

**SheppardMullin**

# U.S. VISAS

A Pocket Guide for  
Employers and Entrepreneurs

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# SheppardMullin

Hiring the best talent can maximize the success of your company. Sometimes that means hiring a foreign national on a work visa. We prepared this booklet to help you navigate the complex U.S. employment-based visa options. This guide provides general information and we encourage you to contact us for more substantive guidance. At Sheppard Mullin, we stand ready to help you grow your company.

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## Visa versus I-94

- A visa and I-94 are different. It is good to know what each one does.
- The visa is inserted within a passport by a consular officer at a U.S. Embassy or Consulate abroad.
- The visa is used to enter the U.S. It does not control how long one may stay nor does it guarantee entry.
- The Visa expiration date is the last day to enter the U.S.
- The I-94 controls the length of stay and is issued by U.S. Customs and Border Protection (CBP) at the port of entry or by U.S. Citizenship and Immigration Services (USCIS) for extensions or change of status filed in the U.S.
- The I-94 can be printed online from CBP's website and is legal proof of status and when one's authorized stay will expire.

## B-1 / B-2 Visitor Visa

- Must have a valid purpose – meetings, conventions, short-term training, contract negotiations, visiting family, and tourism.
- Must apply at a U.S. Consulate abroad.
- Does not authorize work in the U.S.
- Must be paid by the overseas company and demonstrate ties to home country.
- CBP will give an I-94 for 6 months. But business trips should generally be limited to 3 weeks and tourism to 8 weeks. Otherwise, CBP may hassle the individual on the next entry.
- EVUS (Electronic Visa Update System): New CBP program requiring one to register on-line once the B-1 Visa is issued by the U.S. Consulate but prior to flying to the U.S. Applies only to China at this time. Must re-register every 2 years.

## ESTA Visa Waiver

- Only certain countries are eligible to use ESTA.
- Must pre-register online with ESTA (Electronic System for Travel Authorization).
- May enter the U.S. for up to 90 days without a visa for business meetings, conferences, training, and tourism. But CBP prefers much shorter trips.
- If entering for business, must be paid by an overseas company and cannot work in the U.S.
- Cannot change status in the U.S.
- Carry documents on the airplane in case questioned by CBP: Invitation letter, verification of employment letter proving employment abroad, and bank statement to show sufficient funds.
- Social Media: Use discretion on social media. CBP does research to help determine a traveler's intent.

## E-2 Non-Immigrant Investor

- Allows non-immigrant investors to live and work in the U.S. based on a qualifying investment.
- Requires an E-2 treaty between the U.S. and their country of nationality. Only certain countries are on the treaty list.
- Investors, managers, and essential employees may apply to work in the U.S. for the E-2 company as long as they are citizens of the same treaty country.
- U.S. company must be at least 50% owned by foreign nationals with nationality from the treaty country.
- Investment must be substantial, at risk, and irrevocably invested – \$250K is the average investment.

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## E-2 Non-Immigrant Investor *Continued*

- U.S. business must be up and running or close to opening its doors.
- Need a business plan to hire U.S. workers over time. No quota on number of U.S. workers.
- Visa is usually for 3 to 5 years at a time.
- CBP will give an I-94 at the port of entry for 2 years at a time.
- The E-2 has no visa quotas and no limit on renewals.

## E-3 Australia Free Trade Agreement

- Degreed professionals who are Australian citizens may obtain work authorization with a U.S. company.
- Same criteria as for H-1B specialty occupations: four-year degree related to the job offer, position has complex duties, employer must pay prevailing wage, etc.
- Annual E-3 quota has never been exhausted.
- Applicants apply at the U.S. Consulate in Australia. Extensions can be done at other Consulates such as Canada or Mexico.
- Visa is valid for 2 years. No limit on renewals.
- Spouse receives E-3D visa, and can obtain a work permit.

## F-1 Student Visa

- Must first apply to school, get accepted, and demonstrate sufficient funds to study without working. Then the school will issue the I-20.
- The student then applies for the F-1 visa at the U.S. Consulate and presents the I-20 and shows sufficient funds.
- While attending school, may apply for part-time work authorization through Curricular Practical Training (CPT) if receiving school credit.
- After graduation, can receive a 1-year work permit for full-time Optional Practical Training (OPT) that is related to the student's major.
- U.S. STEM majors (Science, Technology, Engineering and Math) may obtain a 24-month extension of their OPT work permit. Employer must enroll in E-Verify and prepare a detailed training plan.
- STEM OPT allows additional time to be successfully sponsored by an employer through the annual H-1B lottery.

## H-1B Professional Specialty Occupations

- Provides work authorization for certain college degreed professionals who are sponsored by an employer.
- Must have at least a four-year college degree in a field related to the job offer.
- Position must include the theoretical and practical application of highly specialized knowledge, also known as a “specialty occupation.”
- Recently, USCIS has created many ad hoc barriers to approving H-1B petitions. Careful screening and planning on the front-end is essential.
- Common occupations include software developers, engineers, and scientists.
- Must pay at least the prevailing wage set by the U.S. Department of Labor.
- Can only work for the sponsoring employer, but can transfer to a new employer after a new petition is filed with USCIS.

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## H-1B Professional Specialty Occupations *Continued*

- Valid for 3 years and renewable for 3 additional years.
- Can extend beyond year 6 if the employer has sponsored the individual for permanent residency.
- Initial H-1B filing is subject to an annual quota of 85,000 visas, and the quota is quickly used up each year. U.S. masters have a better chance.
- For the initial petition, employer files on April 1 for a start date of October 1.
- Exemptions from the quota include change of employer petitions, and petitions filed at any time by universities, nonprofit organizations affiliated with a university and non-profit research organizations.
- Spouses of H-1Bs can receive an H-4 visa. Some can get a work permit if the principal spouse has been sponsored for permanent residency.

