, the beneficiary may apply for an immigrant visa through a U.S. consulate abroad. If the beneficiary is already in the U.S. in a lawful status, he or she may choose to apply for Adjustment of Status to permanent residence

while remaining in the U.S. This process is handled principally through the USCIS Service Centers, with the possibility of a final interview at the USCIS District Office. There are certain advantages and disadvantages to each approach. Both processes usually take about one year to complete. It is also possible to file for Adjustment of Status concurrently with the Immigrant Petition, if a visa number is available, which typically saves time.

A spouse and dependent children (under age 21) may also obtain adjustment of status to permanent residence (or an immigrant visa through a U.S. consulate) as “derivative aliens” of an employment-based immigrant. Separate application forms and filing fees are required for each individual. One advantage of the Adjustment of Status process is that the individual (and/or spouse) can obtain employment authorization after submitting the adjustment of status application, while waiting for the interview. Processing employment authorization applications generally takes up to three months.

There are restrictions on travel outside the U.S. during processing of the Adjustment of Status. Unless the foreign national holds valid H-1B or L status, such travel must be approved in advance, and he or she must receive an “Advance Parole” document prior to traveling. The time frame for approval for advance parole generally takes three months and can be issued with employment authorization or separately.

The forms and supporting materials required for Immigrant Visa Consular Processing and Adjustment of Status differ slightly, but the following documentation is needed for either process:

- Birth certificate (for individual, and for spouse/ children, if applicable). This must include the name, date and place of birth, and names of both parents.
- Marriage certificate (and divorce or death certificates if there were any prior marriages).
- Evidence showing individual is unlikely to become a public charge (bank statements, pay stubs, other information showing financial status).

## Implications of Permanent Resident Status

Before deciding to proceed with the green card, certain implications should be considered. The green card is not totally permanent and the status can be lost or forfeited if the USCIS subsequently determines that an individual has not maintained an intent to reside permanently in the U.S. Each time an individual reenters the U.S., the inspecting officer may consider the length of the absence, frequency and duration of prior absences, purpose of departure, and other factors to indicate whether the visit abroad was intended as temporary. Other factors considered include maintenance of ties with the U.S., such as property ownership, bank accounts and credit, U.S. driver’s license; location of close family members, location and nature of employment; and continued filing of U.S. tax returns as a resident of the U.S.

The longer the absence from the U.S., the greater the possibility of losing permanent resident status. This may be the case, although it occurs infrequently, where an individual remains abroad for many years, even if he/she returns to the U.S. each year for brief visits. An individual may apply for a re-entry permit if he/she intends to leave the U.S. for more than one year, but not more than two years. This establishes, at the time of departure, that the transfer abroad is intended to be temporary.

Also, an individual who wishes to obtain naturalization to U.S. citizenship in the future should be aware that absence from the U.S. may affect eligibility. Continued permanent residence for five years is required prior to filing for naturalization. Actual physical presence in the U.S. is required for at least half of this period. An absence for less than six months will not affect this continuity of residence. An absence of six months but less than one year will break continuity of residence for naturalization purposes unless a reasonable explanation is provided. An absence of more than one year automatically breaks continuity unless the individual obtains extended absence benefits in advance.

To be eligible for extended absence benefits, the individual must have been physically present and residing in the U.S. as a permanent resident for one year prior to absence. For approval of extended absence benefits, the individual needs to show that he/she will be

employed abroad by a U.S. corporation (at least fifty-one percent owned by U.S. nationals) or by a subsidiary of a U.S. corporation (at least fifty-one percent owned by the U.S. corporation).

## Individual Income Tax for non-U.S. Citizens

The individual income tax consequences of permanent residence should also be considered. Subject to any applicable tax treaties, a resident alien is taxed by the U.S. on all income from all sources (world-wide, not only U.S. source income). An individual is treated as a U.S. resident for tax purposes for a calendar year if he/she meets one of two tests:

1. Is a permanent resident of the U.S. (i.e., has a green card); or
2. Meets the “substantial presence test” except under certain exceptions. An individual is considered to be substantially present based on the amount of time he or she spends in the U.S., calculated by using a formula which counts:
  - All of the days that the individual has been physically present in the U.S. in the current year, **plus**
  - One-third of the days in the first preceding year, **plus**
  - One-sixth of the days in the second preceding year.

If this number exceeds a total of 183 days and the individual is present in the U.S. for at least thirty-one days during the current calendar year, then the individual is substantially present and is considered a resident alien for tax purposes.

