

Chapter 2

B-1 BUSINESS VISITORS AND B-2 VISITORS FOR PLEASURE

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Scope Note

This chapter explains B-1 and B-2 nonimmigrant visas, which aliens qualify for the B-1 and B-2 nonimmigrant visas, and how to obtain a B-1 or B-2 nonimmigrant visa. Statutory authorities, including the Code of Federal Regulations and the Foreign Affairs Manual, are referenced throughout the chapter, enabling the reader to readily find the applicable law.

§ 2.1 INTRODUCTION

The majority of aliens coming to the United States arrive on some type of nonimmigrant visa. What does that mean? A nonimmigrant is an alien who is staying temporarily in the United States—either for business or for pleasure—and intends to return to his or her home country at the conclusion of his or her visit. This section will discuss the B-1 and B-2 nonimmigrant visas, which aliens qualify for the B-1 and B-2 nonimmigrant visas, and how to obtain a B-1 or B-2 nonimmigrant visa.

This material is entirely statutory in nature. This chapter contains references to the Code of Federal Regulations (C.F.R.), the Foreign Affairs Manual (FAM), the Immigration and Naturalization Act (INA), and the U.S. Code (U.S.C.). Attorneys should reference each of these when they encounter questions regarding the process and procedure involved with B-1 and B-2 nonimmigrant visa issuance. The Code of Federal Regulations and the FAM are the sources for visa guidelines and policy. This chapter incorporates references to these authorities as much as possible so that attorneys can look to the statutory language on points of interest to them.

§ 2.1.1 How Does an Alien Get a Nonimmigrant Visa?

Depending on the class of B nonimmigrant visa, the burden of proof can be quite different for each. An attorney's first step should be to determine the purpose of the alien's trip to the United States. An attorney should talk to the alien and, if applicable, to the alien's employer, prior to commencing work. Once the attorney understands the alien's purpose upon entry to the United States, he or she will be able to find the appropriate B visa category. In some instances, the attorney will discover that the alien requires a different nonimmigrant visa altogether. Whatever the case, choosing the right visa from the start can avoid unnecessary headaches, delay, and loss of money.

If the alien is outside of the United States and desires a B visa, the alien must apply for the visa in advance with the U.S. embassy or consulate in the country the alien is currently residing to have the visa approved, issued, and attached to the passport. Prior to traveling to the U.S. embassy or consulate, the alien must complete a DS-156 nonimmigrant visa application form, and if the alien is a male between the ages of sixteen and forty-five, the alien must also complete Form DS-157 supplement. These forms should be accompanied by the \$100 machine-readable visa fee, a passport-style photograph, and the alien's passport. Each U.S. embassy or consulate has different requirements on procedure for filing the forms, scheduling appointments for a visa interview, and paying the necessary fees. Fortunately, much of this important information, along with the nonimmigrant visa forms, is on the Web. Attorneys should go to the U.S. Department of State's Web site at <http://usembassy.state.gov/> and select the U.S. embassy or consulate closest to where the alien resides. Forms are available on this site as well.

Practice Note

It is beneficial for attorneys to use the Web site <http://usembassy.state.gov/> not only as a source of up-to-date information for themselves about the U.S. embassy or consulate to which they are planning on sending the alien but also as a source of information for the alien. In some instances, aliens must travel hundreds of miles to attend interviews or pay filing fees for visas. Keeping the alien well-informed when there are thousands of miles between the attorney and alien is much easier with this tool. Moreover, since September 11, attorneys should always check the Department of State's Web site for the U.S. embassy or consulate the alien will visit prior to his or her visit. In light of current world events, U.S. embassies and consulates have changed schedules and procedures and closed down due to security concerns. Much of this can and does happen with little notice to anyone. Additionally, security and

background checks can take additional time, which will impact visa issuance. Where visas used to be issued on a next day basis in some places, it may now take two to three weeks or more. Attorneys should be certain to factor this additional waiting time into their calculations when trying to determine when the alien will be able to arrive in the United States.

Depending on the visa for which the alien has applied, there are specific types of additional evidence that may be required. This additional documentary evidence is mentioned in the individual sections below as it becomes relevant. In general, the alien should always have immediate access to birth certificates, marriage certificates, passports, and educational documentation, all of which establish the alien's history.

§ 2.1.2 What Is the Purpose of the B Visa?

The B visa is for aliens wishing to be admitted to the United States for either business (B-1) or pleasure (B-2). Outside of the Visa Waiver Program (VWP), which is discussed later in this section, an alien who is outside the United States must go to a U.S. embassy or consulate and obtain the appropriate B visa prior to entering the United States. Upon arriving at the U.S. embassy or consulate, the alien must prove that he or she has a residence in his or her country that he or she has no intent of abandoning and to which he or she intends to return. The alien must also establish that he or she is coming to the United States for a temporary period of time (i.e., six months or less) and, in the case of a B-1 visa, that the his or her principle place of business and where he or she is paid is predominantly in a foreign country. In most cases, the alien provides this proof through the presentation of documentation—such as bank records, employment letters, and the like.

If the alien is already in the United States in another legal status—H-1B, L, et cetera—the alien can file for a change of status to B-1 or B-2 with the U.S. Citizenship and Immigration Services (USCIS) through the local service center that covers the region within the United States where the alien is residing. If one is uncertain which service center covers the alien's area of residence, he or she should check with <http://uscis.gov>. The Web site will give details on which service center covers which states and will also include the appropriate mailing addresses, filing fees, and procedures for each. Even though the alien is in the United States in another legal status, he or she will still have to provide the evidence listed herein to the USCIS in order to receive a change in status. An alien who is in the United States but is out of status (illegal) cannot apply for a change of status to B-1 or B-2 through the USCIS.

