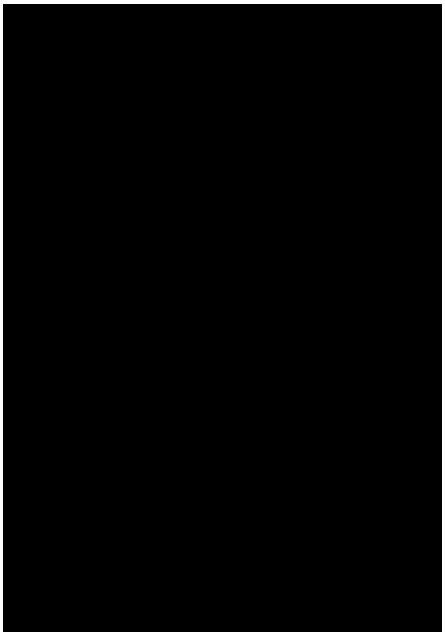

Guide to U.S. Business Visas for Foreign Entrepreneurs

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I. INTRODUCTION

Most immigration-based practices in the U.S. concentrate on "inside-out immigration", focusing on assisting U.S. employers who want to hire foreign nationals who are outside the U.S., or on individuals who are already in the U.S. and how they may want to change their status or adjust their status from a temporary visa to permanent residence. Many of these visas are limited in terms of annual limits on visa numbers, including the well-known H-1B visa, which has an annual cap which has been met in one day several times, or family or employment-based immigrant visas, which also have an annual cap and have long backlogs for nationals from specific countries, including China, Mexico and India.

The purpose of this course is to provide a brief introduction to "outside-in immigration", i.e. visas which trace their origin overseas, and which allow foreign nationals to obtain visas and permanent residence in the U.S. ("green cards") vis-a-vis investment, expansion of existing businesses, purchase of existing U.S. companies or franchises, launches of start-ups, or in limited cases, self-sponsored immigrant visa categories. Each situation is unique and may require a specific option or a combination of options in order to obtain the desired result, so it is important to understand all options and work with creative and experienced immigration law professionals to craft the best solution for each situation. What all these visas have in common is the foreign entrepreneur, i.e. an individual with a vision, capital and specific plans to make their American dreams come true.

Please find a brief synopsis of the options available and situations in which they may apply, including:

- Multinational Company Model (L-1): The Intra-Company Transfer Visa allows a foreign-based company to transfer personnel to a U.S. subsidiary or branch office in the U.S., including to open a new office.
- Treaty-Based Visas (E1/E2): Entrepreneurs may invest capital into a U.S. venture, buy a company or launch a start-up, or set up a U.S. trade office, may get visas to "develop and direct" those companies and bring essential employees. These visas require that the foreign national beneficiary be from a treaty nation and that the U.S. entity be majority owned by treaty nation individuals and/or companies (Please see E Visa treaty list attached)
- Immigrant Visa Petitions (EB-1/ EB-5): These petitions allow foreign nationals to directly obtain permanent residence in the U.S. The focus here is on visas based on Extraordinary Ability (EB-1), or in larger-scale investment (EB-5).

II. INVESTOR VISAS

(a) E-2 TREATY INVESTOR VISA

Basic Requirements:

a. Nationality – at least 50% of U.S. enterprise must be owned and controlled by nationals/companies of the treaty country;
b. Nationality of U.S. company must match its E-1 sponsored employees
c. Dual nationality - can choose one which has bilateral treaty with U.S. (e.g. foreign national has Russian citizenship, so he/she would not qualify due to lack of U.S. treaty with U.S., but if he/she has citizenship from a treat country, like France, for example, they can apply under that passport and qualify);
d. 50-50/Joint Ventures – company may have 2 different nationalities but 50% must be applicant's home country;
e. Spouse can obtain employment authorization and can work independently.
f. No limit to number of renewals as long as the sponsoring business is operating successfully
g. No filing deadlines
h. Applications can be filed directly at the U.S. embassy, consular section, of the corresponding country, which may be faster and less expensive to process.

Legal Standards used in evaluating an E-2 application:

Basic Requirements:

INVESTMENT

- Treaty must exist between foreign national applicant's country and U.S. and company sponsor must have matching nationality (i.e. 50%+ owned by national(s) and/or companies with matching nationality)
- Funds and other assets may be included in estimating the "investment";
- The investment must establish investor´s commitment to the enterprise (i.e. "at risk" funds);
- Theoretically, funds must be irrevocably committed to the enterprise and must be placed "at risk". The more that has already been spent towards the furtherance of the enterprise that more they are at risk.
- A business plan with 5-year projections is required and must include discussions of anticipated hiring and organizational structure, anticipated revenue and re-investment, steps to be implemented and market research. Have to show commitment and organization to communicate high probability of success;
- Must have possession and control over the capital invested.