An alien who meets the substantial presence test may still be considered a non-resident alien if he or she can demonstrate that he or she has a closer connection to another country.<sup>1</sup>

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1 An alien will be considered to be a nonresident under the “closer connection” exception if he or she:

- (i) is present in the U.S. for less than 183 days in the current year;
- (ii) has his/her tax home (principal place of business or, if not applicable, his/her home in a real and substantial sense) in the foreign country and has a closer connection to such foreign country than the U.S.; **and**
- (iii) has not taken steps to apply for permanent residence.

The individual may also want to consider income, gift, and estate tax issues that may be affected by permanent resident status in the U.S. While there are many advantages to obtaining permanent resident status, it is important to understand the implications, including tax consequences, before deciding to pursue a green card.

## Employment Tax Withholdings for non-U.S. Citizen Employees

With the globalization of our economy, many employers are encountering more non-U.S. citizens in their workforce.<sup>2</sup> Often, employers inquire about whether they should be withholding income, social security (FICA), and unemployment (FUTA) taxes for these employees. Withholdings for foreign employees can be very complicated and different rules apply depending on the individual’s status in the U.S. This summary is intended to serve only as a broad overview of this topic and will not cover the many exceptions that may apply as a result of tax treaties.<sup>3</sup>

To determine if an employee is subject to tax withholdings, the first step is to determine whether the employee is considered to be a “resident alien” or “non-resident alien” (see discussion above). Subject to any applicable tax treaties, a resident alien is subject to withholding whereas a non-resident alien is not.

## Exemption from substantial presence test

Certain individuals who are on F-1, J-1, M-1, or Q-1 visas qualify for a limited exemption from the substantial presence test.<sup>4</sup> This exemption is available for different periods of time depending on whether the individuals are students, teachers, or interns/trainees.

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2. Most foreign employees have H-1B (specialty occupation), L-1 (intra-company transferee), F-1 (student), or J-1 (exchange visitor) visas or may have permanent resident status (green card).
3. The U.S. has entered into tax treaties with numerous countries to allow citizens of those countries to avoid double taxation (paying taxes to both the U.S. and their home country). Tax treaties vary significantly from country to country and are beyond the scope of this summary.
4. Individuals who qualify as exempt are required to file Form 8843 (Statement for Exempt Individuals and Individuals with a Medical Condition) or a similar statement with the IRS. This form should be attached to the employee’s income tax return.

After the exempted time period, students, teachers, and interns/trainees are subject to the substantial presence test and can be taxed as resident aliens if they meet the test.

For students (usually on F-1 or J-1 visas), the first five calendar years that they spend in the U.S. do not count toward the substantial presence test. After the fifth year, students no longer qualify for this exemption unless they can establish to the satisfaction of the IRS that they do not intend to reside permanently in the U.S.

Teachers and interns/trainees (on J-1 or Q-1 visas) are also exempted from the substantial presence test as long as they did not use this exemption or the student exemption for any two years in the preceding six years. Medical residents are generally considered to be trainees for purposes of this test. As a practical matter, this exemption means that teachers and interns/trainees will generally qualify as non-resident aliens during their first two years in the U.S.

## FICA and FUTA taxes

Generally, resident and nonresident aliens are subject to FICA and FUTA taxes on their U.S. source wages, subject to applicable tax treaties and other agreements. There is, however, an exemption for non-resident individuals who are on F-1, J-1, M-1, or Q-1 visas and who are non-resident aliens for tax purposes. This exemption from FICA and FUTA taxes applies only for services that are performed in connection with the purpose for which the alien entered the country. These types of services may include on-campus work, practical training, and economic hardship employment. For example, a physician in the U.S. as a J-1 trainee would be exempt while performing services as a medical resident, but not in any other form of employment.

## Practical illustrations

For example, let's say that John Chan, a Chinese national, arrived in the U.S. on June 1, 2010, on a J-1 visa to begin training as a medical resident for Anytown Hospital. Because he will be in the U.S. for more than 183 days during the 2010 calendar year, he would ordinarily be considered a resident alien. However, as a J-1 visa holder, John qualifies for the exemption from the substantial

presence test. During his first two years of medical residency (i.e., 2010 and 2011), John will be exempted from the substantial presence test and will be a non-resident for tax purposes. He will be subject to income tax on his U.S. earnings, but will not be subject to FICA or FUTA withholdings. Beginning in January 2012 (if he remains in the U.S. for more than 183 days during 2010), John will become a resident alien for tax purposes and will be subject to income, FICA, and FUTA tax withholdings.

