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## Solutions for Short-Term Needs

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## Agenda

- Overview
- B-1
  - Activities and Compensation
  - NAFTA
  - Procedure
- H-3
- B-1 in Lieu of H-3
- J-1
- Comparison of Solutions
- Hypotheticals

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## Short-Term Needs

- During a recession:
  - there are more frequent re-structuring.
  - Faster shifts in business strategies.
  - Business is more competitive.
- "Short-Term" visa statuses facilitate the admission of foreign nationals:
  - For specific purposes,
  - For pre-set, short timeframes,
  - Without impact on the U.S. labor market, and
  - Depending on situation, without an employment relationship.

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### Short-Term Needs

- Examples of short-term needs:
  - Training
  - Sales and related activities
  - Support and related activities
  - Meetings, negotiations, research, scouting
  - Collaborative endeavors and other "mutually" productive exchanges (in very limited cases)

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### B-1 – “Business Visitors”

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### Permissible B-1 Activities and Compensation – General Rule

- B-1 Overview
  - “Business Visitor” visa classification, but use is much broader and more flexible than just “business”.
  - Very short term; no “immigrant intent”.
  - Does not enter the U.S. labor market.
  - Obtained through visa (B-1) or under “Visa Waiver Program”.
  - Important in facilitating U.S. participation in global market.

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**Permissible B-1 Activities and Compensation – General Rule**

- To qualify, the foreign national must:
  - seek to visit the U.S. temporarily for business activities, and
  - maintain a residence in a foreign country that he or she has no intention of abandoning.

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**Permissible B-1 Activities and Compensation – General Rule**

- Foreign Affairs Manual (FAM):
  - defines business activities as those that do not involve the performance of skilled or unskilled labor.
  - states B-1 is not appropriate for obtaining or engaging in employment in the U.S.  
*(9 FAM 41.31 N.7)*

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**Permissible B-1 Activities and Compensation – General Rule**

- Permissible Activities for Business Visitors Include:
  - Engaging in commercial transactions which do not involve gainful employment in the U.S. (such as taking orders for goods manufactured abroad).
  - Negotiating contracts.
  - Consultations with Business Associates.
  - Participation in Litigation.
  - Participation in scientific, educational, professional or business conventions, conferences or seminars.
  - Undertaking "Independent Research".  
*9 FAM 41.31 N8*

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### Permissible B-1 Activities and Compensation – General Rule

- *Matter of Hira*, 11 I & N Dec. 824 (BIA 1965, 1966; Att’y General 1966)
  - Look to whether the principal place of business and the actual place of accrual of profits are abroad.
  - Are activities in the U.S. incidental to work that will be performed principally outside of the U.S.?

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### Permissible B-1 Activities and Compensation – Exceptions

- Certain activities involving performance of skilled labor explicitly permitted:
  - After-sales installation, service or repair for equipment or machinery purchased abroad.
  - Training of U.S. workers to perform such after-sales service.
    - The contract for sale must require the seller to provide such services or training and the applicant must possess specialized knowledge essential to the seller’s contractual obligation and must receive no remuneration from a U.S. source. (9 FAM 41.31 N10.1)
- B-1 in lieu of H-1B
- Speakers
- Photographers who receive no income from U.S. source

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### Permissible B-1 Activities and Compensation – Exceptions

- Principle rule of these acceptable activities:
  - The applicant’s salary is paid from a foreign source; no U.S. remuneration.
  - Only common incidental expenses of travel may be reimbursed to the business visitor (meals, hotel, etc.)  
(9 FAM § 41.31 N11.1)
- Common issues:
  - Reimbursement versus allowance
  - Per Diem
  - Honorarium

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**Permissible B-1 Activities and Compensation – Exceptions**

Honorarium Rule

- Acceptable for Academic Activities if:
  - No more than nine (9) days,
  - Single institution,
  - Services to benefit the institution, and
  - Foreign National has not accepted payment or expenses from more than five (5) institutions or organizations in the prior six months.

(INA § 212(j); 9 FAM 41.31 Note 11.2)

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**Permissible B-1 Activities and Compensation – Exceptions**

- Advisory Opinions – if in doubt, may request one. Factors include:
  - Occupation of the Applicant,
  - Type of work to be performed,
  - Place/duration of requested employment,
  - Source/amount of salary to be paid,
  - Identity of U.S. and/or foreign employer,
  - Reasons for believing B-1 is appropriate, and
  - Any other relevant information (catch-all).

