THE INCREDIBLE RIGHTNESS OF 'B'-ING – PRUDENT AND PRACTICAL USES FOR THE B-1 AND WB BUSINESS VISITOR CATEGORIES*

by

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I. INTRODUCTION

What do foreign truck drivers, tailors, computer professionals, missionaries, household workers, trainees, medical students, yachting crews, executives, seminar attendees, investors, athletes, corporate directors, plaintiffs, defendants, and expert witnesses all have in common? No, unlike the lost souls in the Pirandello play, they are not characters in search of an author. The members of this diverse group, and still others even more dissimilar, comprise a gallimaufry of foreign citizens who may be eligible for admission to the United States as B-1 or WB business visitors.[1]

According to recently released Immigration and Naturalization ("INS") figures, more than 24.8 million individuals entered the U.S. in nonimmigrant status in 1996.[2] Not

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* The authors steadfastly refuse to adopt another overused title that plays on the existential vacillation of Hamlet. Instead, they wish to express their thanks and apologies to Milan Kundera, whose book "The Unbearable Lightness of Being" allowed them to adopt the terrible pun chosen for the title of this article.

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[1] The B-1 and WB categories are virtually identical in terms of the underlying substantive eligibility criteria that allow entry to the U.S. as business visitors. INA §217, 8 USC §1187. Hence the legal analysis in this article is equally applicable to both, except with regard to the special limits imposed by the Visa Waiver Pilot Program ("VWPP"). *See infra text accompanying notes* 117-123.

[2] U.S. Immigration and Naturalization Service, *Statistical Yearbook of the Immigration and Naturalization Service, 1997*, U.S. Government Printing Office: Washington, D.C., 1999 at page 104.

surprisingly, of that number, 76.9 percent entered as visitors for pleasure.[3] Significantly, however, the next highest class of admission, at 15.9 percent, was temporary visitors for business.[4] In fact, the U.S. Department of State ("DOS") has acknowledged that the Visa Office uses the B-1 category as a "catch-all for aliens who do not fit in any other nonimmigrant classification but whose admissibility as nonimmigrants seem[s] within the general intent of Congress in distinguishing between immigrants and nonimmigrants."[5]

As the foregoing list illustrates, the B-1 visa category is extremely flexible and can serve as a powerful tool for immigration practitioners. This classification, however, can be abused. If the abuse is discovered, the result for the alien may include such penalties as expedited removal,[6] or denial of admission under the WB category, among others.[7] The outcome for those who conspire with aliens to enter the U.S. unlawfully can be just as harsh, or worse.[8] Attorneys must therefore ensure that the B-1 or WB category is used only in appropriate circumstances, consistent with the facts and law.

This article will explore the factual situations that are suitable for the business visitor categories and consider relevant legal issues that recur in this area.

II. GENERAL REQUIREMENTS

An individual eligible for B-1 status is defined as:

> An alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such a vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure.[9]

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[3] *Id.*
[4] *Id.*
[5] 58 Fed. Reg. 40024, 40025 (proposed July 26, 1993), citing Senate Report No. 1515 accompanying the 1952 Act which states:

> The term "business" as used in the section includes not only intercourse of a commercial character but any other legitimate activity of a temporary nature classified within the ordinary meaning of the word "business" but not classifiable as pleasure or labor.

[6] INS §235(b)(1)(A)(i), 8 USC §1225(b)(1)(A)(i) (providing for expedited removal of inadmissible arriving aliens).
[7] In exchange for the privilege of participating in the program, VWPP aliens forfeit the right to review of a determination of inadmissibility and the right to contest a deportation order. Immigration and Nationality Act (INA) §217(b), 8 USC §1187(b).
[8] *See, e.g.,* INA §274, 8 USC §1324 (penalties for bringing in and harboring certain aliens); INA §274C, 8 USC §1324c (penalties for document fraud).
[9] INA §101(a)(15)(B); 8 USC §1101(a)(15)(B).

A. Defining The Term "Business"

Although the INS regulations do not define "business," a definition has evolved.[10] In the 1924 Act, the term "business visitor" first appeared as a nonimmigrant category, which was distinguished from the definition of "immigrant" and thus exempt from the quota restrictions of the Act.[11] Several years later, the U.S. Supreme Court held that the term "business" meant "intercourse of a commercial character" and did not include "labor for hire."[12] In reaching this conclusion, the Court noted that one of the primary objectives of the 1924 Act was to protect the U.S. labor force from an influx of foreign workers. Consistent with the Court's holding, Congress stated that the term "business" in the 1952 Act was intended to be read "substantially the same" as under the 1924 Act.[13]

Acknowledging that a B-1 visitor may not perform "ordinary labor for hire," the Board of Immigration Appeals ("BIA") has concluded that an individual may be classified as a business visitor if "the function he [or she] performs is a necessary incident to international trade."[14] In *Matter of Hira*, the BIA set forth and the Attorney General affirmed the significant criteria required for business visitor classification: 1) the alien must be engaged in commercial activity; 2) the alien must have a clear intent to maintain a foreign residence; 3) "the principal place of business and the actual place of eventual accrual of profits, at least predominantly, remains in the foreign country"; 4) the alien's stay must be temporary in nature, although the business activity may be ongoing; and 5) the alien's salary must come from abroad. [15]

Despite the prohibition on "labor for hire," the DOS Foreign Affairs Manual ("FAM") instructs consular officers on 20 specific types of workers authorized to receive B-1 visas for the purpose of pursuing employment.[16] Similarly, but less expansively, the INS Operations Instructions ("OI's") allow eight.[17] To complicate matters, in many cases the alien's employment is not related to international trade and, as shown below, some categories allow the payment of salary or wages from a U.S. source.

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[10] 8 CFR §214.2(b).
[11] §3(2) of the Act of May 26, 1924, 43 Stat. 153.
[12] *Karnuth v. United States ex rel Albro*, 279 U.S. 231 (1929).
[13] H.R. Rep. No. 1365, 82d Cong., 2d Sess. 32 (1952).
[14] *Matter of Cote*, 17 I&N Dec. 336 (BIA 1980) (a Canadian who transported automobiles across the U.S./Canadian border was entitled to B-1 entry although he was an employee of a U.S. company).
[15] *Matter of Hira*, 11 I&N Dec. 824 (BIA 1965, 1966).
[16] 9 FAM §41.31, Notes 6-7.
[17] INS Operations Instructions 214.2(b).

