

A Guide On How To Expand Your Business Into The US



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CargoTrans



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1. About LACC

The Luxembourg American Chamber Of Commerce Has Been Committed To Building The Transatlantic Friendship Since 1991. Starting As A Small-sized Business Organization, It Has Grown To Become A Vibrant Center Of Economic And Cultural Exchange Between The United States And The Grand Duchy Of Luxembourg. With Over 60 Member Companies, It Serves The Economic And Financial Interests Of Its Community - Both In The Us And Abroad.

Website Link

<https://www.laccnyc.org/>



2. Knowing What You Don't Know: Optimizing Your Legal Strategy for US Market Entry

Anne Wolfson – Anne Wolfson, PLLC

US Common Law:

- Statutes: Fed (Affects All); 50+ States/Territories; Municipal Statutes
- Regulations From All Levels Of Government
 - Court Cases – Judges/Juries Interpret The Law Based On Specific Facts
 - Case Law Is Crucial - Analysis Of Law Depends On Facts Of Each Case
 - Finding And Understanding The Right Answer (Or An Approximation) Requires A Lot Of Searching And Harmonizing Of Legal Sources
- **Everything Of Importance To The Two Parties Is In The Contract**

The Corporate Form

Why Set Up A US entity?

Asset Protection, Tax And Legal Liability Reduction

US Entity VS. Local Corporate Partner/Distributor

US Entity options

Which Business Structure?

LLC, C-Corporation, S-Corporation Or Partnership

Where To Incorporate?

NY, Delaware Or Another State

Need Either An Entity Or A “Right To Do Business”



IP Protection

IP Protection Regimes In The US And Europe Are Different

- US And EU Systems Are Converging
- They Are Not Yet The Same

- **Wise To Get Legal Review In Each Jurisdiction**

Litigation Is Expensive

Distracts Management Attention



Managing Litigation Risks & Contracts

Litigation More Frequent Under Common Law

US Litigation System Is Notoriously Complex And Expensive

Draft Agreements With An Eye To Managing Litigation Risk

Settlement Is Often The Better And More Efficient Answer

Cost Of Doing Business In The US

Don't Be Afraid Of The Risk, But Don't Ignore It

Tech – Hardware And Software, Licenses And User Agreements

Vendor/Services/Sale Or Use Of Goods Or Equipment

Real Estate Leases

Independent Contractor/Consulting Agreements

Employment Contracts – Used Only For Some

Senior Executives

Insurance – Advisable To Get US-Based Insurance Policies

Changes Should Be In Writing

Oral Agreements Difficult To Enforce

Employment Law

- Employment Law Is **Mostly** State-by-state
- NYS: “Employment At Will” – Most Employees Do Not Have Contracts
 - Either Party Can End The Relationship With Minimal Notice
 - Employer’s Reason Must Not Be An Illegal One
 - Hiring, Termination And Resignation Simpler Than Outside The Us
- “Employee” Vs. “Contractor” – How They Work And Are Supervised
- NY Has Complex Wage/Hour Laws – Errors Are Expensive
- **Discrimination**
Not Hiring/Recruiting/Interviewing Enough Of A Protected Group As Reflected In The Population, Whether Conscious, Intentional Or Not



Real Estate & GDPR

- Certain Visas Need **Physical Space** To Show Intent To Do Business
 - Some Co-working Space Leases Are Acceptable
 - Real Estate Laws Are **Hyperlocal**
 - Most Are By City, Some Are By County, Some By State
 - NYC: Commercial Spaces Have Landlords' Standard Terms
 - Industrial Space Varies Based On Location And Purpose
- GDPR Affects US Firms With EU Operations In Complex Ways
 - The Inquiry And Answer Are **Fact-Dependent**
 - It **May** Apply To EU Firms Operating In The US
 - **Do Not Assume That Your US Operations Will Be GDPR-Free**

Addendum

- **Exporting To The US**
Need Commercial Partners: Local Structure And Presence
Distributors, Retailers, Sales Agents
- **Products Liability**
Manufacturers, Distributors, Suppliers, Retailers, Others
- **Legally Responsible** For Those Products' Injuries
- **Defect And Failure To Warn**
Different Standards Across Industries, Based On Insurance Coverage



3. Tax Law: Pitfalls And Opportunities To Look Out For

Mark van der Linden – WTS Global

The US Tax System

Treaty

- | | | |
|------------------------------|---|--------------------------|
| 1. Sales Tax | → | Does Not Apply |
| 2. City/Municipal Income Tax | → | Does Not Apply |
| 3. State Income Tax | → | Does Not Apply |
| 4. Federal Income Tax | → | <u>Does Apply</u> |

Keeping Inventory In The US

Important Criterion: Is This Taxable Or Not?

