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# IMMIGRATION LAW - THE AMERICAS 2016

## VIRTUAL ROUND TABLE

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# Introduction & Contents

In this special Immigration Law Roundtable 2016 we feature the views and opinions of eight experts from North America. Our chosen experts share their knowledge and experiences regarding the latest trends and interesting developments. This roundtable discusses the development of immigration law under President Obama and how the landscape can change following the upcoming election. It features an insightful analysis on the American psyche with regards to immigration. There is also a detailed summary on the different types of visas available. Other highlighted topics include: current labour conditions and skill shortages, the outcome of a monumental Supreme Court ruling in July, and immigration issues for company formations by foreign nationals.

James Drakeford
Editor In Chief



## MEET THE EXPERTS

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Mike Allen focuses on business immigration. He assists growth companies, entrepreneurs and investors with strategies for bringing workers to the U.S. on a temporary and permanent basis. He also represents individuals sponsoring family members for legal immigration status and helps permanent residents obtain U.S. citizenship. Mike founded Advenienz Legal PLLC to deliver agile, efficient and cost-effective legal solutions for bringing top talent to America. He offers his clients broad corporate and business immigration law experience - from a big law firm, the legal department of a multinational corporation, and boutique immigration practices in both the U.S. and Middle East.

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Alice M. Yardum-Hunter, Certified Specialist and Former Commissioner, Board of Legal Specialization, California State Bar, has practiced business and family immigration law for more than 30 years. She has been honored annually as a designated "Super Lawyer" for the past 10 years, and for 2012 edition was on their Blue Ribbon Panel to assist the vetting process in choosing Super Lawyers. She is rated by Martindale Hubbell. Alice was the 2011 – 2012 Chair of the L.A. County Bar Association, Immigration Section. She has served on the Distance Learning Committee of the American Immigration Lawyers Assn., for which she has been a conference speaker and edited two books: California Chapters Conference Handbook and Practice Before the Department of Labor.

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Valentine A. Brown is a partner at Duane Morris LLP in the Employment, Labor, Benefits and Immigration Practice Group and is the Firm's Pro Bono Counsel. She serves as global immigration law counsel to a diverse group of multi-national and domestic corporations and their employees, providing advice, compliance audits and representation to help navigate the intricacies of US and foreign immigration laws. Ms. Brown also represents individuals in all types of immigration proceedings, including persons of extraordinary ability; spouses, fiancées and children of US citizens; naturalization and political asylum applicants; as well as respondents in deportation and immigration appellate proceedings. She is also a member of the firm's Cuba

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Ashley and his colleagues handle all areas of immigration law, with an emphasis on Business and Family Immigration law. Ashley has extensive experience working with the relevant government agencies such as the United States Citizenship and Immigration Services, United States Customs and Border Protection and the Department of Labor. His practice also assists corporations in securing work permits for U.S. nationals assigned in Europe, Asia and Africa. Ashley develops strategies for corporations in regard to their immigration needs and requirements.

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Matthew Morse has been an immigration attorney for twelve years, focusing on employment-based and family-based immigration law issues. He has extensive experience with H, L, TN, O, K, B visas, as well as with Labor Certifications, Visa Processing, Adjustment of Status, and healthcare worker immigration issues. Mr. Morse also has profound proficiency with Extraordinary Ability Alien cases, National Interest Waiver physician petitions, Outstanding Professor/Researcher petitions, Advance Degreed Professionals cases, Multinational Managers and Executives cases, and Naturalization law issues. Prior to practicing Immigration law, Mr. Morse practiced Gaming and Real Property Law, as well as Contract Law in Detroit, Michigan. Mr. Morse held internships with the Michigan Attorney General's Office, the Michigan Department of Environmental Quality and the Wayne County Prosecutor's Office.

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Roxanne Israel is a partner with EY Law LLP based in Calgary, Alberta with more than 10 years of experience in Corporate immigration. She provides strategic advice to companies with respect to Canadian and global immigration matters. Areas of specialty include visas, work permits, permanent residence, and citizenship. She also provides advisory services related to policy development, global immigration programs and risk management. Roxanne has specific experience conducting reviews and audits of existing corporate immigration programs to minimize risk and promote compliance. Roxanne earned a Bachelor of Arts degree from McGill University, an LLB from the University of Victoria and a Masters of Studies in International Human Rights law from Oxford University.

## TO VIEW RESPONSES - PLEASE SELECT A QUESTION



## What impact has globalisation had on immigration trends?

**Hunter:** Globalisation has had a profound and complex impact on immigration, the benefits of which have yet to crystallise and the pitfalls of which have yet to be felt.

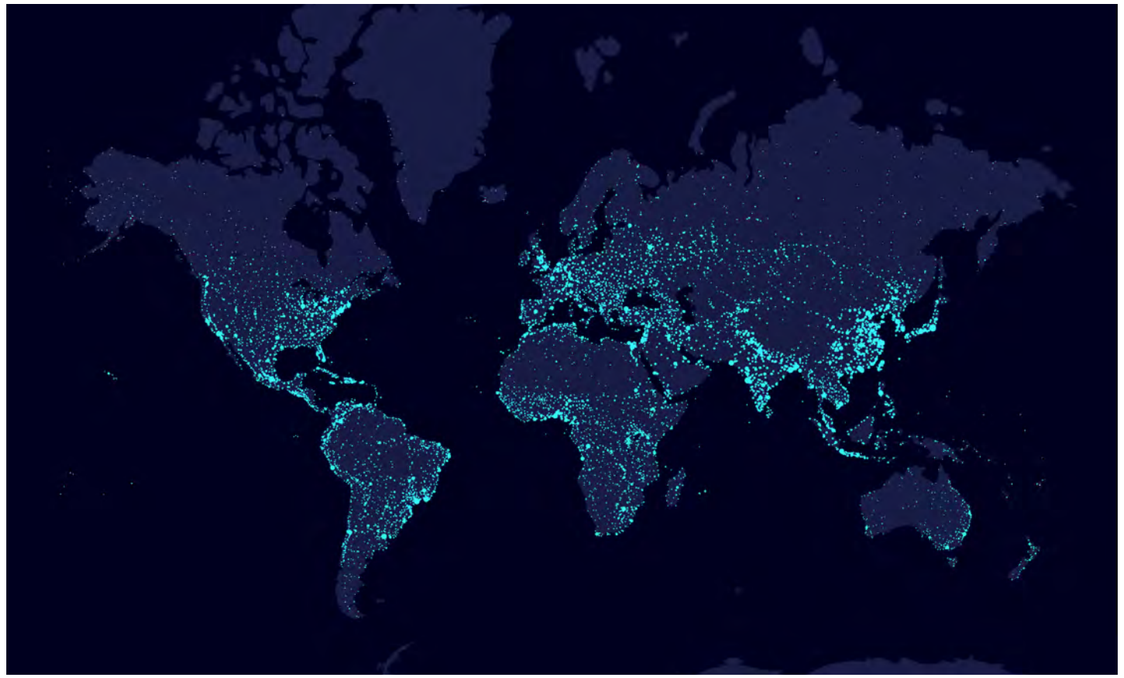
On one hand, there has been a shift in reality. Advances in technology and global capitalism have never made it simpler in terms of speed, comfort, and price for one to travel across the world. The European Union has established open borders for over 500 million people. There have never before been more people of multi-national citizenship nor people, and outbound immigration has now become a speciality for American lawyers. The facts are that Americans now travel into Cuba; Syrian refugees have flooded into Europe by the hundreds of thousands; and Elon Musk is expected to send humans to Mars by 2020!

On the other hand, there has been a shift in perception. Although a globalised world has led to an increased familiarity and decreased marvel with individual immigrants, both homogenous and heterogeneous societies have had to deal with rising xenophobia as the prevailing political, social, and economic structures of the 20th Century break down. While countries of the world have never been closer than through supranational organisations like the UN, IMF, WTO, and WHO, security challenges have multiplied in the face of Charlie Hebdo, the attack in San Bernardino, and other acts of terrorism. One only has to observe the racist, xenophobic, and bigoted remarks of Republican candidate Donald Trump to understand that the views of the world have become remarkably divergent. We need to find solutions that recognise the needs of people, which exist far more than we permit. Things will change or we will become extinct quickly rather than slowly.

So, how does one sum this up? Globalisation will not stop. In fact, it will only accelerate as Africa and South America become increasingly exposed to the internet and the market economy. Moreover, self-isolated nations such as China and North Korea will eventually have to cope with demands for freedom of information and travel, although for them the question is whether it will take decades or centuries to open up. Accordingly, immigration across nations and continents will continue to grow as technology continues to demolish barriers to travel and obstacles to communication. Legal theories which address technology will destroy many intellectual borders. The true question to be asked is how – or rather if – nations will be able to adequately respond to rising globalisation, rising immigration, and an increased desire for people to be seen as humans and not merely citizens of a given country.

**Dworsky:** Even as most Americans celebrate their heritage and identity as a "nation of immigrants," there is deep ambivalence about future immigration. There is a strong base of support for continued immigration as a necessary ingredient for economic growth and as an essential element of a cosmopolitan society among many Americans. Almost 60 million people— more than one-fifth of the total population of the United States—are immigrants or the children of immigrants. For most of this community, immigration policy is not an abstract ideology but a means of family reunification and an affirmation that they are part of the "American dream."

On the other side, there is a substantial share, perhaps a majority, of Americans who are opposed to a continuation of large scale immigration. Many opponents of immigration are old stock Americans who have all



but forgotten their immigrant ancestors. They often live in small towns or in suburban areas, and many have relatively little contact with immigrant families in their neighborhoods, churches, and friendship networks. Beyond the debate over the economic consequences of immigration, there is also an emotional dimension that shapes sentiments toward immigration. Many Americans, like people everywhere, are more comfortable with the familiar than with change. They fear that newcomers with different languages, religions, and cultures are reluctant to assimilate to American society and to learn English.

Although many of the perceptions and fears of old stock Americans about new immigrants are rooted in ignorance and prejudice, the fears of many Americans about the future are not entirely irrational. With globalization and massive industrial restructuring dominating many traditional sources of employment (both blue collar and white collar), many native born citizens are fearful about their (and their children's) future. The news media often cite examples of industries that seek out low cost immigrant workers to replace native born workers. Some sectors, such as harvesting vegetables and fruits in agriculture, have very few native born Americans seeking jobs in them, but immigrants are also disproportionately employed in many other sectors, including meatpacking, construction, hospitals, and even in many areas of advanced study in research universities.

**Israel:** Globalisation has led to increased movement of people across borders in unprecedented numbers. Organizations are now managing multiple populations including traditional expat assignees, short term/commuter assignments, short term business travellers, contingent workforces and those with cross-border roles. The policies and processes to manage immigration and tax compliance for the various populations vary and have led to a need for a centralized immigration function with the ability to track status and report on movement of people in real time. Governments are also becoming more sophisticated in tracking entry and exits which has led to increased scrutiny of business visitors for tax and immigration compliance purposes.

## Who are the main regulators and what legislations apply to immigration law in your jurisdiction?

**Allen:** Employment-based immigration law is governed by three main cabinet-level departments of the U.S. government, all of which are within the executive branch under the authority of the President. These include the U.S. Department of Homeland Security (which encompasses mission-specific agencies such as the U.S. Citizenship & Immigration Services, Customs & Border Protection, and Immigration & Customs Enforcement); the Department of State, having authority over consulates abroad and visa issuance; and the Department of Labor, which regulates various compliance issues such as wage enforcement and certification of labour market conditions in connection with requests for employer sponsorship of permanent residence for foreign nationals.

These executive departments promulgate and enforce regulations to carry out immigration-related legislation. Generally, Congress has authority under the U.S. Constitution to make laws with respect to immigration and naturalization issues, and such legislation governs all aspects of entry, residence and work authorization for foreign nationals. The primary legislation that provides for U.S. immigration law is the Immigration and Nationality Act, as amended ("INA"). A complex set of formal regulations, policy directives, and common-law judicial rulings in administrative and appellate courts implements and interprets the various features of that law.

