

1983

Immigration Law: Entry of International Business Visitors

Renato S. Deluca

Recommended Citation

Renato S. Deluca, *Immigration Law: Entry of International Business Visitors*, 17 INT'L L. 535 (1983)
<https://scholar.smu.edu/til/vol17/iss3/7>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Immigration Law: Entry of International Business Visitors

I. Introduction

Within the last decade the United States has experienced an increased influx of financial interests, commercial enterprises, and individual business investor entities from abroad seeking to make use of our stable political climate, more favorable currency ratio, and relatively advantageous income tax provisions which appear to be a bit more ameliorative than the revenue producing legislation in their home countries.

The Immigration and Naturalization Service (herein called "INS") has consequently found itself confronted with a demand for entry by substantially solvent high level business aliens. Congress has provided no practicable entry mechanism and no single visa status properly designed to cope with the business alien seeking to enter this country with a view towards establishing, conducting and maintaining an active commercial interest or enterprise on a full-time permanent basis.

Consequently, the business alien, as well as the "INS," the State Department, and the private bar have been compelled to rely on a variety of non-immigrant¹ entry methods provided by the Immigration and Nationality Act² (herein called the "Act") and originally intended primarily for limited, temporary use by business visitors on a relatively short term basis. Sometimes these temporary entry mechanisms can be used sequentially or in combination to accomplish the needs of your international business client.

Assume your client is an individual who wishes to enter the United States for the purpose of engaging in some business enterprise either on his own

*Mr. Deluca practices law in the Philadelphia area.

¹By definition, and with exceptions, a non-immigrant alien must maintain a residence abroad which he has no intention of abandoning; he must intend to enter the United States, temporarily. Conversely, an immigrant alien is not required to maintain a residence abroad, and can intend to enter the United States permanently. 8 U.S.C. 1101.

²8 U.S.C. § 1101 *et seq.*

account, on behalf of a financial group or on behalf of a foreign based corporation: Or perhaps, he has approached you as a non-immigrant alien, already present within the United States, whose temporary visa is about to expire but who is confronted with a need to remain here on a long term basis for the same legitimate business reasons. Your client's presence here is required to protect and effect the success of the business enterprise. Some of the best available options and entry mechanisms are as follows:

II. Immigrant Investor Status: An Operational Guidepost

Congress has provided a mechanism for the entry of permanent immigrant investors.³ The problem with obtaining the status of an immigrant investor is that the permanent alien investor has been placed in the "non-preference" visa category along with the mass of unskilled, generally uneducated and marginally solvent laborers waiting for entry into the U.S. labor market from abroad. The "non-preference" visa is last in line, after the sixth preference category, and nonpreference visa numbers have been closed or unavailable since 1978.⁴

Notwithstanding a recognized need for investor capital in the United States, the Immigrant Investor mechanism is of no functional use. It is not the "open door" for your client. But the original requirements promulgated by the government for obtaining Immigrant Investor Status can be of practical and perhaps critical use to the practitioner as guideposts to obtaining entry for his investor client through the non-immigrant entry mechanisms presently available. The non-immigrant entry methods have ambiguous requirements, leaving much to the arbitrary discretion of consular and immigration officers who themselves must resort to utilizing the "non-preference" immigrant investor standards in an unofficial capacity, and for lack of any other formal guidelines.

Pursuant to 8 C.F.R. 212.8(b)(4) "Investment" essentially means that your investor client will do the following:

1. He will engage in an active enterprise located in the United States;
2. His enterprise will employ some U.S. employees, either creating new jobs or insuring that the alien is not coming to compete for third and sixth preference (skilled and unskilled) jobs in the U.S. labor market;
3. He must own 51 percent, representing a controlling interest, of the active enterprise;
4. His monetary outlay must be a \$40,000 minimum;⁵ and
5. The active enterprise must require his personal presence to develop and direct it.

These basic standards, along with a small body of now well established INS Administrative case law, will serve as a valuable guideline in utilizing

³8 C.F.R. 212.8(b).

⁴U.S. Department of State Visa Information Service, October, 1982.

⁵This was once \$10,000, but since amended to reflect the realities of an inflationary dollar, 41 Fed. Reg. 37,566, September 7, 1976; 41 Fed. Reg. 55,850, December, 1976.

those non-immigrant entry mechanisms presently available to the business investor alien.

III. Business Visitor Visa

The most common, and most temporary, means of entry is by means of the visitor visas. The common tourist visa, which affords B-2 status, is well known and easily qualifies an alien who intends to return to his permanent residence abroad. The B-2 tourist visitor need only establish that his intended sojourn here in the United States is for recreational type purposes and is intended to last no more than six months to one year, under normal circumstances.