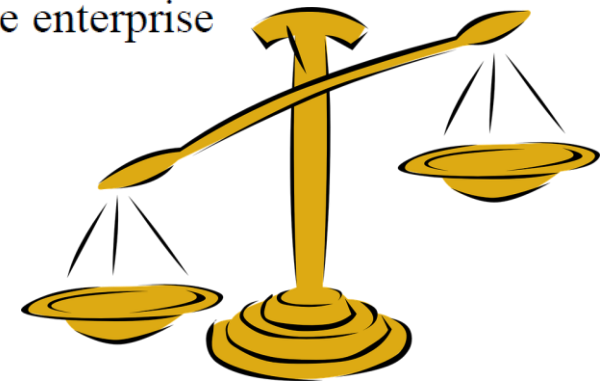
ARTICLE 5

Permanent Establishment

1. For the purposes of this Convention, the term “permanent establishment” means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

4. Notwithstanding the preceding provisions of this Article, the term 'permanent establishment' shall be deemed not to include:

- a) the use of facilities solely for the purpose of storage, display, or delivery of goods or merchandise belonging to the enterprise;
- b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display, or delivery;
- c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;



US Tax Filing For Inventory

Filing

1. Sales Tax	→	Yes
2. City/Municipal Income Tax	→	Yes
3. State Income Tax	→	Yes
4. Federal Income Tax	→	Yes

No File = No Statute Of Limitation

Planning Idea

- There Is A Planning Idea To Have The Margin Realized With The Usa Inventory Sales Taxed At A Very Low Rate
- Maybe Even As Low As 0%.



Sales Tax In The US & Current Tax Benefits

Sales Tax Does Not Work Like VAT

- It Is A State Tax
- There Is No Input Sales Tax That Can Be Offset
- Requires Nexus In A State, But Wayfair Case Substantially Expanded Taxable Presence (Merely Sales Is Sufficient)

This Is A Big Compliance Concern

Suggestion: Outsource For First Few Years

- Lowest Federal Corporate Income Tax Rate Ever (21% Coming From 35%)
- Large Entrepreneurial Facilities
 - Direct Full Amortization
 - Definition Entrepreneurial Expenses Is Wide
 - R&D Low Taxed
 - Subsidized Manufacture In US And Then Export (50% Benefit Or More)
- States Offer Incentives To Establish Businesses
- Strong Support For Businesses

States With No Income Tax

State Tax Benefits

- Wyoming, Nevada, And South Dakota Have No Corporate Or Individual Income Tax (Though Nevada Imposes Gross Receipts Taxes);
- North Carolina's Flat Rate Of 2.5 Percent Is The Lowest In The Country, Followed By Rates In North Dakota (4.31 Percent) And Colorado (4.63 Percent);
- Four Other States Impose Rates At Or Below 5 Percent: Arizona (4.9 Percent), Utah (4.95 Percent), And Kentucky, Mississippi, And South Carolina (5 Percent)
- Alaska Has No Individual Income Or State-level Sales Tax;
- Florida Has No Individual Income Tax;
- New Hampshire, Montana, And Oregon Have No Sales Tax



Setting Up In The US

Problems With The LLC

Foreign Tax Requirements For The Owner

- Participation Exemption Generally Requires % Of Shares (Luxembourg (10%), Germany (10%), Netherlands (5%))
- LLC Does Not Have Capital Divided Into Shares
- LLC Sometimes Tax Transparent
- Issue With EU ATAD Rules (Anti-hybrid)

Amend LLC Contract To Facilitate

LLCs Are Great For Planning

- Very Easy to make hybrid (filing form)
- Foreign Country Qualifies On Merits
- Is An Automatic Hybrid
- Be Careful With Anti-abuse Rules
- US Did Not Sign Off On OECD BEPS



4. Expand Your Business Into The US

Nunzio De Filippis – CargoTrans

Terms Of Sale

- Familiarize Yourself With All Incoterms To Decide Which Is Best For You
- Who's Responsible For The Losses/Damages? Don't Forget About Insurance
- Consider The Power Of Offering DDP To A US Buyer Not Familiar With Importing – **Convenience Sells!**



Former Importer Of Record: How Do I Execute A DDP Transaction?

