

HOW CANADIANS BUY RESIDENTIAL REAL ESTATE IN AMERICA

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[This report is about the technical immigration aspects of Canadians buying real estate in America. It is useful for many Canadians and their U.S. support network, including investors looking to buy and hold, real estate developers, or snowbirds looking to buy a second home. This information is essential for professionals (accountants, lawyers, brokers, etc.) representing these investors.]

U.S. IMMIGRATION---YOUR FIRST CONCERN¹

There are now great real estate opportunities for Canadians---if you can handle the border guards!

If you decide to enter the U.S. real property market, U.S. immigration should be your first concern. Immigration can put you at a competitive disadvantage to U.S. contractors.

The U.S. has no currency control laws. Canadians are free to buy property. You can form corporations. You can do business and earn income just like U.S. citizens. In some cases, tax treatment of Canadians can be even *more* favorable than that of U.S. citizens. U.S. immigration is the only *discriminatory* body of law.

Of course, there are always challenges to doing business in the U.S. However, the competition has to cope with these other pitfalls too. Only immigration law *singles out* Canadian businesses.

You do not want immigration to stop you. Here is why.

Nowhere is timing more important than in construction. The construction project requires coordination between many independent contractors. A late work permit for a key employee can disrupt or destroy the project. If the immigration authorities stop you at the border for not having the correct work permit, they do not always let you in as a tourist. You may not have access to your home or other property.

At the end of the article I give some advice should a problem arise. Nevertheless, the best thing to do is not to get stopped in the first place. This article shows you how to do that.

HOUSE AS INDICATOR OF TEMPORARY OR PERMANENT INTENT

The most common ground of denial for the B visas is “intending immigrant without a green card.” You cannot “reside” here and be on a tourist visitor. If you hear this, this means that the immigration authorities believe you intend to reside in the U.S. permanently and have abandoned your residence in Canada. Canadian visitors cannot have this kind of permanent U.S. intent. Moreover, there is a legal presumption that everyone is an immigrant, and you need to overcome that presumption.

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Acquiring A House Need Not Be Fatal If You Take These Simple Steps.

It is true that owning a home in the U.S. can contribute to this misunderstanding. It is even riskier if you also sell your home in Canada. Nevertheless, you can own a home in the United States and still come to the U.S. as a temporary visitor. Indeed millions of snowbirds have done this.

This is because “residence” is not necessarily a physical dwelling place. Your place of residence is not even where your head hits the pillow all--or even most--of the time. Residence means where you *intend* to have your permanent place of abode. You can own property in the U.S. and still *intend* to reside in Canada. Immigration will look at the whole picture to decide whether you intend to reside in the U.S. or Canada.

Whole picture means things that you do or have that immigration can count towards your ‘intent’ in one country or another. Think of them as baskets of “links” to one country or another. You want to show as many links to Canada as possible. (Contrary to green cardholders, see below, who want to show as many *U.S.* links as possible.)

One way to look at this is to use my “wallet test”. If immigration were to go through your wallet or purse at the border, what would they find? How many things would say “Canada” or have a “Canadian address”? How many indicate U.S. presence?

(Oh, by the way, customs and immigration inspectors can, and often does go through wallets, purses and briefcases!)

Here are sections of an internal checklist I use as a “quick and dirty” test of my clients’ propensity for becoming intending immigrants:

CHECKLIST TO SHOW TEMPORARY INTENT FOR B-2 OR B-1 ENTRIES

...

_____g. Applicant's personal links overseas

- Legal citizen or resident of Canada
- family members overseas, especially close members
 - strong links to overseas country of very close members
- investments overseas
 - fixed
 - requiring active management
- property overseas
 - requiring active management, or you lose money
 - long-term lease or deed
 - ownership requires residency in Province

- required to file resident tax return in Canada
- Canadian bank accounts

_____h. Absence of applicant's personal links to U.S.

- lack of Canadian links (above) in U.S.
- past successful immigration history-always returned overseas
 - maintaining status
 - within period allowed
- temporary itinerary
 - specific terminations date
 - geographical termination of itinerary is at P.O. Exit
 - ongoing itinerary in third country after departure and before arrival in home country
 - period consistent with business/pleasure plans
 - addresses consistent with " " "
 - return transportation ticket which cannot be refunded or refunded only with substantial penalty
 - temporary lodging

...

While an imbalance towards U.S. links is pernicious for temporary visitors, owning a home is *irrelevant* for temporary work permits holders and Citizens. More remarkable, as we shall see below, home ownership in the U.S. (and concomitant lack of a home in Canada) is *beneficial* for green card holders!

DON'T "WORK" SO YOU CAN KEEP B VISITOR STATUS

Immigration can get confusing. It may help to understand that the immigration world everywhere, has three categories:

- non-immigrants,
- immigrants and
- Citizens.

(It is the same in Canada.)

Non-immigrants are here temporarily, although this could be for years. Immigrants intend to remain in the U.S. permanently. The immigration rules only absolve immigrants and citizens of “fatal permanent intent”.

Almost 3/4 of the noncitizen U.S. population is nonimmigrant. That includes you, and millions of Canadian retirees, visitors, and business people. Tens of thousands of others are here on various temporary work permits.

How to tell if you need a work permit

Most Canadian citizen retirees travel to the U.S. as temporary visitors (tourists).

There are two types of tourist visas, visitors for business (“B-1”), and pleasure (“B-2”). These are the easiest temporary permits. Immigration inspectors allow Canadians up to six months on temporary visitor status per trip. Under NAFTA, certain Canadians can get B-1s for a full year.

The following are misconceptions: “As a visitor, immigration rules force me to go back to Canada for six months before I can come back again.” Also false: “I can only stay less than 180 days a year.” There is no prohibition against leaving the country and entering again soon after. Of course, Canadians without a green card cannot intend to reside permanently in the U.S. If you keep turning around and coming right back repeatedly without staying in Canada, immigration will conclude that you are here permanently. Nevertheless there is no *automatic* 6 month Canada wait.