The Business Visitor Visa, which affords B-1 status and is found in the Act at § 101(a)(15)(B)⁶ has been provided for use by non-immigrant aliens who intend to visit the United States temporarily for business purposes. The B-1 visa is usually valid for less than one year at the discretion of the U.S. consul located in the foreign post at which the alien makes his visa application. Once here in the United States, the alien may petition for renewal of the B-1 visa at the INS office governing the jurisdiction where the alien may be doing business. Usually one more extension will be granted for the same length of time as that originally granted by the U.S. consul. But this renewal process will not continue indefinitely and the business visitor will be compelled to return to his foreign residence eventually, if only to reapply for a new B-1 visa with his local U.S. consul. Again, this visa is at the discretion of the U.S. consul and readmission can be refused to a business visitor who makes a habit of frequently shuttling across the border as has been the case with our Canadian border.⁷ On the other hand, B-1 visas for a duration of as much as five years have been granted by some U.S. consuls at foreign posts to business visitors who engage in extensive international mobility. There are no known official guidelines on the five year B-1 visa, nor any known case law opinions or formal INS letter opinions.

Generally, the Business Visitor Visa (B-1 visa) is the best available means with which the individual business investor may first gain an entree towards establishing an active commercial interest or enterprise within the United States. The non-immigrant alien may apply for a B-1 visa to promote, organize and staff a business here in the United States in which he has already invested capital or is about to invest capital. Obviously, the short term duration and temporary nature of the standard B-1 visa make it impossible for the non-immigrant alien to personally manage or operate the enterprise on an active basis, nor would he be eligible to so engage himself under normal B-1 status.

⁶8 U.S.C. § 1101(a)(15)(B).

⁷Matter of Neill, 15 I. & N. 331 (B.I.A. 1975).

Consequently, using the B-1 status, a long term U.S. based business enterprise would require active employees. And, keeping in mind the guidelines aforementioned for the non-usable Immigrant Investor Status, the alien would be well advised to obtain the employee staff from available U.S. citizens or Department of Labor certified permanent immigrant aliens.⁸ Of course, the B-1 visitor could make frequent visits to the United States to supervise the growing enterprise so long as the following criteria for B-1 eligibility are adhered to:

- 1 A clear intent on the part of the alien to continue the foreign residence and not to abandon the existing domicile;
2. The principal place of business and . . . eventual accrual of profit, at least predominantly, remains in the foreign country;
3. While the business activity need not be temporary, the various entries must be individually of a plainly temporary nature.⁹

This holds true also where the B-1 business visitor is the employee of a foreign based business entity, and the U.S. business activities arise from the foreign based employer's transaction of international commerce or trade with the United States. It follows that the B-1 business visitor would be eligible to establish and organize a U.S. based agency on behalf of his employer, subject to the duration restraints of the B-1 temporary visa.¹⁰

Informally, the B-1 business visitor, while here in the United States as an employee, could begin the establishment of his own long term business enterprise, subject also to the time limitations of the B-1 visa and his ability to find another more durable non-immigrant entry method presently available under the Immigration and Nationality Act. The enterprising business visitor would be well advised to give serious consideration to section 101(a)(15)(E) of the Act.

IV. Treaty Visa

On July 3, 1815, the United States entered a Treaty of Commerce with the United Kingdom. This treaty was intended to allow a national of the United Kingdom to enter the United States in order to carry on substantial trade mainly between the United States and his country of nationality. Since the year 1815, the United States has entered into and become signatory to other such "Treaties of Friendship, Commerce and Navigation," as they are commonly known, with other nations. These special treaties now comprise approximately thirty in number¹¹ and have provided Congress the impetus for creating the E visa for "treaty traders" (E-1) and "treaty investors" (E-2) at section 101(15)(E) of the Act.¹²

⁸ 9 U.S.C. § 1182(a)(14).

⁹ *Matter of B & K*, 6 I. & N. 827 (B.I.A. 1955).

¹⁰ *Matter of Cote*, Int. December 2783 (B.I.A. 1980).

¹¹ See Appendix for list of treaty countries. See also 22 C.F.R. 41.41.

¹² 8 U.S.C. § 1101(a)(15)(E).

The E-2 treaty investor method of entry allows a business visitor to remain indefinitely in the United States, as a non-immigrant alien, for so long as he maintains a substantial investment in an active business enterprise located in the United States and which requires his personal direction. The E-2 visa is almost automatically renewable on a year to year basis, based on the filing of a yearly petition to the INS branch controlling the jurisdiction in which the active business enterprise is located.

If the international business visitor is a national¹³ of one of the few signatory countries to enjoy a treaty of trade with the United States, then his best avenue of entry is as a non-immigrant, under the E-2 visa which will allow the business alien to establish, conduct and maintain an active commercial interest or enterprise on a full-time and ostensibly permanent basis here, provided certain evidentiary criteria are met.