B. Commercial Activity

The term "commercial activity" has been interpreted to extend beyond the mere exchange of goods and services. For example, the DOS regulations contemplate among the list of acceptable B-1 conduct, "activities of a commercial or professional nature."[18] Moreover, the BIA has stated that appropriate B-1 activities include functions that are a "necessary incident to international trade or commerce."[19]

C. Temporary Visit

B-1 visitors must demonstrate that they are visiting temporarily and that they can show a foreign residence which they "ha[ve] no intention of abandoning."[20] The foreign residence requirement is generally consistent among nonimmigrant visa categories. However, the INA makes a special exception to this requirement for H-1B, L-1, and O-1 nonimmigrants.[21]

The FAM provides a short laundry list of factors that consular officers may consider when reviewing an alien's application for a B-1 visa. Specifically, the FAM invites consular officers to consider whether it appears "with reasonable certainty that the departure from the United States will take place upon completion of the temporary visit."[22] Additionally, consular officers may evaluate whether a B-1 applicant's business, family, social, cultural, or other associations "would impel departure."[23]

Although the *intention* to remain permanently in the U.S. is inconsistent with B-1 nonimmigrant status, a *wish* to remain in the U.S., should the opportunity present itself, may not bar admission in the classification.[24] The advice of counsel may be critical in such cases as the B-1 applicant must understand the distinction between *intent* and *wish*. Moreover, the alien's conduct upon visa issuance or application for admission may have a significant impact on his or her ability to seek a later change or adjustment of status.

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[18] 22 CFR §41.31(b)(1).
[19] *Matter of Neill*, 15 I&N Dec. 331 (BIA 1975).
[20] INA §101(a)(15)(B), 8 USC §1101(a)(15)(B).
[21] INA §214(h), 8 USC §1184(h) (codifying the concept known as "dual intent"); INA §214(b), 8 USC §1184(b) (describing immigrant presumption but providing an exception for aliens admissible in the H and L categories); INA §101(a)(15)(O)(i), 8 USC §1101(a)(15)(O)(i) (defining alien of extraordinary ability, but including no requirement that the alien's stay be temporary).
[22] 9 FAM §41.31 notes 2.4.
[23] 9 FAM §41.31 note 2.6.
[24] *Matter of Hosseinpour*, 15 I&N Dec. 191 (BIA 1975), *aff'd on other grounds*, *Hosseinpour v. INS*, 520 F.2d 941 (5th Cir. 1975). *See Lauvik v. INS*, 910 F.2d 658, 661 (9th Cir. 1990) ("[A]n alien's desire to remain in the United States does not negate his intent to depart upon termination of his temporary status."); *Bong Youn Choy v. Barber*, 279 F.2d 642, 645-46 (9th Cir. 1960) (no preconceived intent to remain where alien intended to remain temporarily unless he could arrange legally for permanent status). Note that the preconceived intent to remain permanently in the U.S. may be a proper basis for discretionary denial of an adjustment of status under INA §245. *Jain v. INS*, 612 F.2d 683 (2d Cir. 1979).

An alien who engages in fraud or willful misrepresentation of a material fact in order to procure a visa is inadmissible.[25] The DOS instructs consular officers that a misrepresentation requires "an affirmative act," rather than "the failure to volunteer information."[26] To determine whether an alien has made a misrepresentation to obtain a visa, the DOS instructs consular officers to apply the "30/60 day rule." According to this directive, if within 30 days of B-2 visa issuance or entry, the alien seeks unauthorized employment, begins a program of academic study or otherwise acts in a manner inconsistent with his or her status, he or she "may be presumed to have misrepresented his or her intention in seeking a visa or entry."[27] A change in circumstances which deviates from representations made by the alien at a consular post would also apply to business visitors.[28]

In contrast, if such conduct occurs after 30, but within 60 days of visa issuance or entry, there is no automatic presumption of misrepresentation.[29] If the consular officer reasonably believes that that the alien has misrepresented his or her intent, the alien has the opportunity to present additional evidence. The burden of proof, however, remains with the alien.[30] After 60 days, the DOS does not consider the alien's activities to constitute the basis for a finding of ineligibility.[31] Given the significant potential consequences of a B-1 visitor's activity in the U.S., a review of his or her plans may be appropriate at the outset.

D. Accrual Of Profits Abroad

The BIA has stated that the accrual of profits occurs outside the U.S. if the business visitor is paid when he or she returns to his or her home country.[32] Even when a portion of a foreign company's goods are sold in the U.S. by business visitors, the accrual of profits may remain in the home country if the majority of the company's sales occurs in the foreign country.[33]

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[25] INA §212(a)(6)(C), 8 USC §1182(a)(6)(C).
[26] 9 FAM §40.63, Notes 4-4.2. *But cf.* INA §274C(f), 8 USC §1324c(f) (for purposes of determining penalties for document fraud, statute defines a falsely made document to include one that "fails to state a fact which is material to the purpose for which it was submitted").
[27] 9 FAM §40.63, Note 4.7-1.
[28] The authors understand that the DOS has applied the "30/60 day rule" to B-1 visa applicants.
[29] 9 FAM §40.63, Note 4.7-1.
[30] *Id.*
[31] *Id*.
[32] *Matter of P*, 8 I&N Dec. 206 (BIA 1958) (finding the accrual of profits of Canadian salesman who periodically comes to the U.S. to sell plastic bags is Canada because that is where his wages are paid); *Matter of Cortez-Vasquez*, 10 I&N Dec. 544 (BIA 1964) (finding the accrual of profits of Mexican who enters U.S. several times a week and pays ranchers a nominal sum to collect wood occurs in Mexico because the wood was sold there).
[33] *Matter of B and K*, 6 I&N Dec. 827 (BIA 1955) (finding the accrual of profits of Canadian farmers who enter the U.S. to sell a portion of their crops predominantly remains in Canada).