(9 FAM 41.31 N.7)

- Value

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**Permissible B-1 Activities and Compensation – Exceptions**

- Personal/Domestic Employees of:
  - U.S. Citizens Residing Abroad who are coming on Temporary Assignment to the U.S.
  - Foreign Nationals in Nonimmigrant Status.
    - B, E, F, H, I, J, L, M, O, P or Q
- Source of Payment and where payment is made is not relevant.
  - Note: DOES NOT apply to Domestic Employees of Permanent Residents

9 FAM 41.31 N9.3-2 – 9.3-5

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### B-1 Activities under NAFTA

- North American Free Trade Agreement provided expanded list of acceptable activities for Canadians/Mexicans.
  - Listed in Schedule 1 of NAFTA
  - Still must:
    - be paid from source abroad,
    - activities must be international in scope, and
    - the business visitor must not be seeking to enter the local labor market.

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### B-1 Activities under NAFTA

- Schedule 1 Activities
  - Research and Design
  - Growth, Manufacturing and Production
  - Marketing
  - Sales
  - Distributors
  - After-Sales Service (for the life of the warranty or service contract)
  - General Service (includes all NAFTA Professionals not receiving remuneration from a U.S. source)

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### B-1 Procedures

- Regular vs. NAFTA Procedures
  - Canadians under NAFTA
  - Mexicans under NAFTA
    - B-1/BCCC
  - Worldwide B-1 Business Visitors
- Periods of Stay Allowable

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### B-1 Procedures

- B-1 Maintenance of Status
- B-1 Extension/Change of Status Issues
  - Timely Filing and Exceptions
  - 30/60 Day Rule
  - Filling Gaps
  - Stacking EOS/COS
  - Stacking and Unlawful Presence Issues

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### H-3 – “Trainees”

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### H-3 - Overview

- Training provided “at the invitation of an organization or individual” – trainee need not be “employed” by petitioner.
- Training may be “in any field of endeavor, such as agriculture, commerce, communications, finance, government, transportation, or the professions, as well as training in a purely industrial establishment” but not as a physician.
- Short term – maximum stay is 24 months.  
(8 C.F.R. 214.2(h)(7) et seq.)

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### H-3 - Overview

File Form I-129 to USCIS with "training plan" explaining:

- The type of training,
- The structure of (i) the training program, and (ii) supervision,
- The trainee's career abroad that will benefit from the training,
- The source of any remuneration received by the trainee,
- Any benefit accruing to the petitioner for providing the training,
- The proportion of time that will be devoted to productive employment,
- The number of hours of classroom instruction versus on-the-job training,
- Why the training cannot be obtained in the trainee's home country, and
- Why the training must take place in the United States.

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### H-3 - Overview

Training programs will not be approved where they:

- Deal in generalities, with no fixed schedule, objectives, or means of evaluation;
- Are for individuals who already possess substantial training and expertise in the proposed field of training;
- Involve knowledge or skill that are unlikely to be used outside the United States;
- Appear to be intended to recruit and train foreign nationals for staffing of U.S. operations;
- Involve productive employment beyond that which is incidental and necessary to the training;
- Is designed to extend the total allowable period of practical training previously authorized a nonimmigrant student.

(and more)

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### *"B-1 in lieu of H-3"*

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### B-1 in lieu of H-3

- "In lieu of" means that the foreign national may seek admission using a B-1 visa, even though the proposed activities might normally be categorized as appropriate for H-3 visa.
  - Advantage: avoids USCIS petition process.
  - Disadvantage: places ultimate exercise of discretion in the hands of the CBP, rather than the USCIS.
- Remuneration must come from entity abroad except for expense allowance or incidental expenses.
- Must satisfy H-3 requirements.  
9 FAM 41.31 N11

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### When should you use *B-1 in lieu of H-3* as opposed to a simple B-1?

- Common attributes:
  - Scope of allowed activities:
    - Same as for visits for business purposes.
  - Finite duration
    - Maximum duration: 6 mo. (often 90 days—taxes)
    - Un-abandoned residence abroad/immigrant intent presumption

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### When should you use *B-1 in lieu of H-3* as opposed to a simple B-1?