As stated above, the usual length of stay granted to a B visa holder is six months. Once admitted to the United States, the alien can apply for an extension with the appropriate service center before the authorized stay expires and can request additional time for good cause. The total time allowed cannot exceed one year.

In the aftermath of September 11, the U.S. Department of Justice proposed a new rule during April 2002 that would have reduced the admission period for B visa holders from the standard of an automatic six-month stay to the amount of time needed to accomplish the purpose of the visit. The problem with the proposed rule was that it was a discretionary matter left to the individual immigration inspector at the port of entry to determine what a fair and reasonable time period was for the B visa holder to accomplish the stated goals of the entry. If the immigration inspector could not make a determination regarding a specific length of admission, the immigration inspector would simply grant the B visa holder thirty days. In the author's opinion, this proposed rule is a disaster. It was implemented by the Department of Homeland Security (DHS) (the successor to immigration legislation for the U.S. Department of Justice after March 1, 2003) while the rule was in the comment stage of the *Federal Register* publication. This author's experience with the rule's implementation was not positive. The immigration inspectors at various ports of entry were erratic and inconsistent in their adjudication, and exactly what materials and documents each individual inspector required was never certain. Thankfully, the DHS withdrew the proposed regulation on March 3, 2003, after it was bombarded with negative comments during the publication process. However, this author still sees inspectors closely scrutinizing B visa holders upon admission to the United States and attorneys would be well advised to inform their clients to come the port of admission with documents to establish as best possible the length of admission needed for the visit.

§ 2.2 B-1 BUSINESS VISITORS

Business visitors (B-1) may temporarily be admitted to the United States for business as long as they are not engaged in employment. This is certainly a confusing statement—how can an alien come to the United States for business but not work? While the answer to this question continues to evolve, there are some guidelines to answer this question. The B-1 business visitor can enter the United States to

- consult with clients;
- attend meetings;

- attend executive, educational, scientific, or business seminars or conventions and conferences;
- observe business or professional activity;
- conduct litigation;
- engage in activities that are appropriate for a member of a board of directors for a U.S. corporation;
- negotiate contracts with clients or employees; and
- in some instances, perform or receive training.

9 FAM § 41.31 nn.4 & 5.

Practice Note

Prior to giving any advice to a potential business visitor—such as answering the ever-present question “what are the chances I will get a visa,” the more common “how soon will I get the visa,” and, finally, “how long can I stay”—attorneys should conduct a thorough and complete interview. They will discover that the business visitor and the employer who is sending the business visitor to the United States may have different ideas about what the business visitor will be doing while in the United States. They will also discover the intentions of all parties, which is key in determining what visa is appropriate for the alien.

In most cases, as long as the alien is not being paid by a U.S. source for the “work” in the United States, the B-1 will be granted assuming the alien can meet the requirements for a nonimmigrant visa. The rule in general for entry under a B-1 visa is that the alien is involved in legitimate commercial or professional activity and is not involved in local skilled or unskilled work for hire. 22 C.F.R. § 41.31(b)(1).

Example

A mason contacts an attorney’s office from his office in Russia. He states that he has an offer for a brick laying job in Boston that he would like to accept. He is certainly well qualified for the position with over twenty years of experience and the job will only take him three weeks. The mason states that he has no intention of remaining in the United States, as his family, home, and business are in Russia. Can he receive a B-1 visa and accept the position? No. While the mason would likely qualify for a B-2 visa as a tourist, the Code of

Federal Regulations states that the mason cannot perform skilled or unskilled work for hire under a B-1 visa. Would it matter if the Russian was an electrician or a plumber under the same set of facts? No. The answer is the same. The limited duration of time (three weeks) and the fact that the mason has substantial ties to Russia do not change the fact that the mason is not eligible for a B-1 business visa under these circumstances.

It is common knowledge that the B-1 business visitor cannot be paid by a U.S. entity for business transacted while in the United States. However, according to the FAM, the business visitor may receive expense reimbursement for incidentals such as food, lodging, and travel. 9 FAM § 41.31 n.3.4. This reimbursement is not payment for the performance of work in the United States. Moreover, Section 212(q) of the INA states that the B-1 visa holder can accept an honorarium payment and incidental associated expenses for a usual academic activity or activities (lasting no longer than nine days at any single institution), as defined by the attorney general in consultation with the secretary of education, under the following conditions:

- if such payment is offered by an institution or organization described in Section 212(p)(1) and is made for services conducted for the benefit of that institution or entity and
- if the alien has not accepted such payment or expenses from more than five institutions or organizations in the previous six-month period.

The decision on whether to apply for a B-1 visa or some other work-related visa really depends on the scope of the activity involved. A case-by-case determination is the best way for attorneys to handle this type of visa. It is always important for attorneys to remember that a B-1 alien can come to the United States to engage or conduct business but cannot physically be employed. *See* 9 FAM § 41.31 n.4. Note that there is some guidance on what is and what is not permissible under a B-1. *See* 9 FAM § 41.31 n.5. The legacy Immigration and Naturalization Service (INS) office of business liaison has published in Employer Information Bulletin 99-03 a memorandum entitled “Permissible Activities for B-1 Business Visitors” (June 2000).

Unfortunately, determining that the alien qualifies for a B-1 visa based upon the alien’s stated purpose in traveling to the United States for business is only one-third of the battle. Just because the alien appears to fit the B-1 visa category does not in itself guarantee a B-1 visa will be issued. The B-1 visa applicant must next satisfy the consular officer at the U.S. embassy or consulate

where the visa application is filed and then the immigration inspector at the time of entry.

In order to satisfy the consular officer, attorneys must prove nonimmigrant intent on behalf of their alien client to show eligibility for visa issuance. In other words, attorneys must prove to the satisfaction of the consular officer that the alien client will exit the United States and return to the country of origin when he or she completes the proposed business trip. This is generally done by establishing that the alien

- has a foreign residence that he or she will not abandon,
- intends to enter the United States for a specific period of time limited in duration, and
- is seeking admission only to engage in legitimate business activities.