**Ladd:** In the United States, the prevailing legislation is the Immigration and Nationality Act, an unwieldy legal jigsaw puzzle having, unfortunately, little resemblance to economic reality. Under the direction of the president, a vast bureaucracy enforces and carries out the laws, primarily through the departments (ministries) of Homeland Justice, Security, State and Labor. The American Congress – responsible for enacting the crazy-quilt pattern of immigration legislation – has been especially unfriendly to immigration reform since 9/11. You who are following this discussion have surely heard of the byzantine maze that is the US tax code. To describe the federal immigration system, I would say that it is s not so much a maze as a gargantuan, multi-layered pyramid. For a simple visual interpretation, I invite you to visit my website, Visas2America. The website is available in Chinese, French, German, Farsi, Russian and Spanish, as well as English.

**Wasser:** The main regulators of immigration law in the USA are first the Congress, which enacts the statutes to be signed by the President. The Immigration and Nationality Act (INA), as amended governs much of immigration law today. The Executive Agencies involved with filling in the details by regulation and policy, and by administering the INA are the U.S. Department of Homeland Security (DHS), the U.S. State Department (DOS), the U.S. Department of Labor (DOL), and the U.S. Department of Health and Human Services (DOH).

DHS was created after 9/11 and includes among many agencies including the U.S. Customs and Border Protection (CBP) charged with border inspections, customs, and international criminal investigations; U.S. Immigration and Customs Enforcement (ICE), charged with interior inspections and apprehensions, initiating removal proceedings and carrying out removal or deportation orders, control of foreign students and exchange visitors, and inspection and audit of US employers; and US Citizenship and Immigration Services (USCIS), which decides applications for immigration benefits such as changes of stay and extensions of non-immigrant status, green card (permanent residence) applications, and naturalization and citizenship. The DOS issues visas at US consulates and embassies worldwide, and deals with some citizenship issues and passports. The DOS also submits annual human rights and religious freedom reports by country used in asylum and refugee cases and other applications for humanitarian benefits. The DOL's job is to protect US workers. Some immigration related categories require labor market testing and review of wages and working conditions, all of which are regulated by DOL. The DOH deals with medical exams and medical grounds of inadmissibility (including mental health). Increasingly, the states are involved in some peripheral immigration issues such as local law enforcement cooperation with ICE, and driving, business and professional licensing of immigrants.

**Dworsky:** U.S. immigration laws enacted by Congress provide authority over immigration matters, including entry and exit of all travelers across the nation's borders, determining who may enter, how long they may stay, and when they must leave. The Immigration and Naturalization Act (INA) in Title 8 of the United States Code, provides the foundation for immigration law, along with its amendments. Additionally, more recent immigration laws have an impact on visa processing, including, as examples, the USA Patriot Act of 2001 and the Enhanced Border Security and Visa Reform Act of 2002.

**Israel:** The primary legislative frame work for Canadian immigration requirements is set out in the Immigration and Refugee Protection Act (IRPA), S.C. 2001, c.27 and Immigration and Refugee Protection Regulations SOR/2002-227. Other relevant legislation includes the Department of Citizenship and Immigration Act and the Citizenship Act of 1977. Jurisdiction over immigration is shared between the federal and the provincial and territorial governments under section 95 of the Constitution Act, 1867.

The primary regulators include Immigration, Refugees and Citizenship Canada (IRCC), the Canada Border Services Agency (CBSA), Employment and Social Development Canada (ESDC), Provincial Governments and the Department of Foreign Affairs and International Trade (DFAIT).

**Morse:** The U.S. Department of Homeland Security (DHS) and the U.S. Department of State (DOS) are the two main departments within the U.S. government that regulate U.S. immigration. The DOS, through its consulates and embassies around the world, issue visas to people, which allow them to travel to the U.S. to either work, study or visit for business or pleasure. In addition, the DOS issues a monthly publication called the Visa Bulletin, which establishes limits on family and employment-based immigration to the United States.

DHS has three agencies to assist with regulating and enforcing U.S. immigration laws, which are the following:

U.S. Citizenship and Immigration Services (USCIS): This agency oversees lawful immigration to the U.S. It reviews application and petitions for immigration benefits. Petition approval is often required before a foreign national is eligible to apply for a visa with the DOS. The USCIS also processes citizenship applications and administers humanitarian programs that provide protection to individuals inside and outside the U.S. USCIS also manages the E-Verify system, which is used by employers in the U.S. to verify employment eligibility.

U.S. Customs and Border Protection (CBP): This agency is responsible for detecting and preventing the illegal entry of persons and goods into the U.S. All individuals that wish to be admitted into the U.S. must present their visa and themselves for inspection before a CBP officer.

U.S. Immigration and Customs Enforcement (ICE): This agency is responsible for a investigating a range of issues, including human trafficking, drug trafficking. In addition, this agency is responsible for enforcing


U.S. immigration laws, and ensuring the departure of removable aliens from the U.S. This agency is also responsible for the transportation and detention of aliens in the U.S.

The U.S. Immigration and Nationality Act (INA), Chapter 8 of the Code of Federal Regulations (CFR), and the Foreign Affairs Manual (FAM) provide legal authority with respect to U.S. immigration.

## Have there been any recent regulatory changes or interesting developments?

**Hunter:** There are always regulatory changes occurring throughout the system, however, many of them occur for opaque reasons and often it is difficult to keep up with the copious alterations throughout the immigration system. On top of that, the ground upon which immigration lies is constantly shifting. Politicians all agree that the system is broken, but no consensus exists on how to fix it. Executive actions such as President Obama's DAPA program become mired in the court system for years at a time, creating uncertainty for the federal government, states, lawyers, and, most critically, (lawful and unlawful) aliens.

There is one interesting change that I would like to remark upon. The United States Citizenship and Immigration Services, an agency under the Department of Homeland Security, has expanded its use of the "Request for Evidence" over time. In past decades, when submitting filings, the government would rarely issue a request for evidence. But over time, it is typical to get a request for evidence or rarely multiple requests on the same case. Whether this is an example of the bureaucracy demanding ever stricter adherence to regulations generally or it is an attempt by the government to demand more from both immigrants and non-immigrants is unclear thus far. Yet the process has become increasingly fraught for everyone, from the adjudicating agency, the particular adjudicator and supervisors, to the alien and the lawyer, if he has one. If we are looking to decrease the federal deficit, the government should audit the requests for evidence issued in all cases to detect patterns and do away with frivolous or near frivolous requests and other requests which reflect a significant lack of understanding on the part of the government writer. If an alien is required to meet a particular burden of proof (e.g., most frequently, that the evidence more likely than not shows the facts occurred as provided), then the person making the decision should be trained to understand what this means. It is common sense to look at documents and other items to figure out what happened in a case. The facts are exposed with evidence which if the adjudicators understood they must weigh each piece and decide what it helps to establish, then the agency would operate more in line with the law as a result.

**Ladd:** Alas, for many years the American Congress has failed to take any steps to enact legislation that could repair our broken work visa system. As it is, the United States offers virtually no visas for skilled and unskilled workers, apart from seasonal labour.

Sir Winston Churchill once remarked that Americans always do the right thing – after they have tried everything else. Just so: President Obama, after embarking, early in his term, on an overheated deportation policy, wisely reversed course in 2012 and initiated a so-called "Dreamer" incentive to a younger bracket of undocumented foreign nationals. The "DACA" program has, to date, opened access to work authorisation, Social Security eligibility, and driver license privileges to upwards of 750,000 eligible "childhood arrivals."

Then in late 2014, Mr Obama launched a similar, well-intentioned "DAPA" initiative to benefit an estimated 4 to 5 million parents of US citizen children, only to meet with dogged and misguided resistance from the more conservative American states. A decision on June 23rd by a deadlocked US Supreme Court – four of the justices in favour, four against – left the challenge to the DAPA initiative intact in a lower court.

Immigration advocates must now wait for 2017, and the newly-elected president and rejuvenated Congress, for reform.

**Wasser:** Because the GOP members of the US Congress have refused to allow floor votes on immigration statutes, most of the developments in the last year have been by agency regulation, policy memos, and Executive Actions by President Obama. In November 2014, President Obama announced several actions he wanted to take within the confines of existing statutes. The most controversial action was the extension of Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parent Accountability (DAPA) for certain undocumented young people and parents of US born children. However, the Obama Administration was sued by 26 states, and on 24 June, the U.S. Supreme Court in a 4-4 decision in *United States v. Texas* affirmed the lower court's issuance of a preliminary injunction barring implementation of DACA/DAPA. However, that case is still active in the lower court and the US Justice Department has asked for a rehearing.

Meanwhile, in the last year, the Obama administration did check off some of the other Executive Actions on the President's list. One of those dealt with streamlining some of the legal immigration procedures in order to attract and retain top talent in the USA including foreign students. New rules were issued extending "optional practical training" for STEM graduates of US universities, which gives these graduates more time in the US, with the trade off that their employers must now create detailed training plans and reports. Another development was the consolidation of policies into one memo concerning the adjudication of L-1B multinational specialized knowledge workers. This visa invokes a lot of scrutiny due in part to the H-1B professional worker cap. The memo describes when an employee's work is sufficiently "advanced" or "specialized". Another significant development allows applicants for permanent residence to file the final stage of their green card applications before the quota becomes current. Previously, the quota had to be current before filing. This allows individuals to have work permits while waiting for the quota to be current. The permissible filing dates are published every month, as are the quota updates.

In 2015, USCIS held a "listening session" about the possibility of developing a "parole" program for certain entrepreneurs. On 31 August 2016, USCIS issued a proposed regulation for a new "International Entrepreneur" parole category. Comments are due 17 October 2016. Parole is neither a visa nor green card but in certain circumstances allows an individual to enter the US with government approval on a case-by-case basis in the exercise of discretion, in this case with work authorisation. The proposed rule would benefit early stage entrepreneurs with at least a 15% stake in the business, that must have been in business for three years, and has at least $350,000 in US venture capital, angel funding or other US citizen or green card holding investors, or have $100,000 in federal, state or local government grants, or some other combination of funding. The entrepreneur will need to create job, or have fast track revenues or other significant public benefit. Parole would be issued for two years with a three-year extension.

Finally, the Obama administration may produce a memo or regulation before the end of the term expanding the scope of individuals and organisations that could benefit from the EB-2 national interest waiver category.

In terms of the EB-5 entrepreneur investor program, the Securities and Exchange Commission (SEC) has become much more involved in these projects on issues such as when attorney referral fees are investment activities regulated by the SEC, and whether promoters and various consultants are acting as unlicensed investment advisors. In addition, the SEC is monitoring investment fraud issues. Several regional center projects have either failed or been investigated, thus receiving negative media and Congressional attention. Another significant change involves USCIS adoption of an administrative ruling from last year as policy that imposes more liability and bureaucracy on employers requiring them to file H-1B visa amendments for certain "material" job changes. This has become increasingly burdensome on employers, especially those larger employers that move employees around frequently. Finally, a significant filing fee increase is expected in the coming months across all immigration categories.

Some other interesting developments are of an enforcement nature in reaction to terrorism. Congress is reviewing the usefulness of the visa waiver program. In the meantime, individuals who have visited Iraq, Syria, Iran, Somalia, Yemen or Sudan who may be citizens of other visa waiver countries, will need to obtain visas from a consulate or embassy with some limited exceptions. The CBP border agency has proposed a rule that would require visa waiver applicants completing ESTA applications online to disclose all of their social media information.

**Brown:** U.S. Resumes Relations with Cuba: The Obama administration announced wide-ranging changes to loosen travel, commerce and investment restrictions on Cuba. The new rules allow American companies to open locations and hire workers in Cuba. U.S. companies will be allowed to establish subsidiaries or joint ventures as well as open offices, stores and warehouses in Cuba. Additionally, the new rules will expand telecommunications services, facilitate financial transactions between the two countries, remove limits on the amount of money that can be brought to Cuba, and allow "certain persons" to open and maintain bank accounts in Cuba.

