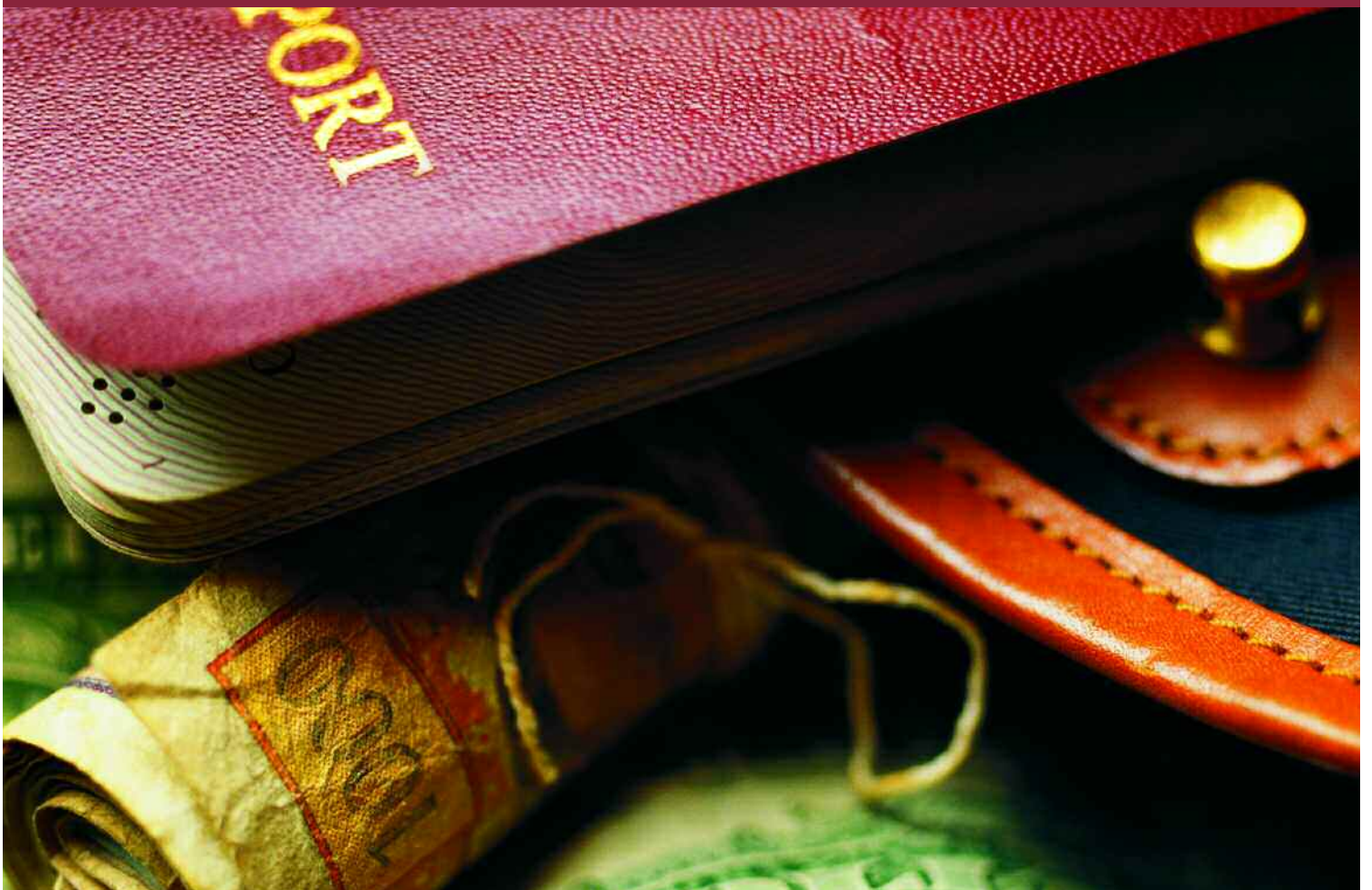


DOING BUSINESS IN THE U.S. – VISA CONSIDERATIONS

**ACCESS
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ADVICE, STRATEGY AND KNOW-HOW
ON DOING BUSINESS IN THE AMERICAS



Doing Business in the U.S. – Visa Considerations

By Deirdre O'Brien of O'Brien and Associates



INTRODUCTION

The topic of U.S. work visas is of great relevance to Irish companies today, particularly to those in the technology sector. While emigration from Ireland in the traditional sense is a thing of the past, U.S. work permits are a business necessity for many Irish executives and professionals in digital media, e-business, information technology, biotechnology, and other industries.