- US Customs Allows Shipper's To Be Declared As The Importer Of Record
 - Power Of Attorney
 - Customs Bond: Single Entry Bond Vs. Continuous (Annual) Bond
- Fully Responsible To Comply With All US Customs Regulations
 - US Consignee Is Only Required To Provide You With Their US Tax I.D.
 - Not Required To Complete Any Docs



Other Government Agencies: Do I Need To Comply With Other Government Agencies? (OGA's)

- United States Department Of Agriculture, Fish And Wildlife, Food And Drug Administration, Etc.
- US Customs Is The Enforcer, But You Need To Obtain Releases From Each OGA
- Consult With Your Customs Broker If You Are Not Sure The Commodity Has To Comply With OGA's



Selecting A Freight Forwarder, Customs Broker, 3PL: What Should I Consider When Selecting A Logistics Partner?

- Buyer's Beware – Selecting Based On Price Only May Limit Your Growth
- Look For Value – I.E. Technology, Visibility, Reporting, EDI/API Connectivity
- Share As Much As Possible About Your Business As A Start-up And Where You Envision It In The Future
- Request For Documentation And Harmonized Tariff Schedule (HTS) Classification Review
- Third-Party Logistics (3PL)
 1. Advantages To Having Inventory In The US
 2. Resource – Flexe



Customs Compliance Tips: What Do I Need To Know?

- Responsible Supervision: Import SOPs, HTS Selection, Country Of Origin Markings
- Record Keeping
 - Five Years From Date Of Entry
 - Never Tell Customs My “Broker” Has It
- Take Advantage Of ACH Periodic Monthly Statements
- Inward Manifest Confidential Treatment
- Partnership Programs With US Customs
 - I.E. BKIP, C-TPAT, Etc.



Out-Of-The-Box Strategies

How Can I Compete In A Crowded Marketplace?

#WeMakeShipHappen

- Tariff Engineering – I.E. Sink For Starbucks Vs. Furniture Counter
- Valuation Strategies
 - First Sale
 - Unbundling
- Country Of Origin – Shift Strategies
 - Extremely Useful With Section 301 China Tariffs
 - Pillow And Bed Comforters
 - Cosmetic Body Sprays



5. US Immigration As Part Of US Business Strategy

Steve Maggi – SMA Immigration & Consular Law Attorneys

Fundamental Parts Of US Immigration: The Bridge

Foundation:

- Establishment Of US Entity
- Funding
- Business Model/Plan
- Physical Office Space

Suspension Mechanism:

- Nationality Of US Entity (Majority Luxembourg Ownership)
- Continuing Existence Of US Entity
- Revenue And Job Creation In The US
- Continuing Activity Of Luxembourg Entity, If Applicable

Path/Lane: Visa Category(ies) Chosen To Achieve Immigration Goals

How To Utilize Visa Waiver/ESTA In Order To Lay The Foundation

What Is Allowed?

- Consult With Business Associates
- Attend A Scientific, Educational, Professional, Or Business Convention Or Conference
- Attend Short-term Training
- *Negotiate A Contract – This Includes Incorporating The Company, Securing A Lease, Opening A Bank Account, Signing Contracts For Services To Be Provided By Or For The Company

What Is **Not** Allowed?

- Study, For Credit
- *Employment – This Means Doing Any Work On Behalf Of A US Entity That Is Compensated In Any Way (Money, Food, Housing, Travel)
- *Permanent Residence In The US – No Extensions, No Change Of Status – Time In The US Is Now Tracked – Can Lead To “Intent” Issues

PASSPORT



ESTA: Mistakes To Avoid In Laying Groundwork

- Do Not Use US Company Funds To Cover Individual Costs – Can Be Seen As Form Of Payment. If Foreign Entity Exists, Cover Costs From The Foreign Entity
- Do Not Send Money Invested Back To Foreign Entity Until After Visas Have Been Secured
- If You Work For A Foreign Company, Always Come Into The US As A Representative Of That Company And Do **Not** Say That You Will Be Working On Behalf Of The US Entity



Path 1: E-2 Treaty Investor Visa: Eligibility

- US Entity Must Be Created And Then It “Sponsors” Visa Petitions
- All Luxembourg Nationals Are Eligible If US Company Is At Least 50% Luxembourg Owned (Nationality Of US Company And Visa Beneficiaries Must Match)
- A “Substantial Investment” Must Be Committed To The US Entity
- An Office Space Must Be Secured That Is Sufficient In Size For The First-year Projected Staff To Work – Year Is Calculated Based On When Petition Is Submitted And Operations Are To Begin
- A Five-year Business Plan Must Be Submitted
- *No Foreign Entity Is Required – Can Be Set Up/Owned By An Individual