## Singapore & Chile H-1B1 Free Trade Agreement Visa

- Citizens of Singapore and Chile with professional degrees may obtain work authorization with a U.S. company.
- Same criteria as for an H-1B specialty occupation: four-year degree related to the job offer, highly specialized knowledge, prevailing wage, etc.
- Visa is good for 18 months. I-94 admission is for 1 year at a time.
- No limit on renewals.
- Annual quota has never been reached.
- Dependent family members are eligible to obtain H-4 status.
- H-1B1 spouses cannot obtain a work permit.

## J-1 Exchange Visa

- Designed to develop educational and cultural exchanges.
- Interns can stay up to 12 months, trainees 18 months, and scholars 5 years.
- Approved J-1 organization acts as the sponsor to facilitate the application.
- U.S. company is the host and provides the worksite location and training to the J-1. A detailed training plan is required.
- Some J-1 visa holders are required to return to their home country for 2 years after their program is completed (J-1 foreign residency requirement).



## L-1 Intra-Company Transferee

- Used to transfer a senior executive or specialized knowledge worker from the overseas company to a qualifying U.S. affiliate.
- L-1A is for senior executives of large companies – with a maximum stay of 7 years in L-1A status.
- L-1B is for a specialized knowledge worker of large companies whose skills and knowledge about company operations abroad cannot be easily found in the U.S. – with a maximum stay of 5 years in L-1B status.
- Employee must have worked for the overseas affiliate full-time for at least 1 year during the 3 years prior to entry.
- Spouse of an L-1 can apply for a work permit after arrival.
- L-1A executive can sometimes apply for permanent residency after one year.
- USCIS is very tough on L-1s. Cases need careful screening.

## O-1 Extraordinary Ability

- Provides work authorization to one who has demonstrated extraordinary ability in the field of science, education, business or athletics (O-1A) or in the arts, motion pictures, and television (O-1B).
- Must be at the very top of their field and prominent individuals in the field must attest to that. It's a very high standard.
- Visa valid for 3 years and renewable without limits.
- Must have national or international acclaim and show evidence of prestigious awards, publicity, original work, publications, judged other's work, etc.
- Frequently used by top actors, musicians, scientists, and extraordinary professionals.

## P-1 Visa for Entertainment and Athletic Groups

- P-1A visa is for athletes or athletic groups that have international recognition. Allows foreign athletes to play with U.S. major league teams.
- Employer can request up to 5 years with a P-1A, with a 10 year maximum. Family members come as P-4s.
- P-1B visa is for a foreign entertainment group coming to the U.S. to perform. Must have international recognition and substantial record of achievement.
- For P-1B, 75% of the members of the group must have had a substantial and sustained relationship with the group for at least one year.
- P-1B is good for the duration of the concert series with a 1 year maximum. Extensions can be filed. Family members come as P-4s.
- For both P-1A and P-1B, essential support personnel can come as well (P-1S).

## TN Visa for Canada and Mexico

- Qualifying citizens of Canada and Mexico can be sponsored and obtain work authorization with a U.S. company. TN stands for "Trade NAFTA."
- Based on the North American Free Trade Agreement (NAFTA).
- Occupation must be on the NAFTA list and the applicant's education must directly relate to the occupation.
- Common occupations are engineers, nurses, and computer systems analysts.
- Canadian citizens apply at the U.S. port of entry or with USCIS, and are admitted for 3 years. Canadians do not need a visa from the U.S. Consulate.
- Mexican citizens must apply at the U.S. Consulate in Mexico and receive a 1-year TN travel visa.
- No limits on extensions but a TN should maintain ties to their home country.
- TN spouses can apply for Trade Dependent (TD) status but cannot work.

## Permanent Residency (Green Card)

- The most common ways to obtain a green card in the U.S. include company sponsorship, family sponsorship, asylum, and the Diversity Lottery.
- For employees, the most common is the PERM labor certification application.
- With PERM, the employer has to prove to DOL that there is a shortage of U.S. workers who qualify for the position.
- Don't need to prove a shortage for extraordinary ability, exceptional ability, outstanding professors and researchers, and multinational executives.
- Some green card categories are subject to annual quotas. Some countries are backlogged due to heavy demand.
- Spouse & single children under 21 also get the green card at the same time.
- Most permanent residents can apply for U.S. citizenship after 5 years.
- Must live in the U.S. at least 6 months per year and pay U.S. tax on worldwide income.

## EB-5 Investor Program for Permanent Residency

- Offers permanent residency to investors who make a substantial investment and create 10 full-time U.S. jobs.
- New investment rules took effect on November 21, 2019. Most regional center projects located in urban metropolitan areas now require a \$1.8 million investment. Previously \$500K was the norm. High unemployment and rural areas now require a \$900K investment.
- Applicant invests either in an approved Regional Center project which will create 10 indirect jobs in the economy or they can directly invest in their own company and hire 10 full-time U.S. workers.
- Investor must prove that the funds came from a lawful source and show a credible business plan proving that the project will produce the required jobs.
- Quotas for immigrant visas have created a big backlog, most notably for China, India, and Vietnam. China has the largest backlog at 15 years.
- EB-5 investor receives a 2-year conditional green card and then must file an I-824 petition to make it permanent.

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## **Sheppard Mullin provides insightful guidance to businesses in many areas including:**

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