Usually folks, who call me, just know when they need a work permit. Immigration starts to scrutinize their entries. “I’m going to a meeting” becomes “what kind of meeting?” . Worse yet, you are pulled over for secondary inspection to go inside or at another counter to tell your story.

Another way to tell is to do your research and ask, “Where does what I do, fit”?

1. You’re activities are clearly permitted under B-1, or
2. you are getting into grey areas, or
3. you really feel the law does not allow your activities.

If you are in the last two areas, get a work permit. We will see how foreclosure and construction fits, later in this section.

What are the B-1 Rules?

I wish I got a dime every time someone says, “I won’t have any problems. I’m getting paid in Canada.”

Compensation from Canada is a *necessary but not sufficient* condition of B-1 status.

It is a good thing to keep all the requirements in mind. You do not know what questions they are going to ask at the border, but this background knowledge will say the right thing, truthfully of course, to the inspector.

Here are the requirements:

1. *Must leave the U.S. when your business ends.* The entry must be temporary. Show the absence of U.S. links of applicant's job description, that the employment of definite duration, trip is as short as possible in *duration*; there are a small *number* of trips and an *intermittent* need for services, vs. *regular* pattern. There should always be a fixed point in time where need for services will end.
2. *Must perform services for non-U.S. employer.* The B-1 visitor for business must perform services for a foreign company. For example, a salesperson can solicit orders for a foreign company. He or she could also make a market study regarding future business in the U.S. The B-1 visitor should not actively manage operations of a U.S. company. For example, if you are buying real estate as a passive investment, that may be fine, but if you are coming here to manage an ongoing real estate development organization, they may not let you in. An exception: Immigration can let you in to manage company *startup* operations. In this case, show that you have not yet set up your U.S. company. Immigration rules specifically allow people who would eventually qualify as L-1 transferees or E-2 investors into the U.S. under B-1 status to set things up.
3. *No money from the U.S.* The source of payment for services and expenses of a B-1 businessperson in the U.S. should come from outside the country. The B-1 business visitor cannot receive salary or payment in any form from a U.S. source. Avoid commissions tied to U.S. duties. The Canadian company should issue payment, in Canadian funds, drawn on a Canadian bank.
4. *Job duties must be of acceptable B-1 nature.* The B-1 visitor for business cannot perform productive tasks that local U.S. workers can do. This is hard to define. It might depend on the judgment of the officer at the port of entry. Rule of thumb: the more what you are doing looks like international commerce, the better. International commerce is the exchange of *commercial goods* across the border . . . including computer software.
5. *Profits must accrue in Canada.* This is a complex concept, used to bar self-employed Canadians who own the Canadian employing business entity.

B-1 at a Glance	
Main procedural step:	No work permit needed; no prior application.
Initial duration of status:	One year maximum/trip (NAFTA)
Total time-limit on the category:	No time cap.
Processing time:	Instant approval.
Major advantage:	Quick; little paperwork.

Major disadvantage:	Limits type of work done in U.S.
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How to Get a B-1

Canadians get a B-1 in three ways:

1. Show up at the border and state the purpose of your visit—*the smile-and-wave approach*.
2. Take a letter on your company letterhead, explaining the purpose of your travel.
3. Arrange for a multiple entry “I-94 - Arrival and Departure Record”---proof that an immigration officer at a port of entry examined you and found you qualified for business-visitor status. The I-94 should make subsequent entries easier—because you have already proven your case once.

Procedures for Canadians. Canadians do not have to apply for a tourist visa in the Consulate. In fact, Canadians who do want a consular visa are usually denied.

Canadian citizens (and some Canadian landed immigrants) merely appear at the border. The inspector will admit you after asking you the purpose of your trip. You are then on either B-1 or B-2 status.

This simplified procedure is a huge advantage for most Canadians. Most Canadians fall clearly within the permitted B-1 or B-2 activities. They cross back and forth between the U.S. and Canada without problems.

Nevertheless, many Canadians fall in the grey areas, where it is not so easy to determine whether they qualify. If you are one of these people, you have already felt the stress of not knowing whether or not you will be given problems at your next entry.

In these cases, it is a *disadvantage* not to be able to have a passport visa. If you had a visa stamp in your passport, your chances of entry without in-depth scrutiny would be higher. You and your business would have more security in knowing that the border guards will allow you into the U.S. on schedule.

One strategy to maximize your chance of admission is to appear with a letter typed on your company stationery. This letter describes the purpose and travel pattern of your proposed trip. The details in the letter reflect current case law on permitted B-1 activities.

There is another strategy---obtaining a form *I-94 Arrival and Departure Record*, indicating B-1 status.

Where the government is willing, the supervisor at the Port of Entry can give you a white card called the Form I-94. This card will indicate that a supervisor has already determined you eligible for entry as a B-1. You can use this card for multiple border crossings until it expires.

This card works, but it is hard to get. Again, it is often easier to get a full work permit. (See below.)

Special Twists For Canadian Real Estate Investors

The law in action has two faces:

- reality of stigmas from word “foreclosure” and “construction” coupled with
- high degree of discretion at the border