For foreign employers that engage in limited business activities in the U.S., it may be relatively easy to demonstrate that the accrual of profits occurs in the foreign country. However, larger foreign companies with a significant presence in the U.S. may have greater difficulties. For example, does the accrual of profits requirement mean that a foreign corporation traded on an American stock exchange or involving American depository receipts would be unable to obtain B-1 status for employees coming to the U.S. as business visitors? While this requirement generates interesting theoretical concerns, the experience of practitioners suggests that the accrual of profits requirement has become less significant over time and that business visitor admission is not routinely refused on this basis alone.

E. Compensation

A general requirement of the B-1 visitor category is that the alien's salary may not come from a U.S. source.[34] However, the FAM states that a U.S. source may provide "an expense allowance or other reimbursement incidental to the alien's temporary stay."[35] Compensation for services is prohibited. Thus, to avoid the appearance of unlawful employment, it must be clear that any reimbursement does not, in cash or in kind, amount to actual compensation. In determining what level of reimbursement is "reasonable," the FAM instructs consular officers to consider common sense factors such as the standard of living to which the applicant is accustomed and the relative cost of living in the U.S.[36]

Although the salary source must be outside the U.S., indirect payment though a U.S. source is permissible under certain circumstances. For example, a foreign employer may make arrangements for an alien to be paid through a U.S. financial institution.[37] Additionally, when an employee of a foreign subsidiary of a U.S. company comes to the U.S. to engage in B-1 appropriate activities, the fact that his or her payroll checks are issued in the U.S. (through the U.S. parent company) does not necessarily threaten his or her B-1 eligibility.[38]

[34] *Matter of Hira*, 11 I&N Dec. 824 (BIA 1965, 1966); 9 FAM §41.31, Note 8.
[35] 9 FAM §41.31, Note 8.
[36] 9 FAM §41.31, Note 3.4.
[37] Letter from R. Michael Miller, Deputy Assistant Commissioner for Adjudications, to Stephen E. Mander, *reproduced in* 70 *Interpreter Releases* 221 (February 22, 1993).
[38] Letter from Jacquelyn A. Bednarz, Chief of the Nonimmigrant Branch at the INS' Office of Adjudications, to Harry Gee, *reproduced in* 71 *Interpreter Releases* 992 (August 1, 1994).

G. 1993 Proposed Regulations

In 1993, the INS and the DOS issued proposed rules to amend the B-1 category. Although never implemented, these proposals illustrate the thinking of the relevant federal agencies.[39] Along with codifying the categories of B-1 visitors enumerated in the OI's and the FAM, both sets of proposed rules (as discussed below) attempt to deal with perceived inconsistencies with the B-1 category.

III. ALLOWABLE ACTIVITIES FOR BUSINESS VISITORS

A. Business Activities

The DOS regulations state that for purposes of the B-1 classification, the term "business" refers to "conventions, conferences, consultations and other legitimate activities of a commercial or professional nature."[40] The notes accompanying the FAM further elaborate that such conduct "generally entails business activities other than the performance of skilled or unskilled labor."[41] However, in *Matter of Neill*, the BIA stated that "an alien need not be considered a 'businessman' to qualify as a business visitor, if the function he performs is a necessary incident to international trade or commerce."[42]

Specifically permissible B-1 activities include entry into the U.S. for the purpose of negotiating a contract.[43] An alien may enter the U.S. in B-1 status to pursue investment that would qualify him or her for status as an E-2 investor, so long as the alien "does not perform productive labor or actively participate in the management of the business prior to receiving a grant of E-2 status."[44] Moreover, an alien seeking to enter the U.S. "to open or be employed in a new branch, subsidiary, or affiliate of a foreign employer" may qualify for B-1 status if he or she would become eligible for L-1 status upon obtaining "proof of acquisition of physical premises."[45]

1. Commercial Transactions

B-1 status may be appropriate for an alien seeking to enter the U.S. to "[e]ngage in commercial transactions which do not involve gainful employment in the United States (such as a merchant who takes orders for goods manufactured abroad)."[46] In *Matter of Hira*, for example, an Indian tailor employed by a Hong Kong manufacturer of custom made men's

[39] 58 Fed. Reg. 58982 (proposed November 5, 1993), 58 Fed. Reg. 40024 (proposed July 26, 1993).
[40] 22 CFR §41.31.
[41] 9 FAM §41.31, Note 4.
[42] 15 I&N Dec. 331(BIA 1975).
[43] 9 FAM §41.31, Note 5..
[44] INS Operations Instructions 214.2(b)(11), 9 FAM §41.31, Note 6.7.
[45] INS Operations Instructions 214.2(b)(12).
[46] 9 FAM §41.31, Note 5.

clothing, who traveled to various U.S. cities to take measurements from clients whom he did not solicit, was entitled to B-1 visitor status.[47] Although the tailor in this case was found to be entitled to B-1 status, he, like the Canadian engineer, was arguably competing with U.S. businesses. The tailor, likewise, could be said to be expanding his employer's business in the U.S.

2. Consultation

While the DOS definition of "business" includes entry with the avowed intention to "consult," is this sparse reference sufficient to include the broad field of endeavor known as "consulting"?[48] The BIA has found that employees of consultants who meet with clients in the U.S. to gather information and then return abroad to complete the project are admissible as B-1 visitors.[49] In contrast, the BIA has found that the principal in a Canadian mechanical engineering firm who repeatedly entered the U.S. for short periods of time to consult with clients and then returned to Canada to perform design and drafting work was not entitled to B-1 status.[50] According to the BIA, the engineer's services were not "performed as an incident to any international commercial activity, except to the extent that the performance of this service can, itself, be considered an international commercial activity."[51] Rather, the BIA concluded that the engineer "appear[ed] to be in the process of extending his professional engineering practice to the United States."[52] Thus, it seems that in the BIA's view, whether the consultant is an employee or principal may affect whether he or she is viewed as eligible for B-1 status. Readers are cautioned, however, that many of the BIA's decisions in the B-1 area may not be reconcilable.

