

Cross Border Business Law Blog

The Visa Waiver Program – Know Before You Go

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Almost everyone^[1] who enters the U.S. for business visits must either (a) have a B-1 visa (which may include a B1/B2 visa) or (b) be eligible to enter without a visa under the Visa Waiver Program. If you have a machine-readable passport and are from one of the countries in the Visa Waiver Program, you may be able to seek admission to the U.S. for a business visit without the need to obtain a visa.

More than 19 million travelers visit the U.S. each year using the Visa Waiver Program. But don't purchase your round-trip ticket until (1) you know that your trip fits the B1/B2 standards, (2) you know that you can accomplish your tasks within 90 days, (3) you have registered for ESTA, and (4) you have confirmed that you or your travel history do not eliminate your eligibility.

B-1 or B1/B2 Standards

Business trips to the U.S. on behalf of a foreign employer are classified as “B-1” entries. Pleasure trips are given the “B-2” classification. B1/B2 allows for both activities.

Your activities must be considered “doing business” on behalf of your foreign employer, and not “working” in the U.S., providing a benefit to a U.S. entity, to fit within the acceptable standards for a B-1 admission. “Doing business” may include negotiating contracts, meeting with business associates, attending conferences and trade shows, etc. “Work,” which is not allowed under the B?1 standard, includes providing labor and/or performing services in the U.S. for compensation, with the benefit of those services accruing in the U.S.

Visa Waiver Program Admission

Visa Waiver Program admission is for ninety (90) days, no more, no less. If your business cannot be concluded within that timeframe, you may want to consider applying for a visa at a U.S. consulate instead of using the Visa Waiver Program. Admission with a visa can be for a period of up to six (6) months or even more, and extensions of stay can be applied for. Extensions are not available to those admitted under the Visa Waiver Program.

There is no specific limitation established regarding the number of times a person can use the Visa Waiver Program to seek admission to the U.S. during any particular period of time. This is different than in some countries, which may limit the time you are actually allowed to be in the

country over a specific period of time, such as those that allow no more than ninety days of being present in the area within a 180 day period.

Electronic System for Travel Authorization (“ESTA”)

Registration for ESTA is quick, inexpensive, and easy to update. ESTA requires the electronic submission of biographic, travel and credit card information. An application may be submitted at any time prior to travel, though it is recommended that travelers apply when they begin making travel plans. It is at the airport, before boarding, that the carrier verifies that the traveler has an approved ESTA on file with the U.S. government.

Recent Changes that may Restrict Participation in the Visa Waiver Program

New standards have been imposed on the Visa Waiver Program that warrant your attention. The enforcement of these may result in delays in admission and/or the need to apply for an actual visa so as to be authorized to travel to the U.S.

Beginning in late 2015, individuals who have been present in Iraq, Syria, Iran, or Sudan (or other countries designated by the Department of Homeland Security (“DHS”) as supporting terrorism or “of concern”) at any time on or after March 1, 2011, are not eligible to participate in the Visa Waiver Program. Those individuals may still be eligible to travel to the U.S., but they must apply for an actual visa and submit to an interview at a U.S. consulate.

ESTA-registered travelers who have traveled to or been present in the countries at issue are likely to be notified of revocation of their ESTA by the email address provided as a part of the ESTA application. Those who receive the revocation email shortly before an urgent business, medical or humanitarian trip to the U.S. can have their visa application interview expedited at the appropriate U.S. consulate or embassy. Nobody with a revoked ESTA will be authorized to board a conveyance to the U.S., whether the individual has received the email notice or not. So everyone is advised to check for continued ESTA approval before making travel reservations.

The new law exempts those performing military service in the armed forces of a country that participates in the Visa Waiver Program, or those carrying out official duties in a full-time capacity in the employment of the government of a Visa Waiver Program country. These exclusion may be waived by DHS if it would be in the interest of law enforcement or national security of the United States.

The law also excludes from the Visa Waiver Program individuals who are “nationals” of Iraq, Syria, Iran, or Sudan. Nationality is not the same as citizenship. It typically depends on the laws of the designated country. A person can be a national of a particular country, even if he or she has never resided in that country and/or does not have a passport issued by that country. Customs and Border Protection (“CBP”) has advised that ESTA-registered travelers who fall into the dual national category will receive notice via email on or about January 21, 2016 that their current ESTA is no longer valid.

Conclusion

The Visa Waiver Program is an excellent and efficient means of obtaining travel authorization, but every traveler should take the time to be sure they qualify for it before attempting to use it to travel to the U.S.

[i] Canadian citizens do not need a B-1, B-2 or B1/B2 visa, and are not part of the Visa Waiver Program. Canadian citizens may seek admission for business or pleasure simply by presenting themselves with appropriate documentation other than a visa at the port of entry.

Tags: B-1 Visa, B-2 Visa, business visits, CBP, Customs and Border Protection, ESTA, Visa Waiver Program