The prospective E-2 business investor must essentially provide evidence of the following:¹⁴

1. The enterprise has the nationality of a treaty country: generally meaning, that the nationality of the individual, financial group, or corporation which owns more than 50 percent of the enterprise will be that of the treaty country;
2. The E-2 business investor has invested or is actively in the process of investing in the enterprise: generally, the alien must demonstrate that the funds are his or that they are in his possession and control, and that he has placed them "at risk" and committed them to the investment enterprise and subjected them to potential or total loss if investment fortunes reverse. There must be a present commitment of funds;¹⁵
3. The enterprise is a real, operating commercial enterprise. This is intended to mean an active entrepreneurial undertaking, a business venture productive of some service or commodity. An idle speculative investment in undeveloped land or in the stock market, for example, would not qualify. A fictitious paper organization also would not qualify;¹⁶
4. The investment is substantial: generally, this means that the amount invested should be more than half the value of the enterprise, but the "substantiality" figure is determined relative to the total value of the business venture, or to the normally accepted market standard considered necessary to establish a viable enterprise. Consequently, no minimum investment amount is required for E-2 status, the entire entry method being subject to the foregoing "proportionality" test;¹⁷
5. The investment fund must be more than a marginal one solely for earning a living: although substantiality is a function largely of capital assets, marginality goes to the expected return on investment. A return sufficient only to pro-

¹³A recent private communique with the U.S. Consular Post in London regarding the 1815 treaty defined a "national" as one who holds a British passport; thus demonstrating that he is a recognized national of the United Kingdom. The communique also indicated that a prospective investor must be a full national of a "treaty" country, and the same passport circumstances would also tend to be required to qualify for a treaty investor visa from elsewhere.

¹⁴U.S. Department of State, Bureau of Consular Affairs, *VISA BULLETIN*, Number 20, Volume V, Washington, D.C.

¹⁵See *Matter of Chung*, 15 I. & N. 681 (December 1976).

¹⁶*Matter of Heitland*, 14 I. & N. 563 (December 1974), also H.R. REP. NO. 1365, 82d Congress, 2d Session (1952).

¹⁷The "Proportionality" Test is outlined at 22 C.F.R. 41.41 note 3.

vide a living for the alien will not qualify. Generally, marginality is overcome by showing that the enterprise will tend to expand employment opportunities in the local job market for U.S. citizens, or may tend to generate a return apart from the business alien's living income;¹⁸

6. The investor is in a position to "develop and direct" the enterprise: generally, the business investor must show that he has a controlling interest in the enterprise, and will be directing the operation himself according to commonly accepted business practices;
7. The business alien intends to depart when the investment ends or his status otherwise terminates: generally, this merely includes no more than the unequivocal expression of "intent" to return to the treaty country;
8. If the alien is an employee of a treaty investor, he must individually qualify as a manager or a highly trained and specially qualified employee: generally, this is the situation where the treaty investor itself is a corporation, partnership or joint venture and is itself a national of the treaty country.¹⁹ The business alien must assume a high ranking managerial position in the enterprise, or he must be a technical expert "essential" to the initiation of the new enterprise specifically because of his own particular familiarity with the overseas operations of the parent firm.²⁰

If the alien business investor is located abroad at the time the E-2 visa is applied for, then such application must be made to the U.S. consular post located in the vicinity of the alien's residential address in the treaty country of which he is a national.

Should the alien be stateside at the time of his E-2 application, then he may make his application on a special form directly to the INS along with his Application for Change of Non-Immigrant Classification. The treaty itself does not necessarily govern the terms of the E-2 visa, the visa is governed by a wide degree of discretion on the part of the U.S. consul and the Immigration Service. The treaty's existence alone appears to be its only contribution at this time.

Indeed, the U.S. Department of State, Bureau of Consular Affairs, itself, advises the foreign consular posts to incorporate the aforementioned guidelines of the non-usable Immigrant Investor Status in the consul's analysis of the prospective alien investor's qualifications for an E-2 Non-Immigrant Visa.²¹

The E-2 treaty investor method may be the best way into the United States for a business investor at the present time. He is not required to retain his residence abroad as are other non-immigrant aliens. He may bring his family with him. He may close out bank accounts in his home country just as an immigrant alien would be permitted to do. And it also affords the opportunity of making other entry applications while retaining the status of "non-immigrant," and does not rule out making application

¹⁸See *Kim v. I.N.S.*, 586 F. 2d 713 (1978), for a severe result against the alien. The decisions of each circuit should be consulted separately for best result.

¹⁹Majority ownership vested in "nationals" of treaty country.

²⁰Matter of Udawaga, 14 I. & N. 578 (December 1974); 22 C.F.R. 41.41 note 4(b).

²¹U.S. Department of State, Bureau of Consular Affairs, *VISA BULLETIN*, Number 20, Volume V, Page 3 at Paragraph 6, Washington, D.C.

for some "immigrant" status should the opportunity ever arise, without any presently known jeopardy to his E-2 status.