9 FAM § 41.31 n.2.

In order to further determine if the alien client is eligible to be issued a B-1 business visa, attorneys should also look at the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 [hereinafter INA] (codified as amended at 8 U.S.C. § 1101 et seq.). The INA states that a nonimmigrant alien is

an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for pleasure

8 U.S.C. § 1101(a)(15)(B).

After reading Section 1101(a)(15)(B), one can see that there are other requirements for the alien client to meet in order to prove eligibility for issuance of the B-1 visa. Attorneys must now prepare the necessary documentation to have the visa issued. As stated above, the issuance of the visa is determined by the consular officer at the U.S. embassy or consulate that has jurisdiction over the alien's foreign residence. This is the person an attorney must persuade to issue the B-1 visa. In order to meet the alien's burden of persuasion as stated under 8 U.S.C. § 1101(a)(15)(B), the attorney or the alien employee should provide the consular officer some, if not all, of the following:

- proof of foreign residence—property deed or title, or apartment lease;
- a letter from the U.S. or foreign company stating the reason for the alien’s trip to the United States, including the approximate, if not exact, dates of the trip;
- proof of employment with the foreign employer, including proof that the foreign employer is paying the salary (best proved by pay stubs or employment contract);
- proof of economic and familial ties to the home country (birth certificates of children, brothers, sisters or parents);
- a detailed itinerary (round-trip ticket or travel agent itinerary);
- a bank statement showing adequate funds for self and for dependents to draw on while the alien is in the United States; and
- as of October 1, 2003, a valid machine-readable passport for nationals of countries who participate in the VWP.

Note that on September 24, 2003, the secretary of state granted a postponement until October 26, 2004, as the date by which VWP travelers from twenty-one countries must present a machine-readable passport at a U.S. port of entry to be admitted into the country without a visa. The countries for which the postponement has been granted are Australia, Austria, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Spain, Sweden, Switzerland, and the United Kingdom. Each country to which this postponement was granted made a formal request for the delay. Five other eligible countries did not request a postponement of the effective date because virtually all of their citizens already have machine-readable passports. Those countries are Andorra, Brunei, Liechtenstein, Luxembourg, and Slovenia. As of October 1, 2003, visa waiver travelers from those five countries must present either a machine-readable passport or a U.S. visa. Belgium, which is also a visa waiver country, was not eligible to receive this extension. Belgian nationals who wish to travel under the auspices of the VWP have been required to present a machine-readable passport since May 15, 2003. This requirement was stipulated in the Department of Justice’s review of Belgium’s continued eligibility to participate in the VWP in February 2003. The secretary’s authority to postpone the effective date for a visa waiver country’s citizens to present a machine-readable passport is contained in the Uniting and Strengthening America Act by Providing Appropriate Tools Required to Intercept

and Obstruct Terrorism (USA PATRIOT) Act, which legislated the requirement for visa waiver travelers.

The items listed above have been found to be the useful and necessary documents to facilitate B-1 visa issuance over the years. However, Volume 9 of the FAM has a specific section entitled “Factors in Determining Entitlement to Temporary Visitor Classification,” which lists basic evidentiary requirements for issuance of the B-1 visa. Some of these items that the FAM states the alien should offer as evidence include the following:

- proof of adequate funds available to avoid unlawful employment in the United States;
- specific and realistic plans for the entire period of the visit;
- establishing with reasonable certainty that the departure from the United States will take place at the end of the visit—as such, the time requested should be consistent with the purpose of the trip;
- requesting not the maximum amount of time allowed by U.S. law but rather giving the proposed dates for the trip;
- demonstrating sufficient ties to the home country, such as permanent employment, business or financial connections, close family ties, or other commitments that show a strong inducement to return to the country of origin; and
- establishing adequate provision of support for dependents while the alien is in the United States.

9 FAM § 41.31 nn.2.1–2.7.

Practice Note

In order to meet the requirements for visa issuance, the alien should provide

- bank statements for the last three months;
- proof of home ownership, if applicable, in the foreign country;
- birth certificates for children who are residing in the foreign country and who will remain in the foreign country;
- a marriage certificate for a spouse who will remain in the foreign country;
- a letter from the foreign employer containing
 - the purpose of the trip,

- the exact dates of the trip,
- a statement that alien will return to his or her position in his or her foreign country at the end of the trip,
- a statement that the company will pay for the alien employee's housing and expenses while he or she is in the United States,
- a statement that the foreign company will continue to pay the alien employee while he or she is in the United States and that the trip is a necessity; and
- information from the Internet or other sources (e.g., annual report) about the company.

Providing the above does not guarantee visa issuance. Section 214(b) of the INA states that every applicant for admission to the United States is assumed to be an intending immigrant until the alien proves otherwise. 8 U.S.C. § 1184(b). The consular officers in many locations also consider factors beyond the alien's control, such as high incidences of visa fraud or overstays for that U.S. embassy or consulate, poor economic conditions in the alien's country, and the unreliability of government-issued documents. 2 *Immigration & Nationality Law Handbook* 103 (Am. Immigration Lawyers Ass'n 2003–04 ed.). However, assuming the alien does not have any prior immigration violations or criminal history, the visa should be issued upon the completion of a satisfactory consular interview and the production of the above-mentioned documentary evidence. In light of the above, attorneys should not discount the importance of the visa interview in this process. Attorneys should remember that visa issuance revolves around the alien's intent and the consular officer is running under the assumption that alien's intent is to remain in the United States indefinitely. The reason that the alien provides all of the above documents is to persuade the consular officer of the alien's intent to return to the country of origin. Therefore, the actual visa interview is extremely important. The alien should be well prepared for the interview and should know what is contained in all of the documents that will be presented to the consular officer.

