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### **Canadian Business Visitors Under NAFTA**

In order for a Canadian business person to gain entry into the United States they must meet certain entry requirements. Most critical is overcoming the presumption that they are an intending immigrant, or a person who intends to live permanently in the United States. If it is determined by a United States inspecting officer that the applicant will be working, as defined by U.S. immigration laws, then that person will be denied entry. This is an overview for Canadian citizens on eligibility to legally enter the US in the "B-1 Business Visitor" status under the North American Free Trade Agreement ("NAFTA") and perform certain services but without having to obtain a valid US government work authorization.

#### ***The Underlying Theme***

Canadians are often surprised at how complicated and time-consuming US immigration procedures are. One need only look at the differing objectives of business immigration and government legislation to understand this discrepancy. Simply put, businesses seek "the best person for the job." US immigration laws, however, aim to protect US workers.

The US government fears that cheap foreign labor would take away jobs from US workers and depress the US labor market. Throughout the years, the United States Congress has enacted laws that prohibit companies from employing Canadians and other foreign nationals who do not possess valid government work authorization. Further, Canadian employees are often hassled at the US border or, in some cases, refused entry altogether if the US inspecting officer believes the employee will be performing work without authorization.

Although one aim of the US government is to protect the American work force, the government also recognizes the significant contributions that foreign businesses, entrepreneurs and workers bring to the US economy. In order to help the US economy grow, the government has developed specific policies to allow US companies to bring in foreign workers who possess professional skills, knowledge and expertise in overseas markets, as well as training and experience in specific occupations. In addition, government policies allow for foreign entrepreneurs and businesspeople to invest, work and immigrate to the United States.

The US government also recognizes the importance and need to allow for a relatively "free flow of goods and services." The North American Free Trade Agreement (NAFTA) perhaps best highlights the importance of this economic growth initiative. NAFTA enables qualified Canadian citizens to work in the US as well as enter the US as legitimate "B-1" Business Visitors.

### **US Visas and I-94 Documents**

As a general rule, foreign nationals are required to possess a "valid visa" to enter the US. Visas are both issued and obtained at US embassies or consulates. Visas are stamped inside one's passport and should be considered the equivalent of an airline ticket that gives the holder the right to present themselves at the airline company's gate. Visas establish the visitation time period, and state the number of times a person may **enter** the US. Nonimmigrant (Temporary Visas) and immigrant or Green Cards (Permanent Visas) are the two types of visas issued to foreign nationals.

Upon entry to the US at certain foreign airports (commonly referred to as "pre-flight inspection") or upon arrival at US port-of-entries ("land borders") visitors meet with a US government inspector. At this time the inspector examines the foreign national's visa and other documents and determines the time period in which they can physically remain **inside** the US. The inspector has a "final say" on whether or not the foreign national is accepted and admitted to the United States. If the foreign national passes the inspection, they are issued an I-94 Document, or "Arrival/Departure Record." The I-94 Document is placed inside the person's passport. The card specifies the visitor's "period of authorized stay" in the US and their "status" such as "B-1" for business visitors, "B-2" for vacationers, "F-1" for students, and "L-1" for Intracompany transferees.

### **Visa Exemptions**

There are certain exceptions to the visa requirements. Canadian citizens are exempt from having to obtain a visa in almost all cases (except for E visas). In addition, foreign nationals who are citizens of Visa Waiver countries may visit

the US for periods of less than 90 days without a visa. However, Canadian Landed Immigrants who are not citizens of Visa Waiver countries are now required to obtain a valid visa before entering the United States.

### ***Business Visitor or Work Authorization***

There is a fine line between a permissible B-1 activity and a Canadian who will be considered “working” in the US and thus, require valid US work authorization. US inspectors consider a number of factors including:

- What is the nature of the activity in which this person will engage while in the US?
- Is the activity generally considered “professional” in nature, or is it skilled or unskilled labor?
- How long will the person be in the US?
- Whether remuneration is or will be paid to the Canadian by a US entity or a Canadian employer;

The primary consideration in analyzing the answers to these questions is whether the prospective activity would deprive a US citizen of work and, if so, whether the activity is professional in nature. If it is determined that the person will be “working” in the US and will be entering to perform non-professional work (construction, food service, retail store sales, maintenance, etc.), then in all likelihood the person will not be able to work in the US without obtaining valid US work authorization. However, if the person’s activity is professional or one that requires “specialized knowledge of the employing entity” then depending upon the length of time and the source of remuneration the person may not need a US work authorization but enter as a B-1 Business Visitor.

### ***B-1 Business Visitors***

The B-1 Business Visitor status is used by a significant majority of foreign nationals entering the US to conduct business activity. Business activity is widely defined to include legitimate commercial and professional activities involving business meetings, conferences and conventions, investigating possible business investments, and negotiations. Under certain circumstances, B-1 business activity may also include providing or receiving training, and consultations to US business clients. It does not include local employment or labor for hire.