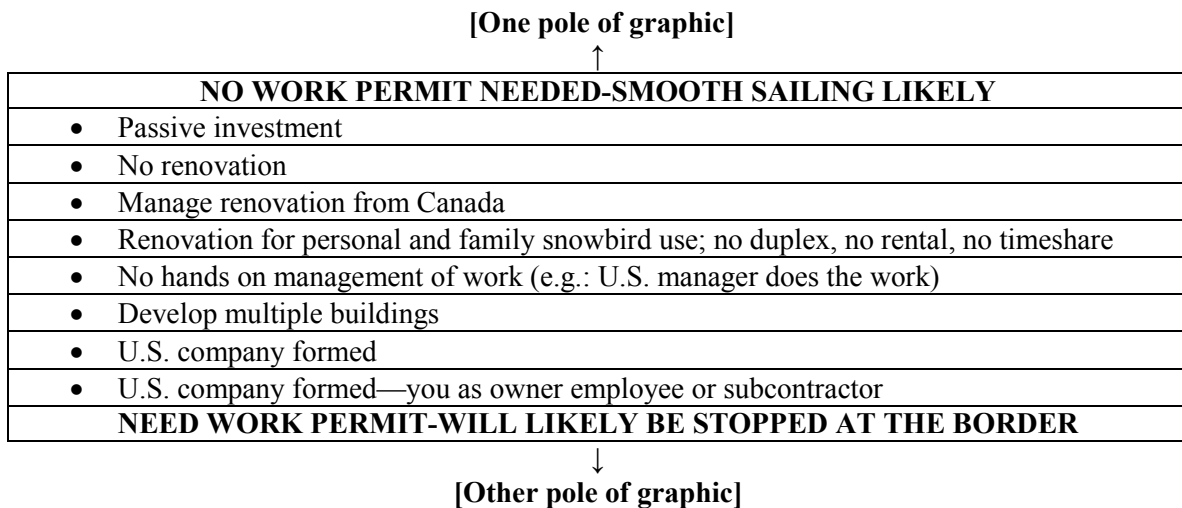
The word “foreclosure” can trigger feelings in the border guards. Perhaps that person’s family member . . . or even that person . . . is fighting a bank, threatening foreclosure.

In addition, the construction industry is the only industry singled out for restrictive B-1 purposes. The Bricklayer’s Union actually sued immigration for being too liberal in granting B-1s to folks coming to the U.S. for after-sales service of imported commercial equipment. While the reader of this book would not usually fall under that category, there may be some generalization to your situation triggered by that word. Put another way, saying the word “foreclosure”, “construction”, “renovation” etc. may trigger scrutiny, even if the lawsuit has nothing to do with you or the substance of your work.

You can proceed with the confidence that this stigma is not legal. If you qualify, you will eventually win. You will need to communicate the facts and law clearly.

Because of the complexity of the interaction between the requirements, the border guard’s discretion, and each person’s business situation, let me simply share my experience with you. Figure 1 tells you what happens. It places the famous B grey areas, with a spectrum showing, as it were, different degrees of grey.

Figure 1: Graphic, showing a spectrum of possible business and work activities arranged by likely border outcomes.



TEMPORARY WORK PERMITS

When the smile and a wave wear thin, let us look at The “Usual Suspects” —— Other Business Visas for Canadians. Work permits are letters of the Alphabet (A, B, C etc.), and almost all the alphabet has been used. Therefore, I will not talk about all of them.

The Usual Suspects, E-2 Treaty Investor and L-1 Intra-Company Transferees.

Four of the usual suspects are

- E-2 Treaty Investor
- L-1, Intra-company Transferee
- H-1B, Professional Worker
- TN, Free Trade Professional

The consequences of owning a dwelling place.

Owning a home for your personal use is fine. Having a house in the U.S. does not take away from the requisite intent to be in the U.S. temporarily. That is because work permits can last for years---it is unreasonable to assume that a Canadian family authorized for this period cannot own a home.

The E-1 Treaty Investor Visa

E-2 Treaty Investor Visa at a Glance	
Main procedural step:	Send application to U.S. Consulate.
Initial duration of status:	1 year maximum/trip; renewable visa for 5 yrs.
Total time-limit on the category:	No time cap.
Processing time:	4-8 weeks or more to approve.
Major advantage:	Indefinite validity; 5 yrs. at a time.
Major disadvantage:	Much paperwork.

E-2 Requirements

Here are some of the E-2 requirements:

1. Invested or in process of investing substantial amount
2. Investment more than marginal
3. U.S. entity and applicant must have same citizenship of treaty country
4. High-level employee
5. Leave U.S. when work completed

Special Concerns for Canadian Real Estate Investors

Issues arise when E-2 Canadians purchase foreclosed U.S. property:

- The investment amount only includes property paid for in cash or leveraged by personal assets. Property secured by business assets cannot go into the pot.
- An investor with only one property used for the investor’s family residence will look like a ‘marginal investment’ providing only income for the investor and family.

Present the application as a business that is in real estate development, rather than “I’m coming to the U.S. to buy a house for my family. Put another way, flip Figure 1 around . . . you *want* to do more business . . . and look like it in the process.

The good news for real estate investors is that the E-2 allows and encourages self-employment. This benefits your industry, since you will often use the sole proprietorship or closely held business structure.

L-1 Intra-company transferee permit

Only Canadians can get an L-1 *at the border*. (Anyone can get an L-1 by mail.)

L-1 at a Glance	
Main procedural step:	Send application to immigration first or apply at border.
Initial duration of status:	One-three year maximum/trip; renewable.
Total time-limit on the category:	7 years for executives/managers; 5 for others.
Processing time:	Instant at border, two-six weeks otherwise.
Major advantage:	Quick if at border, lasts a long time.
Major disadvantage:	Eventual time cap; much paperwork.

L-1 Requirements

Here are some of the L-1 Requirements for the employer and employee:

1. The Canadian company is related to the U.S. company by ownership, in some specific way: affiliate, subsidiary or division
2. Canadian company must continue ongoing operations outside the U.S.
3. Employee must have held an executive or managerial position or a job requiring specialized knowledge with the foreign company, for full year within the three years immediately preceding application.
4. Employee must be doing executive, managerial, or specialized knowledge work at U.S. location.

L-1 Pointers for Construction Contractors

L-1 applications can be especially challenging for the construction industry, for two reasons:

- Lack of W-2 (T4) employees
- Problems with using a home to fulfill the physical presence requirement

This is because the immigration adjudicator likes to see L-1 managers supervising layers of employees. The construction industry will often use subcontracted workers (1099) and organizations leaving few subordinate T-4 or W-2 type employees to supervise.