While the scope of this booklet does not permit any real treatment of changes in U.S. immigration policy and procedure post-9/11 – a subject worthy of a tome in itself – it is necessary to highlight some real and practical effects of heightened scrutiny on travel to the U.S. at some points in the discussion.

U.S. immigration laws are complex, highly regulated and constantly changing. Specialized legal advice is absolutely necessary and treatment of the topic in this booklet is general only. In a general sense therefore, this booklet covers options available to executives and professionals desiring to work and live in the U.S. and exploring common pitfalls and widespread myths about U.S. immigration rules and practice.

The topics are treated in a sequence which generally mirrors the needs of foreign nationals and companies as they develop. Initially, business contact with the U.S. may be tentative and exploratory. The visa waiver program – visa-free travel to the U.S. – is suitable for infrequent and short trips at this stage.

At some point however, the nature of company dealings with the U.S. changes; real business is now being conducted and the length and frequency of trips may be increasing. Also increasing is the level of scrutiny and questioning at the U.S. border or at pre-flight inspection at Shannon and Dublin. It may be wise at this stage to find out whether a B-1 visa is appropriate.

The next stage of business development in the U.S. frequently requires the presence there of one or more executives or managers on a longer term basis. The purpose of travel has now changed. At this juncture many Irish companies will stall. With one leg on either side of the Atlantic, they find it hard to grasp the nettle and many companies will stay in immigration limbo until some crisis or near-crisis prompts them into action. The advice at this point? Just do it! Take proper advice and steps to address your company's immigration needs.

Finally, when immigration limbo is a thing of the distant past, some temporary workers may wish to stay indefinitely or permanently in the U.S. and pursue a 'Green card' application, either through work or marriage to a U.S. citizen. And they all live happily ever after – at least in immigration law terms!

VISA WAIVER PROGRAM and B-1/B-2 VISITORS FOR BUSINESS/PLEASURE

The continuing need to transact business internationally with minimum restriction is vitally important to global business and business people. Key company personnel must have the flexibility to travel to foreign countries to conduct business affairs on short notice. The Visa Waiver Program (VWP) allows nationals of certain countries, including Ireland and the United Kingdom to travel to the U.S. visa-free, for business or pleasure, for up to ninety days. The B visa – B-1 for business and B-2 for pleasure – is identical to the visa waiver in terms of eligibility criteria and permissible activity, but requires attendance at a U.S. embassy for interview and may be granted for six months or more. The B-2 visa is available for tourists and for certain kinds of medical treatment. Our concern is with visa waiver for business (noted 'WB' for 'Waiver Business' in passports) and the B-1 visa for business.

Eligibility Factors for Visa Waiver (Business) and B-1 visa

There is a presumption on the part of consular and immigration officers that every applicant for a U.S. visa intends to permanently remain in the U.S. – a presumption of 'immigrant intent' which the applicant must rebut. The relevant questions are whether the applicant:

- intends to leave the U.S. at the end of the temporary stay;
- has permission to enter a foreign country; and
- has made adequate financial arrangements to carry out the purpose of the visit and then depart the U.S.

Consular officers are advised to rely “primarily on the interview itself and only minimally on the supporting documentation”, (Foreign Affairs Manual), so the interview is extremely important. Although to be relied on minimally, it is nonetheless important to present evidence of adequate finances and social, economic and family ties to the home country.

The applicant’s immigration history is obviously also a factor.

As stated earlier, the eligibility for visa waiver is the same as for B-1 visa. It is advisable to avoid risking refusal under visa waiver at all costs, because one refusal means a lifetime ban on ever using the visa waiver program again. Instead, the business traveler must apply for a B-1 visa at the local U.S. embassy every time he/she wishes to travel to the U.S., and persuade the U.S. Consul that his/her purpose of travel falls within permissible activities of attending meetings, conventions, conferences or engaging in negotiations, consultations, or litigation.