The DOS proposed regulations sought to grapple with the terminology and distinguish between those who advise management and those who perform hands-on work in the U.S.[53] Consistent with the BIA's

[47] *Matter of Hira*, 11 I&N Dec. 824 (BIA 1965, 1966).
[48] The Dictionary of Occupational Titles defines the duties of a consultant and provides, in pertinent part, that a consultant "consults with client to define need or problem, conducts studies and surveys to obtain data, and analyzes data to advise on or recommend solution, utilizing knowledge of theory, principles, or technology of specific discipline or field of specialization." U.S. Dep't of Labor, Dictionary of Occupational Titles (DOT) 189.167-010, at page 153 (4th ed. 1991). *See, e.g.,* Operations Instruction 214.6(c)(8) (for purposes of the Canadian Free Trade Agreement, a management consultant "provide[s] services which are directed toward improving the managerial, operating, and economic performance of public and private entities by analyzing and resolving strategic and operating problems and thereby improving the entity's goals, objectives, policies, strategies, administration, organization, and operation.")
[49] *Matter of Opferkuch*, 17 I&N Dec. 158 (BIA 1975).
[50] *Matter of Neill*, 15 I&N Dec. 331 (BIA 1975).
[51] *Id*.
[52] *Id.*
[53] Although, an alien may be admitted to perform hands-on work in the "B-1 in lieu of H-1" subcategory. *See infra text accompanying notes* 93-109.

view, the DOS proposed regulations provide a hypothetical example in which a U.S.-based company is preparing accounting documents for an international client and seeks to retain the services of a foreign-based business to prepare the necessary materials.[54] The foreign-based accountant is coming to the U.S. to "advise, consult, and educate the U.S. based entity on the relevant foreign accounting principles" and will return to the foreign country to prepare the documents.[55] According to the DOS, the alien is employed abroad and the accrual of profits occurs abroad, thus the alien is engaging in "classic B-1 activity."[56]

Perhaps the purpose of the consultation is more important than the activities the alien actually performs in the U.S. In *Neill*, the BIA may have been concerned that the alien was competing with U.S. engineering firms although he did not engage in "labor for hire" in the U.S., while the DOS' hypothetical involves knowledge that may not be readily available in the U.S.

a. Computer Professionals

The B-1 eligibility of computer professionals has been the subject of considerable debate over the past several years. Both the INS and DOS proposed regulations would significantly restrict the B-1 category based in significant part on concerns regarding so-called "job shops" in the computer industry.[57] Rather than merely capturing aliens improperly performing "local labor for hire," however, both proposals would significantly impact legitimate temporary business relationships. For example, legitimate software localization activities illustrate the potential problems with the INS and DOS' approach.[58]

The DOS proposed regulations include a sample fact pattern that addresses the situation in which a U.S.-based company contracts with a foreign company for the development of a computer software package that the U.S. company plans to market overseas.[59] According to the DOS, foreign programmers sent to the U.S. company's site to develop the software are not entitled to

[54] 58 Fed. Reg. 40024, 40027 (proposed July 26, 1993).
[55] *Id.*
[56] *Id.*
[57] The DOS proposed regulations define "job shops" as foreign firms that hire aliens "solely for the purpose of fulfilling a contract to supply workers to an American firm." 58 Fed. Reg. 40024, 40026 (proposed July 26, 1993).
[58] "Localization" is the translation of software applications and underlying computer operating systems from the "language" utilized by the software developer to the "language" of the end user in the target foreign market. "Language" refers to human language as well as to the technical workings and instructions of the software, both internally and in the software's interaction with the hardware platform from which it is run.
[59] 58 Fed. Reg. 40024, 40027 (proposed July 26, 1993).

B-1 status when the U.S. company provides equipment, pays *per diem* expenses and engages in some oversight of the work product.[60] If, however, the foreign programmers come to the U.S. exclusively for the purpose of obtaining information necessary to develop the software and then return to their foreign workplace to prepare the program, they are entitled to B-1 visa classification.[61]

Both the DOS and INS proposed regulations contemplate that the foreign employer will retain ultimate control over the computer professional's activities, including the U.S. location where the alien will work and the hours of work, although the INS does not require that the foreign company control the alien's day-to-day activities.[62] This proposed requirement is particularly troubling, as it clearly is not reasonable that the foreign employer would have such influence over the operation of the U.S. employer. Moreover, the INS proposed regulations state that the alien's proprietary work product must belong to the alien or the foreign employer and not to the U.S. company.[63]

The federal agencies' restrictive approach to B-1 eligibility for foreign computer professionals would threaten legitimate B-1 activities, particularly in the area of software localization. U.S. technology companies often prefer that employees of foreign companies performing localization activities do so in the U.S. In particular, U.S. companies wish to protect valuable intellectual property rights, safeguard proprietary technology, and prevent piracy and industrial espionage. Moreover, by bringing these foreign computer professionals temporarily to the U.S., software developers may have greater control over quality assurance issues. Additionally, allowing such professionals to come to the U.S. temporarily to engage in localization activities may often be more efficient for both the hosting company and the foreign employer.

Another option may be available to foreign computer professionals. In a never-revoked field memorandum, the INS acknowledged that foreign computer professionals may be admissible in the "B-1 in lieu of H-1" classification where the services provided by the alien "are necessary to the integrated international production, marketing and service system of a corporation, its subsidiaries and affiliates, and do not involve the reassignment of an alien to an employer in the United States (*i.e.*,

[60] *Id*.
[61] *Id.*
[62] 58 Fed Reg. 58982, 58983-58984 (proposed November 5, 1993). In contrast, the DOS proposed rules require that the foreign employer control both the alien's day-to-day activities and the U.S. location where the alien will be performing the activities. 58 Fed. Reg. 40024, 40027 (proposed July 26, 1993).
[63] 58 Fed. Reg. 58982, 58985 (proposed November 5, 1993).

the employee remains under the control of an employer outside the United States)."[64]

3. Board of Directors Meetings

The FAM acknowledges that aliens may enter the U.S. in B-1 status for an employment purpose so long as employment is incidental to their professional business activities.[65] Specifically, alien members of Boards of Directors of U.S. corporations may "attend a meeting of the board or to perform other functions resulting from membership on the board."[66] The DOS proposed regulations note that an alien member of the board of an American firm may attend such meetings, even though he or she is, "in effect, [an] employee of the firm."[67] In support of this interpretation, the proposed regulations speculate that it is highly unlikely that an election of additional U.S. Board members would be held as a result of the foreign Board member's ineligibility for admission.[68]

Moreover, there is immigration "lore" to support the proposition that such board members may be paid a corresponding Director's Fee in the U.S. without compromising their B-1 status.[69] Unlike domestic workers, however, directors are not among the list of those who must apply for employment authorization, so the issue remains uncertain.[70]

In the situation where a foreign officer, such as the CEO, has been appointed prior to the initiation of the immigration process, this classification may be appropriate as a temporary measure. Immigration counsel may consider advising clients that the officer should refrain from engaging in activities of an executive nature while in the U.S. in B-1 status. The board member could be instructed that executive activities are appropriate outside the U.S., but that he or she should engage only in directorial activities in the U.S.