SUBSTANTIALITY/PROPORTIONALITY TEST

- No defined amount of investment required. This is not pure a money issue, so no minimum number is applied. Initial investment should be proportional to the

type and scope of business and should be "substantial", meaning that it should encompass start-up costs and first-year operating costs at a minimum;
- Amount necessary to create viable enterprise of the nature contemplated depends on the type of business. This depends on the threshold to enter the specific business sector and achieve market penetration necessary for success;
- Proportional to total cost of business;
- Use inverted sliding scale – compare amount invested with 1) total cost of purchasing estimated business; or 2) amount necessary to create a viable business.

SOURCE OF FUNDS

- Possession & Control - investment has to be in personal possession and control of the investor;
- Gifts are acceptable;
- Inheritance – inheritance of U.S. business not acceptable;
- Lawful source – can be U.S. source, but must be lawful;
- Loans are OK except cannot borrow where U.S. company is collateral for the loan.

MARGINALITY

- Marginal enterprise is an enterprise having neither a present or future capacity to generate more than just enough income to support the investor and his or her family;
- Hiring employees extends benefit to U.S. citizens and strengthens case; Can be full-time/part-time;
- Capacity to generate future income is critical – success should be attainable within 5-year period – this is accomplished by presenting a highly professional business plan containing projections of growth and increased revenue/profit.

(b) EB-5 INVESTOR GREEN CARDS

- The EB-5 visa category was created in 1990. It is an Employment-Based Visa but unlike the other Employment-Based categories, the visa holder is not employed. The investor helps to create employment by investing his/her money into a business venture which in turn creates at least ten jobs per investor, and in return gets a conditional green card for him or herself and his or her spouse and minor children. Those conditions are removed only if the investor can show that the minimum jobs were created within 2 years of conditional residence or they do not get a permanent green card.

- Initially the investment amount required was $1million, but if the investment is made in what is classified as a Targeted Employment Area (TEA) the amount required is half - $500,000. This occurs in areas where the economy is considered as being depressed, at 150% above the national average. TEA

designations are made by each state with broad authority. Michigan, for example, is a TEA in its entirety and the Bronx is also a TEA in its entirety.

- There has been a sharp increase in the designation of TEAs, in order to attract business to new areas and create employment and this has translated to virtually all of EB-5 visa applications being filed with an investment of $500,000 and not $1 million.

- The number of EB-5 visas approved went from 78 in Fiscal Year 1992 to 7,641 in Fiscal Year 2012. Almost 30,000 EB-5 visas have been awarded in total to date – 73% of those visas were awarded since 2008. The program was practically unused until approximately 2006 when SMA did its first case.

- The annual cap on these visas is 10,000 per year, but this includes all direct family members of each individual investor, which is extremely problematic.

- EB-5 investments can be used by entrepreneurs who want a hands-on role in the management of the business or can be largely passive in nature, where the investor invests the funds and has no contact with the project.

- Job creation is the single-most important factor to keep in mind when choosing a project. Business models which depend on manpower from day 1 of operations, like restaurants, hotels, resorts, hospitals and assisted living centers, are ideal for EB-5.

- In the past two years, approximately 85% of EB-5 investors were from the People's Republic of China. The restrictions on movement of funds for PRC nationals represents perhaps the most complicated path to transfer of funds to the EB-5 projects and was used for illustrative purposes. One must know how to maneuver those kinds of roadblocks depending on where the funds come from. No matter what, all sources of funds must be thoroughly documented.

- Because almost all investments are made at the $500,000 threshold it is important to beware of investments which require $1 million to participate

- It is also important to watch out for projects which do not hold the investment in escrow until the I-526 is approved, thus not protecting the funds during adjudication, which can be lengthy.

III. FOREIGN COMPANY-BASED VISAS

a) **L-1 Intra-Company Transfer Visa for New U.S. Office/ U.S. Subsidiary of Foreign Companies** (INA 101(a)(15)(L), 9 FAM 41.54)

The L-1 visa classification is used for an employee of an international company who is coming to the United States to establish a parent, branch, affiliate or subsidiary in the United States, under the "New Office" category, or to work for the U.S. affiliate, to fill a specific need.

The L-1 visa is the ideal visa for foreign companies with plans of expanding into the U.S. because as long as there is a business plan which explains how the expansion of

the business will be implemented, there are very few preliminary requirements on the U.S. side. Once the U.S. company is established, the foreign company can transfer employees to work for the U.S. branch, however the foreign entity may not cease to operate during the entire duration of the applicable L-1 visas.