Why might one be refused admission on visa waiver? If one’s passport shows 6 months or more spent in the U.S. during the last 12 months, denial is a real possibility. The Department of State is concerned about the so called “revolving door problem”, whereby visa waiver travelers use temporary visas as a means to create permanent residency by leaving and returning frequently. It is no longer enough to sport a business suit and produce a business card showing executive status with an Irish-based company. If your passport shows frequent trips of more than a week or so over a short period of time, you may be refused. There are only so many meetings you can attend after all, and the question arises, what are you doing the rest of the time?

Allowable Business Activity for Visa Waiver (Business) and B-1 visa

Assuming the applicant passes the eligibility test, the next step in the process is showing that the proposed business activity is permissible for this visa category. It is easier to list the activities which are allowed than to define what constitutes “employment” in violation of B status, because decisions on the latter are conflicting and fact driven. In any event, business that is not employment is permitted and includes:

- engaging in activities appropriate to a member of a board of directors of a U.S. corporation, (directive rather than executive);
- conducting litigation;
- negotiating contracts;
- consulting with business associates;
- participating in scientific, educational, professional or business conventions, conferences or seminars; or
- undertaking independent research.

Investors seeking an investment in the U.S. which would qualify them for Treaty Investor classification (E-2 visa) – may enter as B-1 visitors, as long as they do not perform productive labor or actively participate in the management of the business prior to being granted E-2 visa status.

The following business activities are classifiable as B-1 in appropriate circumstances, although they may also be classifiable under one of the non-immigrant visas:

- Commercial or industrial workers coming to the U.S. to install, service, or repair commercial or industrial equipment or machinery purchased from a company outside the U.S. or to train U.S. workers to perform such services. However, in such cases, the contract of sale must specifically require the seller to provide such services or training and the visa applicant must possess specialized knowledge essential to the seller’s contractual obligation to perform the services or training and must receive no remuneration from a U.S. source;
- In the building or construction industry, only applicants coming to the U.S. for purposes of supervising or training other workers engaged in building or construction work may be classified as B-1 visitors. Those who actually perform building or construction work are precluded from admission in B-1 status; and

It may be advisable to keep these provisions in mind when contracts are being drafted.

Regarding activities prohibited for B visa holders, clearly local labor for hire is prohibited. What is not so clear, however, is what business activities cross the permitted line, as very similar cases have been decided very differently. A Hong Kong tailor who entered the U.S. to measure customers was granted a B-1 visa, while a Canadian engineer who traveled to the U.S. to consult with clients was denied a B-1 visa.

Suffice to say each case will turn on its own facts but the following factors will guide a consular officer:

- whether the businessperson’s activities are directed by a foreign employer;
- whether profits from the business activity will accrue abroad;
- whether services rendered in the U.S. are incidental to international trade or contracts (e.g., exchange of merchandise);
- whether there are various U.S. entries of a plainly temporary nature;
- whether services being performed are not ones which a U.S. worker would have to be hired for, are not inherently part of the U.S. labor market and are not primarily benefiting the U.S. entity as local work; and
- whether the source of remuneration is from the U.S. or abroad.

In all cases it is important to have documentary evidence with regard to the planned activity. Although the consular officer may rely largely on the interview with regard to eligibility, proof of reservations for hotel, car, conference facility and well-prepared itineraries, etc., will help the consular officer to make a favorable decision on the purpose of travel issue.

Some travelers to the U.S., business or otherwise, are unfortunate enough to end up on a 'terror list', either randomly or because of a last minute airline ticket purchase, one-way ticket purchase, cash rather than credit card purchase, or similarity in name to someone else. If this happens, your airline ticket will be designated 'SSSS' meaning you are Selected for Special Security Screening and will receive SS-like treatment! For more information on this topic, see www.tsa.gov

Finally, the Department of Homeland Security (DHS) recently announced implementation of the Electronic System for Travel Authorization (ESTA), which will begin to accept voluntary applications on August 1, 2008. ESTA is a new fully automated, electronic system for screening passengers before they begin travel to the United States under the Visa Waiver Program (VWP). ESTA applications may be submitted at any time prior to travel to the United States, and VWP travelers are encouraged to apply for authorization as soon as they begin to plan a trip to the United States. It is anticipated that ESTA will become mandatory for VWP travelers on January 12, 2009. To learn more about ESTA see the DHS Customs and Border Protection website <http://www.cbp.gov>