In another example, Susan Ramirez, a Brazilian national, has been in the U.S. for the past four years (since Sept. 2007) pursuing a university degree in engineering. Hi-Tech Company hires her to begin working as an engineer on July 1, 2011, immediately after graduation. Susan initially begins working while on her F-1 visa, under optional practical training. During the 2011 calendar year, she is exempted from the substantial presence test and is considered a non-resident alien. In 2011, Susan is subject to income tax withholdings, but is exempted from FICA and FUTA taxes. Beginning in 2012, Susan no longer qualifies for exemption from the substantial presence test because she has used up her five years of F-1 student exemption. Therefore, she is subject to income, FICA, and FUTA tax withholdings.

Finally, Manny Singh, an Indian national, has a green card when he is hired at the Major Marketing Firm. He is a resident alien for tax purposes and is subject to income, FICA, and FUTA tax withholdings. Like U.S. citizens, he will be taxed each year on his worldwide income.

## Totalization agreements

The U.S. has entered into Social Security Totalization Agreements with twenty-one countries. Because of these agreements, under certain circumstances a foreign national can remain in the retirement system of his or her home country while temporarily working in the U.S. This eliminates dual contributions, for up to five years.

The countries are:

Italy	Germany	Switzerland
Belgium	Norway	Canada
United Kingdom	Sweden	Spain

France	Portugal	Netherlands
Austria	Finland	Ireland
Luxembourg	Greece	South Korea
Chile	Australia	Japan
Denmark	Poland	Czech Republic

As can be seen from the discussion above, determining whether a foreign employee is subject to withholding taxes can be very complicated. In general, most foreign employees are subject to income tax withholding, but may be exempted from FICA and FUTA withholdings for at least part of their stay in the U.S. if they are on F-1 or J-1 visas.

## Naturalization as a U.S. Citizen

### Eligibility requirements for naturalization

In many cases citizens of other countries are eligible to become U.S. citizens while retaining their native citizenship, resulting in dual citizenship. To be eligible for naturalization, an individual must meet all of the following requirements:

1. Permanent resident of the U.S.
2. Continuous residence in the U.S., subsequent to obtaining permanent residence, for at least five years preceding filing for naturalization (only **three** years for a spouse of a U.S. citizen) and until grant of citizenship. Also, a spouse of a U.S. citizen must have resided in marital union with the U.S. citizen for the three years preceding application, and the spouse must have been a U.S. citizen for the full three years.

“Residence” is considered to be the individual’s “domicile” or principal actual dwelling place, without regard to intent. An absence from the U.S. for less than six months will not affect this continuity of residence. An absence of six months but less than one year will break continuity of residence for naturalization purposes unless a reasonable explanation is provided. An absence of more than one year automatically breaks continuity unless the individual obtains extended absence benefits in advance.

3. Residence for at least three months immediately preceding filing for naturalization in the state in which the petition is filed.
4. Actual physical presence in the U.S. for periods totaling at least one-half of the time required for residence (i.e., eighteen months for spouses of citizens, two and one-half years for others). In calculating the required time for physical presence, any day or partial day absent from the U.S. is excluded.
5. Ability to read, write, and speak English (exemptions provided under certain circumstances, see below).
6. Knowledge of U.S. history and government (see below).
7. Good moral character.
8. At least eighteen years old, except for children of aliens who can be naturalized with their parents.

To meet the requirements for English language and knowledge of U.S. government and history, individuals are given an oral examination by the USCIS during the naturalization interview.

An individual may be exempt from the requirement of ability to read, write, and speak English (including simple words and phrases, etc.) for the following reasons:

- a physical or developmental disability or mental impairment; or
- over fifty years old and has lived in the U.S. for a total of at least twenty years following approval as a permanent resident; or over fifty-five years old and has lived in the U.S. at least fifteen years as a permanent resident.

While there is no specific exemption from the requirement of knowledge of history and government of the U.S., the Attorney General will provide for “special consideration” of the requirement for persons who, on the date of filing the naturalization application, are over age sixty-five and have lived in the U.S. for periods totaling at least twenty years following admission as a permanent resident. Those eligible for special consideration are only required to answer

six out of ten questions about U.S. government and history correctly and may be tested in a language of their choice.

