



The A to Z of US Market Entry: Company Set Up, Tax, Investment, Employment & Immigration

Naomi Seddon, Shareholder

Littler Mendelson, P.C., Los Angeles

Phone: 310 712 7312 • Mobile: 323 633 4367 • nseddon@littler.com

AU Mobile: 0400 034 205

Littler

Employment & Labor Law Solutions Worldwide™

“Buy American and Hire American”

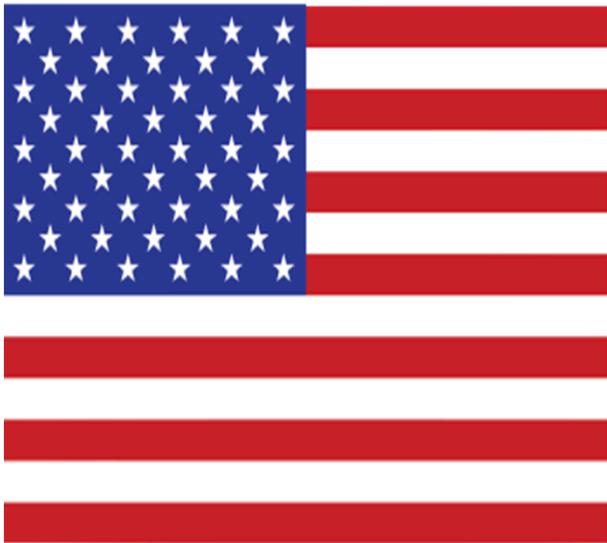


- **Trump’s initiative to protect the interests of American workers. So what does it mean?**
 - Jobs for Americans policy
 - Becoming increasingly difficult to obtain work visas for the U.S. – higher visa rejection rates
 - Employment eligibility checks using E-Verify
 - Random spot checks
 - Awareness of non-immigrant status and “maintaining links to Australia”

Early Considerations

- **What are the rules around foreign company ownership, structuring and set up?**
 - Consider what structure is right for you and your shareholders
 - Consider the residency of shareholders and which laws will apply
- **Long-term goals vs short-term goals may impact structure, share ownership, employment vs contractors and various other matters**
- **Recognize that the laws in each country are different and the need for expert advise**
 - Don't try to navigate yourself
 - Don't cut corners and try to get a "quick fix"
 - Get advice early

Setting up a US Entity



- **Consider impact on your global structure**
- **US presence is required**
- **Reporting requirements and penalty exposure. Depending on your entity choice, foreign trusts, companies and shareholders will have US reporting requirements and penalty exposure.**
- **Delaware C-Corp**
 - Preferred over an LLC
 - It satisfies the standards for US Corporation Laws
 - Registrations in each state when employing workers

Corporate Tax Compliance

- **Corporate tax compliance filings will need to meet federal and state obligations**
- **Each state governs its own requirements and regulations**
- **You may be required to register to do business in several states depending on whether you have created a state tax nexus**
- **Consider whether you are required to register to collect sales tax – determination based on whether a state is a “destination based” or “original based” state**
- **Consult a local firm to discuss your obligations as misreporting and failure to register can result in heavy penalties in each state of non-compliance**

Important Tips

- **Remember that the US is litigious:**
 - Take out insurances – EPLI, renters insurance to cover personal liability, workers' compensation insurance (contractors vs. employees)
- **Laws can differ significantly from state to state:**
 - Don't try to navigate yourself!
 - Don't cut corners
 - Don't try to use Australian documents here: including contracts and policies

Engaging Contractors

- **Contractors often used to “test waters” in a new market**
- **Are you creating a Permanent Establishment?
Consider the activities of sales and business development teams**
- **In many cases it is better to simply establish a legal presence to avoid compliance and penalty exposure.**
- **Key risks include tax liabilities, financial penalties, back payment of benefits and payroll tax exposure.**

Recruiting Local Hires

- **Is a local company required to employ workers or can a foreign company be registered to employ and do business?**
- **What other pre-employment steps need to be taken?**
- **How can employees be paid? Taxes, currency, bank deposits etc?**
- **What are the rules around hiring and firing and managing employees?**
- **Managing employees across borders – consider risks. Should you train your managers on local laws?**

Highlighting Some Significant Differences

U.S.	Australia
“At-Will” employment	Unfair Dismissal Jurisdiction
	Managing Employees: procedural fairness is <u>strictly</u> required – paper trail required
Leave entitlements: Generally no	Yes: annual, personal, compassionate, PHs, community service, parental, flexible work arrangements
Severance: No statutory right	Severance: Statutory right
Generally no application of employment laws outside US borders	Employment laws can apply outside the borders of Australia
Background checks: permitted subject to some exceptions	Backgrounds checks: generally not permitted
Post-employment restraints: some jurisdictions not permitted (e.g. California)	Post-employment restraints: can be enforceable
	Mandatory retirement benefits (Superannuation)



**Transferring Employees Between
Countries – *What Australian
Companies Looking to Expansion
Should Know...***

Transferring Employees Between Countries

- **Sending employees from AU to US**
– **must consider implications of laws in both countries**
- **Immigration – what are the company obligations?**
- **What happens to an employee's accrued local AU benefits?**
- **What taxation implications are there for the company and the employee?**
- **Consider ongoing superannuation obligations**