NON-IMMIGRANT VISAS – Temporary Stay

U.S. employers seeking to employ foreign nationals temporarily in the U.S. may choose from several non-immigrant classifications. There are over sixty types of non-immigrant visa for entry into the U.S., but the L, E, and H visas are the most common for international business personnel. Foreign companies who have not yet incorporated in the U.S. may need to do so for some categories in order to qualify as a U.S. employer capable of sponsoring a foreign worker.

'Non immigrant' means 'temporary', and refers to intention as much as period of stay. Most of these visas are issued for several years.

The L visa is an intra-company transfer visa available to managers, executives and specialized knowledge workers being transferred to a U.S. subsidiary or branch. The employee must have worked in one of these capacities with the Irish company for one year or more within the previous three years. He/she may be eligible for an L-1A visa to perform managerial or executive duties for the company in the U.S., or an L-1B visa to perform duties requiring specialized knowledge. There is also a 'functional manager' category, which may come to the rescue if there is no staff in the U.S. to supervise or manage.

It is usually necessary to incorporate in the U.S. as a step towards qualifying for an L visa, and while Immigration Service in the U.S. (formerly 'INS', now 'USCIS') will grant L visas to new companies, any foreign company which has not been doing business in the U.S. for one year or more is subject to closer scrutiny than an established business. In addition, new company employees are eligible for an L visa for one year only, as compared with usual initial three year term for L-1 visas. The one-year L visa is renewable for the usual term, once USCIS is satisfied that the business is viable, but this involves the company in extensive documentary evidence and the expense of a new application.

L-1 visas are very useful for at least two reasons: firstly, spouses of L-1's may obtain employment authorization, and secondly, the L-1A is a fast track to a 'green card' for individuals who were employed abroad with a qualifying organization (e.g., parent, subsidiary or affiliate of a U.S. company) in a managerial capacity prior to transferring to the U.S. In these cases it is not necessary to advertise the job and make recruitment efforts to prove there are no U.S. citizens qualified and available for the job. The avoidance of this process, known as labor certification, is a significant advantage for L-1A holders.

Finally and very importantly, Immigration Service offers an expedited processing service known as premium processing, in return for payment of an additional \$1,000 filing fee. This guarantees processing of the petition within two weeks or refund of the \$1,000 fee. Otherwise, determination of a petition by Immigration Service can take four - six months, during which time the worker cannot commence employment with the sponsoring company. Of course if matters are planned well in advance, it may be possible to avoid payment of the premium processing fee but many employers are happy to avail of the expedite service.

The L-1 visa is a 'dual intent' visa, meaning an L holder may apply for lawful permanent residence without jeopardizing his/her temporary L visa.

E Treaty Trader and Treaty Investor visas are issued pursuant to bilateral treaties of friendship, commerce or investment between the U.S. and other countries, including Ireland and the United Kingdom. The nationality of a business is determined by the nationality of its owners, not the place of incorporation, and nationals of the treaty country must own at least 50% of the business in question. A foreign national who is an employee of a qualifying company must share the nationality of that company and must be employed in a supervisory or executive capacity or if non-supervisory, must be an essential employee with special qualifications. Ordinary skilled and unskilled workers do not qualify with one exception - with regard to employees needed for start up, visas may be granted for a limited period of time only. It is presumed that U.S. workers will be trained within two years.

Regarding E-1 (Treaty Trader) visas for Irish companies, the U.S. company must be at least 50% owned by an Irish-owned company or it must be 50% directly owned by Irish nationals who are not lawful permanent residents ('green card' holders) of the U.S. The company must document that it is engaged in "substantial trade" between the U.S. and Ireland, meaning engaged in regular and frequent trade in goods or services between the U.S. and Ireland which accounts for more than 50% of the U.S. company's trading revenues.