New Joint I-9 Audit Guidance from Department of Justice and USCIS: In December 2015, U.S. Immigration and Customs Enforcement joined the Office of Special Counsel for Immigration Related Unfair Employment Practices under the Department of Justice to issue a joint document entitled Guidance for Employers Conducting Internal Employment Eligibility Verification Form I-9 Audits. The document is intended to help employers align sometimes seemingly disparate I-9 guidance from these two agencies. From an employer standpoint, it often seems that the governing principles of U.S. Immigration and Customs Enforcement are diametrically opposed to the governing principles of the Office of Special Counsel for Immigration Related Unfair Employment Practices and it has been difficult for employers in the past to determine what to do in certain circumstances because of the seemingly contradictory advice from these two agencies. The new document is helpful in aligning the guidance of these two agencies on many of the most vexing questions employers encounter when conducting internal I-9 audits.

STEM OPT Expanded to 24 Months: Optional Practical Training for Student Visa holders (F-1) who complete their program of study in a STEM field (Science, Technology, Engineering and Math) are now eligible for an additional 24 months of work authorization. The extended duration of the authorization is to allow these students to have an additional opportunity to enter into the H-1B visa lottery. The regulation also contained several other beneficial changes for students participating in the STEM OPT program. The periods of allowed unemployment during the STEM OPT authorization have been increased by an additional 60 days during the 24-month extension period. This is in addition to the 90 days permitted during the initial 12 months of OPT. In addition, students may now use any STEM authorized U.S. degree to qualify for STEM OPT. It does not have to be only their final, terminal degree as it was under the prior regulation. Finally, students who have completed a 17-month STEM period, or will complete it in the next several months, may apply to gain the additional seven months available under the new 24-month allotment. These applications may not be submitted prior to 10 May 2016 or they will be denied.

**Israel:** There have been several recent updates relevant to Canadian immigration including:

The introduction of an Electronic Travel Authorization for visa exempt nationals traveling to Canada. Foreign nationals other than U. S. Citizens will be required to apply online for an eTA to fly or transit through Canada. The eTA will become mandatory as of 29 September 2016.

A review of the Temporary Foreign Worker Program is currently underway. It is anticipated that any proposed

changes to the Temporary Foreign Worker Program or the International Mobility Program will be made public late in 2016.

There continues to be an increased focus on Employer Compliance. Employers seeking to retain foreign nationals are now required to submit an "employment offer" through an online portal in advance confirming the proposed terms and conditions of employment prior to the issuance of a work permit. This includes U.S. and Mexican nationals applying under the NAFTA agreement. Employers are then subject to inspection to ensure they are meeting the conditions promised to workers. A similar inspection process is already in place for foreign nationals applying for a work permit based on a Labour Market Impact Assessment.

There are several rules that are going through the rule making processing, which will impact employment-based immigration, as follows:

USCIS Filing Fees: There is a rule that will increase the filing fees for most of the U.S. immigration forms submitted to the U.S. Citizenship and Immigration Services (USCIS) for immigration benefits. The funding for USCIS' operations is derived mainly through the collection of filing fees. USCIS is reporting that it continues to receive an increase in petition and application filings. In order for the USCIS to continue to provide the same level of service the USCIS has indicated that the fee increase is necessary. The proposed filing fee increase will increase filing fees by 21% on average.

PERM labor certification program: The PERM labor certification program is used by employers to sponsor professional workers for U.S. green cards. This program is undergoing assessment. This assessment period will come to a conclusion sometime this year, and a rule will be promulgated that will make changes to the PERM labor certification program. The rule will likely change the methods of recruitment an employer is to engage in during the PERM labor certification process, and impose fees for filing a Prevailing Wage Determination (PWD) request and for filing the Application for Alien Employment Certification (Form 9089).

Employment Authorization Document (EAD) for highly skilled workers: As part of President Barack Obama's Executive Actions, there is a rule that is current going through the rule making process to make certain foreign nationals eligible for an EAD, if the foreign national has completed a portion of the U.S. green card application process. Under this rule, a foreign national would be eligible for an EAD, if the foreign national is the beneficiary of an approved Form I-140 petition, maintaining valid non-immigrant status, have a priority date that is not current, and show a compelling reason for needing an EAD. This rule provides a means for a foreign national to remain in the U.S. lawfully, and engage in lawful employment while waiting to complete the U.S. green card application process. In many cases, these individuals possess special skills valuable to employers and the U.S. economy.

## Can a business send an employee to work in your jurisdiction if there was an urgent business need and how quickly could they start?

**Hunter:** Sometimes, the urgency of any business' – foreign or domestic – need may bear on how quickly the employee can start. It depends on the details. Admission to the U.S. might be same day, days or weeks later, as a business visitor (B-1).

Preparing employment cases in the U.S. is different and depends on two questions: (i) how quickly the application can be prepared; and (ii) how quickly the government will make a decision?

When it comes to the former, there is no substitute for an experienced attorney working with a determined employer and employee. Cases can often be held up by inexperienced attorneys who are unfamiliar with the process as well as employers who are not yet certain whether they will hire a particular employee or whether the position exists or an alien who is not sure himself what he wants.

Regarding the latter, if there is an urgent need of a sending country employer, then a business visitor visa (or visa waiver) is appropriate for emergent travel. If the person is clearly coming temporarily for a business need of a foreign company/employer who does business within the U.S., then likely that's acceptable. If any of this is lacking, then a closer look may be expected by a port of entry government officer. This might be possible to organise for entry the same day, without any submission apart from a letter at the port of entry, if everything works perfectly. Such an entry could be good for as much as six months, with extensions afterwards for a limited, temporary purpose.

But most non-immigrant (temporary up to a few or many years) employment visas require submission of the I-129 form. There are certain visa categories that can be expedited with a premium processing fee of $1,225, such as the H-1B for specialised knowledge, college educated people, O-1 for those extraordinary in their fields, and the L-1 for intracompany transfers. Other categories (e.g., R-1 religious worker) are only eligible for premium processing after certain requirements have been fulfilled. Others are still not eligible for premium processing at all. When using a Form I-907, a request for Premium Processing Service will produce a decision within 15 days. You would receive an approval notice, preceded by email to that effect if the petition is granted. It may also be denied or a Request for Evidence may be issued (see above on the question about regulatory changes).

After petition approval, the employee usually needs to apply for a visa. If the person is Canadian, for most petition based, non-immigrant statuses, no visa is required. A visa is affixed from the U.S. Embassy or Consulate abroad into a current passport. The remaining waiting time into the U.S. consists of the time before and after obtaining an appointment at a particular consulate/embassy, attending the appointed interview, and receiving your visa in your passport. Depending on the diplomatic post, the interview may be scheduled within days or weeks. Seasonal fluctuations may occur based on demand by applicants and capacity of the government to decide them timely. Generally the visa is issued. Our practice has an above 99% success rate, however this does not guarantee anything. The State Department, of which the embassies and consulates are a part, operates with wide discretion due to their diplomatic/national security functions so there is little recourse if you are denied. Some cases can be brought against them, but those are rare. We have handled such.

**Ladd:** Consider these avenues to facilitate the entry of an employee of a foreign company:

- The "B" visa: for certain "Business" representatives of foreign employers, to perform such services as after-sales service and to attend business meetings and negotiations.
- The "E" visa: for "Entrepreneurial" investors and traders and their key employees.
- The "L" visa: for "Long-distance" transfers of employees from foreign affiliates, such as executives, managers, and individuals with specialized or advanced knowledge of foreign-affiliate products or processes.
- The "TN visa: for services rendered under "Trade NAFTA" by Canadian and Mexican skilled labor and professionals.

Each visa, and the attendant procedures for entry, is of course subject to its own peculiar set of laws and regulations.

The advantage of the "B" visa is that, thanks to the Visa Waiver Program, an employee may be available on-site in the US within a couple of days' time. An employee with a "B1" business visitor visa stamp (and thus not subject to the ESTA registration waiting period) can literally be in the air within hours.

Similarly, Canadian "TN" visa holders may be processed directly at a US port of entry, whether at the border or at a Canadian airport.

**Caveat:** ALWAYS consult US immigration counsel, to confirm that the purpose of the visit is authorized by US immigration law, and that the employee has appropriate supporting documentation.

**Wasser:** There are a couple of options for some employees to come to the US for an urgent business need. For example, a business visitor (B-1 visa or visa waiver) can come pretty quickly once the visa is issued by the consulate (or ESTA application is made online for visa waiver applicants) if on behalf of a business based abroad for such things as taking orders, attending meetings and trade shows or conferences, attending board of directors meetings, or looking into potential investments. The person must be paid from the company abroad. Such a business visitor cannot provide local labor for hire to US companies; in other words, a B-1 visa or visa waiver holder could not perform work that would normally be done on a permanent basis by someone locally paid by a US employer. Some of the other work visa categories that are more involved can be expedited either for a premium processing fee of over $1000 or for certain humanitarian or potential business loss or disruption reasons.

**Brown:** In limited circumstances an employer with U.S. operations may be able to bring an employee into the United States to work under emergent circumstances. The best visa option for this situation would be the B-1, which normally permits foreign individuals to enter the U.S. for temporary, business-related activities such as meetings with U.S-based colleagues or to attend scientific or professional conferences. In general, B-1 business visitors may not engage in work, defined as services performed that inure to the benefit of a U.S. employer.

However, there is a special type of B-1 visitor visa called a "B-1 in lieu of H-1B." The B-1 in lieu of H-1B is a useful tool for U.S. employers who need help quickly and who are unable or unwilling to wait for an H-1B or L-1 visa application to be processed.

To qualify, the situation must meet the following criteria:

- The employee must customarily be employed outside of the United States;
- The foreign entity must pay the employee's salary, and the source of the employee's salary must stay abroad for the duration of the stay in the U.S. No salary or other remuneration may come from a U.S. source, however expense allowances or other reimbursement for expenses incidental to travel are permitted;
- The work to be performed in the U.S. must be professional work, i.e. requiring at least a bachelor's degree level education;
- The employee must have at least a bachelor's degree or equivalent experience; and
- The length of work to be performed should limited in duration, generally six months or less.

If these criteria are met, the applicant will submit the B-1 in lieu of H-1B visa application directly to the home Embassy or Consulate, eliminating the need for any application filing with USCIS.

**Dworsky:** Yes. Should the visa selected allow for premium processing, the employee may be able to start within 14 days of the filing of the petition.

The United States welcomes thousands of foreign workers in multiple occupations or employment categories every year. These include artists, researchers, cultural exchange participants, information technology specialists, religious workers, investors, scientists, athletes, nurses, agricultural workers and others. All foreign workers must obtain permission to work legally in the United States. Each employment category for admission has different requirements, conditions and authorized periods of stay. It is important that you adhere to the terms of your application or petition for admission and visa. Any violation can result in removal or denial of re-entry into the United States.

Temporary (Nonimmigrant) Worker: A temporary worker is an individual seeking to enter the United States temporarily for a specific purpose. Nonimmigrants enter the United States for a temporary period of time, and once in the United States, are restricted to the activity or reason for which their nonimmigrant visa was issued.

Permanent (Immigrant) Worker: A permanent worker is an individual who is authorized to live and work permanently in the United States.

Information for Employers & Employees: Employers must verify that an individual whom they plan to employ or continue to employ in the United States is authorized to accept employment in the United States. Individuals, such as those who have been admitted as permanent residents, granted asylum or refugee status, or admitted in work-related nonimmigrant classifications, may have employment authorization as a direct result of their immigration status. Other aliens may need to apply individually for employment authorization.

Temporary Visitors For Business: To visit the United States for business purposes you will need to obtain a visa as a temporary visitor for business (B-1 visa), unless you qualify for admission without a visa under the Visa Waiver Program. For more information on the topics above, select the category related to your situation to the left.