## Information and documentation

At the interview with USCIS an individual should be prepared to produce the following:

1. All marriage certificates, divorce decrees, annulments, name change documents, and death certificates for prior spouses and current spouse.
2. Certified copies of court documents showing resolution of the case if individual has been arrested, detained, or cited by any law enforcement officer. Evidence of completion of probation requirements if probation ordered.
3. From the date permanent residence began, a list of all international travels including date of departure, date of return to U.S., and countries visited.
4. All valid and expired passports and U.S. travel authorization documents.
5. If a male between 18 and 26, proof of registration with U.S. Selective Services. If a male between 26 and 31, proof that registration with U.S. Selective Services was done timely.
6. Certified income tax returns for the last 5 years (3 years if married to a U.S. citizen). Certified returns can be obtained from the Internal Revenue Service using Form 4506-T or calling 800-908-9946.
7. Original Permanent Resident card and a state-issued identification card (such as a driver's license).

## Naturalization process

The process of obtaining naturalization involves several steps:

1. Submit the naturalization application (USCIS Form N-400) and supporting materials, to the USCIS Regional Service Center with

jurisdiction over the place of residence. The N-400 application form should be completed carefully and reviewed with counsel prior to filing. If the answer to any question on Part 7 is "yes," it should be discussed with legal counsel prior to submission. In addition to the application, be sure to submit two photographs along with a copy of your current permanent resident card. The filing fee is \$680.00 and includes the \$85 biometric fee.

2. Once the naturalization application (N-400) is received by the USCIS, USCIS will send a letter to the applicant specifying a time at which the applicant must report to the local USCIS office for fingerprinting. The applicant should bring the notice to the USCIS fingerprint facility along with valid identification. Once the fingerprints are taken USCIS submits them to the FBI for processing.
3. Next, the USCIS Regional Service Center will forward the application to the local USCIS office with jurisdiction over the applicant's place of residence. The local USCIS office will contact the applicant to schedule an appointment for the naturalization interview and the examination (if not already taken). The time-frame from filing of the application until the interview may vary depending on the region of the country and office.
4. During the naturalization interview the USCIS Officer will review the questions on the application, particularly information related to absences from the U.S. (as these can affect eligibility for naturalization) and the questions in Part 7. The applicant will be tested on the English language and U.S. history and government during the interview.
5. USCIS usually reaches a decision at the conclusion of the interview. If no decision is reached within 120 days, the applicant may apply to the U.S. District Court for a decision.
6. The individual will then be scheduled for a naturalization ceremony. The time-frame from USCIS approval of the citizenship application until the final swearing-in ceremony varies based on the office.

## Estate Planning for non-U.S. Citizens:

### Why Should I be Concerned About Estate Planning?

There are both personal and tax reasons why you should be concerned.

**Personal reasons.** First, your estate will be handled in the place of your domicile at the time of death. If you are domiciled in the U.S., then your estate will be administered in the state where you were living, and if you do not have a valid will, your assets will be distributed in accordance with the intestate laws of that state. Real property that you own in other states or countries will be subject to the laws of their location. Estate planning gives you the opportunity to specify how you would like your assets to be distributed, any special instructions, who should handle your estate matters, who should be guardian for your minor children, and many other important topics. It can also help to reduce the costs of estate administration by preparing for an orderly and efficient transfer of assets.

**Tax reasons.** If you are a U.S. citizen or a resident alien of the U.S., your estate for tax purposes will include all property in which you have any interest at the time of your death, regardless of its location or your domicile. Non-resident aliens are subject to estate tax only on assets with a situs in the U.S. In some cases, another country may also have jurisdiction over your estate for tax purposes. If your spouse is not a U.S. citizen, there are restrictions that require additional planning to reduce your estate tax liability. Proper planning to take advantage of the available exemptions and credits is important to preserve assets for your family.

#### What are the general rules for U.S. estate and gift tax?

- Each person is entitled to give unlimited amounts of assets to a U.S. citizen spouse during life, free of federal gift tax, by using the unlimited marital deduction.
- Each person is entitled to give \$13,000 per year to as many individuals as he or she would like, free of federal gift tax.

- Each person is entitled to have \$5,000,000 of assets pass at death free of federal estate tax to beneficiaries of his/her choice.
- Each person is entitled to leave all assets to a U.S. citizen surviving spouse at death free of federal estate tax using the unlimited marital deduction.

What about those persons who are not U.S. citizens?

In 1988, Congress amended the tax laws to provide that benefits available to married U.S. citizens are not similarly available to those who are not U.S. citizens.

What rules apply now to non-U.S. citizens?

