

B-1 visa for business visitors: Permissible activities-Part I

The B-1 nonimmigrant classification (including admissions under the Visa Waiver Program) is appropriate for foreign nationals who are entering the US on a temporary, limited basis to engage in legitimate business activities provided that they should not receive remuneration from a U.S. source except for reimbursement for expenses while in the US. The Department of State (DOS) regulations define “business” as “conventions, conferences, consultations, and other legitimate activities of a commercial or professional nature” but not local employment or labor for hire. The DOS’ Foreign Affairs Manual (FAM) further specifies activities, such as engaging in commercial transactions, contract negotiations, and litigation.

However, though the regulations exclude productive labor as a general matter, the FAM has long recognized an array of permissible B-1 functions that fall across the spectrum from the pure business activities noted in the rules to those that approach or constitute labor for hire. The DOS has acknowledged that the classification has served as a catch-all for foreign nationals performing short-term activities that do not clearly fall within other nonimmigrant classifications, “but whose admissibility as nonimmigrant seemed within the general intent of Congress in distinguishing immigrants and nonimmigrant.” These include foreign nationals entering to serve on the board of directors of a US entity, workers coming to install, service, or repair equipment pursuant to a contract of sale, certain foreign domestic workers, and some entertainers and athletes, among others.

Despite the specific functions enumerated in the FAM, the DOS has acknowledged the difficulty of discerning appropriate B-1 activities and the lack of a single overarching definition. Consular officers typically turn to a Board of Immigration Appeals’ (BIA’s) test articulated in *Matter of Hira*, which specifies that B-1 activities must typically meet the following criteria:

- The foreign national’s activity must involve “intercourse of a commercial nature” but cannot include local employment (i.e., employment activity that is domestic in nature in a position that is generally filled within the US labor market);
- The foreign national must have a clear intent to continue a foreign residence and not to abandon any existing domicile;
- The foreign national’s salary must come from abroad;
- The principal place of business and actual place of eventual accrual of profits, at least predominantly, must remain in a foreign country; and
- The foreign national’s stay in the US must be temporary, although the business activity itself need not be.

In various decisions by the BIA has held that a foreign national need not be considered as a “businessman” to qualify as a Business Visitor. If the function he performs is a necessary incident to Inter-national Trade or Commerce. BIA, in certain consulting functions, can be considered as appropriate B-1 activities. For example, in one case, an engineer of the company coming to the US to gather information and requirements under a client contract for his foreign employer’s Cement Manufacturing Consulting Services was considered appropriate B-1 activity. Many such decisions have held that B-1 visa was appropriate for a foreign national possessing specialized knowledge essential to the project involving installation or servicing of machinery.

However, use of B-1 in lieu of H-1B visa has come under scrutiny at the US Consulates and ports of entry in the present time of high levels of unemployment. Recently, many government officials believe that there are instances of visa fraud in B-1 visas and fraudulent use of B-1 visa.

The following recommendations and guidance can be made to the companies in the current environment for the use of B-1 visas:

Overseas employment and source of salary

- The employee must remain on overseas payroll throughout the US stay. The employee may not receive remuneration from a US source other than an expense allowance or expense reimbursement.

Intent to maintain foreign residence; nonimmigrant intent

- The employee must maintain a foreign residence that he or she has no intention of abandoning and other ties to the home country in order to overcome the presumption of immigrant intent and to demonstrate that the employee will depart the US upon completion of the temporary visit.

Nature of activities

- The foreign national must not engage in any activity that constitutes local employment or labor for hire that could be performed by a US worker.

Control and supervision

- The foreign national must remain under the control and supervision of the overseas affiliate. US consulates and border officials will scrutinize B-1 applications carefully for indications that a foreign employer is a job shop or placement agency or that the US host entity will otherwise use the foreign national to supplement its local workforce; therefore, control and supervision issues should be reviewed carefully.

Temporary nature of the stay

- The foreign national should be entering the US for a specific and limited period of stay that is consistent with the purpose of the trip. There are recent indications that US consulates are closely reviewing the actual duration of a B-1 nonimmigrant's stay against the time periods requested in letters of support, and are aggressively pursuing visa revocation when a foreign national's length of stay exceeds a support letter's representations.

Adequate financial resources for the stay

- The individual must demonstrate adequate financial resources to accomplish the purpose of the visit and departure from the US. Even though the individual will continue to receive a salary from the overseas employers, consular officers may request documentation of the expense allowance or reimbursement the foreign national will receive in the US.

Primary benefit of stay accrues to foreign entity or furthers international Commerce

- Problems may arise if the foreign national is entering to perform activities that are clearly for the benefit of a US affiliate or client.

– *To be continued...*