Finally, although it is customary for the E-2 visas to have a one year period of validity prior to renewal, there are no guidelines or controls imposed by the U.S. Department of State with respect to this period of validity. Foreign posts are guided by reciprocity schedules and the approving consular officer's discretion in each individual case. Consequently, longer validity periods prior to renewal are also possible for the E-2 treaty investor visa.²²

Again, the E-2 business investor must be a national of one of the thirty signatory treaty countries to qualify. If the prospective business visitor is not so fortunate he may wish to give serious consideration to section 101(a)(15)(L) of the Act.

V. Intra-Company Transferee: Executive Visa

Where the prospective business visitor is not a treaty country national then he may be well advised to attach himself to a foreign corporation doing business through subsidiaries or affiliates within the United States on behalf of a foreign based parent corporation.

Since this business alien himself cannot establish his own nationality as deriving from a treaty country to qualify for an E visa, then his best avenue of entry is as a non-immigrant under the L-1 Intra-Company Transferee Visa. His entry approach would be that of an employee of the foreign parent corporation being transferred as an executive or manager from the foreign business office to the U.S. based subsidiary or affiliate.

Within the last twenty years, the extensive increase in transnational business transactions has created an urgent need for unimpeded movement by executives and managers of international business concerns to meet the hectic demand of commercial expansion across international borders.

Congress provided a mechanism for the entry of these business executives and managers at Section 101(a)(15)(L) of the Act,²³ which appears to be intended to serve the business visitor who seeks to enter the United States temporarily, but for a term of years, in order to continue to render services to his foreign employer or a subsidiary or affiliate thereof in a high level supervisory capacity. The requirements of his supervisory position would require the L-1 business alien to temporarily base himself and his immediate family here in the United States, while he would still be expected to maintain his residence abroad and would be permitted to engage in frequent travel on an international scale.

²²U.S. Department of State, Bureau of Consular Affairs, *VISA BULLETIN*, Number 28, Volume V, Page 1, Paragraph 2, Washington, D.C.

²³Sec. 101(a)(15)(L), Act of 1952, 8 U.S.C. 1101(a)(15)(L), as amended by sec. 1(b), Act of April 7, 1970, Pub. L. No. 91-225, 84 Stat. 116.

This section of the Act is extremely ambiguous and discretionary, but since it is a special approach (for certain qualified individuals) which can lead to permanent immigrant status and citizenship without risk to the alien's status as a non-immigrant, the trend is clearly in favor of the business visitor.

The L-1 non-immigrant business visitor must provide evidence of the following:

1. He must have been employed continuously for one year by the parent firm outside of the United States;²⁴
2. The one year tenure must immediately precede the visa application date;
3. He must declare his intent to remain only temporarily, retaining a residence abroad to which he intends to return;²⁵
4. He must be entering the United States on behalf of the foreign firm, which firm will actually be making the petition for the L-1 visitor's visa at the INS office controlling the vicinity in the United States where the alien will be employed;²⁶
5. A bona fide purpose to set up a new office to further the foreign parent's or affiliate's operations in the United States is acceptable;²⁷
6. The new office must be an active enterprise, creating jobs for U.S. employees;²⁸
7. The services which the business visitor will perform on behalf of the foreign firm will be in a managerial or executive capacity; or will involve specialized knowledge.

This latter requirement is of special importance because qualifying as a manager or executive can lead to a permanent immigrant visa for the L-1 business visitor under certain special circumstances to be outlined later.

Unlike the Immigrant Investor Status, the B-1 visa and the E-visa which appear to require that the alien's personal presence be needed to develop and direct the U.S. based business enterprise, the L-1 visa requirements, ambiguous as they are, appear to contemplate a chain of command with executives, managers and specialists, allowing the alien executive to travel freely between various offices of the parent firm both here in the United States and abroad and more in keeping with modern transnational business practice.²⁹

Also, unlike the Immigrant Investor, the B-1 and E-1 visa corporate employers, the L-1 foreign business entity need not maintain a 51 percent stock ownership in the U.S. based subsidiary or affiliate. Control can be through less than majority stock ownership. Consequently, a substantial degree of managerial control or controlling representation on the board of directors of the subsidiary or affiliate through strategic use of minority proxy voting during corporate elections can establish a sufficient subsidiary

²⁴Matter of Vallaincourt, 13 I. & N. 654 (1970).

²⁵I.N.S. Form I-129B, Instructions (Rev. 6/20/80) N.

²⁶8 C.F.R. 214.2(1)(1).

²⁷Matter of Leblanc, 13 I. & N. 816 (1971).

²⁸I.N.S. Form I-129B, Instructions (rev. 6/20/80) N.