A problem may also arise when a client issues a press release announcing the appointment of the foreign CEO before the immigration process has begun. Immigration counsel may wish to advise the client to publish a clarification or create a Board resolution stating that the officer's

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[64] *See Matter of Srinivasan*, quoted and discussed in S. Bernsen, *The Proposed Restriction of the "B-1 in Lieu of H-1" Concept*, 70 Interpreter Releases 35, 1189-92 (September 13, 1993).
[65] 9 FAM §41.31, Note 6.
[66] 9 FAM §41.31, Note 6.2.
[67] 58 Fed. Reg. 40024, 40026 (proposed July 26, 1993).
[68] *Id*.
[69] Based on Angelo A. Paparelli's discussions with Cornelius "Dick" Scully, then Director of Legislative, Regulatory and Advisory Assistance (These conversations originated out of concerns reportedly expressed by the consular post in Montreal that resulted in a DOS advisory opinion. Alas, the authors do not have a copy of this document. Thus, practitioners should tread carefully when advising directors on this issue.); *see also* DOS Proposed Regulations, 58 Fed. Reg. 40024, 40026 (proposed July 26, 1993).
[70] 8 CFR §274a.12(c)(17).

capacity in the U.S. will be exclusively directorial and not executive in nature.

Another situation arises when an executive "jumps the gun" by coming to the U.S. in B-1 or WB status in anticipation of a subsequent transfer to the U.S. Such conduct may be viewed as a material misrepresentation in an effort to procure an immigration benefit (a visa or admission to the U.S.) and thereby adversely impact the alien's later application for an E, L, or H visa.

4. Commercial Or Industrial Workers

B-1 status may be appropriate for an alien entering the U.S. "to install, service, or repair commercial or industrial equipment or machinery purchased from a company outside the United States or to train U.S. workers to perform such services."[71] The FAM provides that the contract of sale specifically requires the seller to perform the service or training at issue, the alien possesses "specialized knowledge" essential to the seller's obligation, and the alien receives no remuneration from a U.S. source.[72] The OI's impose an additional obligation that the alien's trip to the U.S. must occur within one year following the purchase of equipment or machinery.[73]

Several issues arise when a commercial or industrial worker seeks B-1 status. For example, what constitutes the "contract of sale" that embodies the agreement of seller and buyer?[74] Is the purchase order the contract? The issue may involve a "battle of the [pre-printed] forms."[75] Practitioners should keep in mind, however, that the contract itself should not be used as a vehicle to circumvent federal law. The INA prohibits the use of a contract to obtain the labor of an unauthorized alien and provides for criminal and civil penalties for anyone in violation of this provision.[76]

Moreover, an after-sale or warranty clause is critical to an alien's qualification as a B-1 visitor because the contract must require the seller to perform the services that the alien is entering the U.S. to provide.[77] Based on the OI's, however, an after-sale or warranty clause of greater than one

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[71] 9 FAM §41.31, Note 7.1(a). The INS Operations Instructions are substantially the same with regard to this specific point. INS Operations Instructions 214.2(b)(5).
[72] *Id*. In contrast, the INS regulations addressing NAFTA allow temporary entry "as a business person to engage in business activities at a professional level." 8 CFR §214.6(a).
[73] INS Operations Instructions 214.2(b)(5).
[74] *See infra text accompanying note* 128 for a discussion of the comparable provision under NAFTA. For a general discussion of the B-1 category under NAFTA, *see infra text accompanying notes* 124-128.
[75] Uniform Commercial Code §2-207 (1999-2000).
[76] INA §274A(a)(4), 8 USC §1324a(a)(4).
[77] 9 FAM §41.31, Note 7.1(a), INS Operations Instructions 214.2(b)(5).

year will not ensure an alien's entry in B-1 status for any period of time except perhaps for the first year following the purchase.[78]

It is unclear whether the seller must be foreign, although the FAM and OI's indicate that the company must be "outside the U.S."[79] The proportion of the contract that must involve "goods" rather than "services" is also unclear. The INS proposed regulations state that when a purchase contract is entered into, the purchase must involve "a physical product (for example, machinery or other forms of equipment), and not activities of a service nature."[80] However, large contracts often involve the provision of both goods and services. For example, situations may arise where only a small proportion of a large contract is for the purchase of goods (*e.g.*, computer chips) and the remainder of the purchase covers services. Whether a "mixed" contract for goods and services will suffice remains unclear.

The confusion regarding the terms "business" and "labor for hire" reached its culmination in a 1985 California federal district court decision where the court seemed poised to reject the B-1 category in its entirety.[81] In *Bricklayers II*, the court held that INS Operations Instructions ("OI's"), which permitted the issuance of visas to foreign laborers coming to work temporarily in the U.S., violated the Immigration and Nationality Act's ("INA") policy to protect against an influx of foreign labor and was inconsistent with the requirement of H-2 temporary worker status. However, the government withdrew its appeal of this decision after reaching a settlement with the union in which the INS and the DOS agreed to place certain restrictions on the ability of commercial and industrial workers to qualify for B-1 status.[82]

5. Study Or Training

The INA bars from the B-1 category aliens entering the U.S. for the primary purpose of study. [83] However, B-1 visitors may engage in incidental study.[84] Additionally, there are other circumstances in which an

[78] INS Operations Instructions 214.2(b)(5).
[79] 9 FAM §41.31, Note 7.1(a), INS Operations Instructions 214.2(b)(5).
[80] 58 Fed. Reg. 58982, 58984 (proposed November 5, 1993)
[81] *Int'l Union of Bricklayers v. Meese*, 616 F. Supp. 1387 (1985) [Bricklayers II].
[82] 51 Fed. Reg. 44266 (Dec. 9, 1986). The settlement resulted in a revised FAM note providing that B-1 status is not available to an alien seeking to perform building or construction work, but allowing business visitor classification for the supervision or training of building or construction workers. 9 FAM §41.31, Note 7.1.
[83] *Matter of Hsu*, 14 I&N Dec. 344 (Reg. Comm'r 1973) (B-1 visitor whose primary purpose was study not considered a bona fide visitor).
[84] Letter from Lawrence J. Weinig, Deputy Assoc. Comm. for Examinations to Angelo A. Paparelli (January 4, 1988), *reproduced in* 65 *Interpreter Releases* 86 (January 25, 1988).