In the case of E-2 (Treaty Investor) visas, the Irish company must have made a “substantial investment” in the U.S. company. “Substantial investment” is not defined by a minimum dollar amount. The Department of State uses a proportionality test to weigh the investment against the total value of the business, or the usual amount needed for successful similar businesses, to determine whether a substantial investment has been made. Small and medium sized businesses should generally plan to invest at least half of the value of the business or the usual amount required to start up similar businesses.

As with L-1’s, the spouses of E visa holders are eligible for work authorization, and like the L-1A for individuals who were employed abroad with a qualifying organization in a managerial capacity prior to transferring to the U.S., the Treaty investor may fast track to a ‘green card’ by skipping the labor certification process. E visas are issued for a period of five years or less but renewable indefinitely so long as conditions of eligibility continue to be met.

Regarding processing, E visas are generally consular processed - by the U.S. Embassy in the home country and not by the Immigration Service in the U.S. Turnaround time will depend on the particular embassy, time of year, etc, and can take up to two months or more.

The H-1B visa is a professional visa for foreign degree holders being sponsored by a U.S. employer for a professional position. Both the job and the employee must be professional. There are non-precedent decisions supporting the right of a corporation to petition for H-1B visa for its owner - an extremely useful option for enterprising professionals. For those who do not have a university degree, work experience may be combined with educational credentials for a degree equivalency in the relevant field. U.S. credential evaluation services evaluate for this purpose, and it is accepted by Immigration Service for H-1B purposes that three years of relevant experience equals one year of university. This equivalency rule proves extremely useful for computer technology professionals, many of whom took early leave of college during the dot.com era without that important piece of paper, but whose training and work experience include the practical application of specialized knowledge required of an information system professional.

The downside of this otherwise broadly applicable visa is an annual cap of 65,000 (which is in fact 58,000 because of ‘free trade’ visas reserved for Chile and Singapore). Fiscal year for U.S. immigration is October 1st to September 30th and on April 1, 2008, USCIS announced that the quota for FY 2009 had been reached, with no new H-1B visas available until October 1, 2009 (with petitions being accepted as early as April 1, 2009). The scarcity of H-1B visas is a serious drawback placing this otherwise important category way down the list of preferred visas.

One exception is that petitions for new H-1B employment are exempt from the numerical cap if the non-national will work at an institution of higher education or a related or affiliated nonprofit entity, or at a nonprofit research organization or governmental research organization. Thus, employers may continue to file petitions for these exempt H-1B categories regardless of H-1B visa number availability.

H-1B visas are issued for three years and renewable for another three, for a total of six years (annual post-6th year extensions are available to individuals who have begun the process of applying for a green card through either labor certification or by filing an immigrant visa petition at least 365 days prior to the end of their 6th year in H-1B status). Spouses of H-1B visa holders may accompany the H-1B holder but (unlike spouses of L and E visa holders) may not obtain employment authorization through their spouse and must qualify for a visa in their own right if they wish to work in the U.S. There is no fast track to ‘green cards’ for H-1B holders. Like the L visa, the premium processing expedited service is available to H-1B applicants and the H-1B is also a ‘dual intent’ visa which means the holder may apply for ‘green card’ without jeopardizing his/her temporary H-1B visa.

I visa is available to representatives of foreign press, radio, film, or other foreign information media.

O-1 visa is for aliens of extraordinary ability in the sciences, arts, education, business, or athletics. It is a useful alternative in appropriate cases where a business person does not qualify for an H, L or E and it is helpful in some cases to business people lacking professional degrees. The standard for “extraordinary” is very high and the successful applicant requires extraordinary ability demonstrated by sustained national or international acclaim.

Note on Filing Fees: The topic of filing fees is always of interest to business people and USCIS filing fees are quite considerable for L-1s and H-1Bs. Additional filing fees have been imposed in recent years to fund increased security measures and appease anti-immigration lobbyists. Effective July 30, 2007, Congress approved significant increases to filing fees which, ostensibly, will allow USCIS to recover its costs of doing business while meeting national security and public safety concerns. Of course, this also has the effect of causing employers to hire local rather than foreign workers. Sometimes, however, local labor will not fill the need, whatever the reasons, and planning immigration issues in advance may save money and increase options. Treaty Trader and Treaty Investor (E-1/2) visas are a good long-term strategy in many cases, as petitions are processed by the Department of State (U.S. Embassy) whose fees are nominal in comparison with those of Immigration Service in the U.S. Once the employers are registered as Treaty Traders or Treaty Investors, eligible employees will also qualify for E visas, again a much more economical process than applying for L-1 or H-1B visas. E visas also have the advantage of not requiring prior service with the company abroad (as with L-1 visas) and not being subject to a quota (as with H-1B visas).