²⁹I.N.S. Commissioner's Memorandum, April 9, 1981, CO 214 L-P, 58 INT'L. REL. 194a.

or affiliate relationship to satisfy the L-1 provisions of the Act.³⁰

Indeed, the L-1 provisions of the Act are so ambiguous that they do not appear to specifically exclude the alien who, himself, may be a business investor. The mere fact that the business visitor can qualify as a business investor does not preclude his eligibility for L-1 status.³¹ A close reading of Section 101(a)(15)(L) of the Act indicates that the alien need only be employed by "... a firm or corporation or other legal entity or an affiliate or subsidiary thereof..." in order to qualify for L-1 status. It follows that the sole proprietor of a closely held corporation could very well qualify for L-1 status, since in a closely held corporation the sole stockholder, chief executive employee, and corporation *per se* are three distinct legal entities. Indeed, he may not even be receiving compensation for his services and still qualify as an L-1 executive or business manager.³²

What is most critical in advising a prospective L-1 non-immigrant is directing the applicant's attention to satisfying the discretionary tendencies of the INS where questions of proof and credibility might arise. The guidelines provided by the Immigrant Investor, B-1 and E-1 visa categories must be utilized whenever questions of documentation may arise. For example, evidence must be submitted that physical premises for a new business establishment here in the United States have been acquired by purchase, lease, or rental and will be occupied by that establishment.³³ Such evidence could include a deed, lease agreement, mortgage commitment or similar documents.

Currently, the L-1 non-immigrant visa is initially valid for a term of three years. Thereafter, the L-1 visa can be renewed and extended by petition for a period of demonstrated need, but the extension is usually for no more than one year at a time.³⁴

Consequently, if the L-1 international business visitor feels a necessity to remain in the United States on a more permanent basis he would be well advised to consider application for a special permanent immigrant visa as a third preference L-1 executive or manager qualifying for a Schedule A Labor Certification.

VI. Third Preference Immigrant: Schedule a Certification

During the three year period or renewal period of his L-1 non-immigrant visa, the L-1 business visitor has the special opportunity to qualify for adjustment of his non-immigrant status to that of a Third Preference *Permanent* Immigrant.

³⁰*I.N.S. Commissioner's Memorandum*, April 9, 1981, CO 214 L-P, 58 Int. Rel. 194a.

³¹*Matter of Tessel*, 17 I. & N. (I.D. 2849, Assoc. Comm. 1981).

³²*I.N.S. Commissioner's Memorandum*, April 9, 1981, CO 214 L-P, 58 Rel. 194a. *Matter of Tessel*, 17 I. & N. (I.D. 2849, Assoc. Comm. 1981).

³³*I.N.S. Form I-129B*, Instructions (Rev. 6/20/80) N. Also, 8 C.F.R. 214(1)(1).

³⁴8 C.F.R. 214.2 (1)(1), June 2, 1981, 46 Fed. Reg. 29,456. 58 INT'L. REL. 418 (1981).

The L-1 business visitor belongs to a special class called a Group IV executive or manager permitted to obtain a labor certification without the necessity, delay or risk of applying for a certification from the U.S. Department of Labor.

The Department of Labor has promulgated a Schedule A of *pre-certified* occupations of which Group IV (L-1) is a special member of this list.³⁵

The value and special significance of this pre-certified exemption cannot be overstated. An applicant for permanent immigrant status is generally required to obtain a clearance for entry from the U.S. Secretary of Labor before the alien can even be considered for permanent immigrant status by the INS and the corresponding visa by the U.S. consul.

Normally, the Department of Labor must certify that the prospective immigrant would not be one who is likely to replace an American worker by working under noncompetitive employment conditions and filling a job for which there are already sufficient American workers able, willing, qualified, and available for the position. It follows that the Department of Labor's certification procedures have become exacting, cumbersome and time consuming in order to meet the requirements of this employment certification which governs Third, Sixth, and Nonpreference immigrant aliens intending to be permanently employed in the United States.³⁶

The Act allows the Department of Labor to certify occupations according to its own certification process. This includes the authority to issue its own clearance or automatic certification, without the necessity for lengthy processing, to an employment status which it essentially considers to be within a group affording no economic threat to the American labor market. Schedule A, Group IV of the Department of Labor's regulations afford such a clearance to L-1 executives or managers under certain circumstances.³⁷

In order to qualify for Schedule A, Group IV Third Preference Treatment, thus bypassing the certification process, the prospective business immigrant must show evidence of the following:

1. He must produce an L-1 visa;
2. The international corporation or organization for which he is employed must have been established and doing active, continuous business in the United States for one year prior to the Third Preference Immigrant Application;
3. If a new U.S. based subsidiary or affiliate is being established, then the executive or manager transferred to establish the new office must apply for Group IV certification after the new U.S. office has been in operation for one year;³⁸
4. It would appear that his functional status as an executive or manager becomes critical here. The business alien must have performed one of these two functions abroad for the corporation for at least one year. And thereafter, he must

³⁵20 C.F.R. Part 656.