alien may enter the U.S. in B-1 status for educational purposes.[85] An alien who is classifiable as an H-3 nonimmigrant, is employed abroad, and will continue to be paid by his or her foreign employer may enter the U.S. as a B-1 visitor to undertake training (also known as "B-1 in lieu of H-3").[86]

Aliens may also come to the U.S. to engage in certain teaching or training activities.[87] The FAM and OI's contemplate that a commercial or industrial worker may enter the U.S. in B-1 status to conduct training of U.S. workers.[88] Moreover, B-1 visitors engaging in "usual academic activity" may accept honoraria under the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA").[89] However, the activity must last no longer than nine days at any one institution and the alien may not accept payment from more than five institutions within the previous six-month period.[90]

As a practical matter, numerous European universities and professional licensing authorities require students to participate in unpaid internships. Those individuals whose course of study requires an international component often seek 60 to 90 day internships with organizations in the U.S. Although the FAM allows a business visitor to "observe the conduct of business," consular officers are instructed that students seeking practical experience must qualify for H, L, or J visas "when an appropriate exchange visitors program exists."[91]

Although the INA excludes persons whose primary purpose is study from the ambit of the B-1 category, the DOS and INS regulations provide that an alien studying at a foreign medical school may enter the U.S. in B-1 status to take an "elective clerkship" at a U.S. medical

[85] 9 FAM §41.31, Note 5 (B-1 visitor allowed to participate in scientific, educational, professional or business conventions or seminars or to undertake independent research), 9 FAM §41.31, Note 7.3-1 and INS Operations Instructions 214.2(b)(4) (alien studying at foreign medical school seeking to enter the U.S. as B-1 visitor to take an "elective clerkship"), 9 FAM §41.31, Note 7.3-2 (B-1 visitor may observe the conduct of business including other "vocational activity" provided the alien pays his or her own expenses). The statement found on Form OF-156 (Nonimmigrant Visa Application), which states at No. 22: "Bearers of visitors visas may *generally* not work or study in the U.S" confirms, if obliquely, that study is sometimes permitted. (Emphasis added).

[86] INS Operations Instructions 214.2(b)(3).

[87] For example, a Canadian or Mexican seeking temporary employment under Appendix 1603.D.1 of the NAFTA "may also perform training functions relating to the profession, including conducting seminars." 8 CFR §214.6, note 1. Additionally, an alien may engage in training activities as a J-1 exchange visitor. 8 CFR §214.2(j). An alien may serve as a professional trainer in H-1B status. 8 CFR §214.2(h). Likewise, if an alien meets the requirements, he or she may engage in training activities as a business visitor under the "B-1 in lieu of H-1" subcategory. 9 FAM §41.31, Note 8 (discussing the B-1 category).

[88] 9 FAM §41.31, Note 7.1(a), INS Operations Instructions 214.2(b)(5).

[89] American Competitiveness and Workforce Improvement Act of 1998, Title IV of Pub. L. 105-277 (Oct. 21, 1998), 112 Stat, 2381, §431.

[90] *Id.*

[91] 9 FAM §41.31, Note 7.3-2. This reference is puzzling because only the J visa involves an appropriate exchange visitor program.

school's hospital "as an approved part of the foreign medical school education."[92] These medical students are distinguishable from other students seeking to attend school in the U.S. because they must be attending a foreign medical school.

B. "B-1 In Lieu Of H-1"

Aliens who qualify for H-1B visas may be classified as visitors for business under certain circumstances and may, therefore, render professional services.[93] The INS and DOS' 1993 proposed regulations, however, would have eliminated the "B-1 in lieu of H-1" subcategory.[94] The INS justified this proposed change by noting that the restrictions imposed on the H-1B category by the Immigration Act of 1990 ("IMMACT90") and the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 "effectively superced[ed]" the "B-1 in lieu of H-1" provisions of the OI's.[95]

The DOS proposed regulations also relied on these statutes, stating that the "B-1 in lieu of H-1" classification "was apparently a careless use of language which has led to misinterpretation and occasional misuse over the years."[96] Despite this rejection of the "B-1 in lieu of H-1" subcategory, the DOS states that "[t]he concept . . . of issuing visas in the B-1 classification to and admitting aliens who are not employed by an organization in the United States but rather are working for and drawing their income from a foreign firm, is still perfectly valid under straightforward B-1 visa standards, regardless of the fact that the aliens may also be of 'distinguished merit and ability'."[97]

An equally plausible alternative analysis suggests that Congress considered the "B-1 in lieu of H-1" subcategory an important safety valve. Unlike the B-1 visitor classification, the H-1B category is subject to an annual cap, which results in an inevitable inflexibility in response to changing economic conditions.[98] Additionally, there are significant documentation requirements associated with H-1B visas that may be infeasible when an alien will remain in the U.S. for a matter of weeks or months.[99] Moreover, in the face of the ongoing presence of the "B-1 in lieu of H-1" option, Congress has remained conspicuously silent on this issue.[100]

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[92] INS Operations Instructions 214.2(b)(4), 9 FAM §41.31, Note 7.3-1.
[93] 9 FAM §41.31, Note 8 (discussing the B-1 category).
[94] 58 Fed. Reg. 40024-30 (proposed July 26, 1993), 58 Fed. Reg. 58982-88 (proposed Nov. 5, 1993).
[95] 58 Fed. Reg. 58982, 58982 (proposed Nov. 5, 1993).
[96] 58 Fed. Reg. 40024, 40025 (proposed July 26, 1993).
[97] *Id*. "Distinguished merit and ability" is a former synonym for one subcategory of the H-1B classification. IMMACT90 Pub. L. No. 101-649, 104 Stat. 4978, §205, to be codified in INA §101(a)(15)(H) (changing standard from "distinguished merit and ability" to "specialty occupation").
[98] 65 Fed. Reg. 15178-15180 (March 21, 2000) (announcing that INS will reject H-1B petitions requesting a start date before October 1, 2000).
[99] 8 CFR §214.2(h)(4)(B).
[100] IMMACT90, Pub. L. No. 101-649, 104 Stat. 4978 (Congress makes no mention of the "B-1in lieu of H-1" subcategory in the legislative history of IMMACT90 despite the long existence of the FAM note).