A skillfully prepared application can surmount these obstacles using one or more of these strategies:

- You can show that the L-1 manager is a "functional manager" under these regulations. A functional manager need not show subordinate employees.
- Another strategy is to show that you have such a high degree of control over these contractors, to mandate that immigration consider them "employees" for L-1 management purposes. Your accountant may not like this, but remember that "employed" for immigration purposes is not always the same as "w-2 employee" for immigration purposes.
- Make them W-2 employees, at least in the US.

Closely Held or Sole Proprietors

Immigration will not automatically bar self-employed investors from L-1 status eligibility. Nevertheless, if the business entities are closely held, immigration will give the application an extra degree of formal scrutiny. You will need to show the adjudicator how the Canadian company will continue to thrive since you will now be in the U.S.

Yet another Special Twist when real estate is involved

One of the L-1 requirements is to have physical presence in the U.S. Home offices are a notorious ground for denial . . . if not because "you have no real business office", then because "you are not a real manager because you don't even have an office."

Figure 2: The spectrum of possible ways to meet the physical presence requirement for qualification as an L-1 Intra-company transferee

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[One pole of graphic placed on the top or to the left]

FAILURE TO MEET PHYSICAL PRESENCE REQUIREMENT: APPLICATION DENIED
<ul style="list-style-type: none"> • Home office
<ul style="list-style-type: none"> • On demand space at executive office-type premises
<ul style="list-style-type: none"> • Executive office service with a designated exclusive space, and on-demand services
<ul style="list-style-type: none"> • Lease or deed for exclusive office premises and permanent staff
SUCCESSFULLY MEET PHYSICAL PRESENCE REQUIREMENT: PETITION AP-

PROVED

[One pole of graphic placed on the bottom or to the right]



Fallback Permits; The TN NAFTA and H-1B Professional Permits.

NAFTA accords Canadians a quick and special status. You can get this TN (“Trade NAFTA”) work permit, with no application form, within minutes of arriving at a port of entry. The TN is now good for *three* years at a shot.

TN NAFTA Requirements

To qualify for a “TN-Free Trade Professional,” you must be coming to the U.S. to work in one of the professions listed in the NAFTA agreement. Most of the TN professions require a bachelor degree.

See the TN List, on my website. <http://www.grasmick.com/nafta.htm> . (Incidentally, the NAFTA list can be confusing. I think my list is the best starting point.)

TN at a Glance	
Main procedural step:	Apply at border only.
Initial duration of status:	Three-year maximum/trip.
Total time-limit on the category:	No time cap.
Processing time:	Instant approval.
Major advantage:	Quick.
Major disadvantage:	No disadvantages.

Universal Border TN Requirements

Certain requirements pertain to all the TN professions:

1. You must be Canadian.
2. On the TN list of specific job titles
3. Show documentation of arrangements with U.S. entity (company supporting letter)
4. Your U.S. employment must be temporary.

You can now get up to 3 years at a time, with no top limit.

Most TN categories require at least a bachelor’s degree. Some allow a two year diploma and work experience to substitute for the bachelor’s degree. Only two allow non degreed recipients.

Each TN category has its own twists.

TN Permits, NAFTA Permits- Construction Industry Twists

Buried in the list of NAFTA TN professions is a gem: the scientific technician and technologist (civil engineering) category.

We have successfully used this category for skilled construction specialists. No license or university degree is required. [Attached memo for supplemental web information: TN Memo On Sci Tech.PDF]

Actual examples of positions filled with this permit include concrete technician, glass wall specialist, and project manager.

Other useful construction TN categories that I have used for clients in the construction and real estate investment industry:

- engineer
- management consultant
- interior designer
- systems analyst
- architect
- geologist
- industrial designer
- landscape architect
- land surveyor
- urban planner
- soil scientist

The TN is OK for self-employed, if . . .

The clear rule is that self-employed people cannot use the TN. Many Canadians see this rule and give up. Misunderstanding of this bar is one of the most destructive of the “tricky” TN areas. They should not give up.

First, the rule itself has nothing to do with someone who *has been* self-employed in Canada. The rule only prohibits self-employment while in the U.S. on TN status.

Second, the rule does not prohibit self-employment if you will be self-employed while in a contract with *another* company. You could not be a controlling owner of this other company. The company would then be the “sponsor” and sign your TN company supporting letter.

To summarize you can be self-employed and working for a business you own, if:

- you or your business are performing services for another entity you do not control, and
- that entity is your TN “sponsor”, i.e., provides a company supporting letter and appears on the rear of your form *I-94, Arrival and Departure Record*.

An INS advisory opinion spells this out, as do the regulations:

It should be noted that the bar on establishment of a business or practice in which the... citizen will be self-employed is in no way intended to limit a Canadian...citizen who is

self-employed abroad from entering this country in, changing status to, or extending non-immigrant stay in, TN classification pursuant to a prearranged agreement with a third party that is not substantively the same as, or de facto controlled by, the alien. On the other hand, a Canadian... citizen is precluded from entering this country in TN classification for the purpose of rendering pre-arranged services for a U.S. corporation or entity of which he or she is the sole or controlling shareholder or owner.

The TN Management Consultant category: tricky but useful

The TN Management Consultant category works for people without college or university degrees. Crucial to approval is a job that:

- is *advising*, not *doing* or *managing*, and
- is advising about *management*, not *technical* issues.

By far the most problematic TN classification during the history of NAFTA has been the Management Consultant. At the same time, it is the most flexible category. Hundreds of Canadians would not be working in the U.S. but for this classification. You can get this permit without a bachelor's degree. Requirements:

- . bachelor degree, or
- . five years' experience in consulting, or
- . five years' experience in a field relating to your U.S. job

This category is flexible not only because of the alternate requirements. It is also flexible because it can work for people in any industry. It can work for people in any substantive area of expertise. Immigration trains its border inspectors to approve applications in this fashion

This belief is for two reasons:

- Management consultants can work in virtually any industry with any substantive specialization, and
- it is one of the two TN occupations allowing qualification without formal academics.

That makes this perfect for many folks on the Figure 1 spectrum, if it were not for some big "ifs".