After stating all of the above regarding the fact that an alien cannot work with a B-1 visa, naturally there are exceptions to the rules. While most B-1 business visa holders are not allowed to perform skilled or unskilled labor, there are a limited number of aliens who can enter the United States on a B-1 visa and be gainfully employed in the United States. According to the FAM, the following categories of aliens can be employed with a B-1 visa:

- ministers on evangelical tour, ministers of religion who exchange pulpits with American counterparts, members of religious denominations entering the United States temporarily to perform

missionary work, and members of charitable organizations and participants in voluntary service programs;

- members of boards of directors of U.S. corporations may enter the United States to attend meetings of the board or to perform other functions derivative of board membership;
- personal or domestic servants of certain nonimmigrant visa holders;
- personal or domestic servants of U.S. citizens who live abroad and temporarily assigned to the United States;
- certain yacht crewman;
- certain professional athletes; and
- investors seeking an investment in the United States that would qualify them for E visa status.

9 FAM § 41.31 nn.6, 6.1–6.9.

§ 2.2.1 B-1 Nonimmigrant Visa for a Nanny

A common scenario is the application of a domestic worker or nanny (“worker”) for a B visa to accompany his or her employer to the United States. If the worker meets the requirements for entry, both a U.S. citizen living abroad and temporarily assigned to the United States and a nonimmigrant temporarily assigned to the United States may bring their nanny or domestic worker with them to the United States.

(a) *Nanny or Domestic Worker of a U.S. Citizen Living Abroad*

Personal or domestic workers of U.S. citizens residing abroad who are temporarily assigned to the United States may bring their nanny or domestic worker with them to the United States. 9 FAM § 41.31 nn.9.3-1, 9.3-2. The employer-employee relationship, however, must have been established prior to the employer’s admission to the United States.

The FAM states that a domestic worker can be admitted to the United States pursuant to a B visa, assuming the following criteria are satisfied:

- the employee has a residence abroad which he or she has no intention of abandoning;
- the alien has been employed abroad by the employer as a personal or domestic servant for at least six months prior to the date of the employer's admission to the United States;
- in the alternative, the employer can show that while abroad the employer has regularly employed a domestic servant in the same capacity as that intended for the applicant;
- the employee can demonstrate at least one year of experience as a personal or domestic servant by producing statements from previous employers attesting to such experience; and
- the employee is in possession of an original contract or a copy of the contract, to be presented at port of entry, which contains the original signatures of both the employer and employee.

9 FAM § 41.31 n.9.3-2.

In addition to the above, the employer must not be staying in the United States for more than four years and the worker can only be employed by the sponsoring employer. The employer must offer to the worker free room and board, round-trip air-fare, and an eight-hour workday at the minimum or prevailing wage (whichever is greater) for the area where they will reside. 9 FAM § 41.31 n.9.3-2.

The worker may obtain a B-1 visa at the appropriate U.S. embassy or consulate abroad and apply to enter the United States. Upon arrival, the U.S. Customs and Border Protection inspector will issue a six-month I-94 to the worker. The worker will have to file an I-539, Application to Extend/Change Nonimmigrant Status, with USCIS prior to the expiration date of the I-94. Upon arrival, the employer must also file for an employment authorization document (EAD) with USCIS and obtain a Social Security Number for the worker so that Social Security can be deducted from the worker's paycheck.

(b) *Nanny or Domestic Worker of a Nonimmigrant Employer*

Personal or domestic workers of a nonimmigrant employer who is applying to come to the United States temporarily or is already in the United States pursuant to a nonimmigrant visa (B, E, F, H, I, J, L, M, O, or Q) may travel to the United States to be employed as a nanny or domestic worker with the nonimmigrant employer. 9 FAM § 41.31 n.9.3-3.

The FAM states that a domestic worker of a nonimmigrant employer can be admitted to the United States pursuant to a B visa, assuming the following criteria are satisfied:

- the employee has a residence abroad which he or she has no intention of abandoning;
- the employee can demonstrate at least one year of experience as a personal or domestic employee; and
- the employee has been employed abroad by the employer as a personal or domestic servant for at least one year prior to the date of the employer's admission to the United States; or
- if the employee-employer relationship existed immediately prior to the time of the visa application, the employer can demonstrate that he or she has regularly employed personal or domestic employees over a period of several years preceding the domestic employee's visa application for a nonimmigrant B-1 visa;
- the employer and employee have signed an employment contract which contains statements that the employer has guaranteed the minimum or prevailing wage, whichever is greater, and free room and board, and the employer will be the only provider of employment to the employee; and
- the employer must pay the domestic worker's initial travel expenses to the United States and subsequently to the employer's onward assignment, or to the country of normal residence at the termination of this assignment.

9 FAM § 41.31 n.9.3-3.

As with the worker of a U.S. citizen, the worker may obtain a B-1 visa at the appropriate U.S. embassy or consulate abroad and apply to enter the United States. Upon arrival, the U.S. Customs and Border Protection inspector will also issue a six-month I-94 to the worker. The worker will have to file an I-539, Application to Extend/Change Nonimmigrant Status, with USCIS prior to the expiration date of the I-94. Upon arrival, the employer must also file for an EAD with USCIS and obtain a Social Security Number for the worker so that Social Security can be deducted from the worker's paycheck.

In addition to the above list, the FAM states that there are some professions that may qualify for a different nonimmigrant visa—such as A, E, F, H, L, or M—but still may be issued a B-1 visa by the consular officer under the criteria that follows.