In 1982, a never-rescinded INS cable addressed the circumstances in which the "B-1 in lieu of H-1" classification is appropriate.[101] In this cable, the INS considered *Matter of Srinivasan*, a case involving the denial of B-1 status to employees of an India-based computer company. The INS concluded that B-1 classification is proper under the following circumstances: 1) the alien receives no remuneration from a U.S. source; 2) he or she is a *bona fide* nonimmigrant; 3) the alien qualifies for H-1 status and will perform duties that "require distinguished merit and ability"; and 4) "[t]he services to be provided are necessary to the integrated international production, marketing, and service system of the corporation, its subsidiaries, and affiliates, and so [does] not involve the reassignment of an alien to an employer in the United States."[102]

Use of the "B-1 in lieu of H-1" classification requires appropriate supervision by the foreign employer. If the B-1 visitor is supervised extensively by the U.S. customer, the U.S. company could be deemed the employer.[103] Moreover, such oversight could be deemed a violation of IRCA's prohibition against using a contract to circumvent the federal law prohibiting the knowing employment of an unauthorized alien.[104]

To reduce the risk that a U.S. customer is deemed the "employer" of a B-1 visitor, an appropriate chain of command leading to the foreign employer should be in place and be documented, possibly through the use of periodic e-mail or other written communication. Moreover, the U.S. customer's control over the business visitor's activities, including the order in which the visitor performs his or her work and the hours during which the work is performed, will influence whether the customer will be deemed the alien's employer for purposes of immigration law.

What if the B-1 visitor is self-employed? In such cases, it may be much more difficult for the alien to demonstrate that he or she is not supervised by the U.S. customer.[105] Certainly, the more formal the business entity is in the foreign

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[101] *Matter of Srinivasan*, quoted and discussed in S. Bersen, *The Proposed Restrictions of the "B-1 in Lieu of H-1" Concept*, 70 *Interpreter Releases* 35, 1189-92 (September 13, 1993).
[102] *Id.*
[103] The INS defines "employer" as "a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration." 8 CFR §274a.1(g). An "employee" is defined as "an individual who provides services or labor for an employer for wages or other remuneration." 8 CFR §274a.1(f). The INS defines the term "independent contractor" to include "individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results." 8 CFR §274a.1(j). *See* Angelo A. Paparelli, *Yes We Have No Employees: The U.S. Immigration Consequences of Corporate Outsourcing and Secondment*, 13 Immigration Law Report No. 16, 181-185 (August 15, 1994).
[104] INA §274A(a)(4), 8 CFR §274a.5.
[105] *Matter of Neill*, 15 I&N Dec. 331 (BIA 1975) (principal in Canadian engineering firm found to be extending his business practice to U.S. and therefore not entitled to B-1 status even though he performed all work in Canada)

country, the more likely the self-employed individual will be able to meet the B-1 requirements. For example, an individual who works out of his or her home and has no employees may be a more difficult case than the alien who has an office in the foreign country and employees. Likewise, the nature of the self-employment may make a difference. For example, an alien who is a majority shareholder in a foreign corporation may be an easier case than a sole proprietor.

Moreover, the supervision requirement may create unique issues for professionals, such as lawyers, who are self-supervising and exercise a high degree of independent judgment.[106] In its proposed regulations, the DOS provides an example of a foreign lawyer coming to a U.S. law firm to perform research and render an opinion regarding foreign law.[107] According to the DOS, when the research and analysis is performed in the U.S., the lawyer is performing "domestic services" and, thus, is not entitled to B-1 status.[108] In contrast, if the foreign lawyer performs the necessary research abroad and comes to the U.S. to "advise" the American law firm, he may be classified as a business visitor.[109]

C. Household Domestic Workers

Consistent with its characterization as a "catch all" classification, the B-1 category is available to certain domestic workers. Servants of U.S. citizens residing abroad, if the citizen is temporarily visiting the U.S. or is temporarily assigned to the U.S., may enter the U.S. in B-1 status and perform work for their employer.[110] Additionally, nonimmigrant employers entering the U.S. in B, E, F, H, I, J, or L status may bring a personal or household domestic servant under certain circumstances.[111]

The threshold requirements of the B-1 category do not apply to such workers. For example, the FAM provides that, contrary to the basic requirements of the B-1 category, the source of payment for the B-1 personal or domestic servant "is not relevant."[112] Moreover, because these individuals will be performing work, personal or domestic servants who qualify as B-1 visitors must apply for employment authorization.[113]

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[106] *See* American Bar Association Model Rules of Professional Conduct, Rule 2.1 (1999) (stating that "a lawyer shall exercise independent professional judgment and render candid advice.")
[107] 58 Fed. Reg. 40024, 40027 (proposed July 26, 1993).
[108] *Id.*
[109] *Id.*
[110] INS Operations Instructions 214.2(b)(1).
[111] 9 FAM §41.31, Note 6.3, INS Operations Instructions 214.2(b). The FAM (but not the OI's) allows personal servants for employers seeking M nonimmigrant status.
[112] 9 FAM §41.31, Note 6.3-5.
[113] 8 CFR §274a.12(c)(17).