³⁶8 U.S.C. § 1182(a)(14); 8 U.S.C. § 1255.

³⁷Note that only executives or managers can qualify under L-1. L-1 specialists or technicians must apply for individual labor certifications. 20 C.F.R. Part 656.10.

³⁸45 Fed. Reg. 83,929 (1980).

continue in one of these two capacities with the same corporation here in the United States.³⁹

As discussed previously, with regard to the L-1 visa, there appears to be no current obstacle to the sole stockholder of a closely held corporate entity qualifying for Schedule A, Group IV precertification just as he would for the L-1 visa.

Indeed, since the original L-1 visa is valid for three years, after the first of these years the immigrant application could be made with a view toward allowing the entire application process to mature under the second or third year of the L-1 visa.

Within five to seven years after receiving permanent immigrant status, there appears to be no obstacle to the business executive's making application to become a U.S. national or citizen, if desired.

VII. Non-Immigrant Professional: The H-1 Visa

Another method of entry for the international business visitor requires sponsorship by an American employer.

Section 101(a)(15)(H) of the Act allows U.S. based corporations and organizations⁴⁰ to sponsor the entry of high level professionals strictly for the limited purpose of performing some high level services as a temporary employee of the sponsoring entity.

The Act specifically provides an H-1 visa to allow the entry of a person of distinguished merit and ability who is coming to the United States "... to perform services of an exceptional nature requiring such merit and ability."⁴¹

No Department of Labor certification is required for the H-1 temporary visa.

And unlike the L-1 visa, the non-immigrant professional need not demonstrate any prior employment history with the sponsoring corporation or organization.

Indeed, once the H-1 professional has entered the United States there appears to be no obstacle to the sponsoring employer declaring the non-immigrant's employment to be a permanent one, and proceeding to apply for the business visitor's adjustment of status to that of a Third preference permanent immigrant.

There are strict requirements for qualifying under the H-1 status, however.

³⁹20 C.F.R. 656.10 (d); also 656.22: The executive function involves policy making, independent discretionary decision making with finality and little supervision; the managerial function involves directing the work of other employees, participation in hiring, firing and promotion, with discretionary control over the enterprise, a department or subdivision thereof.

⁴⁰Such as universities.

⁴¹8 U.S.C. § 1101(a)(15)(H).

There must be a U.S. sponsor who can demonstrate the existence of a job opening and its unique need for the exceptional ability of the business visitor.

The U.S. sponsor must demonstrate that the business visitor or "professional" possesses the high degree of education or equivalent training and experience to perform the functions involved in the particular job opening.

Consequently, the H-1 non-immigrant will be compelled to show some advanced degree of formal education, usually above the baccalaureate degree level, and some concomitant professional achievement or skill sufficient to distinguish the H-1 non-immigrant from his peers.

Within the context of the international business visitor, a microbiologist or physicist employed by a U.S. corporation within the high technology field, or a similarly skilled teaching professional who can be placed in a teaching position with a local university are two common examples.⁴²

The H-1 visa is usually granted for an initial period of one year, subject to annual renewals thereafter by petition and a demonstrated need on the part of the employer sponsor.

The H-1 non-immigrant visitor would tend to be dependant upon his U.S. sponsor as to whether a transition from H-1 to Third preference status is possible. But there appear to be no requirements precluding the H-1 visitor from obtaining sufficient ownership control or participation in the sponsoring corporation to effectuate this transition to permanent employment.

Indeed, informally the H-1 visitor could also begin the establishment of his own long term business enterprise apart from the sponsoring entity, investing venture capital, employing U.S. citizens, and perhaps even acting as an investor-manager of his own entrepreneurial undertaking.⁴³ But he would be well advised to do so while actively maintaining the functions of his H-1 position.

Finally, the new investment enterprise would have to closely follow the guidelines provided by the non-usable Immigrant Investor Status, discussed earlier, in order to clearly establish a risk oriented, capital intensive entrepreneurial undertaking sufficient to avoid INS disclaimer of his enterprise as an "unauthorized employment" in violation of his H-1 temporary visa.⁴⁴

VIII. Immigrant Investor Status: Recent Developments

As previously indicated, the problem with obtaining the status of an immigrant investor is that the permanent alien investor has been placed in the "non-preference" visa category which is so encumbered with visa candi-

⁴²Matter of Essex Cryogenics Industries, 14 I. & N. 196 (1972).

⁴³Bhakta vs. Immigration and Naturalization Service, 667 F.2d 771, (9th Cir. 1982).

⁴⁴8 U.S.C. § 1255(c); See *Yiu Tsang Cheung v. I.N.S.* 641 F.2d 666, (9th Cir. 1981) for an example of "unauthorized employment."

dates under the numerical quota system that non-preference visa numbers have been unavailable since 1978.