The immigration rule makers feel there has been abuse by Canadians who take advantage of the broad requirements just because "they do not fit anywhere else." Management consultants encounter the most difficulty of all the TN classifications. While this is a flexible and useful category, immigration border inspectors scrutinize the TN applications of management consultants particularly carefully. This is because immigration has a general belief that many applicants are not really management consultants. The scrutiny is even greater when the consulting is in sales and marketing management

Here is a "quick and dirty" test for your eligibility. Can your potential job be that of a person who will?

1. Provide services that improve managerial, operating, and economic performance.
2. Analyze and resolve strategic and operating problems.

3. Improve the entity's goals, objectives, policies, strategies, administration, organization, and operation.
4. Work in one of the following capacities:
 - Independent contractor, or
 - Employee of a consulting firm under contract to a U.S. entity

The applicant's U.S. employment should consist of tackling a specific management problem for the U.S. employer. This tackling involves collecting data, preparing reports, and making recommendations to solve the problem. The person can stay on to oversee implementation of his or her recommendations and even train employees to implement these recommendations. However, to qualify as a TN-1 management consultant, the person should not carry out regular line-management functions in the U.S. employer's organization or perform any professional services other than that necessary to solve the employer's management problem.

No Line Management. Management consultants should deal with *management* problems. At the same time, they should not *be* managers.

Do not attempt this permit without studying the management consultant sections of *Grasmick's TN Handbook for Canadians: How to Work in the U.S. Under NAFTA*. This is the best (and only!) book on the subject. You can download this book immediately at <http://www.grasmick.com/handbook.htm>.

H-1 B Professionals

H-1B professionals do not have to have a job that falls on a specific list. Any profession can support an H-1B petition. Crucial for self-taught businesspeople is that H-1B professionals can meet the bachelor's degree requirement through equivalent work experience.

H-1B at a Glance	
Main procedural step:	Send applications to Labor Department and immigration first.
Initial duration of status:	Three- then three-year extension.
Total time-limit on the category:	Six-year total time cap.
Processing time:	Two-to-ten weeks to approve then wait for lottery and/or October start date in case of oversubscribed quotas.
Major advantage:	Lasts a long time.
Major disadvantage:	Much paperwork if professional status not clear.

H-1B requirements

The key requirement for H-1B status is to be a professional.

TN qualification for professional activities will not necessarily qualify the applicant as an H-1B professional. (Conversely, Canadians qualified for H-1B status may not necessarily qualify for TN status.)

To qualify in the H-1B professional category, both the beneficiary and the position must be professional in nature. The law defines a profession as a specialty occupation that requires the critical and practical application of a body of highly specialized knowledge. It lists a number of areas of possible professional employment, examples include:

- Accounting
- Architecture
- Business Specialties
- Design
- Engineering

Professional with Bachelor's Degree

To be a designated professional, the beneficiary typically must have completed a specific course of study at an accredited college or university. That study must have culminated in at least a bachelor's degree. (I have successfully obtained H-1 status for some Canadians with 3-year Bachelor's Degrees.) Finally, such a degree or its equivalent must be the minimum requirement for entering the position in the United States. To prove this requirement, you must submit at least a diploma and an evaluation stating the equivalent U.S. degree.

Technologists may qualify for the H-1B. This could include engineering technologists. It may also include some technologists in the medical professions (e.g., respiratory, ultrasound, radiology, nuclear medicine, physician assistants area of health care).

Professional without Bachelor's Degree

Some licensed individuals and people with a certain level of professional experience can overcome the bachelor's-degree requirement by carefully documenting those special qualifications. This can include a certain level of education, specialized training, and/or professional experience. This must be equivalent to the training received by bachelor's-degree recipients.

H-1B quirks for real estate investors

Two special H-1 quirks affect Canadian H-1Bs coming to America to buy real estate:

- Academic inflation: *masters* degree may be the standard prerequisite for business jobs
- New hassles for self-employed H-1bs

Immigration feels that the standard prerequisite for entry into many business jobs is the Master's, not bachelor's degree. This means that the H-1 applicant would have to have the master's degree, or an additional six years of equivalent employment experience. Finding a technical niche in your company may be to your advantage---produce only a bachelor's degree requirement.

Another pitfall for real estate development is a new trend toward barring self-employment. Many folks on the Figure 1 spectrum will be self-employed sole proprietors or closely holding corporate owners. A new memo is wrecking havoc with H-1 practice; the "Memorandum for Service Center Directors, U.S. Citizenship and Immigration Services, Determining Employer-Employee Rela-

tionship for Adjudication of H-1B Petitions, Donald Neufeld, Associate Director, Service Center Operations January 8, 2010.”. Immigration lawyers just call it “The Neufeld Memo” (and shudder!). [H-1BNeufeldmemo.pdf attached] Here is a quote:

The following scenarios would not present a valid employer-employee relationship: Self-Employed Beneficiaries. [No Separation between Individual and Employing Entity; No Independent Control Exercised and No Right to Control Exists]

The petitioner is a fashion merchandising company owned by the beneficiary. The beneficiary is a fashion analyst. The beneficiary is the sole operator, manager, and employee of the petitioning company. The petitioning company cannot fire the beneficiary. There is no outside entity, which can exercise control over the beneficiary. The petitioner has not provided evidence that that the corporation, and not the beneficiary herself, will be controlling her work.

Creative---but truthful---corporate structuring may be the prescription for this attach on self-employed H-1Bs.

GREEN CARDS

As I mentioned, almost 3/4 of the noncitizen U.S. population is nonimmigrant. What about the other 1/4?

Permanent Residency Green Card

An excellent route to U.S. living rights is permanent residency. Other names for permanent residency include green card, landed immigrant, and immigrant status.

Permanent is better than temporary. Green carded Canadians can get full dual citizenship (see next topic) after a waiting period.

Foresight is rewarded. If you do not have a close U.S. relative, you may need an employer sponsor or an immigration lawyer to help you launch an “EB-5 green card” investment. These green cards take more time and paperwork than do temporary permits. Green carded Canadians can later change employers or quit work; however, leaving the job too soon will tempt the authorities to lift the card, because of “no intent to work full time for sponsoring employer.”