9 FAM § 41.31 n.7. The FAM states that the following visitors may receive B-1 visas as well:

- commercial or industrial workers coming to the United States to install, service, or repair commercial or industrial equipment or machinery purchased from a company outside the United States, or to train U.S. workers to perform such services (9 FAM § 41.31 n.7.1);
- foreign airline employees who enter in an executive, supervisory, or highly technical capacity or are coming to the United States to pick up aircraft (9 FAM § 41.31 n.7.2);
- certain unpaid clerkships in the medical field (9 FAM § 41.31 n.7.3);
- those coming to the United States only to observe the conduct of business or other professional or vocational activity, as long as they pay the expenses of their visit. (9 FAM § 41.31 n.7.3-2);
- participants in the Foreign Assistance Act Program (9 FAM § 41.31 n.7.4);
- Peace Corps volunteer trainers (9 FAM § 41.31 n.7.5);
- interns with the United Nations Institute for Training and Research (UNITAR) Program, who are not employees of foreign governments (9 FAM § 41.31 n.7.6);
- aliens employed by foreign or U.S. exhibitors at international fairs or expositions (9 FAM § 41.31 n.7.7);
- certain employees of foreign exhibitors who are not foreign government representatives (9 FAM § 41.31 n.7.7-2);
- employees of foreign exhibitors who are not foreign government representatives (9 FAM § 41.31 n.7.7-2);
- aliens normally classified as H-1 or H-3 may receive a B visa under certain circumstances (For example, a qualified H-1 or H-3 visa applicant coming to the United States to participate in a training program, where the applicant will receive no salary or other remuneration from a U.S. source other than an expense allowance or other reimbursement for expenses incidental to the alien's temporary stay. The remuneration or source of income for the alien's

services performed in the United States must come from the business entity located abroad (i.e., the alien's salary continues to be paid by the foreign firm outside the United States.) (9 FAM § 41.31 n.8);

- certain professional entertainers if they are participants in cultural programs or international competitions and
 - are performing before a nonpaying audience,
 - are having all expenses paid by the member's government, and
 - are coming to the United States to participate in a competition for which there is no remuneration other than a prize (monetary or otherwise) and expenses (9 FAM § 41.31 n.8.1-1);
- still photographers who are coming to take photographs and will not receive any income from a U.S. source (9 FAM § 41.31 n.8.1-2);
- musicians who are coming to the United States for recording facilities or recording purposes only or for a recording sold outside the United States only, and who will not be giving any public performances (9 FAM § 41.31 n.8.1-3);
- medical doctors coming to the United States to observe U.S. medical practices and to consult with colleagues on latest techniques, providing that no remuneration is received from a U.S. source and no patient care is involved (9 FAM § 41.31 n.8.1-5);
- certain alien trainees who are already employed abroad and are coming to undertake training, who are also classifiable as H-3 trainees and will continue to receive a salary from the foreign employer may enter on a B-1 visa (The alien must not receive a salary or other remuneration from a U.S. source other than an expense allowance that is incidental to the stay. The fact that the training may last one year or more is not in itself controlling and it should not result in denial of a visa, provided the consular officer is satisfied that the intended stay is temporary in nature and there is a definite time limitation to the training.) (9 FAM § 41.31, Note 8.1-5);
- artists coming to the United States to paint or sculpt, who are not under contract with a U.S. employer and who do not intend to

regularly sell such art work in the United States (9 FAM § 41.31 n.8.2-6); and

- finally, supervisors in the building or construction industry coming to the United States for the sole purpose to supervise or train other workers engaged in building or construction work may be admitted as B-1 visitors as well (8 C.F.R. § 214.2(b)(5)).

This is not intended to be an exhaustive list. The FAM states that there are other cases classifiable as B-1 that do not fit any of the classes listed above. 9 FAM § 41.31 n.9. In such cases, attorneys can request that the consular officer contact the Department of State and request an advisory opinion to determine if the alien is classifiable as B-1. The advisory opinion is a useful tool and should not be forgotten in the unusual case.

The list of classes of B-1 aliens also continues to evolve as more cases are brought to consular officers' attention. For example, certain commercial truck drivers are eligible for B-1 entry according to a legacy INS memorandum entitled "Entry of Commercial Truck Drivers into the United States IFM Update" (Sept. 12, 2001). The *INS Inspector's Field Manual* added another chapter for international truck drivers due to the above memorandum. It states that international truck drivers may be admitted in B-1 status as long as they are transporting goods across international borders. *INS Inspector's Field Manual* 21.13. The B-1 truck driver may not be involved in cabotage (transporting goods picked up in one U.S. location to another U.S. location). The following conditions must also be met:

- the goods must be leaving or entering the United States and must remain in the stream of international commerce;
- once the goods are unloaded in the United States, the goods assume a domestic character;
- the goods being hauled cannot have their origin and destination within the United States;
- the goods may be picked up in Mexico or Canada regardless of whether they are U.S. or foreign made and deliver them to the United States;
- the entry of the driver must be for the international movement of the goods; and
- drivers may not engage in local labor for hire.

INS Inspector's Field Manual 21.13.

Practice Note

“Cabotage” is a costly offense for the unwitting truck driver. This author has seen cases where Canadian truck drivers have been put into removal proceedings before the immigration judge for violating their B-1 status by picking up a load in the United States after they off-loaded their international shipment. The ramifications to the driver can be costly: loss of B-1 visa or any new visa without a waiver and potential removal from the United States that could effectively put the driver out of a job.

The North American Free Trade Agreement (NAFTA) is another wrinkle to the B visa process. The NAFTA allows temporary entry for citizens of Canada and Mexico who meet the previously mentioned requirements for nonimmigrants to be admitted as business visitors. A business visitor may enter the United States under the NAFTA if the purpose of the visit is one of the following in general:

- research and design;
- growth, manufacture, and production;
- marketing;
- sales;
- distribution;
- after-sales service; and
- general service.