Recently, Congress has enacted an amendment to the Act designed to alleviate some of the restraints involving immigrant investors.

On December 29, 1981, with Public Law No. 97-116⁴⁵ Congress provided that the numerical limitations contained in sections 201 and 202 of the Act⁴⁶ shall not apply to any alien who is currently present in the United States and who, *on or before June 1, 1978*:

1. qualified as a non-preference immigrant under section 203(a)(8) of the Act;⁴⁷
2. was determined to be exempt from the labor certification requirement of section 212(a)(14) of the Act⁴⁸ because the alien had actually invested, *before such date*, capital in an enterprise in the United States of which the alien became a principal manager and which employed a person or persons (other than the spouse or children of the alien) who are citizens of the United States or aliens lawfully admitted for permanent residence; and
3. applied for adjustment of status to that of an alien lawfully admitted for permanent residence.

In effect, this recent amendment allows an immediate visa to a resident non-preference business visitor who qualified for investor status on or before June 1, 1978, and who also applied, on or before June 1, 1978, to the INS for an adjustment of his status to that of a permanent immigrant.

Congress has also been moving forward through both the House and Senate Immigration Subcommittees whose chairmen have co-sponsored a proposed immigration reform bill commonly known as the Simpson-Mazoli bill.⁴⁹

This bill proposes, in part, to create new preference categories including an independent preference for investors of \$250,000 in a new enterprise which creates at least ten jobs in high unemployment areas.

This investor preference would be part of the visa quota system and would qualify for visa numbers unused by two preceding categories controlling *aliens of exceptional ability* and *skilled workers needed in the U.S.*, respectively.

The new investor category would take preference over the unskilled worker and nonpreference categories which would then wait, in turn, for unused visa numbers.

IX. Conclusion

The international business visitor who wishes to enter or remain in the United States for the purpose of engaging in a business enterprise on a long-term basis either on his own account, or on behalf of a financial group

⁴⁵Section 19, Pub. No. 97-116, December 29, 1981, 95 Stat. 1621.

⁴⁶8 U.S.C. §§ 1151, 1152.

⁴⁷8 U.S.C. 1153.

⁴⁸8 U.S.C. 1182.

⁴⁹Immigration Reform and Control Act of 1983.

or corporation may find immediate obstacles originally intended by Congress to protect the American labor market from an overwhelming influx of unskilled and apparently insolvent immigrant laborers.

Notwithstanding a recognized need for investor capital in the United States, Congress has not provided a functional visa preference or entry category for the business alien intending to enter strictly for the purpose of engaging in an active commercial enterprise.

These obstacles to immigration have given way to a milieu of short term non-immigrant entry methods which may be cautiously utilized, usually sequentially or in combination, to allow entry and provide the international business visitor with options enabling the business alien to establish, conduct and maintain an active commercial enterprise on a full-time basis here in the United States.

Appendix

TREATIES CONTAINING TREATY INVESTOR PROVISIONS

Argentina—Treaty of friendship, commerce, and navigation. (Article II)
Entered into force December 20, 1854.
10 Stat. 1005; TS 4; I Malloy 20.

Austria—Treaty of friendship, commerce and consular rights. (Article I)
Entered into force May 27, 1931.
47 Stat. 1876; TS 838; 118 LNTS 241.

Belgium—Treaty of friendship, establishment and navigation. (Article II)
Entered into force October 3, 1963 (Treaty of 1875 in force prior to this date).
14 UST 1284; TIAS 5432; 480 UNTS 149.

China—Treaty of friendship, commerce, and navigation. (Article II)
Entered into force November 20, 1948.
63 Stat. (2) 1299; TIAS 1871; 25 UNTS 69.

Colombia—Treaty of peace, amity, navigation and commerce. (Article III)
Entered into force June 10, 1848.
9 Stat. 881; TS 54; I Malloy 302.

Costa Rica—Treaty of friendship, commerce, and navigation. (Article II)
Entered into force May 26, 1852.
10 Stat. 916; TS 62; I Malloy 341.

Ethiopia—Treaty of amity and economic relations. (Article VI)
Entered into force October 8, 1953.
4 UST 2134; TIAS 2864; 206 UNTS 41.

France—Convention of establishment, protocol, and declaration. (Article II)
Entered into force December 21, 1960.
11 UST 2398; TIAS 4625.

Germany—Treaty of friendship, commerce, and navigation.
Entered into force July 14, 1956.
7 UST 1839; TIAS 3593; 273 UNTS 3.¹

Honduras—Treaty of friendship, commerce, and consular rights. (Article I)
Entered into force July 19, 1928.
45 Stat. 2618; TS 764; 87 LNTS 421.

Iran—Treaty of amity, economic relations and consular rights.
Entered into force June 16, 1957.
8 UST 899; TIAS 2863; 284 UNTS 93.