First, the unlimited marital deduction at death does not apply where the surviving spouse is not a U.S. citizen, unless the assets are placed in a “Qualified Domestic Trust” (a “QDOT”). Regulations specify strict tests that a QDOT must meet to qualify as such, and apply the QDOT rules to retirement benefits and annuities as well. Next, there is no unlimited gift tax marital exemption for transfers during life to a non-citizen spouse: the annual amount in 2011 is \$136,000 per year (the \$13,000 per donee per year exclusion is still available for others).

How does this work?

There is still a federal estate tax exemption of \$5,000,000 for all resident aliens (those who have green cards or who spend more than 183 days per year in the U.S.). However, any amounts over that threshold would be subject to federal tax at 35 percent unless a QDOT is established to hold the assets for the benefit of the surviving spouse. If the surviving spouse subsequently becomes a U.S. citizen he or she can then avoid the QDOT.

Non-resident aliens are limited to a federal estate tax exemption of \$60,000 of U.S. assets, with any amounts over that threshold subject to federal estate tax beginning at a rate of 6 percent.

## What is a Qualified Domestic Trust/QDOT?

It is a trust that:

- a. Requires that at least one trustee be an individual citizen of the U.S. or a domestic corporation;
- b. Provides that no distribution, other than income, may be made unless the U.S. trustee has the right to withhold estate tax from such distribution;
- c. Meets the requirements as prescribed by the IRS regulations; and
- d. Files an election to be treated as a QDOT (by the executor of the decedent's estate).

What should I do about this?

You can minimize the tax and management problems for a non-U.S. citizen spouse through proper estate planning, including a properly drafted will, avoidance of joint ownership of assets, proper use of life insurance, and selection of an appropriate fiduciary. These are the first steps and will be applicable in almost every situation. More complex estates that include property in other countries, application of treaties, or unusual assets will require sophisticated analysis and planning.

*1. Yugoslavia - The U.S. view is that the Socialist Federal Republic of Yugoslavia (SFRY) has dissolved and that the successors that formerly made up the SFRY - Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Slovenia, and the Federal Republic of Yugoslavia continue to be bound by the treaty in force with the SFRY and the time of dissolution.*

## Appendix

### Non-immigrant Visas and classifications

#### *Foreign Government Officials*

- A-1 Ambassador, public minister, career, diplomatic or consular officer, and members of immediate family.
- A-2 Other foreign government official or employee, and members of immediate family.
- A-3 Attendant, servant, or personal employee of A-1 and A-2, and members of immediate family.

#### *Visitors*

- B-1 Temporary visitor for business
- B-2 Temporary visitor for pleasure

#### *Aliens in Transit*

- C-1 Alien in transit directly through U.S.
- C-1D Combined transit and crewman visa
- C-2 Alien in transit to UN headquarters district under Section 11.(3), (4), or (5) of the Headquarters Agreement
- C-3 Foreign government official, members of immediate family, attendant, servant, or personal employee, in transit
- C-4 Transit without Visa, see TWOV

#### *Crewmen*

- D-1 Crewmember departing on same vessel of arrival
- D-2 Crewmember departing by means other than vessel of arrival

#### *Treaty Traders and Treaty Investors*

- E-1 Treaty Trader, spouse and children
- E-2 Treaty Investor, spouse and children
- E-2C Long-term foreign investors in the CNMI