Permanent residency can also come from a family member sponsor. It may flow from an unusual source, e.g., some people who believe their green cards “expired” may find the cards still valid.

Advantages of Green Card Status to Canadians

Job

Unlike temporary permits, permanent residency yields *permanent* job and immigration security. The employer is assuring Canadian employees of intent to keep on the payroll indefinitely. Except for full citizenship, other permits have expiration dates. Immigration does not approve all renewals and there is an automatic top limit on total stay for permits such as the L-1 and H-1. If a job ends, changes or if corporate ownership changes, the work permit can be invalid immediately-

--even before the expiration! A green card holder can work in any job, anywhere. This includes starting a business, adding a part-time job, or retiring.

Business

Fewer turnovers is good business. The other side of employee's job security is employer's stable labor force. The green card is a valuable cost-effective fringe benefit that employers can give Canadian employees. This benefit is crucial for continuity in difficult to fill positions. Perceived and actual benefits to the employer greatly exceed the expense, especially during economic downturns. Costs are less than the expense of employee turnover or a recruiter's commission. The green card is not usually a "ticket to leave the company". It produces loyalty. As a bonus, there is less hassle for the employer because green cards eliminate expensive temporary permit renewals.

Family

Green carded Canadian families take root in the U.S. and are secure. The family has U.S. immigration status if a Canadian should pass away or lose a job. Canadians can pass on immigration benefits to certain relatives. Children do not "age out", and keep green card status when turning 21. This is particularly important for Canadians, who find that children quickly adapt to the similarities in American education, language and culture. Spouses and children can work, without separate employer sponsorship---even before immigration approves the green card. Some life/disability insurance agencies require green cards.

Career

Green cards put most Canadians on equal footing with U.S. employee counterparts. For example, some states require green cards before granting professional licenses. Employers and U.S. government contractors cannot use Canadians on projects requiring certain security clearances without a green card. The same goes for eligibility for government grants and exemption from export restrictions.

Personal Finance

Canadians who stay on temporary permits may miss certain benefits. With similar education systems, there is a marked trend for Canadians to take advantage of U.S. higher education options. In many states, green card holders pay less college tuition. Government financial aid, social security and income taxation benefits may also follow.

Travel

Green card travel liberalizations are particularly useful for Canadians who travel frequently between our neighboring countries. There is no need for passport visas or form I-94 for international travel. Green cards are multiple entry, and do not need frequent renewals, so there are no "renewal period" travel restrictions.

The Future

Escape from the "immigration cul-de-sac". The green card is a direct optional path to dual Canada/U.S. Citizenship.

House

Home mortgages are easier. Many banks require permanent residency. (Interest is deductible on a U.S. tax return.)

Residence

Flashing a green card gives mobility that modern jobs require. Green card holders can permanently move to the U.S. but do not have to be continuously present in the. This is crucial for Canadians, who often want to commute to the U.S. It also helps those who must work in Canadian affiliates from time to time. In fact, Canadians can actually have a “Commuter Green Card,” without a U.S. residence requirement. In addition, unlike some temporary workers, green carders have no geographical restrictions.

Freedom

Green card status produces unexpected miscellaneous benefits. Green Card holders can contribute in connection with State and Federal Elections. Other foreign nationals may not. In addition, Green carders have most of the myriad rights afforded U.S. citizens.

Green Card Via Employer Sponsorship At a Glance	
Main procedural step:	Employer applies to Labor Dept or USCIS
Initial duration of status:	Permanent; routine document renewal every 10 years
Total time-limit on the category:	Permanent
Processing time:	1 ½ to 5+ years
Major advantage:	Indefinite duration. (See above list.)
Major disadvantage:	Much paperwork; long wait.

The Impact Of Selling Your Home

As mentioned in the tourist visa section, home ownership is beneficial to green card holders. This is because it helps show that the permanent resident has the intent to reside permanently in the U.S. Unlike the B visa, immigration rules allow this permanent U.S. intent for green card holders. Not only is it allowed, it is required!

What if you sell your home? What if you get a good offer, and want to return to Canada for a while? Not all is lost. You can keep your green card, if you take the right steps in advance.

Can I keep my Green Card while working abroad?

ANSWER: Yes. Simple prevention usually works.

Many people ask this question. These job situations are common as our economy becomes internationalized. In addition, with post 9/11 scrutiny, immigration is simply catching more residence-abandoning people who slipped through in the past. Border enforcement payroll is exponentially larger now. There are now in-country checks, exit controls and passport requirements.

Here are some actual stories expressing acute needs:

- "Immigration asked me to surrender my U.S. Green Card, which I have held for two years. What should I do?"
- "I have Canadian citizenship and a Green Card. Do I have to go back to the U.S. within the year? Jobs are not available right now and we have jobs in Canada."
- "I am Canadian, married to an American. I have had a permanent resident card for three years. I am interested in U.S. citizenship. Can I apply and then move to Canada? My husband is interviewing with a Canadian business but we would like to keep the 'moving back to the U.S. option' open."