VISAS FOR STUDENTS AND TRAINEES

The J visa for trainees and F/ M classifications for academic/vocational students may provide an alternative in certain circumstances for U.S. employers wishing to hire foreign workers.

J-1 trainee visa is an interesting possibility for foreign nationals who might not fit other categories. Most people will associate the J visa with students but it is an option available to trainees who wish to enter the U.S. temporarily to train in their chosen career or profession, with a view to returning to the home country and applying skills acquired while in the U.S.

Many large organizations apply for authorization to act as a J program sponsor, however there are organizations designated by the U.S. Department of State as J program sponsors (“umbrella programs”) who will issue the required documentation to approved applicants to enable them to obtain a visa from a U.S. Consul to train with a U.S. host employer.

In order to be approved, the applicant needs a host employer in the U.S. who will train him/her in the relevant field for a period of up to eighteen months (up to 12 months in the hospitality industry) and a training program must be approved by the sponsoring organization.

The J-1 is available to professionals and highly skilled and paid individuals as well as young workers beginning their careers, and is worthy of consideration when other options are limited or unavailable.

F and M holders may provide an easy fit in certain circumstances, because these students are permitted to engage in practical training in the U.S., following completion of their U.S. educational programs.

F-1 visas are available to foreign nationals qualified to pursue a full time course of study in the U.S. There are strict regulations governing foreign student programs at all levels following the events of 9/11 which are not discussed here. What may be of interest to employers is that F-1 students are permitted to engage in one year of practical training after every new program at a higher academic level (plus an additional 17 months for Science, Technology, Math or Engineering (STEM) graduates who are employed by an employer registered with the “E-Verify” federal employment verification system). This means that many entry level graduates are available to work for one year or more, without having to obtain an additional visa.

M-1 visas are similar to the F-1 category, but M-1 visas are for vocational rather than academic courses and practical training is limited to six months.

H-3 visas are training visas requiring a structured training plan and evidence that the training to be given is not available in the alien’s home country. H-3 visas are available for the length of the training program but not to exceed two years.

IMMIGRANT VISAS – Permanent Stay

Lawful Permanent Residence is commonly referred to as the ‘green card’, notwithstanding the fact that the card has not been green for many decades – it’s now pink. Application for a ‘green card’ is known as adjustment. Some temporary visa categories may provide faster tracks to the ‘green card’ so it is worth taking the bigger picture into account when deciding on which visa to apply for in the shorter term. While employment based ‘green cards’ are of most interest to business people, family based ‘green cards’ merit a mention for those fortunate enough to qualify.

Family Based Lawful Permanent Residence (‘Green card’)

Not all family relationships serve as a basis to apply for LPR status. There are two basic categories:

- Immediate relatives, including: spouses of U.S. citizens; minor (under 21) unmarried children of U.S. citizens; parents of U.S. citizens over 21; and spouses of deceased U.S. citizens in certain circumstances; and
- Preference immigrants, in order of preference: first, unmarried children of U.S. citizens over 21 years; second, spouses or children of ‘green card’ holders; third, married children of U.S. citizens; fourth, siblings of U.S. citizens over 21 years.

The process is reasonably fast for immediate relatives but takes many years for preference immigrants.

Employment Based Lawful Permanent Residence (‘Green card’)

The ‘green card’ process is lengthy and expensive but unavoidable for those who plan to stay in the U.S. permanently. Ideally, the non-national will be working in the U.S. in some other visa category while the process is winding its lengthy course, preferably with the employer who is sponsoring him/her for the ‘green card’.