A B-1 Business Visitor cannot enter the US to perform productive tasks that could be carried out by local US workers. This has been difficult to define and in many cases applicants for B-1 status have been denied entry because US Immigration inspectors believe that the applicant may be entering to work and that the work can be performed by local US workers. However, there are a number of business activities that have been determined to be acceptable B-1 activities, including:

- Consulting with US clients and business associates provided that their activities in the US are limited to fact finding, interviews, recommendations as to management of business operations, and client activities. All productive work, such as preparing reports, must be performed outside the US;
- Negotiating contracts, seeking investment opportunities, and purchasing and selling real property or businesses in the US;
- Participating in professional or business meetings, conventions and conferences;
- Receiving training through a well-defined training program;
- Arranging future H-1 employment or setting up a business in the US to change to L-1 or E-1/E-2 status as soon as possible.

The B-1 business visitor must continue to receive a salary from the foreign employer and receive no salary or other remuneration from a US source other than expenses incidental to the stay. Furthermore, the foreign national's employer must have an office outside the US, and its payroll must also be disbursed from outside the US. The foreign national's employer may be a wholly-owned subsidiary of a US parent corporation.

### **Special NAFTA Provisions for B-1 Canadian Citizens**

Canadian citizens may enter the US as B-1 Business Visitors under NAFTA for legitimate business purposes provided that:

- They are employees of a Canadian enterprise;
- They continue to be paid by the Canadian enterprise while in the US;
- They intend to return to Canada after their temporary visit in the US; and
- They present proof of Canadian citizenship.

Permissible B-1 business activities under the **NAFTA List of Occupations** include the following:

- **Research and Design:** Technical scientific and statistical researchers conducting independent research or research for an enterprise located in Canada.
- **Growth, Manufacture and Production:** Including harvester owners supervising crews harvesting agricultural crops such as grain, fiber, fruit and vegetables; and Purchasing and Production management personnel conducting commercial transactions for an enterprise located in Canada.
- **Marketing:** Market researchers and analysts conducting independent research or analysis, or research or analysis for a Canadian enterprise.
- **Trade Shows:** Trade fair and promotional personnel attending trade conventions.
- **Sales:** Sales representatives and agents taking orders or negotiating contracts for goods or services for a Canadian enterprise, and Buyers purchasing for a Canadian enterprise, but not delivering goods or providing services
- **Distribution:** Transportation operators transporting goods or passengers to the United States from Canada or loading and transporting goods or passengers from the United States to Canada. Operators may make deliveries in the United States if all goods or passengers to be delivered were loaded in Canada. Furthermore, they may load from locations in the United States if all goods or passengers to be loaded will be delivered in Canada. Purely domestic service or solicitation is considered competing with United States operators and is not permitted.
- **Brokerage:** Customs brokers performing brokerage duties associated with the export of goods from the United States to or through Canada.
- **After-Sales Installation and Service:** Installers, repair and maintenance personnel, and supervisors possessing specialized knowledge essential to the seller's contractual obligation, performing services or training workers to perform services, pursuant to a warranty or other service contract incidental to the sale of commercial or industrial equipment or machinery, including computer software, purchased from an enterprise located outside the United States, during the life of the warranty or service agreement. The commercial or industrial equipment or machinery, including computer software, must have been manufactured outside the United States.
- **General Service:** Professionals engaging in a business activity at a professional level in a profession set out in the **NAFTA List of Occupations**, but receiving no salary or other remuneration from a United States source other than an expense allowance or other reimbursement for expenses incidental to the temporary stay. Professionals allowed in under NAFTA include the following:
  - **Management and Supervisory Personnel** engaging in commercial transactions for an enterprise located in Canada.
  - **Financial Services Personnel** including insurers, bankers or investment brokers engaging in commercial transactions for an enterprise located in Canada
  - **Public Relations and Advertising Personnel** consulting with business associates, or attending or participating in conventions.
  - **Tourism Personnel:** Including tour and travel agents, tour guides or tour operators attending or participating in conventions or conducting a tour that has begun in Canada. The tour may begin in the United States; but must terminate in Canada, and a significant portion of the tour must be conducted in Canada.
  - **Tour Bus Operators** entering the United States: With a group of passengers on a bus tour that has begun in and will return to Canada.
  - **Translators or Interpreters** performing services as employees of an enterprise located in Canada.
  - **Construction workers are not admissible.** Aliens seeking to enter the US to perform building or construction work, whether on-site or in-plant, are not eligible for classification or admission as B-1 Business Visitors. However, Canadians may enter the US for the purpose of supervising or training others engaged in building or construction work, but not for the purpose of actually performing any such building or construction work themselves.

### **Unique Strategies Using B-1 Status**

Under limited circumstances, the B-1 status may be used by Canadian Citizens to perform actual work or training activities which otherwise would require formal US work authorization. The permissible work must, under most circumstances, qualify for H-1B "Specialty Occupation" or H-3 "Training" status.