<ul style="list-style-type: none"><li>■ <b>B-1:</b><ul style="list-style-type: none"><li>■ Wider scope of activities: "permissible business activities" (e.g., meetings, conference attendance or presentations, consulting, certain types of training)</li><li>■ Productive employment prohibited <i>but</i> activities incidental to work that will be principally performed outside the U.S. permissible, <u>Matter of Hira</u> (BIA 1965)</li></ul></li></ul>	<ul style="list-style-type: none"><li>■ <b>B-1 in lieu of H-3</b><ul style="list-style-type: none"><li>■ Narrower scope of activities: primarily training (but doesn't prohibit other B activities)</li><li>■ Productive employment allowed but limited to that which is "incidental and necessary" to the training</li></ul></li></ul>
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J-1 – “Exchange Visitors”

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This slide features a dark green vertical bar on the left side. The title "J-1 – 'Exchange Visitors'" is centered in a large, black, sans-serif font. Below the title, the name "Sandra Sheridan - Fragomen, Del Rey, Bensen & Loewy, LLP" is enclosed in a red rectangular box. A small number "28" is located in the bottom right corner of the slide.

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J-1 Status for Short-Term Needs

- The Exchange Visitor Program is carried out pursuant to the Mutual Educational and Cultural Exchange Act of 1961, as amended.
- The purpose of the Act is to “promote mutual understanding between the people of the United States and the people of other countries through educational and cultural exchanges.”
- Independent organizations apply to the DOS to be “designated” to sponsor certain programs. Instead of the DOS adjudicating applications, the designated organizations (“sponsors”) are responsible for issuing the DS-2019 and for interns/trainees) DS-7002 Training Plans.
- Sponsors must enter relevant data into SEVIS for all program participants.

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This slide features a dark green vertical bar on the left side. The title "J-1 Status for Short-Term Needs" is centered in a black, sans-serif font. Below the title, there is a bulleted list of four items, each preceded by a small square bullet point. A small number "29" is located in the bottom right corner of the slide.

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J-1 Status for Short-Term Needs

- Research scholar/Professor:
  - Research, teaching and lecturing
  - 3 week minimum
  - 5 calendar year maximum
  - Special administrative handling for periodic assignments during the 5-year period

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This slide features a dark green vertical bar on the left side. The title "J-1 Status for Short-Term Needs" is centered in a black, sans-serif font. Below the title, there is a bulleted list with one main item, "Research scholar/Professor:", which is followed by a sub-bulleted list of four items. A small number "30" is located in the bottom right corner of the slide.

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### J-1 Status for Short-Term Needs

- **Specialist:**
  - Experts in a field of specialized knowledge or skill coming to the U.S. for observing, consulting or demonstrating special skills
  - Cannot fill a permanent or long-term position of employment while in the U.S.

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### J-1 Status for Short-Term Needs

- **Short-term scholar:**
  - Activities: lecture, observe, consult and to participate in seminars, workshops, conferences, study tours, professional meetings, or similar types of educational and professional activities
  - Exempt from 3 week minimum; cannot exceed 6 months
  - Unaware of any "umbrella" programs

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### J-1 Status for Short-Term Needs

- **Intern / Trainee**
  - Intern: available to students who either:
    - are currently enrolled in and pursuing studies at a degree- or certificate-granting foreign post-secondary academic institution or
    - have graduated from such an institution no more than 12 months prior to the start date of the J-1 program.
  - Trainees: available to students who :
    - have either
      - A degree or professional certificate from a foreign post-secondary academic institution and at least 1 year of prior, related work experience in the occupational field, acquired outside the U.S.; or
      - 5 years of work experience acquired outside the United States in the occupational field, and
    - Seeks to enter the U.S. to participate in a structured and guided work-based training program in his/her specific occupational field.

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**Comparison of Solutions**

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B-1 vs. *B-1 in lieu of H-3* vs. H-3 vs. *J-1 Intern/Trainee*:  
are they interchangeable?

- **B-1 Business Visitors seeking admission for training:**
  - Visitor visa
  - Finite duration - 6 mo. (perhaps only 90 days for tax purposes)
  - No prerequisites for eligibility
  - No USCIS petition required
    - Minimal paperwork/documentation
    - Leaves exercise of discretion about activities to CBP
  - Should involve "legitimate" business activities
  - Presumption of immigrant intent; un-abandoned residence abroad

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B-1 vs. *B-1 in lieu of H-3* vs. H-3 vs. *J-1 Intern/Trainee*:  
are they interchangeable?