There are five categories of employment based (EB) ‘green card’:

- First Preference, Priority Workers, (EB-1), includes Persons of Extraordinary Ability, Outstanding Professors and Researchers, and Multinational Executives and Managers (No Labor Certification Required).
- Second Preference, (EB-2), Advanced Degree or Exceptional Ability Aliens
- Third Preference, (EB-3), Skilled Workers, Professionals and Other Workers
- Fourth Preference, (EB-4), Special Immigrants, including Religious Workers, Returning Immigrants and others; and
- Fifth Preference, (EB-5), Investment and job creation

“Unless labor certification can be bypassed by filing a first preference petition, there are three stages to obtaining a “green card”

- Labor Certification now called PERM, (Program Electronic Review Management), which requires proving to the U.S. Department of Labor, after advertising and recruitment efforts, that no U.S. citizen is qualified or willing to do the job;
- The Immigrant Visa Petition;
- Adjustment of status (must be physically in present in the U.S.) or consular processing (requires an interview at the home consulate)

PERM which replaced the old labor certification process in 2005, has greatly expedited this erstwhile painfully slow process which is good news. The bad news, however, is that there are no visa numbers available in the most common category, EB-3 for skilled workers and professionals, which means that having cleared the first hurdle of PERM approval, applicants cannot progress the second stage of adjustment of status because there are no current visa numbers available. In October 2005 adjustment applications received an enormous setback when visa numbers were retrogressed, creating a backlog and setting back otherwise qualified applicants by several years. This situation was temporarily alleviated when visas were made available in all employment-based categories in July 2007. Naturally, thousands of waiting applicants rushed to file adjustment of status applications at that time. As a result, visa numbers have once again retrogressed. The current situation puts one in mind of being stranded at the airport in bad weather - everyone has a ticket but flights have been cancelled.

One could speculate about the manner in which visa numbers have been allocated in recent years with this effect of exhausting the quotas but whatever the reasons, the backlog has created a serious problem for the PERM system just as it was becoming extremely efficient. With more PERM approvals, the pool of potential adjustment applicants has substantially increased but the approvals cannot be used to file for adjustment until the priority dates are current again. Compare PERM to the once grand Concorde, sitting on a runway in bad weather, super fast, but going nowhere.

In the meantime, the PERM system is approving thousands of new labor certifications on a daily basis and although most of them will have to wait several years to adjust, many people are still pursuing EB-3 applications. If you're not in, you can't win and if you're already lawfully working in the U.S. in one of the temporary visa categories, you can at least live and work in the U.S. while you're waiting.

Of course, not everyone has been equally affected by the retrogression of visa numbers. The coveted EB-1 Aliens of Extraordinary Ability, Outstanding Researchers and Professors and Multinational Executives/Managers, and to a lesser extent, EB-2 (Advanced Degree Professionals) categories were less affected. Visa numbers for people from most countries in these categories are either available or only slightly backlogged and are expected to become current at the beginning of the new fiscal year. As a result, The Department of Labor has placed limitations on who qualifies as an EB-2 professional, with USCIS placing increased scrutiny on the already tough EB-1 category.

Diversity visas – lottery 'green cards'

The Diversity Immigrant Visa Program (DV program) is one of the most generous immigrant visa categories, with 50,000 visas allocated annually to nationals of countries with low rates of immigration to the U.S. Ireland and Northern Ireland are included in the list of "under represented" countries, but the U.K. is excluded. Qualifying requirements are minimal and it is truly a lottery where luck plays the biggest part. U.S. employers with affiliates in Ireland and N. Ireland might be well advised to encourage employees to apply. Information is freely available on U.S. Department of State websites, including, <http://travel.state.gov>.

Establishing a U.S. Business

It may be necessary to establish a U.S. entity for immigration purposes, as it is very often a prerequisite for obtaining U.S. visas. Delaying incorporation can have adverse consequences for the L-1 visa applicant, for example, as those in business in the U.S. for less than one year will be granted L-1 visas for one year only, instead of the usual three years.

Having a U.S. entity may also be advisable from a business perspective.

This section of the guide is designed to give non-U.S. companies and individuals a very brief overview of the issues involved in establishing a U.S. entity. Reference should also be made to the topic of acquiring a U.S. business, covered in the AskUS guide 'Crossing the Border: Key Legal Considerations in Acquiring a U.S.-based Company'.