**Israel:** As in many countries, the eligibility for work authorization in Canada is fact specific and dependent upon the individual's qualifications, nature of the work to be performed, duration of stay and the impact on the Canadian labour market. As explained in more detail below, Canada currently has two distinct immigration programs for foreign nationals seeking to work in Canada, the Foreign Worker Program (FWP) and the International Mobility Program (IMP).

In instances where there is urgency or a significant business need, it is best to consult with an experienced Canadian immigration practitioner to review options for entry as a business visitor or to apply for a work permit. Generally, Canada does not have premium processing, but there may be instances when applications can be expedited upon request or a shorter term authorization can be issued quickly to address a business imperative.

The FWP generally requires that prospective employers test the local labour market by posting a position for a minimum of four weeks prior to submitting an application for a Labour Market Impact Assessment (LMIA). There are a few recruitment exceptions such as short term work to be provided by a specialized service

provider. Expedited processing (10 -15 business days) is available for the top 10% of wage earners based on the provincial median wage. Upon issuance of a positive LMIA, foreign nationals can then apply for a work permit either at the port of entry or visa office if they require a visa to travel to Canada. Visa office processing varies from a few weeks to several months.

The IMP facilitates the issuance of work permits where there are significant benefits or reciprocal opportunities for Canadians. This would include LMIA exempt work permits including intra-company transferees (senior managerial, executives or specialized knowledge workers), certain professionals identified in Free Trade agreements, reciprocal agreements and work permits for those providing significant social, cultural or economic benefits.

**Morse:** The non-immigrant (or temporary) visas that are often used by employers to bring foreign nationals to the U.S. are the B-1, L-1, and H-1B categories. In some cases an O-1 visa or an E-1 or E-2 visa might be available. Here is a brief description of each:

B-1 visa: The B-1 visa does not allow a foreign national to engage in employment. However, it is a visa that is not petition-based, so the foreign national may apply directly with the U.S. consulate. Processing time may be as little as three to five days. The B-1 visa allows the foreign national to come to the U.S. to engage in business activities, such as business discussions/meetings, attending seminars, install or repair equipment or machinery purchased from a foreign company, observe business operations, etc. For certain foreign nationals from countries eligible to participate in the U.S. government's Visa Waiver Program (VWP), these foreign national may bypass applying for a B-1 visa, and may enter the U.S. under the VWP by simply registering in the Electronic System for Travel Authorization (ESTA).

H-1B visa: The H-1B visa allows a foreign national to engage in employment. This type of visa is petition based. As a result, a U.S. employer is required to file an H-1B petition with the USCIS. Once the USCIS approves the H-1B petition, the foreign national may then apply for an H-1B visa stamp with the U.S. Department of State. The USCIS processing time for the H-1B petition is between 30 and 120 days. However, the USCIS will process the H-1B petition in 15 days, if the $1,225.00 premium processing fee is paid to the U.S. government. The visa application process is between three to five days. This visa is used to bring professional workers to the U.S. One drawback to this category, which often prevents employers from being able to use this category is that there is a limit of the number of H-1B visas that are issued each year by the government of 65,000, plus an additional 20,000 H-1B visas for those foreign nationals who have graduated from an accredited college or university in the U.S. with a Master's Degree or higher.

L-1 visa: This visa category is designed to make it easy for large multi-national companies to send workers to the U.S. to work for a subsidiary or affiliate or parent company in a managerial, executive, or specialized knowledge capacity. The L-1 visa is a petition-based visa. As a result, a U.S. employer is required to file an L-1 petition with the USCIS. Once the USCIS approves the L-1 petition, the foreign national may then apply for an L-1 visa stamp with the U.S. Department of State. (Note: In some cases, depending on the size of the multi-national company, the amount of revenue it earns, and the frequency in which it transfers workers to the U.S. on L-1 visas, the foreign national may apply for an L-1 visa directly with the U.S. Department of State.) The USCIS processing time for the L-1 petition is between 30 and 120 days. However, the USCIS will process the L-1 petition in 15 days, if the $1,225.00 premium processing fee is paid to the U.S. government. Once the L-1 petition is approved, the visa application process takes between three to five days to complete.

O-1 visa: This visa category is designed to bring a foreign national to the U.S. who is extraordinary in the field of business, science, or the arts. The O-1 visa is a petition-based visa. As a result, a U.S. employer is required to file a visa petition with the USCIS. Once the visa petition is approved the foreign national may then apply for an O-1 visa. The USCIS processing time for an O-1 visa is approximately four to six months. Once the O-1 petition is approved, the visa application process takes between three to five days to complete.

E-1/E-2 visa: The E-1 (Treaty Trader) and E-2 (Treaty Investor) visa categories are designed to help investors, who have established businesses in the U.S., send managers, and foreign nationals who will work in the U.S. in an essential capacity for the U.S. business. In order to qualify for this category, the foreign national must be from a country that the U.S. has a treaty of commerce and navigation with, and must possesses the same nationality with a certain percentage of the owners/investors of the company. Typically, E-1/E-2 visa is applied for directly at a U.S. consulate or embassy. Processing times vary. However, if the U.S. business is already registered, processing time may be a few days.

## Can you talk us through the visa application process?

**Allen:** Most employment-based work visa options entail a two-stage process. Firstly, the sponsoring U.S. employer must file an I-129 non-immigrant worker visa petition with the U.S. Citizenship & Immigration Service (USCIS), an agency within the cabinet-level Department of Homeland Security, based upon the appropriate visa classification, such as H-1B professional or L-1 intracompany transferee. During adjudication, USCIS may issue a request for additional evidence to solicit further documentation or clarify information presented in the petition. Secondly, the individual worker, who is typically located abroad in advance of relocation, must apply for the actual work visa at the U.S. consulate in her home country following USCIS adjudication and approval of the visa petition. USCIS will issue an approval notice, which is presented at the consulate along with the other documents in support of the visa application.

While procedural rules vary at different consulates abroad, visa applicants typically complete the basic application form online via a designated web site and pay the associated application fee in advance of a final in-person visa interview at the consulate. The visa interview process may involve various security clearance reviews requested by the consular officer and processed through internal consultation within a network of other federal agencies, especially in cases where the visa applicant has expertise in sensitive, potential dual-use technologies with military applications. Also, visa applicants are screened for various grounds of inadmissibility, which may arise from prior criminal activity or violation of past visa status. In some cases, waivers are required before the visa can be issued, which may significantly delay the application process.

Once the visa is issued at the consulate, the individual may then travel and seek admission to the United States. Following admission, a person's status is regulated through the USCIS and may be extended under certain conditions. Generally, foreign nationals who have not yet become permanent residences (green card holders) must timely report any address changes to the USCIS as long as they remain inside the United States and maintain their visa status.

**Hunter:** The purpose of a visa is to allow you to gain access to a country when you present yourself at a port-of-entry. There are a number of steps you must take in order to complete the U.S. visa application process. When required, it is affixed to a passport and obtained in advance of travel. These details depend on what country you enter.

Here are the steps with regards to the U.S. process:

1. Figure out whether you are applying for an immigrant (permanent resident) or a non-immigrant (temporary entrant) visa.

2. Determine whether or not you must obtain an approved petition before your visa application. While certain statuses require an approved petition, for example an approved I-140 for permanent residence (immigrant) employment based status, or I-129 for temporary employment. Some statuses do not require any petition, notably the most commonly used visa: the visitor visa. If you require an approved petition, that is filed with U.S. Citizenship and Immigration Services (USCIS) for approval. Depending on the petition, you may also need to get Certification from the Department of Labor (DOL) or other preliminary applications on which a petition must be based.

3. Gather the requisite documents and complete either an online DS-160 with the Department of State (DOS) for temporary admission or for permanent admission, or the DS-260. The specific documents you need and how you will get them is delineated on both the DOS's National Visa Center (NVC), for permanent residence cases, and the specific U.S. consulate/embassy's websites as well as the general Department of State website. Documents will either have to be submitted to the NVC (always for permanent residence) or to the consulate/embassy directly (sometimes for permanent resident immigrants, and for non-immigrants). The required documents vary by visa classification. The DS-160 or DS-260 must be submitted prior to the consular interview and the questions cover your biography, family/employment history, education, and security concerns and laws of the United States.

4. Make an appointment online after paying the visa fee using bank or credit card information, then attend the appointed consular interview on time.

5. Wait for your visa to be approved and then processed. During this period, you will not have your passport as the visa must be affixed inside of it. Once you receive your visa, you are free to travel to the United States!

**Wasser:** For many temporary business visas, first the employer must file a "petition" in the USA explaining the opportunity (job duties and requirements) and how the applicant's credentials qualify for that opportunity. Once the petition is approved, it is sent to the US embassy or consulate where the applicant will apply for a visa. Visa applications are made online. The applicant will be interviewed, and if all goes well, he or she will receive a work visa stamp in the passport. The CBP border officer has the final say about admission to the USA and duration of that particular stay. Some applications are made directly to the embassy/consulate without the need of a prior approved petition. E-1 and E-2 treaty trader/investor visas are an example. Canadian TN professional worker applicants, H-1B and L-1 workers under NAFTA do not need visas and can apply directly at the border.

For permanent residence business categories, the general rule is that first, the US employer must advertise and recruit for US workers meeting minimum qualifications in a process called labor certification or PERM. Then the employer files an immigrant visa petition explaining the category, the worker's credentials and the company's ability to pay. Finally, depending upon where the applicant is and the underlying status, the worker files an "adjustment of status" application if in the USA or an "immigrant visa" application abroad at a US consulate or embassy. There may be quotas and thus delays before the final stage of adjustment or immigrant visa can be completed depending upon the category and where one is from. Some categories permit self-sponsorship without PERM and/or an employer's sponsorship. These are generally reserved for people who are high up in an organization or in their field or whose work is of national interest or for significant investment in the USA.

**Dworsky:** Generally, a citizen of a foreign country who wishes to enter the United States must first obtain a visa, either a nonimmigrant visa for temporary stay, or an immigrant visa for permanent residence. Temporary worker visas are for persons who want to enter the United States for employment lasting a fixed period of time, and are not considered permanent or indefinite. Each of these visas requires the prospective employer to first file a petition with U.S. Citizenship and Immigration Services (USCIS). An approved petition is required to apply for a work visa.

Temporary worker visa categories:

H-1B: Person in Specialty Occupation: To work in a specialty occupation. Requires a higher education degree or its equivalent. Includes fashion models of distinguished merit and ability and government-to-government research and development, or co-production projects administered by the Department of Defense.

H-1B1: Free Trade Agreement (FTA) Professional - Chile, Singapore: To work in a specialty occupation. Requires a post-secondary degree involving at least four years of study in the field of specialization. (Note: This is not a petition-based visa. For application procedures, please refer to the website for the U.S. Embassy in Chile or the U.S. Embassy in Singapore.)

H-2A: Temporary Agricultural Worker: For temporary or seasonal agricultural work. Limited to citizens or nationals of designated countries, with limited exceptions, if determined to be in the United States interest.

H-2B: Temporary Non-agricultural Worker: For temporary or seasonal non- agricultural work. Limited to citizens or nationals of designated countries, with limited exceptions, if determined to be in the United States interest.

H-3: Trainee or Special Education visitor: To receive training, other than graduate medical or academic, that is not available in the trainee's home country or practical training programs in the education of children with mental, physical, or emotional disabilities.

L: Intracompany Transferee: To work at a branch, parent, affiliate, or subsidiary of the current employer in a managerial or executive capacity, or in a position requiring specialized knowledge. Individual must have been employed by the same employer abroad continuously for 1 year within the three preceding years.

O: Individual with Extraordinary Ability or Achievement: For persons with extraordinary ability or achievement in the sciences, arts, education, business, athletics, or extraordinary recognized achievements in the motion picture and television fields, demonstrated by sustained national or international acclaim, to work in their field of expertise. Includes persons providing essential services in support of the above individual.

P-1: Individual or Team Athlete, or Member of an Entertainment Group: To perform at a specific athletic competition as an athlete or as a member of an entertainment group. Requires an internationally recognized level of sustained performance. Includes persons providing essential services in support of the above individual.