You should not have a problem, if you take some advance steps. Here are a few:

- *Apply for a returning resident permit.* A Re-entry Permit will create a presumption in your favor, should the border inspectors ever challenge your green card status. Even though the instructions on the form say that the permit is for those who are leaving the country continuously for more than 1 year, file it anyway---even if you will visit the U.S. before the year is up. Also, look into filing the little-known *Application to Preserve Residence for Naturalization Purposes*.
- *File 1040 income tax resident forms, not a 1040NR.* As I like to say "A 1040NR is an 'N-O!'" An immigration law---which many accountants do not know---creates a presumption that you have abandoned your green card, if you benefit from filing a 1040NR. If you do not have an accountant well versed in expatriate tax matters, get one. You may wish to refer to the names and addresses at this Web site: *Joseph C. Grasmick's Rolodex®-List of Canada/U.S. Business Experts* at <http://www.grasmick.com/resource.htm>. (My bias: I have never wasted money on a good accountant!) There may also be tax-planning opportunities for you.
- *Do not sign form I-407, Abandonment of Lawful Permanent Residence Status* at the border or Consulate. This makes your case difficult. You may receive great pressure to sign this. You worked hard to get your Green Card. Do not give it up. If you did sign this form, call me immediately. We will see if we can make a timely retraction and get your green card back. Put another way, remember this saying: "The I-407 is the 'evil I'!"
- *Be able to identify physical property in the U.S.* where you can stay when visiting. Best, is home ownership. Second best, is a lease. Even a sublease is better than staying with family or friends. You can then meet the informal "pillow requirement". (INS inspectors will often ask, "Where do you live? Where does your head hit the pillow?" You will have an answer!)
- *Come to the U.S. as much as possible for visits.* Note that in addition to the above steps needed to preserve your residence and keep your green card, naturalization for U.S. citizenship requires more: a certain period of actual physical presence in the U.S. There are some exotic exceptions, but generally you need to spend 2 1/2 of the past 5 years in the U.S. (counting from the day you file for naturalization) to qualify. (1 1/2 out of 3 years, if married to a U.S. citizen.)

One of these exceptions is for people working on U.S. government contracts. Check to see if your prospective employer is working on any such projects. Then see if you can be assigned to them.

Incidentally, the law on snatched green cards is this: *as long as you continuously intend to keep your green card, immigration cannot lift it*. The above factors only create presumptions as to what your intent is.

Here are three ways your immigration professional can help you or your employees:

- *Returning Resident Permit*. We can apply for a Re-entry Permit. This is to make sure presumptions of resident intent are in your favor. It is extremely difficult for immigration to seize your green card when you have this permit. Use immigration form I-131 *Application for Travel Document*.
- *Prepare backup paperwork to have on hand for green card confiscation contingencies*. I can show you how to keep immigration from impounding your Green Card. The goal is to create a situation that shows your continuing intent to keep your residence in the U.S., in spite of your absence. You and your sponsors worked hard for your Card. You and your family may need it someday. For most folks it is now harder to get the green card the second time around. At the same time, it is remarkably easy to preserve your residence *in advance* of border problems.
- *Get dual citizenship*. For many people, dual citizenship is the prescribed remedy. U.S. citizens can reside anywhere. Denaturalization is almost impossible. Nobody will ever ask you to "give up" your U.S. citizenship in a process similar to the I-407. If you have a green card, keep North America's two best dual citizenship pages (since 1995) <http://www.grasmick.com/citizen.htm> and <http://www.richw.org/dualcit/> marked on your browser's Favorites.

DUAL CITIZENSHIP---THE CROWN JEWEL

American citizenship gives maximum rights. It is particularly applicable to Canadians because proximity foments cross-border kinship histories. Automatic dual citizenship can flow from an ancestor. Contrary to popular belief, one can hold "dual citizenship" in the U.S. and in Canada. Thousands of senior Canadians are citizens of the U.S. ---and may not even know it!

"Canadian-born with a U.S.-born parent" is a common scenario. A few Canadians can even have U.S. citizenship passed from a U.S. citizen grandparent. Furthermore, derivative citizenship rules favor Canadian retirees. This is because older rules concerning transmission of citizenship were liberal. They help people who were born earlier, are older and therefore, more likely to be retired.

Citizenship trumps every single problem of tourist status, work permits and green card. Ownership of real property is irrelevant vis a vis your temporary vs. permanent intent. Citizens can reside anywhere they like. Work permits and their timing, duration is irrelevant. Citizens can work or not work whenever and for whomever they like. For example, questions of self-employment for temporary workers and green card holders disappear.

Mortgages will probably be easier. Although normally the power of a green card is the same as citizenship for mortgage applications, times are different. Banks know that immigration can lift

green cards. In marginal financing applications, dual citizenship may tip the balance in your favor.

Questionnaire to Determine U.S. Citizenship

Here is a quick set of questions you can answer. If the answer to any of these questions is "YES", investigate your eligibility for citizenship.

Both you and your spouse (if you are married) should answer these questions.

(Answer "yes" or "no".)

Questionnaire To Determine U.S. Citizenship

1. Were you born in the U.S. or its territories or possessions?
2. Was either of your parents born in the U.S.?
3. Were any of your grandparents born in the U.S.?
4. Have you had a Green Card based on marriage to a USC spouse for at least 3 years?
5. Have you had a Green Card for at least 5 Years?

You or your ancestors may have retained U.S. citizenship even if you think someone became Canadian, "gave up" or "lost" U.S. citizenship.

Advantages of Dual Canadian/American Citizenship

This article is for Canadians who are considering the dual Canada/U.S. citizenship option. For a full description of U.S. citizenship as it pertains to Canadians, see U.S. Citizenship for Canadians at <http://www.grasmick.com/citizen.htm>.

Here is a list of the major reasons to proceed with U.S. citizenship.

Government benefits

Immigration laws severely limit valuable public benefits, unless you are a U.S. citizen. Even green card holders face strict restrictions. Who knows what future laws will bring? *With full citizenship, these exclusions disappear.*

Integrated family

Citizens, including dual Canadian/Americans, get priority to sponsor relatives for U.S. immigration. In most cases a child born *anywhere* to a U.S. citizen is automatically a U.S. citizen.

Jobs

Many government contracts and jobs require U.S. citizenship.

Voting rights

Only U.S. citizens can vote in Federal Elections. Most states also restrict the right to vote.

Freedom to live anywhere

A citizen does not have to reside in the U.S. By contrast, the immigration authorities can revoke green cards, if the holders fail to reside in the U.S. (See the FAQ question concerning preservation of permanent residency.)

No more paperwork

If you become naturalized you do not have to worry about replacing your Green Card with newer versions. Some time ago, the immigration rule makers announced the expiration of the old green card forms I-551. All people in possession of the card had to apply for replacement with a secure, machine-readable Alien Registration Receipt Card. This card expires, and you must renew it. Citizens do not have to do this.