### **B-1 in Lieu of H-1B**

An employee who would otherwise be qualified for H-1B but receives no salary or remuneration other than an expense allowance or other reimbursement incidental to the temporary stay in the US could enter as a B-1. The most important

criteria to meet in using this strategy is that the person be employed by a Canadian based entity and maintain Canadian primary residence. While not widely used, and highly scrutinized by US inspectors, this strategy may be the only answer where the TN status is not available (a Canadian Landed Immigrant) and there are no H-1B visas immediately available because the annual cap was reached. A typical situation may be where a Canadian computer consulting company has a contract to supply a computer systems engineer to a US business on a short term, temporary basis (3 months).

H-1B visas are granted to foreign nationals hired by a U.S. employer to fulfill a “specialty occupation.” A specialty occupation is a position that requires a minimum of a bachelor’s degree, or equivalent, to perform the duties and responsibilities of the position. Specialty Occupations generally include positions in Accounting, Architecture, Arts, Business Specialties, Education, Engineering, Law, Mathematics, Medicine and Health, Physical Sciences, Social Sciences, and Theology, or any area of study at major universities where a bachelor’s degree program is offered.

### ***B-1 in Lieu of H-3***

The H-3 status is available to persons who enter the US for purposes of receiving instruction or training proprietary in nature to the employer. These training programs are usually designed to familiarize the foreign employee with the proprietary practices of the company, which is often U.S. based, for whom they will be working abroad. The individuals then return to their positions abroad where they can put their newly gained knowledge into practice. The training must be of a type not available in the home country. Also, the training program must be one that is not designed primarily to provide productive employment.

A typical use of this strategy is where the employer has a factory or facility in the US where the person needs to learn new policies, procedure or skills that will be brought back to his Canadian employer and applied in his work. Again, the person must maintain a residence in Canada which he has no intention of abandoning and receives no salary or remuneration other than an expense allowance or other reimbursement incidental to the training in the US.

### **General Requirements for B-1 Status**

The following is the general requirements to obtain the B-1 status:

- Applicant must be a citizen of a foreign country
- Which they do not intend to abandon
- Applicant is visiting the US temporarily for business
- Applicant intends to depart the US at the expiration of your visit
- Applicant has adequate financial arrangements to carry out the purpose of the visit

### **Period of Admission, Application and Cost for the B-1**

B-1 visitors may be admitted initially for any period of time up to six months. The US government may, but is not required to, grant extensions of temporary stay in increments of not more than six months each.

There is no formal application form. Generally, the US inspector will ask the person: “what is the purpose of your trip?” If the applicant’s answer is consistent with the basic requirements for B-1 status (as listed above) then in all likelihood, the US inspector will “admit” the person without issuing a formal I-94 document. However, if the person indicates that their activity is more than just a “business meeting or conference,” written documentation of the person’s intending activity will be needed.

In that case, applicants for B-1 status should have a passport, or proof of Canadian citizenship for NAFTA applicants, and a letter from their Canadian employer stating:

Nature of employer’s business activities, year founded, number of employees and annual revenue;  
Position and tenure of applicant;  
Purpose of applicant’s visit to the US;  
Time applicant intends to stay in the US;  
That applicant is a full-time, paid employee of Canadian employer; and  
That applicant will return to their Canadian residence after temporary visit.

In some cases, the US inspector may want additional information. Requests for additional evidence occur quite often with Sales Representatives who work full time for Canadian companies but who often enter the US to sell goods or services. If an individual is asked to present additional information or evidence, the applicant should first show a round trip ticket indicating their intent to leave the US after the trip. The applicant's T-4s and recent pay stubs may also be helpful in demonstrating full-time employment in Canada.

It is rare, but the Inspector may still not be satisfied of the intent to leave the US after a business visit even after presenting the roundtrip ticket, letter and T-4s. In that case, one may have to present evidence of ownership or rental of a home in Canada (deed or long term lease agreement), recent telephone and utility bills, and/or credit card statements with Canadian residence shown on them.

### **Conclusion**

The business visitor has different avenues to obtain entry into the US to conduct business. However, it is important that the business visitor consult with a qualified US immigration attorney to determine which avenue is appropriate. Contacting an attorney will help the business visitor understand the dynamics at the border.

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Michael Serotte is the founding partner of Serotte Immigration Law Firm. He has been practicing Immigration Law since 1992 and has developed a reputation for creative solutions to difficult corporate and business immigration matters. Serotte Immigration Law Firm is located at 170 Franking Street, Suite 702, Buffalo, New York, with affiliated offices in Toronto and Washington, D.C. For more information, please see [www.serottelaw.com](http://www.serottelaw.com) or call 888-875-8110. You can also email Mr. Serotte at [mserotte@serottelaw.com](mailto:mserotte@serottelaw.com).