P-2: Artist or Entertainer (Individual or Group): For performance under a reciprocal exchange program between an organization in the United States and an organization in another country. Includes persons providing essential services in support of the above individual.

P-3: Artist or Entertainer (Individual or Group): To perform, teach or coach under a program that is culturally unique or a traditional ethnic, folk, cultural, musical, theatrical, or artistic performance or presentation. Includes persons providing essential services in support of the above individual.

Q-1: Participant in an International Cultural Exchange Program: For practical training and employment and for sharing of the history, culture, and traditions of your home country through participation in an international cultural exchange program.

Nonimmigrant visa categories:

B-1 Business Visitor: You may be eligible for a B-1 visa if you are coming to the United States as a business visitor in order to secure funding or office space, negotiate a contract, or attend certain business meetings in connection with opening a new business in this country. Initial period of stay in the United States: Generally up to 6 months. Extensions possible.

F-1/OPT Optional Practical Training: You may be eligible for Optional Practical Training (OPT) if you are an F-1 student in the United States and you seek to start a business that is directly related to your major area of study. Students in English language training programs, however, are ineligible for OPT.

Maximum possible work authorization: An F-1 student may be authorized for up to 12 months of OPT, and becomes eligible for another 12 months of OPT when he or she seeks another post-secondary degree at a higher degree level. An F-1 student with a qualifying Science, Technology, Engineering or Mathematics (STEM) degree may apply for a 17-month extension of their post-completion OPT.

H-1B Specialty Occupation: You may be eligible for an H-1B visa if you are planning to work for the business you start in the United States in an occupation that normally requires a bachelor's degree or higher in a related field of study (e.g., engineers, scientists or mathematicians), and you have at least a bachelor's degree or equivalent in a field related to the position.

Initial period of stay in the United States: Up to three years. Extensions possible in up to three year increments. Maximum period of stay generally six years (extensions beyond six years may be possible).

O-1A Extraordinary Ability and Achievement: You may be eligible for an O-1A visa if you have extraordinary ability in the sciences, arts, education, business or athletics, which can be demonstrated by sustained acclaim and recognition, and you will be coming to the United States to start a business in your field. Extraordinary ability means you have a level of expertise indicating you are one of the small percentage of people who have risen to the very top of your field.

Initial period of stay in the United States: Up to three years. May extend or renew the period of stay in one year increments as necessary to complete or further the event or activity.

E-2 Treaty Investor: You may be eligible for an E-2 visa if you invest a substantial amount of money in a new or existing U.S. business. You must be from a country that has a treaty of commerce and navigation with the United States or a country designated by Congress as eligible for participation in the E-2 nonimmigrant visa program. For a list of treaty countries, visit the Department of State website.

Initial period of stay in the United States: Up to two years. May extend or renew the period of stay in two year increments.

L-1 Intracompany Transferee: You may be eligible for an L-1 visa for "intracompany transferees" if you are an executive, manager, or a worker with specialized knowledge who has worked abroad for a qualifying organization (including an affiliate, parent, subsidiary or branch of your foreign employer) for at least one year within the three years preceding the filing of your L-1 petition (or in some cases your admission to the United States). The organization must seek to transfer you to the United States to work in one of the capacities listed above.

Initial period of stay in the United States: Up to three years (one year for new office petitions). Extensions possible in up to two year increments. Maximum period of stay: seven years for managers and executives; five years for specialized knowledge workers.

Immigrant visa categories:

EB-1 Extraordinary Ability: You may be eligible for the EB-1 extraordinary ability immigrant classification if you have extraordinary ability in the sciences, arts, education, business, or athletics as demonstrated by sustained national or international acclaim and recognized achievements in the field of expertise. In addition, you must show that you will continue working in your area of extraordinary ability. Extraordinary ability means that your level of expertise indicates that you are one of the small percentage of individuals who have risen to the very top of your field. You may self-petition as an extraordinary ability individual since a job offer is not required for this classification.

EB-2 Classification and National Interest Waiver: The EB-2 classification is divided into two sub-categories: professionals with advanced degrees and individuals with exceptional ability in the sciences, arts or business. Although a job offer from an employer and a labor certification from the Department of Labor are generally


required for the EB-2 classification, you may be eligible to self-petition if you are asking for a waiver of the labor certification requirement based on the national interest.

EB-2 Advanced Degree Professional: You may be eligible for this category if: (i) you are a professional holding a U.S. master's degree or higher or foreign equivalent degree that relates to the field you will be working in; or (ii) you have a U.S. Bachelor's degree or foreign equivalent degree and at least five years of progressively responsible experience in your field after receiving your Bachelor's degree.

EB-2 Exceptional Ability: You may be eligible for this category if you have exceptional ability in the sciences, arts, or business. Exceptional ability means that you have a degree of expertise significantly above that ordinarily encountered in the sciences, arts or business.

**Israel:** Canada has identified a list of countries whose nationals would require a Temporary Resident Visa (TRV) in advance of travel to Canada. A TRV may be issued to facilitate a single or multiple entries. The visa application can be submitted via the online MyCIC portal, or via paper to a Visa Application Centre ("VAC"), with a processing fee of CDN$100. The applicant must demonstrate to the Visa Officer that they possess temporary intent and will return to their home country after their period of authorized stay. Canada does allow for admission of foreign nationals on a temporary basis despite an intention to also seek permanent residence (dual intent). In addition, the applicant must demonstrate that they possess sufficient means of financial support for their proposed stay. If, upon review the Visa Officer determines that a TRV be issued, the applicant will receive a request to have their passport sent and affixed with a counterfoil. It is important to note that the TRV provides authorization to travel to Canada, however it does not in and of itself authorize work or study.

Applicants already in Canada can apply for a new TRV from within the country if they hold a valid work permit, study permit, or visitor record. Applications can be submitted online or by paper and TRV's are usually issued for a period concurrent with their Canadian status document.

For those seeking a work permit or study permit from a visa required country, the TRV would be processed concurrently with the application through a visa office outside of Canada.

Electronic Travel Authorization ("eTA"): Canada recently introduced a new entry requirement, known as the eTA, for visa-exempt foreign nationals travelling to Canada by air. Limited exceptions to the requirement which will become mandatory on 29 September 2016 include U.S. citizens; citizens of France residing in St. Pierre and Miquelon; visitors, students and workers returning to Canada after solely visiting the U.S. or St. Pierre and Miquelon. The eTA is an online application, which once approved is valid for five years or until the validity of the applicant's passport – whichever comes first. The fee to complete an eTA is CDN$7.00.

Until 29 September 2016 travellers who do not have an eTA can board their flight, as long as they hold appropriate travel documents such as a valid passport. Canadian citizens or permanent residents are not eligible for an eTA.

**Morse:** With respect to the U.S. green card (or immigrant visa application process) visa application process, the path to lawful permanent resident alien status varies. However, for most foreign national professionals sponsored for a green card by a U.S. employer, the process is either a three-step process: (i) PERM labor certification; (ii) visa petition processing; and (iii) green card application processing), or a two-step process (i) visa petition processing and (ii) green card application processing).

In some cases, a foreign national may self-sponsor in one of the employment-based preference categories. Foreign nationals from India, China, Mexico, and the Philippines typically have to wait the longest to receive an immigrant visa and/or green card, unless sponsored for the Employment-Based, First Preference (EB-1) categories. Foreign nationals from Indian, China, Mexico, and the Philippines sponsored in the EB-2 or EB-3 preference categories typically have to wait years before being eligible to receive a U.S. green card, with the wait time for the EB-3 category being the longest. As a result, foreign nationals from these countries desire

## What are the different options available to an employee or individual looking to relocate?

**Allen:** The American immigration system is largely employer driven, meaning that nearly every available category re quires a sponsoring employer. Generally, the relocation process first requires a non-immigrant visa that provides residence, work and travel permission. Common work visa options include the following categories: H-1B, E (E-1/E-2/E-3), L-1 and O-1, as well as the TN category for citizens under the jurisdiction of the NAFTA Treaty with Canada and Mexico.

The H-1B visa is for professionals employed in a specialty occupation, which requires a bachelor's degree or higher in a related speciality field for entry into the position. This category also entails employer compliance with certain wage and work condition rules enforced by the Department of Labor.

There are several E visas available through treaty relationships between the United States and various countries, including the E-1 category for nationals of a treaty country engaged in substantial trade with the U.S., and the E-2 category for treaty country nationals who have made or are in the process of making a substantial investment. Complex rules govern the requirements for qualifying trade and investment activity. Also, the E-3 category enables professionals who are Australian citizens to obtain a work visa with eligibility criteria similar to the H-1B classification.

L-1 visas are available to certain personnel transferring between companies within an international organization, such as transfer of a manager or technical expert from a foreign subsidiary to U.S. parent company headquarters. This category requires the existence of a qualifying relationship between the connected entities within the international organization, and it is available to executives and managers as well as employees with specialized knowledge of the organization's products, technologies and/or international business processes and methods. Transferees must have worked for the connected foreign company for at least 12 months within the past three-year period prior to transfer. An attractive feature of both the L-1 and E visa categories is the availability of temporary work authorization for spouses of the principal worker's employment and visa status.

The O visa category is for individuals having extraordinary ability in business, science, athletics or the arts, as well as certain support personnel who directly assist individuals of extraordinary ability. Finally, the TN visa category applies to professionals with Canadian or Mexican citizenship who are employed by U.S. companies within specific fields stipulated by the NAFTA treaty.

**Ladd:** I counsel entrepreneurs and investors as part of my practice, and I derive great satisfaction from finding creative, cost-effective solutions whenever possible.

US immigration law offers several alternatives to individuals (and their families) that are looking to take up residence in America:

Permanent residence - EB-5 program: For investors with deep pockets ($500,000 to $1 million), the EB-5 employment-creation visa for permanent residence offers a two-step program. In my opinion it is an overly complicated and challenging option. It is, nonetheless, heavily in demand by Chinese and Indian investors.

"L" visa for "Long-distance" transferees, and transition to permanent residence: This is an intelligent, cost-effective alternative to "the EB-5." It is a relatively sensible procedure and it offers a relatively direct, common-sense platform to plan for a transition to permanent residence for many entrepreneurs and smaller employers and their employees. Another perk: "L visa spouses are eligible for work permits.

"E" visa for "Entrepreneurial" investors and traders and employees, with limited access to permanent residence: The key ingredient is a "treaty of commerce and navigation" between the United States and the individual's home country, of which there are several dozen. The US-UK treaty dates from 1815. An "E" visa is requested directly through a US embassy or consulate, upon its registration and approval of the proposed American enterprise. Generally a minimum investment of about $100,000 is required, but the law allows for flexibility. "E" visa spouses are eligible for work permits in this visa category as well. The "E" visa is renewable; however, the transition to permanent residence may be problematic.

"N for NO" visa for retirees: Americans are known to be friendly to older visitors, but our immigration system does not accommodate them, apart from seasonal holidaymakers and winter "snowbirds." Without a long-term plan, that vacation home in Colorado or Florida will have to be vacant most of the year.

But I do see potential, however, for an "E" visa to support a franchise or other small business which will create jobs locally. I have represented at least one British client who qualified for permanent residence on his own merit as a business consultant, based on proof of his "extraordinary ability" in his field. It just might be worthwhile to consult an immigration lawyer to explore the possible options.

**Wasser:** I generally recommend that individuals wishing to relocate to the USA do some job hunting first, preferably in the field(s) in which they are educated or have work experience. It's much harder to qualify for a visa if changing careers unless going to school. Upon receiving an interview or offer, we look at the specific job duties and requirements, the organization's credentials and the job applicant's education and work qualifications to assess various work visa eligibilities. For people who work abroad with companies that have offices in the USA, we recommend asking for a transfer if the person has qualifying experience and will qualify for a multinational transferee visa, or perhaps offer to open up a new office in the USA. Still others may benefit from being entrepreneurs if from a treaty country that can benefit from a substantial investment or involvement with substantial trade in goods or services, or if having significant experience or reputation in the field.