8 C.F.R. § 214.2(4)(i).

In order to enter the United States under the NAFTA, Canadian business visitors must provide proof of citizenship and Mexican business visitors must present valid passport, visa, or a Mexican border crossing card. Nationals of both nations should also present a letter from the employer describing the purpose of their entry as well as proof that the NAFTA alien is coming to the United States to engage in one of the occupations or professions listed above. There is an exhaustive list of specific professions allowed for admission under the NAFTA in Appendix 1603.A.1 to Annex 1603 of the NAFTA. This list can also be found at 8 C.F.R. § 214.6.

§ 2.3 B-2 VISITORS FOR PLEASURE

The B-2 visa is likely to be the visa attorneys will encounter the most. More often than not, the immigration attorney will not be involved in assisting the alien with obtaining the B-2 visa, as most aliens apply for this visa on their own from their home country. When the immigration attorney is involved, it usually is to obtain an extension for a B-2 alien who has already entered the United States or to assist an alien in another visa category to change status to B-2 because the alien no longer can maintain the other nonimmigrant visa status. Through the consular process, an alien can receive a B-2 visa either in the United States or overseas (described in detail in § 2.1.1). The FAM states that the B-2 nonimmigrant visa is for aliens arriving in the United States for purposes of tourism or to make social visits to relatives or friends. 9 FAM § 41.31 n.10.1. Under the INA, an alien can obtain a B-2 visa in order to temporarily enter the United States for pleasure. 8 U.S.C. § 1101(a)(15)(b). The Code defines pleasure as legitimate activities of a recreational character, including tourism, amusement, visits with friends or relatives, rest, medical treatment, and activities of a fraternal, social, or service nature. 22 C.F.R. § 41.31(b)(2). Much like the B-1 visa, the FAM contains a list of certain permissible activities that may be carried out with the B-2 visa. Such activities include visits for the following:

- medical reasons;
- participation in social events, including conventions, conferences, or convocation of fraternal, social, or service organizations;
- armed forces dependents of an alien member of any branch of the U.S. armed forces temporarily assigned for duty in the United States;
- dependents of crewmen coming to the United States solely for the purpose of accompanying the principal alien; and
- aliens coming to the United States primarily for tourism who also will engage in a short course of study during their visit.

9 FAM § 41.31 n.10.2–10.6.

If the alien is coming to the United States for a vacation and needs to obtain a B-2 visa, the alien would want to provide evidence to the consular officer that includes the following:

- proof of foreign employment to help establish ties to the foreign country (9 FAM § 41.31 n.2.6);

- proof of foreign residence, evidencing ties to a foreign country (9 FAM § 41.31 n.2.6);
- adequate bank account or finances (9 FAM § 41.31 n.2.1);
- specific information regarding the alien’s trip (including itinerary and the names or relationship of the persons who will be traveling with him or her) (9 FAM § 41.31 n.2.3);
- the requested period of time for the trip is consistent with the stated purpose and not expressed as “maximum period allowable” (9 FAM § 41.31 n.2.4–2.5);
- the existence of close family relationships in the aliens home country (9 FAM § 41.31 n.2.6);
- evidence that alien can support his or her children and spouse abroad while the alien is absent, if the alien is the primary wage earner (9 FAM § 41.31 n.2.7); and
- any other information that shows intent to return to the country of residence upon the expiration of the alien’s lawful stay in the United States.

Attorneys should remember, too, as stated previously, the DS-156 nonimmigrant visa application form and supplement DS-157 where appropriate (if male and between the ages of sixteen and forty-five), are necessary to complete and present to the consular officer along with the visa fee and photographs. The consular officer must be satisfied that the alien

- will return at the end of the temporary stay;
- has permission to return at the end of his or her trip to the United States; and
- has adequate finances to effectuate both the purpose of the trip and the departure from the United States.

22 C.F.R. § 41.31(a)(1)–(3).

§ 2.3.1 Duration of Admission

The length of time granted to the B visa holder is usually six months. However, the aftermath of the September 11 attacks have made immigration inspectors more

cautious of unspecified length of stays with nonspecific intentions upon arrival at a the port of entry. While the DHS has withdrawn the proposed regulations discussed previously on limiting visits based upon intent of the alien and discretion of the immigration inspector, the alien should still make an effort to detail the trip and the needed length of stay, so as to avoid an immigration inspector limiting the aliens stay due to lack of detail for the trip.

§ 2.3.2 Visa Issuance

Assuming that the alien has not overstayed any previous visits to the United States and that the alien has presented the proper evidence to the consular officer, the visa should be issued upon the completion of security checks. The consular officer must be satisfied that

- the alien has a foreign residence that the alien will not abandon;
- the stay is of limited duration; and
- the intent of the entry is for the purpose of engaging in legitimate activities relating to pleasure.

9 FAM § 41.31 n.2.

Depending on the location of the consulate and the alien's immigration history, the visa that is issued can be valid for anywhere from three months and one entry to ten years and multiple entries.

§ 2.3.3 Extend/Change Status

Once in the United States, the B-2 visitor for pleasure, just like the B-1 business visitor, may apply to extend the stay or change status to another nonimmigrant status. The extension of stay is filed with the service center that has jurisdiction over the state where the alien is residing. Once again, the alien would file Form I-539 with the appropriate service center—which can be through <http://www.immigration.gov>—and would also have to file additional documentary evidence to explain the necessity for the extension and also that the alien can still meet the initial criteria for issuance of a nonimmigrant visa.

Practice Note

The USCIS service center usually will request a letter from the alien's foreign employer stating that

- the employer is aware of the alien's request to stay longer in the United States,
- the extended stay will not interfere with the alien's job, and
- the job will be available to the alien when the alien returns to the foreign country.

The alien should also provide new bank records and a notarized affidavit-type letter that explains in detail the need for the additional time in the United States.