Basic Requirements for Obtaining L-1 Status

1. The employee must have worked abroad for the overseas company for a continuous period of one year in the preceding three years.
2. The company for which the employee has worked for a year abroad must be related to the U.S. company in a specific manner, such as parent/subsidiary, sister companies with common parent.
3. The company must be a qualifying organization-one that is doing business in the United States and one other country during the whole period of the transfer.
4. The employee to be transferred must have been employed abroad in an "executive" or "managerial" position (L-1A) or a position involving "specialized knowledge." (L-1B)
5. The employee must be coming to the U.S. company to fill one of these capacities (Executive, Managerial, or Specialized Knowledge)
6. The employee must be qualified for the position by virtue of his or her prior education and experience.
7. The L-1 visa holder must intend to depart the United States upon completion of his or her authorized stay. However, in practice, this is considered a “dual intent” visa category, which means that it is considered a gateway to a green card under the right circumstances.

EXAMPLE: Company X, a beer-brewing company, wants its general manager at its foreign office, as well as its Head Brewmaster to work in its newly established New Orleans office and brewery. To qualify, these alien would work at an executive or managerial position (L-1A visa), and the specialized knowledge position (L-1B).

The U.S. entity must be incorporated in the U.S., and must secure sufficient physical premises to house an office, and the individuals must have worked for the foreign company for at least one continuous year in the previous three years. The company for which the employee has worked for a year abroad must be related to the U.S. counterpart in a specific manner, such as parent/subsidiary, sister companies with common parent or joint venture.

These visas allow individuals to live in the US for a designated period and to work only at specific jobs which pertain to the employer/sponsor. Dependents (spouses of primary visa holder and minor children under 21 years of age) can also join the principal worker and spouses can apply for employment authorization.

As an executive or manager, the individual is also eligible for an employment-based green card application on the EB-1 category, which makes them eligible to skip the labor certification process.

Advantages of the L-1 Visa:

- No filing deadlines;
- No annual caps;
- A great platform for green card petition for those with L-1A status, assuming the business is growing and the venture is a successful one which generates revenue and creates jobs;
- There are minimal requirements at the time of applying as far the U.S. entity is concerned – Incorporated entity and secured physical premises for business;
- The new office category applies to any size company, from a multinational giant to small business with great growth potential, as long as it legally connected to a foreign company

Disadvantage of the L-1 Visa:

The major disadvantage of the L category is the higher standard utilized in the potential renewal of the visa. In the case of the L-1A for an Executive/Manager, the requirement is that the executive manager be removed from day-to-day management and that he/she be exclusively in a supervisorial role by the time the visa is up for renewal. In the case of the L-1B Specialized Knowledge employee, there comes a point where the company must show why a similarly-positioned and experienced U.S. worker could not be employed in the position occupied by the L-1B visa holder, given a reasonable amount of time for training.

IV. EB-1 EXTRAORDINARY ABILITY VISA

- Similar to O-1 nonimmigrant visa for Extraordinary Ability – Standards are similar, but O-1 requires sponsorship, while EB-1 is self-sponsored
- Almost no limitation as to profession: Science, Academics, Arts, Sports, Research, Business, etc.
- Eligible for premium processing so can be adjudicated extremely quickly

Eligibility Criteria:

Three-prong test:

Prong 1: Criteria

Applicants must meet 3 out of the 10 listed criteria below to prove extraordinary ability in your field:

- Evidence of receipt of lesser nationally or internationally recognized prizes or awards for excellence ("lesser" is not strictly defined but in practice means winning anything but a Pulitzer, Nobel, Academy Award, Grammy or Emmy).
- Evidence of your membership in associations in the field which demand outstanding achievement of their members
- Evidence of published material about you in professional or major trade publications or other major media

- Evidence that you have been asked to judge the work of others, either individually or on a panel
- Evidence of your original scientific, scholarly, artistic, athletic, or business-related contributions of major significance to the field
- Evidence of your authorship of scholarly articles in professional or major trade publications or other major media
- Evidence that your work has been displayed at artistic exhibitions or showcases
- Evidence of your performance of a leading or critical role in distinguished organizations
- Evidence that you command a high salary or other significantly high remuneration in relation to others in the field
- Evidence of your commercial successes in the performing arts

Prong 2: "Sustained Acclaim": Applicant must show that he/she has a high level of national and/or international sustained acclaim – This is evidenced by letters signed by leaders in their industry. The letter-signers reputations legitimize the sustained acclaim of the visa applicant.

Prong 3 – Substantial Benefit to the U.S. – This standard is not clearly defined, but argument must be made that visa applicant's physical presence in the U.S. will translate into tangible benefits to the U.S. economy, like job creation, as well as more intangible benefits, like overall contribution to the arts or culture of the U.S.