- **H-3 Trainees**
  - Any productive employment must be "incidental & necessary"
  - Cannot be placed in a position in the normal operation of the business and in which citizens & resident workers are regularly employed
  - Training must be unavailable in beneficiary's home country
  - Purpose is to prepare trainee for position/career abroad
  - Not a workaround for extending OPT
  - Presumption of immigrant intent; un-abandoned residence abroad
  - Maximum stay: 24 months

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B-1 vs. B-1 in lieu of H-3 vs. H-3 vs. J-1 Intern/Trainee: are they interchangeable?

- **J-1 "Intern/Trainee":**
  - Depending on profile, not everyone will qualify
  - Gap in "intern" and "trainee" definitional requirements
  - Must provide:
    - *Bona fide* training as opposed to merely "gaining additional work experience"
    - Work-based learning in academic field as opposed to unskilled labor
  - Cannot displace U.S. workers
  - Quicker and cheaper if organization has its own J program (including tax consequences)
  - Maximum duration: intern (12 months); trainee (18 months) *22 CFR Part 62*

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B-1 vs. B-1 in lieu of H-3 vs. H-3 vs. J-1 Intern/Trainee: are they interchangeable?

- **J-1 "Intern/Trainee" special requirements:**
  - Only offered in certain occupational categories
  - Cultural component
  - English language proficiency
  - Interview required during "admission/selection"
  - Mid-program and end-of-program evaluations required
  - Third party trainers scrutinized
  - SEVIS reporting obligations
  - Requires own J-1 program designation or use of an umbrella program
  - 2-year return residency requirement may attach (INA § 212(e))

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B-1 vs. B-1 in lieu of H-3 vs. H-3 vs. J-1 Intern/Trainee: are they interchangeable?

B-1	B-1 in lieu of H-3	H-3	J-1
Other visa	Other visa	Training visa (H-3)	Training visa (J-1)
Must qualify every 180 days for same purpose only 90 days for 1st purpose	Same purpose only 90 days for 1st purpose	For purpose	For purpose
NO cultural component required	NO cultural component required	NO cultural component required	NO cultural component required
High academic	Same requirements as B-1 and H-3	Any productive employment (not a normal position of business)	Must have training vs. general professional work experience
High business activities		Current place in normal position of business	Work based learning in academic field vs. unskilled labor
Presumption of immigrant intent; residence abroad		Training available in home country	Cannot use as work around to attending OPT
		Prepare for job abroad	
		Presumption of immigrant intent	
No prerequisites for eligibility	No prerequisites for eligibility	No prerequisites for eligibility	Education: degree plus 1 yr work abroad or no degree plus 2 yr work abroad Degree with 2 yrs. of degree in beneficial field here in degree program English language proficiency

- **Other considerations:**
  - Reciprocity schedules for various visa types
  - Practices of particular Consulate(s)

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## Hypotheticals

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## Hypothetical #1

- High tech manufacturing company brings employees of foreign subsidiaries to U.S. for 60 days of training. Of the following activities, which visa is more appropriate:
  - Classroom training
  - Observation
  - Hands-on activities in a module/simulation
  - Hands-on activities in the factory where other U.S. workers are working

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## Hypothetical #2

- Company needs to bring a group of employees from its facility in China to learn the company's payroll system in the U.S. since it will be offshored to China within a few months. The training will involve studying process manuals, attending meetings, observing the team performing the function and actually preparing payroll prior to returning to China.
  - Which visa is most appropriate?
    - What if training lasts two weeks?
  - What if the employee prepared payroll for another U.S. company for 10 years prior to joining this company? Would one visa be more appropriate than another in this circumstance?
  - What other facts might you want to know?

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### Hypothetical #3

- Private company invites prominent professor from Asia to a 5-day speaking engagement for one of its international conferences; the professor requires a minimum payment for speaking engagements.
  - How can the company bring the professor to the U.S.?
    - B-1?
    - Can it pay honoraria?
    - What other visa option(s) might work?
    - Any other creative solution?

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### Hypothetical #4

- U.S. company is "joining forces" with competitor abroad (this might be merger, acquisition, partnership, or business agreement). As a result, the U.S. systems must undergo changes to accommodate foreign systems. Necessary work includes:
  1. Foreign and U.S. programmers collaborating to write code to permit systems to talk to each other (3 weeks)
  2. Foreign Technicians learning U.S. quality standards for "shared" manufacturing process, and being "Lean Sigma"-ed (6-weeks)
  3. Foreign engineers installing, servicing, repairing or replacing hardware in U.S. systems, to upgrade U.S. systems to European standards (4 months)
- What visa would be used for each, and what problems might arise?

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### QUESTIONS?

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