D. Participation in Litigation

The FAM provides that aliens may enter the U.S. in B-1 visitor status to litigate.[114] Although other visa classifications may be available to aliens under very narrow circumstances, this reference in the FAM may provide a more flexible alternative.[115] The B-1 classification may provide a less structured option for aliens involved in the U.S. legal system in less dramatic ways than provided for above. For example, B-1 classification may be an option for aliens involved in civil litigation, including a divorce or other family law matters.[116]

E. Visa Waiver Pilot Program

The Visa Waiver Pilot Program ("VWPP"), now in its eleventh year, allows citizens of certain countries to enter the U.S. in visitor status for business (or pleasure) for up to 90 days without obtaining a visa from a U.S. consulate abroad.[117] The VWPP is an extremely restrictive category, however. Unlike the B-1 category, the VWPP does not permit a change of status to another category.[118] Additionally, an alien who enters through the VWPP does not have the right to extend his or her authorized stay.[119] Moreover, in exchange for the right to enter the U.S. without a visa, a VWPP alien forfeits the right to have a determination of ineligibility reviewed, and the right to contest an order of removal.[120]

In addition to significant restrictions that do not exist for the B-1 category, the VWPP has been cited by the U.S. Department of Justice as having created the serious potential for fraudulent entry.[121] Specifically, the report stated that abuse of the VWPP poses a threat to U.S. national security by increasing the probability that "mala fide" aliens will be able to enter the U.S.[122]

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[114] 9 FAM §41.31, Note 5.

[115] INA §101(a)(15(S)(ii) (an alien witness or informant in a criminal matter may be classified as an S-5 alien if he or she possesses information regarding a "criminal organization or enterprise" and is willing to supply this information to law enforcement officials); INA §101(a)(15)(S)(ii) (an alien witness or informant regarding a counterterrorism matter may be entitled to S-6 classification); ACWIA §413(a). (the "whistleblower" provision of ACWIA protects from adverse action employees who have cooperated in an investigation or proceeding).

[116] *See In re Marriage of Dick*, 18 Cal. Rptr. 2d 743 (1993) (holding that a B-2 visitor may establish residency for purposes of obtaining a dissolution of marriage).

[117] INA §217, 8 USC §1187; 8 CFR Part 217.

[118] INA §248, 8 USC §1258.

[119] INA §217(a)(1), 8 USC §1187(a)(1). A VWPP alien who is unable to depart within the 90-day period due to an "emergency" may be granted an additional period of stay of not more than 30 days. 8 CFR §217.3(a)

[120] INA §217(a), 8 USC §1187(a).

[121] The Potential for Fraud and INS's Efforts to Reduce the Risks of the Visa Waiver Pilot Program, U.S. Department of Justice Office of the Inspector General Inspection Report, Report Number I-99-10 (March 1999).

[122] *Id.*

At the time this article went to press, the VWPP was set to expire on April 30, 2000. Legislation is in the works, however, that would make the program permanent while adding additional security measures.[123]

E. NAFTA

The North American Free Trade Agreement ("NAFTA") allows Canadians and Mexicans admission as business visitors to pursue a variety of enumerated activities on behalf of an enterprise located in Canada or Mexico.[124] Unlike the B-1 regulations, which are rather sparse, requiring practitioners to rely upon the FAM, OI's and other materials to determine the parameters of the classification, the B-1 provisions of NAFTA are extensive, and often broader than the B-1 regulations. There is a lengthy list of permissible B-1 activities that are permissible under NAFTA so long as the alien receives no remuneration from a U.S. source.[125] For example, professionals, including managers and supervisory personnel engaging in commercial transactions for a Mexican or Canadian enterprise are admissible in B-1 status.[126] Moreover, Canadian or Mexican individuals engaging in independent research of a technical, scientific or statistical nature may come to the U.S. in B-1 status.[127]

The after-sales service provision of NAFTA is broader than the comparable discussions in the FAM and OI's. For example, under NAFTA, this provision allows after-sale service and training for the duration of the warranty or service agreement, rather than restricting such activity for one year as in the INS OI's.[128] Significantly, the after-sales service provision of NAFTA specifically includes computer software.

IV. PREPARATION OF ALIEN

Immigration counsel should consider a variety of issues before an alien seeking entry as a B-1 visitor reaches a U.S. port of entry.

1. **A letter for the alien to carry for possible presentation at the port of entry**. A letter of invitation from the relevant U.S. entity that confirms the facts may assist the alien, who may be unable to communicate effectively in English. Such a document may also serve as protection for the attorney as he or she may advise the alien not to use the letter unless it accurately reflects the facts. A letter authored by the attorney, however, presents several problems. First, such a letter should be accompanied by a Form

[123] H.R. 3767, 106th Cong., 2d Sess. (2000).
[124] 8 CFR §214.2(b)(4). Specific occupations set forth in Appendix 1603.A.1 to Annex 1603 of NAFTA are: research and design; growth, manufacture and production, marketing, sales, distribution, after-sales service, general service. 8 CFR §214.2(b)(4)(i).
[125] 8 CFR §214.2(b)(4)(i).
[126] 8 CFR §214.2(b)(4)(i)(G).
[127] 8 CFR §214.2(b)(4)(i)(A).
[128] 8 CFR §214.2(b)(4)(i)(F).

G-28 (Notice of Entry of Appearance as Attorney or Representative), which is not entirely appropriate for this situation. Moreover, the alien has no right to representation at the border.

2. **Preparatory interview with the alien.** Such an interview is extremely desirable as a method of describing in detail the particulars of the B-1 visitor category. Specifically, the attorney should caution against the casual use of the word "work" when being interviewed by the INS. At this time, the attorney has the opportunity to discuss the range of activities that are not considered "business" by the INS and the prohibition against engaging in such activities during a B-1 entry. Consider advising the alien to carry a cell phone and utilize it before confiscation by the INS in the event he or she is placed in secondary inspection. The alien should be further instructed to contact counsel and inform him or her of the situation, including the name of the relevant INS official.

3. **Documentation.** The attorney may wish to instruct the alien to request a copy of any statement that the alien is required by the INS to sign. Moreover, the alien should be instructed to thoroughly review any such document and to refuse to sign if the document is inaccurate. Realistically, this process may be hampered by a language barrier and the use of an INS interpreter. If a problem arises at the port of entry, the attorney should instruct the alien to prepare a contemporaneous memorandum describing his or her interaction with the INS, including INS questions, the alien's answers, and any documentation reviewed. In the event of a challenge to the INS action, such a recording of events may prove critical.

V. CONCLUSION

As has been seen, America stands as a veritable caravansary to multitudes of temporary business visitors, welcoming the many and the motley who qualify under the expansive "catch-all" B-1 and WB categories. They may come here for legitimate business purposes, as long as each can truthfully say upon arrival:

"I'm on my way
Well I'm on my way
Home sweet home."[129]

[129] "Home Sweet Home," by the band, Mötley Crüe, 1985.