



## March 2010 Immigration Update



**Topics: Basic options for companies looking to do business in the U.S.; Form DS-160 changes; and update to H-1B Visa Employer/Employee status.**

This month's alert includes basic information for companies looking to do business in the United States. Some of the information — in particular about Form DS-160 — is applicable to all foreign nationals traveling to the United States. We have also included a short paragraph about the recent Guidance Memo issued about the employer/employee relationships as it pertains to H-1B visas. We hope this information proves useful.

**Options for Companies Doing Business in the U.S.** The United States is open for business and encourages foreign investment, including foreign participation in energy, information technology, and other high-tech projects funded by the U.S. Stimulus Act (American Recovery and Reinvestment Act of 2009).

Fortunately, you will continue to find that U.S. immigration procedures encourage the opening of new offices in the U.S. and the expansion of business operations. However, you do need to know the “rules of the game” to avoid delays, particularly when transferring key personnel. With that thought in mind, we have listed below some pointers or highlights that explain helpful procedures. They also take into account the recent emphasis on security and anti-terrorism measures that you will encounter when applying for a work visa or just making a short business trip.

- Where available, use the popular Visa Waiver Program (VWP) for visits of up to 90 days without having to apply for a visa. There are over 50 million VWP visits each year to the U.S. for business and tourism. Citizens of many European and Asian

countries can use the VWP for such business activities as market research, meeting with customers, negotiating contracts or viewing possible sites for a new investment.

- Formalities, however, do matter when using the VWP. To meet security requirements, you must [register with the ESTA electronically](#) before boarding your flight. You should also make sure that your passport fully complies with VWP requirements and will not expire in less than six months. Take a copy of your planned itinerary and round-trip airline ticket, and disclose fully when asked at the arriving airport that you are here for business, not tourism. If you have any questions about the procedures, consult the website of your local U.S. consulate at least several weeks in advance of your trip. [For example, see the explanation of the VWP on the website of the U.S. consulate in Paris.](#)
- If your country does not participate in the VWP, you will have to apply for a B-1/B-2 visa to visit the U.S. Beginning January 2010, many U.S. consulates began requiring completion of the new, electronic Form DS-160 when applying for a visa. This form has more than 10 pages and cannot be easily completed, particularly at the last minute. It replaces the Forms DS 156 and DS 157, used for many years by travel agents in foreign countries, who may or may not be aware of the new form. Please check with your local U.S. consulate to confirm whether they are using the new DS-160.
- Due to continuing security issues, do not

### Williams Mullen Immigration Team

**William J. Benos, Chair**  
804.783.6402  
bbenos@williamsmullen.com

**Eliot Norman**  
804.783.6482  
enorman@williamsmullen.com

**D. Earl Baggett IV**  
804.783.6478  
ebaggett@williamsmullen.com

**Kathryn M. Carmichael**  
434.951.5701  
kcarmichael@williamsmullen.com

**Alyson E. Fickenscher**  
804.783.6495  
afickenscher@williamsmullen.com



assume you will receive your visa on the day of your interview. It is usually mailed out to you by Federal Express or another courier service within three days of your interview after a security or name check. For these reasons, do not book your flights until you have your visa in hand.

- If you are setting up operations in the U.S. for the first time, take advantage of the new Office L-1. This special visa is particularly useful for small and medium-size companies who are not making a large investment. It requires only the establishment of a U.S. bank account, the signing of an office lease, a business plan that will show how the U.S. office will generate revenues to support its operations, and proof that the U.S. office is a subsidiary or an affiliate of the foreign parent organization. You can use the new Office L-1 to transfer a manager or an employee who has specialized knowledge of your business processes or procedures, provided they have been employed in a managerial/executive or specialized knowledge position with your foreign company for at least one year.
- There are a number of E-1/E-2 trade and investment visas available for qualifying citizens of many foreign countries. You can consult an immigration advisor to see how your business can qualify and whether your use of this program makes sense. You can often use the E-2 to avoid the delays and larger capital requirements associated with the EB-5 Green Card program.
- To speed up visa issuance and eliminate many government fees, qualifying companies can utilize the Blanket L-1 and accelerated or expedited E-1/E-2 Visa Programs. These programs allow certain companies to apply for visas directly at the U.S. consulate without first filing any paperwork with or paying any fees to U.S. Citizenship and Immigration Services in the United States. Savings can be more than \$1,300 per visa.
- Finally, the U.S. Department of State has recently revised its J-1 Program to create

two classifications of exchange workers: trainees and interns. Many foreign companies use the J-1 program to provide opportunities to recent foreign graduates to gain productive experience in the United States from 12 to 18 months with their U.S. operations. The J-1 can be an attractive, low-cost alternative to using H-1B and L-1B visas and is not subject to any annual quotas.

With proper planning, you will find that the U.S. immigration program can help your business hire or transfer global talent for your U.S. operations.

**New Guidance Memo on Proving the “Employee-Employer Relationship” in H-1B Petitions.** On Jan. 13, 2010, USCIS issued updated guidance to adjudication officers clarifying the requirements to establish the employer-employee relationship required for H-1B petitions approvals. The memo looks at three categories of employment relationship: independent contractors, self-employed beneficiaries, and beneficiaries placed at third-party worksites. Suggested evidence to establish the relationship in these circumstances includes a complete itinerary of services or engagements; a signed employment agreement with the beneficiary; and/or relevant portions of valid contracts including statements of work, work orders, or service agreements with the end-user client. The adjudicator will use the submitted evidence to evaluate such factors including the manner and extent to which the petitioner actually supervises the beneficiary; the petitioner’s right to control the beneficiary’s daily work; and the petitioner’s right to hire, fire, and pay the beneficiary. Adjudicators are to look at the totality of the circumstances when determining whether a qualifying employer-employee relationship exists for H-1B purposes.

*For more information on these and other immigration developments, contact any member of our immigration team.*

Williams Mullen Immigration Update. Copyright 2010. Editorial inquiries should be directed to William J. Benos, Two James Center, 1021 E. Cary Street, Richmond, VA 23219, 804.643.1991.

This information is provided as an educational service and is not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel.

Please visit [www.williamsmullen.com/immigration](http://www.williamsmullen.com/immigration) for more information about the Williams Mullen Immigration Team.



WILLIAMS MULLEN  
Where Every Client is a Partner®