Easy international travel

Only citizens can take out U.S. passports. Entering the U.S. is easier. Many countries waive visa requirements for U.S. passport holders. With a U.S. passport, you are eligible for U.S. citizen services from U.S. embassies and consulates when traveling throughout the world. Because of the contiguous location of our countries, this is a huge advantage to dual Canadian/U.S. citizens.

Easy domestic travel

U.S. citizens do not have to carry proof of citizenship when they travel within the U.S. On the other hand, immigration authorities demand that permanent residents always carry their green cards. The government detains permanent residents who forget to carry their cards.

Eligibility for elected positions

Many elected offices require U.S. citizenship. The ability to go into politics is more important than it may seem. Many Canadians are in demand and called upon to serve in local government. This is because of our common cultures. My retired USC clients, for example, often enjoy serving on city councils.

Emotional benefits

Finally, there are intangible advantages. Most green card holders have decided that the U.S. is the permanent home for their families. Canadians find it of psychological benefit to be on an equal footing with their American peers. Becoming a U.S. citizen is an unassailable demonstration of commitment to the country. This is important for school-age children who are very much concerned with their identity.

Citizenship At a Glance	
Main procedural step:	Apply for U.S. Passport or Naturalization
Initial duration of status:	Valid forever
Total time-limit on the category:	No expiration, just renew passport.

Processing time:	One day to 1+ year
Major advantage:	Full citizen's rights. (See above list.)
Major disadvantage:	Questionable cases hard to document

WHAT IF IMMIGRATION STOPS ME?

"They won't let me into the U.S.A.!"

The reason is usually either:

1. The immigration authorities feel your employee will be working in the U.S. without the proper work permit, or
2. Something in the employee's background renders him or her "undesirable" in the eyes of U.S. Immigration.

Why Was I Stopped at the Border and Refused Entry?

We receive calls every day from Canadian citizens refused entry at the U.S. border. Many are genuinely bewildered:

"Why was I refused? I've been coming to the U.S. with no problem for twenty years!" is a typical question.

For some people, refusal is simply a problem getting the U.S. immigration inspectors to understand the reason for the trip. For others, a nearly forgotten brush with the law, perhaps in student days, has been resurrected as a border barrier.

Possible scenarios and effect of the border immigration examination

These border problems can deeply involve corporate management. Employers often need employees quickly. Delays can stymie business plans. This revelation of an employee's background can trigger a reexamination of your relationship with him or her. These events can have deep personal significance to the employee. If deemed "undesirable" immigration completely bars the employee from traveling to the U.S.A. ---even for vacation or shopping. The employee will often view the work assignment as "triggering" the immigration bar.

A number of scenarios can result. On the nice end of the spectrum, immigration can determine you are qualified and let you in---perhaps with a warning to do something before the next entry. The worst scenario, especially if they feel you are hiding something, is a permanent bar from ever entering the U.S. again---for any purpose whatsoever.

What to do now

It is hard to prepare a script to tell you "what to say". That is because the immigration inspectors intentionally ask different questions in different ways. Always tell the truth. If you at the border and immigration wants to lift your green card, do all you cannot to sign form I-407, *Abandon-*

ment of Lawful Permanent Resident Status. This can be difficult. Pressure to sign may seem unbearable. The inspectors will often offer to let you in for this particular trip, implying that they will do so only if you sign the form. In most cases, it is worthwhile to say, “OK, I respect your decision, but I think I will just turn around and go home and sort things out. Please let me withdraw my application for entry into the U.S., if you will not let me in as a visitor.”

FURTHER INFORMATION [supplemental web resources]

Canada to U.S. Business Immigration, Home Page

<http://www.grasmick.com/>

B-1 Business Visitor-Quick Immigration Permit for Canadian Business Needs

<http://www.grasmick.com/business.htm>

E-2 Investor-Long-lasting U.S. Visa for Canadian Investors

<http://www.grasmick.com/invest.htm>

L-1 Home Page-Intra-company Transferee: Cornerstone of Canada to U.S. Business Immigration

<http://www.grasmick.com/transfer.htm>

TN NAFTA Home Page: A U.S. Immigration Permit for Canadians

<http://www.grasmick.com/nafta.htm>

Grasmick's TN Handbook for Canadians---Information Page

<http://www.grasmick.com/handbook.htm>

H-1B Professional-U.S. Immigration Permit for University Degree Professions; Information for Canadians

<http://www.grasmick.com/prof.htm>

Exporting Canadian Construction Services to the U.S.A. ---The Immigration Angle

<http://www.grasmick.com/contract.htm>

How Canadians Retire in the United States

<http://www.avvo.com/legal-guides/ugc/how-canadians-retire-in-the-us>

For related questions, see the “FAQ: Canada to U.S. Immigration for Businesses and Professionals” at <http://www.grasmick.com/canimfaq.htm> :

11. *Can I use the National Interest Waiver to avoid an individual Labor Certification for my Green Card?*

12. *Can I keep my Green Card while working abroad?*

...

14. *Why should we go through the hassle of hiring a Canadian for the job?*
15. *How can I convince the employer to sponsor me?*
16. *Can I keep both, the U.S. Green Card and Canadian Landed Immigrant status?*
17. *My company feels that a Green Card is a passport to leave and are "sitting on the fence" as far as helping me. What can I do?*

Also, see "U.S. Citizenship for Canadians" (the "Dual Citizenship") page: Advantages of Citizenship <http://www.grasmick.com/citizen.htm> for the ultimate goal of many Canadians.

"Grasmick's U.S. Visa Selector-Interactive Flowchart for Canadians" at <http://www.grasmick.com/discover.htm> is a "quick and dirty way" for a Canadian to identify temporary and permanent immigration options.

[Attachments, upon request:

- TN Memo On Sci Tech.PDF
- H-1BNeufeldmemo.pdf]

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