A change of status to another nonimmigrant visa is possible as well. During the current recession, a commonplace event has been to change H-1B visa holders into B-2 visa holders while they wrap up their affairs and return home. The B-2 visa allows the H visa holder to remain in legal status and also to conclude his or her affairs in a more reasonable fashion. When filing the I-539 for a change of nonimmigrant status (same form as used for extension of status), the alien should file a notarized affidavit type letter stating the reason for the change of status to B-2 and state in detail the plan for the time remaining.

§ 2.3.4 B-2 Visa to F-1 Visa

Prior to September 11, a common event was the change from B-2 visitor to F-1 student upon arrival in the United States. The alien would begin school immediately without a consular interview and then change status to a student. This process was quite simple. This practice has been preempted by the DHS filing an interim regulation on April 11, 2002, that prevents B-1 or B-2 visa holders from attending school without first obtaining approval of a change of status request to student status. The alien also has to go through a consular interview as a student in order to change to that status. The alien can then reenter the United States as a student. An alien who enters the United States as a prospective student and informs the consular officer at the interview and the immigration inspector at the time of admission that the alien is specifically coming to the United States to look for the appropriate school, may change status to that of a student after admission without exiting the United States. However, the immigration inspector must mark the alien's I-94 as a prospective student for the change to be allowed.

§ 2.3.5 Fiancés and Fiancées

The FAM states that other aliens may also be issued B-2 visas in certain situations where another nonimmigrant visa is not appropriate. Fiancés or Fiancées of U.S. citizens and even lawful permanent residents (LPRs) may enter the United States with a B-2 visa for the purpose of marrying the U.S. citizen or LPR if the

consular officer believes that the alien will return to a foreign residence after the marriage. 9 FAM § 41.31 nn.11.1-1 to 11.1-2. In the case of an LPR, the alien fiancé or fiancée can apply to change status to that of the nonimmigrant spouse. 9 FAM § 41.31 n.11.1-2. The consular officer may also, provided that the officer is satisfied that the fiancé or fiancée intends to return to the foreign residence, issue a B-2 where the alien fiancé or fiancée is entering the United States to

- meet the family of the fiancé or fiancée;
- become engaged;
- make arrangements for the wedding;
- renew a relationship with the prospective spouse.

9 FAM § 41.31 n.11.1-1.

§ 2.3.6 Other Matters

Other aliens who may be appropriately granted B-2 visas for admission to the United States are certain nonimmigrant dependents such as nonspouse partners of nonimmigrants working in the United States. 9 FAM § 41.31 n.11.4. Furthermore, members of the armed forces and their dependents who are specifically seeking naturalization under Section 329 or 322 of the INA may also be issued B-2 visas. 9 FAM § 41.31 nn.11.5–11.6. Parents of F-1 students may obtain B-2 visas and extensions where necessary, as long as they maintain their temporary intent. 73 Interpreter Releases 970–71 (July 22, 1996).

When advising alien clients who seek admission on a B visa, attorneys should be certain to let the alien know that issuance of the visa does not guarantee admission to the United States. Many of the B-2 scenarios listed above are unusual uses of a B-2. The more exotic the B-2 (B-2 fiancé or fiancée not on a K visa), the more likely that the immigration inspector at that port of entry will not be able to ascertain the intent of the alien. This is an immigration attorney's biggest concern. The decisions made at ports of entry across that country can vary greatly due to experience and knowledge of the immigration inspector. Attorneys would be well advised to have their B-2 alien client bring copies of all of the papers submitted to the U.S. embassy or consulate overseas when the visa was issued. Since an immigration attorney cannot be there at the port of entry when the B-2 alien enters, the B-2 visa package that was prepared can speak volumes for the alien in expressing through documents what the alien might not be able to express verbally.

§ 2.4 VISA WAIVER PROGRAM

The VWP allows an alien from a preapproved list of countries to enter the United States without a visa as a B-1 visitor for business or a B-2 visitor for pleasure for a period up to ninety days. 8 U.S.C. § 1187(a)(1). The regulations for the VWP can be found at Section 217 of the INA and at 8 U.S.C. § 1187. Currently, aliens who are nationals of the following twenty-seven countries may enter the United States without a visa under the VWP: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.

Example

An alien from Italy contacts an attorney's office regarding a business trip that he or she must make to the United States for the purpose of negotiating a contract. The alien states that the time needed to stay in the United States is about seven days. Does he or she need a

(Text continues on p. 2-23.)

visa? The answer is no, assuming that the attorney verifies that the alien holds an Italian passport and has not been found to be a violator of the VWP in the past. If the alien told the attorney that he or she needed 100 days (as it was a complex, multimillion dollar negotiation), then he or she should be advised to apply for a B-1 visa so that he or she might stay in the United States for more than ninety days without interruption and not violate the VWP status.

Aliens entering the United States under this program under either B-1 or B-2 categories will be issued what is known as WB (waiver for business) or WT (waiver for tourist) status. The INA requires that the alien must be from one of the above-named countries and have a round-trip ticket. 8 U.S.C. § 1187(a)(8). The PATRIOT Act of October 26, 2001, requires in addition to the above that the VWP alien must have a valid machine-readable passport from that country that is valid for at least six months beyond the intended visit by October 1, 2003, to continue using the program. 8 U.S.C. § 1187(c)(B). See § 2.2, above, discussing the change of this date to October 26, 2004, for certain VWP countries. If the alien is arriving by way of a land border, the alien must provide, in addition to what is listed herein, proof of foreign residence and the ability to finance the stay in the United States.

The obvious advantage to using the VWP entry process is that there is no delay in waiting for a visa to be issued abroad. However, VWP aliens do give up certain rights as well. Visa Waiver Program aliens cannot change their status to another nonimmigrant status once they are admitted onto the United States. Visa Waiver Program aliens also cannot extend their status should an unexpected circumstance arise that requires an extension of time. The VWP alien may adjust status in certain situations. The only adjustment of status allowed for a VWP alien is on the basis of an immediate relative petition (i.e., marriage to a U.S. citizen). INA § 245(i). Otherwise, adjustment of status is not allowed and the alien will have to leave the United States and process the adjustment of status through consular processing.

