

Options for Working in the U.S. as an Executive for a U.S. Company



Immigration Blog

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There are many articles in the news about U.S. immigration. Few of them focus on executives working in the United States. For those executives who need to enter the U.S. for work purposes, this may be a bigger concern than the enforcement actions being taken by U.S. Immigration and Customs Enforcement.

Every day, many executives enter the United States under the B-1 Business Visitor category. This is often smooth sailing, especially when the executive can articulate the purpose of their trip in a way that comports with the B-1 requirements. For example, if a foreign executive is coming into the U.S. for simple business meetings with potential customers or to build or develop business relationships, they generally do not have a problem. But sometimes, these efforts to enter the United States don't work so well. If a U.S. Customs and Border Protection officer believes that an executive is working while in the U.S., they will generally not be admitted as a visitor. This concern can be triggered by the existence of direct reports in the U.S., a planned stay in the U.S. that exceeds the norm, very frequent visits or activities that may cross the line into "work."

Some executives continue to utilize the B-1 Business Visitor status after its shelf life has expired. When they first start entering the U.S. as a B-1, their visits may line up perfectly with the Business Visitor category. Over time, however, their U.S. activities may shift. It is beneficial to stay ahead of the impact that such changes may bring to admissibility. While some executives will not want to fix what does not appear to be broken, a proactive approach is often best.

U.S. Customs and Border Protection officers make the determination on each foreign entrant's admissibility and have broad discretion to interpret the regulations and policies controlling whether and when someone's intended activities exceed the parameters of a "business visit." If an executive tries to enter the U.S. without proper documentation — and especially if they have been previously told they need work authorization — the next time they need to go to the United States, they could have the privilege of entering the U.S. for any purpose taken away for five years. This is called "expedited removal" — a process where low-level officers "remove" (or administratively deport) non-citizens without a hearing, if they lack proper entry documents or do not meet the eligibility requirements for entry in their chosen classification, according to a U.S. Customs and Border Protection officer.

Executives have some fantastic U.S. work permit options, in most cases. L-1A Intracompany Transferee status permits an executive or manager to work for between one and three years for a U.S. company, as long as he or she has worked for a foreign affiliate for one out of the past three years in a position that was executive, managerial or required specialized knowledge. This popular status can be extended for up to seven years, or even longer if the executive resides and spends most of his or her time outside the U.S.

The E-visas are another good option. The E-1 is for an executive of a business whose owner is a citizen of a country that has a relevant treaty, the executive shares that citizenship and substantial trade has been or will be prospectively established between the treaty country and the United States. Executives can also work in E-2 status for U.S. companies that also have ownership by citizens of countries with relevant treaties, where there has been a substantial investment from citizens of the treaty country, the business is active and not marginal and, again, the applicant's nationality matches that of the company's owners.

Some of the well-known professional statuses are generally not good fits for executives. The TN (USMCA), E-3 (specialty occupation workers from Australia), H-1B1 (specialty occupation workers from Singapore and Chile), and H-1B (general specialty occupation workers) status and/or visa options carry an expectation that the worker will engage in professional work. Such professional/specialty occupation statuses are generally not concluded to be consistent with executive duties — meaning, a specific professional degree is not necessarily required to work as an executive. As a result, a foreign national who wishes to come to the U.S. to engage in executive duties will generally not be successful in obtaining one of these types of work permits to do so.

Speaking to U.S. immigration counsel about whether an executive requires a work permit and what options may be available is a smart and proactive way to prevent U.S. immigration disruptions to executive travel. Lippes Mathias LLP Immigration Team members Eileen M. Martin (emartin@lippes.com) and Elizabeth M. Klarin (eklarin@lippes.com) may be contacted regarding matters related to this topic and more.

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