We also look at the spouse's credentials and opportunities to see whose case might be best. Some categories allow spouses of the principal visa applicant to work for anyone. And, we look to see if individuals have family members in the USA that could sponsor them directly. Or perhaps the individual may have an unknown claim to US citizenship. Sometimes we recommend going to school, or seeking an internship, or job training through an exchange program. There are usually various options available for someone with at least a bachelor's degree or higher with work experience in their field. However, individuals with advanced education and/or extensive experience or significant reputation in the field will have better opportunities. In sum, we take a holistic approach in exploring all options.

**Brown:** The U.S. has many different visa options, but each has very specific requirement that must be fully met before the visa will be issued. The most common temporary visas are the following:

The E-1 Treaty Trader Visa allows foreign nationals of a country with which the U.S. has a commercial treaty to come to the U.S. to engage in trade of a substantial nature between the U.S. and the applicant's country of nationality. There are no quota restrictions.

The E-2 Treaty Investor Visa applicant must be a national of a country with which the U.S. maintains a treaty of commerce. The purpose of the individual's entry must be to carry out substantial trade, including

trade in services or technology, principally between the U.S. and the treaty country; or, to develop and direct the operations of an enterprise in which the individual has invested; or is in the process of investing substantial capital.

The E-3 Visa is available to Australian citizens who will work in the U.S. in a specialty occupation. Currently, 10,500 E-3 visas may be issued each year. Extensions of stay may be granted indefinitely in increments of two years.

The H-1B Visa is for professional employment in a specialty occupation, in which a bachelor's degree or equivalent is the minimum for entry into the field.

The H-1B1 Visa is for nationals of Chile and Singapore. The position must be a specialty occupation, the employee must have the equivalent of a U.S. bachelor's degree, and plan to perform H-1B-caliber work.

The H-3 Visa is designed to facilitate participation in training programs in any field, including agriculture, commerce, communications, finance, government, transportation or the professions, as well as training in an industrial establishment.

The I Visa or "media (I)" visa is for people who are representatives of the foreign media traveling to the United States.

The J-1 Visa permits students, teachers, professors, research scholars, and other professionals to apply for the J-1 visa in order to participate in U.S. government-approved educational exchange programs.

The L-1 Visa - The purpose of the L-1 visa is to permit a qualifying organization to transfer certain types of employees from a non-U.S. location to perform services in the U.S. for the same organization, parent, branch, subsidiary, or affiliate.

The O-1 Visa is for persons who have (i) extraordinary ability in the fields of science, art, education, business, or athletics as demonstrated by sustained national or international acclaim; or (ii) a demonstrated record of extraordinary achievement in the motion picture or television industry.

The Q-1 Visa is a temporary work visa for adults to participate in a training, employment and cultural exchange program. The program must be administered by a U.S. employer and must provide practical training and employment while facilitating the sharing of history, culture and tradition of the participant's home country.

TN status is issued to Canadian and Mexican citizens who seek temporary entry into the U.S. to engage in professional business activities pursuant to the North American Free Trade Agreement.

**Israel:** A foreign national seeking temporary admission to Canada must satisfy the processing officer that the nature of their visit is truly temporary, meaning that they have ties to their home country and sufficient resources to cover the period of stay in Canada. They must not be inadmissible to Canada and otherwise meet the criteria for the status they are seeking whether that is as a visitor, worker or student.

There are three primary streams for immigration to Canada: the Economic Class, Family Sponsorship or Refugee and Humanitarian and Compassionate cases. In most cases economic immigrants must submit an Express Entry profile online and meet the criteria for one of the following: Canadian Experience Class, Federal Skilled Worker, Federal Skilled Trade programs. Potential immigrants are ranked based on a Comprehensive Ranking System (CRS) which allocates points based on a number of factors including age, education, language ability in French and/or English, and work experience.

Those ranked highest are invited to submit an application for permanent residence. Most Provinces and Territories also have provincial nominee programs which allow the provincial governments to nominate foreign nationals for permanent residence based upon local labour market needs or other categories defined regionally. Quebec has a distinct immigration program.

## Can you outline the current labour market conditions in your jurisdiction?

**Hunter:** Over the last three decades, we have experienced a decline in the middle class and the rise of a wealthy small upper class of persons, some of whom are at the very height of wealth. This is despite the fact that the richest people in the world are not as American as one may anticipate. This wealthy class is also marked by possession of multiple nationalities and the greatest migration options of any people in the world. These people are highly trained professionals such as physicians and lawyers but more often they are technology company owners and those who own healthcare and insurance companies. The government not paying for medical care has created this basic function in the private sector through insurance companies. Manufacturing still creates wealth, but most of those old style manufacturing positions have migrated to Asia and will one day be in Africa too as low wage workers are less prevalent in China given the rise of a middle class there, with South Asia not far behind. The current presidential race in the U.S. holds the future of U.S. workers hostage until such time as some resolution toward creating sustainable jobs for the planet and the people might be reached. It is currently the summer before the election of November 2016 and the U.S. Presidential candidates have just been chosen. It's anyone's guess who the next U.S. president will be. What that person should do is bring us back from the greater possibility of civil unrest and create new jobs understanding we are at a time of big change or perish, thus bringing hope to those now suffering.

**Wasser:** In my area of Seattle, Washington and the greater Northwest, unemployment is fairly similar to the national average. However, the state is rather divided socioeconomically, politically and geographically. Several industries are booming, among them wine making, artisan breweries and distilleries, technology, aerospace, biotechnology, agriculture, retail, healthcare, tourism, and, of course, our new legal marijuana gold rush. (Federal immigration law has not kept pace with state laws on legal marijuana.) Seattle is home to Microsoft, Amazon, Costco, Starbucks, Boeing, T-Mobile, Nordstrom, Weyerhauser and other big name companies and their suppliers. Located on the west coast, Seattle is the gateway to Asia and Canada where international trade has a significant impact on the region in terms of the constant daily flow of goods and people through our major ports of entry. Therefore, immigration is vital to the region.

The demand for highly skilled IT professionals continues to grow. This demand for highly skilled IT professionals has existed for several years. As an indicator of this demand, we can examine the H-1B petition filings for the last few cap seasons. As indicated previously, the top 10 occupations listed on certified Labor Condition Applications (LCA) are IT occupations. In the last four H-1B cap seasons, the number of H-1B petitions filed has increased as follows:

- 2017 Fiscal Year: 236,000 H-1B petitions received for only 65,000 (Regular Cap) and 20,000 (Master's Cap) slots;
- 2016 Fiscal Year: 233,000 H-1B petitions received for only 65,000 (Regular Cap) and 20,000 (Master's Cap) slots;
- 2015 Fiscal Year: 172,500 H-1B petitions received for only 65,000 (Regular Cap) and 20,000 (Master's Cap) slots;
- 2014 Fiscal Year: 124,000 H-1B petitions received for only 65,000 (Regular Cap) and 20,000 (Master's Cap) slots.

This demand for highly skilled IT professionals is likely to continue.

## What skill shortages currently exist in your jurisdiction?

**Allen:** In my region of the U.S. West Coast, there are several high technology hubs, including the Silicon Valley and Seattle area, which is home to industry giants such as Microsoft, Amazon and Boeing, as well as a burgeoning biotechnology sector. Due to rapid business growth and job creation, there are chronic shortages of highly skilled engineers, especially software development and data science. Additionally, there are consistent shortages of skilled healthcare workers, especially in the area of nursing, as many members of the Baby Boomer generation retire and leave the workforce. Another national industry sector facing ongoing shortages due to rapid growth is oil & gas, given recent expansion of domestic petroleum production.

**Ladd:** I will attempt to address the question with respect to skills which for which the current US immigration system provides any kind of satisfactory solution. I am referring to professional nurses and physical therapists.

The permanent residence ("green card") system does offer abbreviated, preferential handling for employer-based applications for these occupations.

At the temporary worker ("nonimmigrant visa") level, there is precious little relief, save within the North American Free Trade Agreement (NAFTA), which creates a three-year work visa system for citizens of Canada and Mexico in a number of professional occupations, and certain skilled labor occupations in the allied health fields. These include licensed Physical Therapists and Nurses.

**Wasser:** In the Pacific Northwest where I practice immigration law, demand for qualified Americans and foreign workers are high in many industry segments. We have a shortage of technology workers, health care workers of all types including home health aids, doctors and nurses, and researchers, especially in biotechnology and environmental areas.

Seattle-Bellevue proper is a booming technology and healthcare innovation hub including biotech. Although STEM fields get the most media attention, other occupations in demand are in agriculture, education (primarily preschool teachers), seafood processing, air and sea pilots, graphic designers, accountants and financial industry professionals, manufacturing and production workers, market researchers, and other non-STEM occupations.

**Dworsky:** A strong manufacturing industry is fundamental to our nation's economic prosperity. Since the industrial revolution, manufacturing has contributed to higher export potential, better standards of living, and more jobs. Investments in manufacturing have a strong multiplier effect for the broader economy, too. Every dollar spent in manufacturing adds $1.37 to the U.S. economy, and every 100 jobs in a manufacturing facility creates an additional 250 jobs in other sectors. In short, manufacturing matters.

Current macro-economic conditions indicate the global and the U.S. economies will experience low to moderate growth over the next two years. The International Monetary Fund (IMF) expects the global economy to grow by 3.3 to 3.8 percent in 2014 and 2015, respectively. They also project the U.S. economy to grow by 2.2 to 3.1 percent, and manufacturing production to grow by 3 to 4 percent during the same period.

A brighter economic future may lie ahead, and as a result, many U.S. manufacturers are optimistic they will regain momentum. Despite this favorable outlook, they will likely face some familiar, yet significant, challenges. Not least among these is talent. This is not new – for years, manufacturers have reported a sizeable gap between the talent they need to keep growing their businesses and the talent they can actually find. Beyond today's talent issues though, what do manufacturers need to address for future years? And, what is the trajectory of the skills gap over the next decade?

The Manufacturing Institute and Deloitte embarked on their third Skills Gap study seeking to answer these pressing questions. The following report reveals the issue is growing and is exacerbated by a number of factors that brings manufacturers to an inflection point that must be addressed in order to ensure viability and success of American-based operations as well as the nation's economic prosperity as a whole.

<u>The skills gap is widening</u>

Over the next decade, nearly three and a half million manufacturing jobs likely need to be filled and the skills gap is expected to result in 2 million of those jobs going unfilled. There are two major contributing factors to the widening gap – baby boomer retirements and economic expansion. An estimated 2.7 million jobs are likely to be needed as a result of retirements of the existing workforce, while 700,000 jobs are likely to be created due to natural business growth. In addition to retirements and economic expansion, other factors contribute to the shortage of skilled workforce, including loss of embedded knowledge due to movement of experienced workers, a negative image of the manufacturing industry among younger generations, lack of STEM (science, technology, engineering and mathematics) skills among workers, and a gradual decline of technical education programs in public high schools.

<u>The impact is significant</u>

With CEOs and manufacturing executives around the world identifying talent-driven innovation as the number one determinant of competitiveness, it stands to reason the implications of such a shortage are significant and can have a material impact on manufacturers' growth and profitability. For example, 82% of executives responding to the Skills gap survey indicate they believe the skills gap will impact their ability to meet customer demand, and 78% believe it will impact their ability to implement new technologies and increase productivity. In addition, executives indicate the skills gap also impacts the ability to provide effective customer service (69%), the ability to innovate and develop new products (62%), and the ability to expand internationally (48%).

<u>Filling jobs is no easy task</u>

80% of manufacturing executives reported they are willing to pay more than the market rates in workforce areas reeling under talent crisis. Still six out of 10 positions remain unfilled due to the talent shortage. This clearly indicates there are not a sufficient number of workers in manufacturing to fill these positions. Additionally, executives reported it takes an average of 94 days to recruit employees in the engineer /researcher/ scientist fields and an average of 70 days to recruit skilled production workers. Facing these numbers, it comes as no surprise why manufacturers report the most significant business impact of the talent shortage is their ability to meet customer demand.