E-3	Specialty occupation professionals from Australia	H-4	Spouse or child of H-1, H-2, H-3
	<i>Academic Students</i>		<i>Foreign Media Representatives</i>
F-1	Academic Student	I	Visas for foreign media representatives
F-2	Spouse or child of F-1		<i>Exchange Visitors</i>
F-3	Canadian/Mexican academic commuter	J-1	Visas for exchange visitors
	<i>For Foreign Medical Graduates (see individual categories H-1B, J-1, O-1, TN, E-2)</i>	J-2	Spouse or child of J-1
GB	Business visitor (Guam only)		<i>Fiance(e) of U.S. Citizen</i>
	<i>Foreign Government Officials to International Organizations</i>	K-1	Fiance(e)
G-1	Principal resident representative of recognized foreign member government to international organization, and members of immediate family.	K-2	Minor child of K-1
G-2	Other representative of recognized foreign member government to international organization, and members of immediate family.	K-3	Spouse of a U.S. Citizen (LIFE Act)
G-3	Representative of non-recognized or non-member government to international organization, and members of immediate family	K-4	Child of K-3 (LIFE Act)
G-4	International organization officer or employee, and members of immediate family		<i>Intracompany Transferee</i>
G-5	Attendant, servant, or personal employee of G-1, G-2, G-3, G-4, or members of immediate family	L-1A	Executive, managerial
	<i>Temporary Workers</i>	L-1B	Specialized knowledge
H-1B	Specialty Occupation	L-2	Spouse or child of L-1
H-1B1	Specialty Occupation from Chile or Singapore		<i>Vocational and Language Students</i>
H-1B2	Specialty occupations related to the Department of Defense Cooperative Research and Development projects or co-production projects	M-1	Vocational student or other non-academic student
H-1B3	Fashion models of distinguished merit and ability	M-2	Spouse or child of M-1
H-2A	Temporary Agricultural Worker	M-3	Canadian/Mexican vocational commuter students
H-2B	Temporary worker: skilled and unskilled	N-8	Parent of alien classified SK-3 "Special Immigrant"
H-3	Trainee	N-9	Child of N-8, SK-1, SK-2, or SK-4 "Special Immigrant"
		NAFTA	<i>North American Free Trade Agreement (NAFTA) (see TN, below)</i>
			<i>North Atlantic Treaty Organization</i>
		NATO-1	Principal Permanent Representative of Member State to NATO and resident members of official staff or immediate family

NATO-2	Other representatives of Member State; Dependents of Member of a Force entering in accordance with the provisions of NATO Status-of-Forces agreement; Members of such a Force if issued visas		<i>International Cultural Exchange Visitors</i>
		Q-1	International cultural exchange visitors
		Q-2	Irish Peace Process Cultural and Training Program (Walsh Visas)
NATO-3	Official clerical staff accompanying Representative of Member State to NATO or immediate family		
NATO-4	Official of NATO other than those qualified as NATO-1 and immediate family	R-1	<i>Religious Workers</i> Religious workers
NATO-5	Expert other than NATO officials qualified under NATO-4, employed on behalf of NATO and immediate family	R-2	Spouse or child of R-1
			<i>Witness or Informant</i>
NATO-6	Member of civilian component who is either accompanying a Force entering in accordance with the provisions of the NATO Status-of-Forces agreement; attached to an Allied headquarters under the protocol on the Status of International Military headquarters set up pursuant to the North Atlantic Treaty; and their dependents	S-5	Informant of criminal organization information
		S-6	Informant of terrorism information
		S-7	Family members of S visa holders
			<i>Victims</i>
NATO-7	Servant or personal employee of NATO-1, NATO-2, NATO-3, NATO-4, NATO-5, NATO-6, or immediate family	T-1	Victim of a severe form of trafficking in persons
		T-2	Spouse of a victim of a severe form of trafficking in persons
		T-3	Child of victim of a severe form of trafficking in persons
		T-4	Parent of victim of a severe form of trafficking in persons (if T-1 victim is under 21 years of age)
		U-1	Victim of Certain Criminal Activity
		U-2	Spouse of U-1
		U-3	Child of U-1
		U-4	Parent of U-1, if U-1 is under 21 years of age
			<i>Workers with Extraordinary Abilities</i>
O-1	Extraordinary ability in Sciences, Arts, Education, Business, or Athletics		
O-2	Alien's (support) accompanying O-1		
O-3	Spouse or child of O-1 or O-2		
			<i>Athletes and Entertainers</i>
P-1A	Individual or team athletes, internationally recognized		
P-1B	Entertainment groups or entertainers, internationally recognized	TN	<i>North American Free Trade Agreement (NAFTA)</i> Trade visas for Canadians and Mexicans
P-2	Artists and entertainers in reciprocal exchange programs	TD	Spouse or child accompanying TN
P-3	Artists and entertainers in culturally unique programs		
P-4	Spouse or child of P-1, 2, or 3	V-1	<i>Certain Second Preference Beneficiaries</i> Spouse of an LPR who is the principal beneficiary of a family-based petition (Form I-130) that was filed prior to December 21, 2000, and has been pending for at least three years

V-2 Child of an LPR who is the principal beneficiary of a family-based visa petition (Form I-130) that was filed prior to December 21, 2000, and has been pending for at least three years.

V-3 The derivative child of a V-1 or V-2

*Humanitarian Parole*

*Temporary Protected Status (TPS)*

TPS Temporary Protected Status

*Transit Without Visa*

TWOV Passenger

TWOV Crew

WB Visa Waiver Program (business or pleasure visitors of designated countries)

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