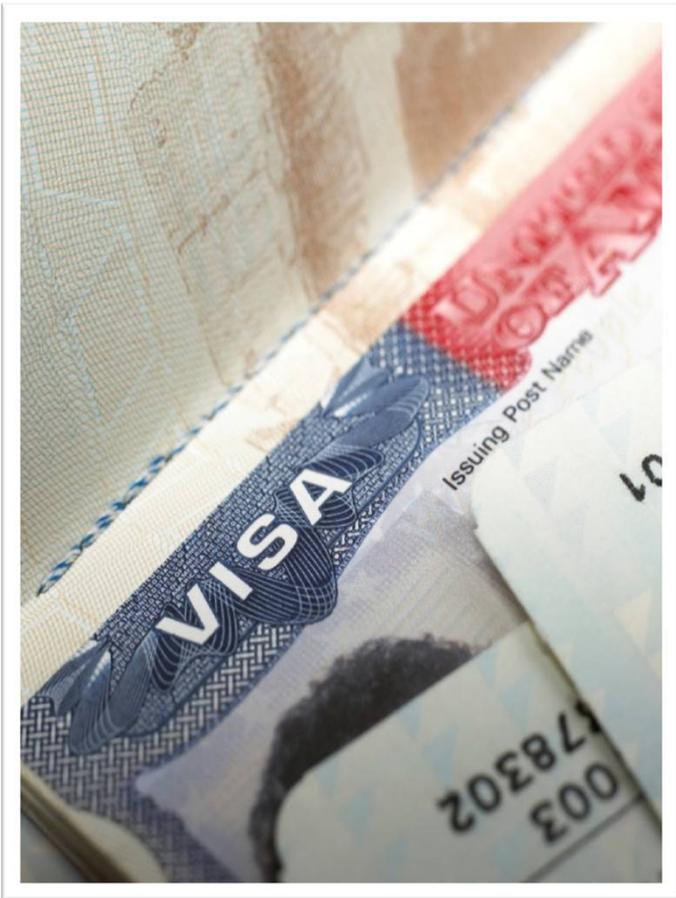


So....what does immigration look like under Trump's administration???

So what are the risks??....

- **Becoming increasingly difficult to obtain work visas for the U.S.**
- **Jobs for Americans policy**
- **Higher scrutiny of visa applications**
- **Higher rejection rates**
- **Random spot checks**
- **Be aware of non-immigrant status and maintaining links to Australia**

U.S. Business Visa Options



- **ESTA**
- **B1/B2 Business Visitor/Tourist**
- **E1 Treaty Trader**
- **E-2 Treaty Investor**
- **L-1 Intra-company Transferee Executive or Manager Visa**
- **E3**

U.S. Business Visa Options

- **B-1/B-2: This visa is only for:**

- Conducting Negotiations
- Soliciting sales or investment
- Discussing planned investment or purchases.
- Making investments or purchases
- Attending Meetings
- Interviewing and hiring staff
- Conducting market research

- **The following activities are not permitted under the B-1/B2 visa:**

- Running a business.
- "Gainful employment" – Receiving payment from an organisation within the US.

U.S. Business Visa Options

■ E-2 Treaty/Trader/Investor

- Available to Australian companies who make “significant investment” in the United States. This is not defined but typically means at least \$100,000 of investment
- Once approved, unlimited in time and number of management, supervisory or ‘special skilled’ employees that can be brought over to the U.S. to work but all must be Australian nationals. Each “visa stamp” valid for 2 years
- Transfer employees do not have to be existing employees. Can be newly hired for purposes of transfer
- Must be transferred to the U.S. for a supervisory or management position
- No qualification requirements for transfer employees but must be able to demonstrate management, supervisory or special skills
- Initial application and all visa stamp applications (for each individual employee being transferred) must be applied for in Canberra

U.S. Business Visa Options

▪ **E-3 High-Skilled visa for Professional Australian Nationals**

- Part of the U.S. Australia Free Trade Agreement
- 2 year visas and can be renewed – no cap on number of renewals
- Must have bachelor's degree or equivalent work experience i.e. minimum 12 years in chosen profession/field of expertise
- Relatively easy visa to obtain and inexpensive i.e. approx. \$3,000
- Many Australian's set up companies and sponsor employee under E-3 visa at the same time
- Whole process can be completed within 6 to 8 weeks – employer applies for Labor Condition Application to be an “approved sponsor” and then visa application for employee
- First time E-3 visa applications are required to be completed within Australia

U.S. Business Visa Options

- **L-1 Intra-company Transferee Executive or Manager Visa**
 - enables a company to transfer an executive or manager from one of its foreign offices to the U.S.
 - Also enables company which does not yet have an affiliated U.S. office to send an executive or manager to the U.S. to establish one.
 - Difficult visa to obtain – complicated process and must show significant documentation to demonstrate skills of executive or manager. Also must have been managing a number of employees in the foreign office before the transfer and show evidence of this. L-1 being more highly scrutinised over the last six months or so.
 - Once approved, 4 year visa terms and can be renewed.
 - Available to nationals of any country so sometimes Australian companies will utilise this visa for other non-AU citizens they want to transfer from Australia

U.S. Business Visa Options

■ **H-1B Specialty Occupations Visa**

- Available for high-skilled or speciality occupations
- Very difficult to obtain and are only available from April 1st for a few days
- H-1B visa is so high in demand that the U.S. Citizenship and Immigration Services has resorted to using a lottery system to determine which complete applications are even evaluated. In 2013, there were 124,000 H-1B applications received within five days beginning on April 1st, which is the first day applications can be accepted—all applying for 85,000 visas, of which 20,000 are saved exclusively for applicants with a U.S. master's degree or higher. In 2014, the number of applications increased to an astounding 172,500, for the same 85,000 spots.
- If approved, employee receives approval by approx. June but cannot commence work until October 1st.
- 2 year visa terms but cannot stay on H-1B for more than 6 years unless leave U.S. for more than one year.
- H-1B allows visa applicants to move into a PERM application for residency



Contact Us

Naomi Seddon, Shareholder
LOS ANGELES | SYDNEY | MELBOURNE
nseddon@littler.com | +1 323 633 4367