Over the next decade nearly 3 ½ million manufacturing jobs likely need to be filled. The skills gap is expected to result in 2 million of those jobs going unfilled.

**Morse:** There are certain occupations that the U.S. Department of Labor's (DOL) has determined to be shortage occupations. Physical Therapist and Nurse are considered shortage occupations by the DOL. However, there are other occupations that appear to be shortage occupations. These occupations appear to be mainly in the Information Technology (IT) field. Computer related occupations make up approximately 60% of all PERM labor applications that are filed with the DOL. Likewise, the top ten occupations that have Labor Condition Applications (LCA) certified in connection with the H-1B visa petition process are all computer related occupations. As a result, there is a demand for workers with certain skills in IT and Computer Science.

## Are there any immigration implications relating to foreign investors setting up a company in your jurisdiction?

**Allen:** Visa options are available to support both temporary and permanent residence through qualifying investments in business within the United States, including the E-2 Treaty Investor visa and the L-1 "new office" visa for personnel transferred in order to open and expand a new U.S. office of a foreign company. However, investors must remain cognizant of restrictions on employment without proper work authorization.

Some preliminary activities involved in the development of investment prospects, such as identifying investment opportunities, negotiating business terms, opening bank accounts, consulting with advisors and business partners, may be permissible pursuant to admission as a B-1 temporary business visitor. However, many other activities, especially start up management by an investor holding a formal position as an officer of a new company or other investment entity, could be construed by U.S. authorities as work, and thus subject to the requirement for official employment authorization. Care should be taken not to cross the line and engage in actual work related to establishing and directing a new investment, until one obtains a work visa authorizing employment.

**Hunter:** The first rule for foreign investors to follow is that of securing an international business and tax counsel that is familiar with the U.S. state you're in, and possibly a separate counsel in the country of the citizenship and residence of the client. Sometimes understanding a client's foreign investment goals is important to knowing which status in the U.S. is best. Setting up a business in the U.S. is not a trigger as such to acquiring U.S. immigration status. It is, however, the prerequisite to many visa categories which a foreign investor may qualify for. The establishment of a company in the U.S. may take different forms, which only certain immigration statuses qualify to hold as an owner, for example, the well-known C-corporation requires its owners to already be U.S. permanent residents. Non-immigrants may not lawfully own such shares.

Additionally, the sort of U.S. entity decided on also does matter, whether an LLC or an S-corporation, partnership or sole proprietor. These are where immigration and business counsel work together. An H-1B alien used to be able to be an employee of his own entity, but today, this relationship is viewed as being too close to an employer/employee relationship. The last thing to know about immigration implications to foreign investors is that the EB-5 status is about as risky an immigration application as there is. The issue with EB-5 is that the attorney can't control the work and the team is reliant on others whose expertise is not known by each other. This is because the EB-5 is possibly the most complex legal procedure which exists. As a result, the government's regulations are inadequate making the predictability of interpretation of the law impossible. It's for those who have the money to lose and have no other viable options, in my view. The opportunity for abuse exists, as well as lack of expertise. Well intentioned lawyers and clients can both lose.

**Ladd:** Foreign investors may set up, capitalize, and otherwise own an American company, from abroad. Occasional visits to the business premises and meetings with staff or customers or suppliers may be allowed, under the "B" visa or its ESTA visa-less counterpart. Ultimately, the question of one's entrance will be left to US immigration personnel at passport control.

For active, on-the-ground management of the American company, the "E" and "L" visas are essential. I have touched on these elsewhere in this roundtable discussion.

Aside from securing the appropriate visas, there may be a number of issues for which the advice and counsel of capable business lawyer and accountant will be essential. These include: choice of business entity, tax consequences, tax planning, state licensing requirements, etc.

I am increasingly seeing this, with my "E" visa entrepreneurial clients who wish to join in the economic growth here in the southeastern United States. In South Carolina, for example, a residential remodeling license is available to US citizens and permanent residents (even refugees, if you can believe it), but not to "E" visa entrepreneurs! This problem may be resolved by strategic partnerships with, or the employment in key positions of, US citizens.

**Wasser:** There are many immigration implications relating to foreign investors setting up companies in the US, whether through the E-2 treaty investor visa or the EB-5 permanent investor visa. Besides meeting the minimum investment of capital requirements, both categories anticipate job creation and some minimum policy or managerial role in the company. Unlike some other countries, US investor immigration is not designed for mere passive investors. Tracing source of funds is a significant issue, especially for investors from countries with lax accounting or tax rules or countries with rules making it difficult to take money out of the country. Creating sufficient jobs and how those jobs are calculated can be difficult for some of the pooled investment projects. EB-5 regional centers now have to file annual reports documenting how much money was invested, by whom, where the money was spent, how the jobs were created and many other details about the project.

A number of projects have failed, have been investigated, or developers or their agents have been sued or prosecuted.

The SEC has taken a much more active role in project oversight and regulation of unlicensed investment advisors, including attorneys and marketing consultants. Chinese EB-5 investors have been the biggest users of this category such that there is now a quota backlog. It has become a long and expensive program for them. Certain members of Congress hate the program and have called for investigations or ending it all together, while other members love it. In Washington State, there are a number of EB-5 regional centers and many E-2 investors in addition to individual entrepreneur projects. Millions of dollars have been invested in the region. Any investor should seek professional advice from international tax experts, registered investment advisors, business counsel and immigration attorneys due to the many issues involved.

**Dworksy:** No – The requirements are visa related.

**Israel:** Foreign investors are subject to the general immigration requirements. Initial entry to assess market opportunities, arrange for office set-up and attend preliminary meetings may be facilitated as a business visitor. In order to "work" in Canada, foreign nationals will require a work permit. If the new entity in Canada is related to a foreign entity (branch, affiliate, subsidiary, parent), there may be an opportunity to transfer existing employees to Canada on a temporary basis to assume senior managerial, executive or specialized knowledge positions.

Start-ups may need to apply for a Labour Market Impact Assessment for an Owner/ Operator if there are no options to transfer employees.

There are currently no quotas on the ability to hire foreign nationals for skilled positions, however, it is advisable to retain a qualified Canadian immigration lawyer or certified consultant in advance of undertaking any new ventures or acquiring a business in Canada to review immigration strategy and potential compliance concerns.

**Morse:** Most foreign national investors come to the


U.S. on a B-1 visa or through the Visa Waiver Program to set-up their business. However, once the business is set-up, the foreign national must have a visa in order to work on or in their business. The E-1 (Treaty Trader) or E-2 (Treaty Investor) visas are used by these foreign nationals to come to the U.S. to work. However, not all foreign nationals qualify for the E-1 or E-2 visa, because their country does not have a treaty of commerce or navigation with the U.S. For these foreign nationals who are not eligible for an E-1 or E-2 visas, an L-1 new office visa is often used to bring the investor to the U.S. in order to work on their business. The E-1, E-2, and L-1 visas do not give the foreign national U.S. green card status. Rather, they simply allow the foreign national to come to the U.S., temporarily, in order to work on their business.

The Employment-Based, Fifth Preference (EB-5) category is a category that many investors use to pursue a U.S. green card. Under this preference category, the investor is required to invest $1,000,000.00 into the new commercial enterprise. In the alternative, if the capital to be invested is for a new commercial enterprise located in a Targeted employment Area (TEA), the foreign national investor is only required to invest $500,000.00. In addition, the investment by the foreign national investor must create full-time employment for at least 10 U.S. workers. (Note: Unlike the EB-5 Investor Immigrant Visa category, the non-immigrant E-2 category does not have a dollar threshold that must be met. Rather, the government uses a proportionality test to determine whether the investment amount is substantial enough to qualify for the E-2 visa.)

## Can you outline any penalties or restrictions for non-compliance with immigration regulations?

**Allen:** A key area for employer compliance is the I-9 verification regime, whereby US employers are mandated to validate the work authorization of all employees. The employer must verify a new employee's proof of valid employment authorization and complete the Form I-9 for this purpose within three business days of the worker's first day of employment and maintain proper I-9 documentation. Original work authorization documents must be inspected by the employer's designated official. Adhering to these requirements calls for careful internal procedures. Noncompliance can lead to steep fines and even criminal penalties, but making an improper inquiry about a new-hire's particular immigration status can in some situations expose a company to discrimination liability.

A properly completed I-9 form generally offers safe harbour for having unknowingly employed unauthorized foreign workers. But improperly completed or even missing I-9 forms can lead to civil fines and even criminal sanctions. Penalties for non-compliance can be steep. "Wilful" violations run into the multiple $100,000s in fines, not to mention the costs of litigation. Even seemingly clerical errors, like a missing signature, could be considered substantive violations that can add up across the workforce to substantial penalties. Worse yet, employers found engaging in a pattern of practice may face steep fines (up to $3,000 for each unauthorized alien, even on the first offense) and even criminal prosecution and imprisonment.

I-9 records must be retained for three years after the date of hire, or one year after the date employment ends, whichever is later. Generally, forms should not be kept any longer than necessary, as a good housekeeping practice. In recent years, there has been increased enforcement by Immigration and Customs Enforcement (ICE), including "silent immigration raids" through paperwork investigations. Businesses in industries with higher levels of unauthorized labor (e.g., agriculture, manufacturing, restaurants, construction) often face increased risk of targeted investigation or random audit, and I-9 compliance investigations can provide the government with a gateway toward broader investigations, especially in this era of increased inter-agency information sharing.

For individual workers holding non-immigrant status, non-compliance with the terms and conditions of one's visa status may lead to cancellation or revocation of the visa and prohibitions upon future entry to the United States. Serious violations of status such as those involving wilful misrepresentation of material information in obtaining or extending a visa can even result in a permanent bar to entry.

**Hunter:** There are many ways to fall foul of compliance with U.S. immigration regulations at all phases of the immigration life cycle, from non-immigrant to U.S. citizen, regardless of whether admission was with inspection or not. A temporary entrant (a non-immigrant) who allows his status to expire or violate it by committing some act makes himself inadmissible or removable. These mean the person is prohibited from entering or may be required to depart the U.S. indefinitely or for at least a number of years. For example, regulations prohibit aliens from accepting employment unless they are authorised to work in the U.S. Concomitant rules apply to employers of aliens not authorised to be employed. Penalties consist of civil fines and criminal liability. Aliens not authorised to be employed in the future, with exception, are those who enter without inspection or those who enter lawfully but whose status expires. If you are able to be employment authorised, apply, usually (but not always) sooner is better than later.

Another way one may be punished for failing to comply with immigration regulations is by committing or being convicted of certain crimes, whether moral turpitude, aggravated felony, or multiple crimes of certain character in a short time. Seek competent legal counsel to decide if or when to apply at the optimal time for you, if there is one. It is also important to attempt to stay authorised as best as you possibly can. If found to not be in compliance with employment authorisation or anything else affecting admissibility or removability, you may find yourself unable to be admitted to the U.S. or if here, in removal proceedings.

**Wasser**: There are several areas of business immigration that have penalties for non-compliance or subject employers to audit. PERM or labor certification, the labor market test for US workers seeking permanent residence or the temporary H-2A or H-2B visas, does have an audit process to assure employers have conducted proper and adequate recruitment before a labor certification can be approved. The H-1B and E-3 specialty worker categories for professional workers have a number of employer liabilities for wages and working conditions. Employers are subject to audit and can be fined or debarred from participating in the program if wage and hour or work conditions violations are found or for failure to file amendments for job changes. All US employers must document the work permission status on form I-9 of employees hired or referred for a fee. This has been the law since 1986 and includes documenting the status of US citizens. There are penalties for I-9 paperwork violations as well as for "knowingly hiring" undocumented workers. In addition, there are penalties for employers who discriminate in the hiring process based on national origin or citizenship status.