It must be stated at the outset that specialist legal advice is essential on the location, structure and consequences of incorporation in the U.S. Usually the most important considerations are (i) avoiding personal liability for business debts and obligations; (ii) decision-making and control of the business; and (iii) the impact of tax laws.

A foreign corporation will usually form an 'Inc' (C Corp or S Corp) or Limited Liability Company (LLC) as both offer limited liability for the entity's debts and obligations.

A branch or authorization to do business in a particular state may also be considered. The use of a branch of a foreign corporation to operate a business in the U.S. presents significant complexity and definitely requires specialist tax advice. Please refer to the ACCESS AMERICAS guide 'Tax and financial considerations on doing business in the U.S.' in this regard. From an immigration perspective choosing a U.S. branch over a U.S. corporation can have adverse consequences for the treaty trader (E-1) visa applicant, as the global business of the corporation (rather than just U.S.) is taken into account when calculating whether the required 50% of the company's trade is with the U.S.

Regarding Authorizations to do Business, organizations formed outside the state where they intend to conduct business, called "foreign" corporations (whether formed in another state of the U.S. or in another country) generally may not do business in the relevant state unless authorized to do so. Delaware is very often the state of choice for corporations as it has a very favorable business environment from a legislative and judicial perspective but it is often not the state of the corporation's real presence, requiring authorization to do business in the other state/s.

It is clear that conducting an isolated transaction does not qualify as doing business, nor does soliciting orders via email or internet. If regular business is carried out however, proper authorization is required to avoid possible tax fines and penalties and to be permitted access to the courts of the particular state.

After consultation with accountants and tax/corporate lawyers on which entity type to establish and where, there are certain administrative matters which need to be dealt with.

1. Corporate name: check availability and reserve the name of choice.
2. Organizational documents: while it may seem easy to download precedent forms from many websites, it is important not to blindly follow any form.
3. Employer Identification Number: an EIN is like a social security number for a company and is required for many purposes, including sponsoring for visa purposes, tax registration and filings, and opening a bank account.
4. Individual Taxpayer Identification Number: an ITIN is required where a foreigner applying for an EIN does not have a social security number. This process can be unexpectedly tricky as IRS keeps changing the goalposts in respect of its requirements in this regard. Expert assistance is likely to be required.

CONCLUSION

It is perhaps fitting to conclude with a warning note. Irish business people wishing to transact business and work in the U.S. often procrastinate when it comes to establishing a presence and dealing with immigration issues, even when they have U.S. clients and the U.S. market is key to the success of the enterprise. Considering the benefits which can be derived from doing business in the U.S. and the serious consequences of visa denial for executives and specialized knowledge workers, the importance of proper planning and expert advice cannot be over-stressed. It is vital to obtain appropriate advice at the outset as mistakes in this minefield can cost dearly. With proper advice and planning, however, the journey can be relatively smooth and the destination worthwhile.



Deirdre O'Brien



O'Brien & Associates was established over eleven years ago as a New York law firm by Deirdre O'Brien, an Irish woman who graduated in law from Trinity College, Dublin and practiced as an Irish solicitor before moving to the U.S. in 1994.

O'Brien & Associates is an energetic boutique practice specializing in business immigration law with offices in New York (in the landmark Woolworth Building) and in Kilkenny, Ireland. It prides itself on a creative approach to the provision of legal services and its clients include many top Irish companies and individuals.

Deirdre O'Brien has been featured in articles in the New York Law Journal, the Irish Times and the Irish Voice. She has also been published in the Irish Law Society Gazette.

*Deirdre acted as a consultant in the preparation of the book *The Girl's Guide to Starting Your Own Business*, by Caitlin Friedman and Kimberly Yorio, published in 2003 by Harper Collins and enduringly popular.*

She has been interviewed by Irish TV and radio presenter Pat Kenny on RTE's Today Show in connection with American immigration law and policies, and in New York Deirdre hosted a weekly call-in show dealing with immigration questions for Voice of Eireann Radio. In June 2004, Deirdre was honored as one of "Ireland's Best" by the American Friends of James Joyce at New York's Yale Club for her professional achievements in the U.S.

Organizations of which Deirdre is a member include the American-Irish Lawyers Association, the American Immigration Law Association, the New York Bar Association, the Irish Law Society, and Trinity College Dublin Alumni Association.