¹Germany—The treaty which entered into force in 1956 now applies to Berlin, as defined in Article XXVI thereof.

Italy—Treaty of friendship, commerce and navigation. (Article I and Article XXIV, paragraph 7)

Entered into force July 26, 1949.

63 Stat., 2255; TIAS 1965; 79 UNTS 171.

Japan—Treaty of friendship, commerce, and navigation. (Article I)

Entered into force October 30, 1953.

4 UST 2063; TIAS 2863; 206 UNTS 143.²

Korea—Treaty of friendship, commerce and navigation. (Article II)

Entered into force November 7, 1957.

8 UST 2217; TIAS 3947; 302 UNTS 281.

Liberia—Treaty of friendship, commerce, and navigation. (Article I)

Entered into force November 21, 1939.

54 Stat. 1739; TS 956; 201 LNTS 163.

Luxembourg—Treaty of friendship, establishment and navigation. (Article II)

Entered into force March 28, 1963.

14 UST 251; TIAS 5306; 474 UNTS 3.

Muscat and Oman (the Sultanate of)—Treaty of amity, economic relations and consular rights. (Article II)

Entered into force June 11, 1960.

11 UST 1835; TIAS 4530; 380 UNTS 181.

Netherlands—Treaty of friendship, commerce and navigation. (Article II)

Entered into force December 5, 1957 (Made applicable to Surinam on February 10, 1963).

8 UST 2043, TIAS 3942; 285 UNTS 231.

Nicaragua—Treaty of friendship, commerce and navigation. (Article II)

Entered into force May 24, 1958.

9 UST 449; TIAS 4024; 367 UNTS 3.

Norway—Treaty of commerce and navigation. (Article I)

Entered into force January 18, 1828.

8 Stat. 346; TS 348; II Malloy 1748.

Treaty of friendship, commerce, and consular rights, etc.

Entered into force September 13, 1932.

47 Stat. 2135; TS 852; 134 LNTS 81.³

Pakistan—Treaty of friendship, commerce, and protocol.

Entered into force February 12, 1961.

12 UST 110; TIAS 4683; 404 UNTS 259.

²Japan—The treaty which entered into force in 1953 does not apply to trade with the Ryukyu Islands (south of 29 degrees north latitude), or to certain lesser island groups specified in Protocol paragraph 13 thereof.

³Norway—The treaty which entered into force in 1932 does not apply to Svalbard (Spitzbergen and certain lesser islands).

Paraguay—Treaty of friendship, commerce, and navigation. (Article II)

Entered into force March 7, 1860.

12 Stat. 1091; TS 272; II Malloy 1364.

Philippines—On September 6, 1955, pursuant to Article V of the revised Trade Agreement between the United States and the Republic of the Philippines, notes were exchanged between the two Governments implementing the provisions of the Act of June 18, 1954 which renders Philippine nationals eligible for nonimmigrant classification as treaty traders or treaty investors under the provisions of section 101(a)(15)(E)(i) or 101(a)(15)(E)(ii) of the Act although there is no commercial treaty in force between the two countries.

Entered into force September 6, 1955.

6 UST 3030; TIAS 3349; 238 UNTS 109.

Spain—Treaty of friendship and general relations. (Article II)

Entered into force April 14, 1903.

33 Stat. 2105; TS 422; II Malloy 1701.

Switzerland—Convention of friendship, commerce, and extradition. (Article I)

Entered into force November 8, 1855.

11 Stat. 587; TS 353; II Malloy 1763.

Thailand—Treaty of amity and economic relations.

Entered into force June 8, 1968.

TIAS 6540.

Togo—Treaty of amity and economic relations. (Article I)

Entered into force February 5, 1967.

18 UST 1; TIAS 6193

United Kingdom of Great Britain and Northern Ireland—Convention to regulate commerce. (Article I)

Entered into force July 3, 1815.

8 Stat. 228; TS 110; I Malloy 624.⁴

Viet-Nam—Treaty of amity and economic relations. (Article I)

Entered into force November 30, 1961.

12 UST 1703; TIAS 4890; 424 UNTS 137.

Yugoslavia—Treaty of commerce. (Article I)

Entered into force November 15, 1882.

22 Stat. 963, TS 319; II Malloy 1613.

⁴United Kingdom—The convention which entered into force in 1815 applies only to British territory in Europe (the British Isles (except the Republic of Ireland), the Channel Islands and Gibraltar) and to "inhabitants" of such territory. This term, as used in the Convention, means "one who resides actually and permanently in a given place, and has his domicile there". Also, in order to qualify for treaty trader or treaty investor status under this treaty, the alien must be a national of the United Kingdom. Individuals having the nationality of members of the Commonwealth other than the United Kingdom whose laws accord a separate nationality, such as Canada, do not qualify for treaty trader or treaty investor status under the treaty. (Amended)