**Brown**: Immigration penalties in the United States include civil money penalties, criminal penalties, debarment from immigration programs, back wages and interest, disgorgement of business profits if gained by the use of undocumented workers. Investigations and fines have increased in recent years, with the largest immigration fine to date of $34 million.

A particular area of concern in recent years has been proper usage by employers of the H-1B program and proper wage payments to H-1B workers. Below is a list of several action steps employers can take immediately to ensure they are in compliance with immigration laws.

Conduct an audit for all of your H-1B workers to determine whether the worker's current physical location matches up to what is on the Labor Condition Application (LCA) and whether any additional LCAs or H-1B amendments need to be filed in situations where the work address on the LCA does not match the employee's current work location.

Review all terminations in the last 12 months and determine whether any were H-1B workers. If yes, confirm that the H-1B petition and the LCA were withdrawn on behalf of the employer. Failing to withdraw these items may cause the employer to incur additional wage obligations even after the employee's termination.

Review wage level changes for all H-1B workers to determine whether any H-1B or LCA amendments may be required. While normally salary raises do not require any change to an H-1B petition, a significant salary increase could indicate a change in the level of responsibilities or a change in the employer's wage scheme. Under either of these scenarios, an H-1B amendment would likely be required.

Review H-1B employees' gross year end wages as reported on their W-2 forms to ensure that they meet the minimum requirements on the Labor Condition Application for that employee. Any wage deficiencies identified by the employer should be reviewed with an experienced immigration attorney to determine next steps and how to rectify the violation.

**Israel:** As part of the June, 2014 overhaul of the Temporary Foreign Worker Program, the Canadian government solidified their Canadians First policy and enhanced compliance measures to protect vulnerable workers. On 1 December 2015, a new Administrative Monetary Penalty regime ("AMP") was introduced which made it easier to levy penalties against non-compliant employers. As part of the new regime, Employers are faced with cumulative monetary penalties in addition to single, multi-year or permanent bans from accessing the Foreign Worker and/or International Mobility programs.

The enhanced compliance framework allows Employment and Social Development Canada (ESDC) and Immigration, Refugee, Citizenship Canada (IRCC) more flexibility to impose penalties which are proportionate to the seriousness or repeated nature of the offence. Penalties may include fines ranging from $500 to $100,000 depending on the type of violation, the severity of the impact of the violation, an employers' compliance history and the type of employer – a small or large business. Employers who are subject to a fine or ban would also have their information posted publicly as a warning to the public of the non-compliance.

In cases where an employer is determined to be non-compliant with more than one condition, AMP fines would be added together for an aggregate amount not to exceed $1 million. When a violation affects more than one employee, each foreign national would be treated as a separate case and resulting penalties would be added together.

In some cases, non-compliance with the Temporary Foreign Worker Program or International Mobility Program may be justified under existing regulations such as when there are changes to federal or provincial laws or collective agreements, changes in economic conditions that impact all employees, good faith errors, unintentional accounting or administrative errors and force majeure.

Voluntary disclosure is encouraged and provided the disclosure is complete and not made during the course of an already initiated inspection it may result in a decrease in the number of points used to determine the penalty for non-compliance. Whether or not the voluntary disclosure is considered acceptable will depend on the severity of the violation, the impact on the Canadian economy, whether disclosure was made in a timely manner, prior instances of voluntary disclosure and the nature of the condition with which the employer failed to comply.

The AMP regime applies to matters which were filed after 1 December 2015.

**Morse:** One area of compliance that U.S. employers should be aware of involves the attestations an employer is required to make when it files a Labor Condition Application (LCA) with the U.S. Department of Labor (DOL). (Note: Once the LCA is certified with the DOL, it is included in the H-1B petition that is submitted to the U.S. Citizenship and Immigration Services (USCIS) on behalf of the foreign national. The H-1B category is used by U.S. employer to bring professional workers to the U.S. to engage in employment.) Under the law, when an employer files an LCA with the DOL, it attests to the following:

- Pay the H-1B worker the higher of the prevailing or actual wage;
- Post notice of the filing of the LCA;
- No strike or lockout is taking place in the occupation at the place of employment.
- Offer working conditions to H-1B workers on the same basis and in accordance with the same criteria it affords U.S. workers, and that the working conditions will not adversely affect U.S. workers.

Employers that are wilful violations or dependent employers are also required to make the following additional attestations: (i) The H-1B employer will not displace any similarly employed U.S. worker within the period beginning 90 days before and ending 90 days after the date of filing the H-1B request with the USCIS; (ii) The employer will not place any H-1B worker with any other employer or at another employer's worksite unless the H-1B employer first makes a bona fide inquiry as to whether the entity with the work location where the H-1B worker will be working has displaced

or intends to displace a similarly employed U.S. worker within the period beginning 90 days before and ending 90 days after the placement; and (iii) The employer has taken "good faith steps" to recruit U.S. workers for the H-1B position and that the employer has offered the job to any U.S. worker who applies and is equally or better qualified for the job than the H-1B employee.

The failure to comply with these attestations may result in the U.S. employer being fined or debarred from the H-1B program. In some cases, the U.S. government may pursue criminal charges against certain employees of the company depending on the seriousness of the violations. In addition, violations may result in the employer being listed on a government web site with other violators, which may be viewed by the public. This has the potential to result in negative media attention for the company.



## What key trends do you expect to see over the coming year and in an ideal world what would you like to see implemented or changed?

**Allen:** Sadly, with the current election year cycle in the United States and the political gridlock in Congress, I am not optimistic about any meaningful near term changes. The current presidential administration may issue executive orders or proposed regulations regarding certain aspects of the PERM labor certification program in connection with employment-based permanent residence (green card). Congress will also likely extend the EB-5 Regional Center immigrant investor program, which otherwise will sunset at the end of the current fiscal year (30 September 2016), although that program has come under greater scrutiny due to recent Securities and Exchange Commission investigations and actions against fraudulent activity in connection with certain Regional Centers.

Ideally, I would wish to see an overhaul of the shockingly backlogged immigrant worker visa quota system; effective start-up visa options to support non-immigrant entrepreneurs who build new companies and attract venture capital investment that promotes job creation; and meaningful reform of the antiquated labour certification process that involves employer testing of the U.S. labour market. Rational proposals already exist for all of these areas, but the political will and bold leadership has been sorely lacking.

**Ladd:** First, let me say that I believe the candidacy of Mr Donald Trump, while hugely entertaining (or disturbing, depending on one's point of view), is not likely to lead to the White House. While Mr Trump, as Ms Palin before him, is undeniably charismatic, and offers appealingly simplistic answers to the world's most complex issues, he will simply not be able to amass the broad base he needs for election to the presidency.

Assuming Mrs Hillary Clinton is elected to the presidency, I believe that she (and Bill) will push for meaningful reform of the immigration laws of this country, and that she will be successful in working with the Congress to an infinitely higher degree than her well-intentioned but aloof predecessor.

In any event, in an ideal world I would like to see dramatic overhaul of the US work visa system. The biggest change would be to restore the pre-fiscal-year-2000 allowance for the "H-1B" work visa for professional-level positions, termed "specialty occupations." The current permitted annual allotment is roughly 40% (at best) of the earlier "cap" figure.

Another glaring inadequacy of the work visa system is that there is virtually no accommodation for skilled worker positions. Perhaps it would be most fitting if the largely Republican Congress were to honor its free-market principles and create a visa category whereby employers, true to economic reality, could sponsor any worker of their choosing, following a process to test the labor market.

Such is the system for permanent residence, but it presupposes that the individual is known to the employer and hence already legally employed. This creates a Catch-22 for the skilled worker, since there is no such visa appropriate to skilled (or for that matter, unskilled) workers. That inconsistency is typical of the dangerously dysfunctional US immigration system.

**Wasser:** The November 2016 US Presidential and Congressional elections in particular will dictate whether the US sees any immigration reform. On the subject of immigration, there is a lot of xenophobia in America as there is elsewhere in the world whether one is discussing legal or illegal immigration. While President Obama has been in office, the GOP members in Congress have refused to allow debate or votes on immigra-

tion reform legislation as payback for his Executive Actions of 2014. Therefore, the makeup of the next Congress will be critical in this election regardless of who is President. A divided Congress intent on preventing the President from having any success has led to a legacy of inaction leaving us with an antiquated immigration system. There was a bipartisan immigration reform bill enacted by the Senate in 2013, but it never reached the House for a floor vote. Since then, there has been very little action by the Congress on immigration except to react to incidents of terrorism. Meanwhile, the President managed to deport more people than any president before him. Ultimately, the President cannot sign a bill if there is no bill. This is what led President Obama to take "Executive Actions" to try to fix different aspects of immigration within existing statutes. If we get another divided Congress that cannot produce legislation or will not work with the next President, we will see more inaction.

Congressional inaction affects many aspects of the US immigration system, but in the business area, it mostly affects the H-1B specialty worker category, which is capped for most private sector jobs. Only Congress can fix the cap. This year there were 236,000 applicants for 85,000 visas. DHS was just sued over how the H-1B lottery is managed. In addition, the permanent residence quota is backlogged substantially for Chinese and Indian nationals, keeping them trapped in jobs or some are deciding to leave and go home. Other business immigration categories have backlogged quotas for everyone. Only Congress can fix the visa numbers. Other trends we are seeing now are more universities establishing incubators, and other spinoff entities to take advantage of the H-1B cap exception dealing with affiliation agreements. Other trends include companies having more and more roving employees, telecommuters, and independent contractors where the old immigration laws and adjudication trends don't accommodate these workers. We are also seeing more program integrity actions such as site visits, employer audits and investigations by the government.

In an ideal world, we need immigration reform that addresses all of the following four main areas. Whether enacted at once or piecemeal, they have to fit together like a puzzle and cannot be treated separately in a vacuum: (i) reform the legal business and family immigration system – update the numbers and categories for the modern age – adequate means for legal immigration reduces illegal immigration; (ii) reform enforcement priorities, tools, and consequences that are fair, don't waste taxpayer money, and enhance the security of the USA; (iii) decide what to do with the 11 million undocumented people living in the US, most of whom are busy raising families, earning a living and trying to integrate with the rest of the country – put them on a path to citizenship that does not take forever; and (iv) restore due process, access to counsel, and access to courts in the immigration system; eliminate family detention centers; eliminate the three and 10 year and permanent bars to immigration that keep undocumented individuals with a way to immigrate trapped in the USA without status; end the criminalization of immigrants.

**Israel:** A review of the Temporary Foreign Worker Program is currently underway. Changes are anticipated based on the recommendations in late 2016 or early 2017. The Express Entry system used to manage intake for the economic streams of permanent residence is also under review and we anticipate changes to the points allocation under the Comprehensive Ranking System to address concerns that the system disproportionately disadvantages international students and those working in Canada on an LMIA exempt work permit. Changes to the Citizenship Act have also been proposed.

In an ideal world, we would see increased balance between the need to ensure employer compliance and the ability to process work authorizations and labour market impact assessments in a clear, transparent and efficient manner. Processing times would continue to decrease across all immigration service lines including family sponsorship and there would be increased opportunities for international students to remain in Canada as permanent residents.


**Morse:** The U.S. Department of Labor's (DOL) Office of Foreign Labor Certification (OFLC) and the U.S. Citizenship and Immigration Services (USCIS) will continue to see an increase in applications and petitions submitted for processing. These agencies will continue to have staffing issues, and it is likely that processing times will increase. Even with the increase in USCIS filing fees and the promulgation of rules that give the DOL fee authority, it will likely take the government time to train new officers that are hired, so reductions in processing times will not likely be seen in the immediate future. There will also be an increase in the scrutiny of the placement of workers at third party locations who are in H-1B or L-1 status. The government will continue to examine whether proper wages are being paid to H-1B and L-1 workers, and whether an employer-employee relationship exists between the H-1B and L-1 workers, and the sponsoring employers. As a result of this increased scrutiny, there will likely be an increase in H-1B and L-1 site inspections. In addition, H-1B and L-1 petitions filed with the USCIS will need to be well documented.