The VWP alien cannot challenge a denial of admission by an immigration inspector as the VWP alien waives this right. 8 U.S.C. § 1187(b). The only way for a VWP alien to receive a hearing before an immigration judge is if the alien is claiming asylum, is withholding, or is under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). If a VWP alien is found by the immigration inspector to have violated the terms of the VWP on a previous entry, the alien will be denied admission to the United States and will be barred from using the program. The alien will then be sent home on the next available flight. 8 C.F.R. § 217.4(c)(2). In order to reenter the United States in the future, the alien will likely have to apply for a visa at the embassy or consulate abroad and apply for a waiver of

inadmissibility. INA § 212(a)(9)(A). This too is how the VWP alien would essentially “appeal” the finding of the immigration inspector—the alien would file for a traditional visa with the embassy or consulate abroad. 8 U.S.C. § 1187(g). If the visa is refused too, the alien is likely out of options to enter the United States. The other option for an attorney to discuss with the client who he or she believes may have difficulty with a VWP admission is to withdraw the application for admission, which will avoid a removal and future finding of inadmissibility; however, withdrawal is allowed at the discretion of the immigration inspector. 8 C.F.R. § 1235.4.

Since the B-1 and B-2 visa applicants have to provide certain evidence to the consular officer and then to the immigration inspector to establish visa qualification and admission, what evidence then does the VWP alien have to provide? According to the INA, the VWP alien must

- meet the requirements for a nonimmigrant visitor for business or pleasure as defined under 8 U.S.C. § 1101(a)(15)(B);
- establish that the alien seeks to enter the United States for a period of ninety days or less;
- present a machine-readable (after October 1, 2003) passport from a program country that is valid for six months after the conclusion of the entry (See § 2.2, above, discussing the change of this date to October 26, 2004, for certain VWP countries.);
- possess a completed and signed I-94W nonimmigrant visa waiver arrival/departure form;
- have identity checked against lookout database for ground of inadmissibility with none found;
- waive right to administrative or judicial review as to immigration inspector’s decision on admissibility;
- waive right to challenge removal, if necessary, other than for asylum, withholding, or UNCAT; and
- possess a round-trip ticket.

INA § 217.

A VWP alien must be certain to abide by the terms of the admission. Failure to do so can result in serious consequences. The VWP alien should be advised to return to their country of origin or a noncontiguous country prior to the expira-

tion of the ninety-day period. Often times VWP aliens, either on their own initiative or through erroneous advice, believe that a trip to Canada or Mexico will allow them to receive a new ninety-day period upon “readmission” to the United States. This is not true. A VWP alien who leaves the United States for Canada on day seventy-eight and returns to the United States seven days later will be admitted for five days only. 8 C.F.R. § 217.3(b). The VWP alien who overstays the ninety-day period, if discovered, will likely be barred from using the VWP in the future and will have to apply for a visa in his or her home country.

Practice Note

Any alien, whether VWP alien or B-1/B-2 visa holder, who stays in the United States beyond their authorized period of admission for more than six months or one year is subject to what is called the “three- and ten-year bar” under Section 212 of the INA. What this means is that if the VWP alien stays in the United States for more than six months beyond the date of authorized stay on their I-94 or I-94W, the alien will be barred from returning to the United States for three years. If the alien stays more than one year past the authorized stay on the I-94 or I-94W, the alien is barred for ten years from being admitted to the United States. This rule applies to B-1 and B-2 visa holders, as well as VWP aliens.

With all of these warnings said, there is naturally a rare exception. In the case of an emergency, the DHS can grant a departure no later than thirty days from the I-94W stated departure date. 8 C.F.R. § 217.3(a). Assuming the VWP alien departs during the allotted period of extension, there will be no violation of the alien’s VWP status. 8 C.F.R. § 217.3(a). Emergency extensions under the VWP are few and far between. Urge the client to do whatever is necessary to effectuate departure before initiating an extension request. If an attorney does undertake an emergency VWP extension, he or she would be well advised to collect as much documentary evidence as possible and the reason should be on the extraordinary side.

The VWP is certainly an excellent tool for the business and pleasure visitor who has a short, well-planned stay. However, attorneys should be certain to discuss with the client in advance the potential problems with VWP, such as the inability to gain an extension should it become necessary. An attorney will likely find that after discussing the VWP with the client, that about 30 percent will prefer the traditional visa due to the unexpected nature of business and international travel. While the delays in the embassies and consulates can cause inconveniences, the traditional visa can be valuable to aliens in some circumstances.

§ 2.5 CONCLUSION

The B visa is more flexible than most attorneys and aliens realize. The B visa is as valuable to those who are applying for admission to the United States as it is to those who are applying to change their status from within the United States. From the B-1 business applicant who is trying to close a major deal in the United States to the H-1B visa holder who is changing status to B-2 for the purpose of preserving legal status and potential portability of the H-1B in the future, the B visa is the ultimate vehicle. If used correctly, it can accomplish many purposes.

§ 2.6 SOME USEFUL SOURCES

The following list includes some useful sources:

- the AILA Web site (<http://www.aila.org>);
- the USCIS Web site, which contains the current version of Title 8 of the Code of Federal Regulations and other useful information (<http://www.immigration.gov>);
- the U.S. Department of State Web site (<http://www.state.gov>);
- the foreign trade information system for NAFTA questions (<http://www.sice.oas.org/trade/NAFTA/NAFTATCE.asp>);
- the Department of Homeland Security Web site (<http://www.dhs.gov>); and
- the notes contained in 9 FAM § 41.31 (May 2003), *available at* <http://foia.state.gov/regs/search.asp>.