Benefits To The US

- In Order To Obtain The Visa You Have To Show The US Government The Following Will Happen:
 - Job Creation – Marginality – More Than Just The Visa Beneficiary And His/Her Family Must Benefit – The More Jobs That Are Created The Better For Maximizing Success Of Visa Applications
 - Ideally, Projected/Sustained Ratio Is 1 Foreign National For Each 5+ American Workers
 - Revenue Generated And Taxes Paid
 - With Regards To Revenue, A Business May Be Barely Profitable But As Long As Jobs Are Created And Maintained This Is Usually Sufficient



- Investment-based Visa – Investment Must Be “Substantial” – Covers 1st Year Operating Costs
- Funds Must Be “Committed” – Irrevocable – They Must Be In The US Entity’s Account And Stay There (For How Long Is Situational)
- Funds Must Be “At Risk” – Must Spend The Money To Show Real Risk (Office, Services)
- Company Must Be “Real And Operating” (Funds Are In Motion) – Subsequent Visa Petitions Require Company To Be Consistently Active

Suspension: Maintaining Luxembourg Nationality

- The US Entity Must Always Continue To Maintain Luxembourg Nationality By Never Ceding More Than 50% Of Ownership To Nationals From Other Countries

This Is Especially Tricky In Three Specific Scenarios:

- 1) Joint Venture – 50% Luxembourg/50% [Other Country] Ownership – Luxembourg Ownership May Not Be Reduced At All
- 2) Companies Seeking Venture Capital – Must Be Careful Not To Cede The Minimum 50% Threshold When Bringing In Investors
- 3) In Case Where There Is A Foreign Parent Owner – If The Ultimate Ownership Changes And The Foreign Parent Is No Longer 50% Luxembourg, Then US Company No Longer Qualifies To Sponsor E2 Visas

Path 2: L-1 Intra-Company Transfer Visa

- Foreign Companies Create Subsidiaries In US
- Most Often Used By Companies Whose Ownership Nationality Does Not Qualify Them For E-2 Sponsorship Or Whose Employee's Nationality Does Not
- Foundation: Requires Existence Of Foreign Company And Directly-related US Entity
 - Subsidiary
 - Joint Venture
 - Branch
- Foreign Company Must Have Existed For At Least One Year
- Any Employees To Be Transferred Must Have Worked For At Least 1 Continuous Year In The Past 3 Years For Any Foreign Related
- Suspension: Foreign Entity Must Continue To Function And Relationship Between Foreign And US Entity Must To Continue Exist



L-1

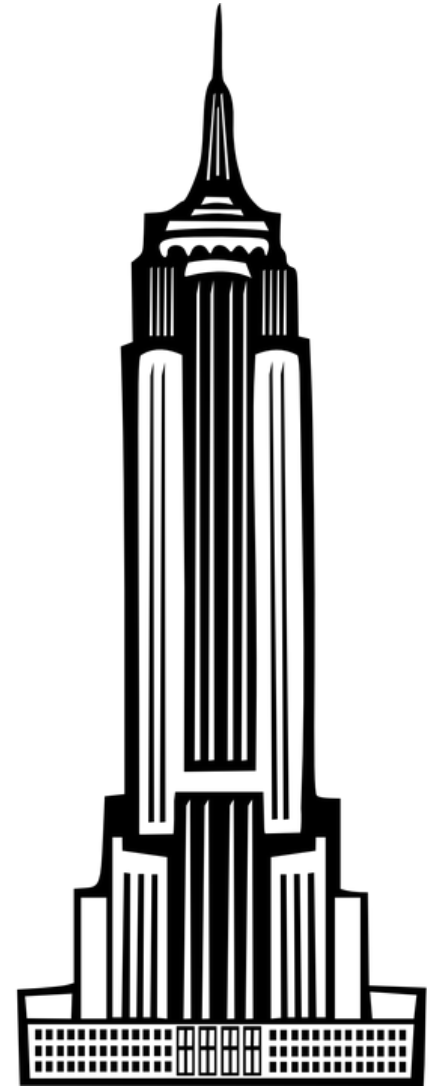
- Duties Must Be Managerial Or Executive (L-1a) In Nature In Both Foreign Employment And US Position – No Mixing And Matching
 - “Specialized Knowledge” (L-1b) Is Almost Impossible To Establish – Used For Software Engineers And Trainers For Unique And Proprietary Products Only, So Very Rare And Renewals Very Difficult
 - Similar To E-2 In Terms Of Preliminary Steps But Ramp-up For Renewals Is Much Faster/Higher Expectations
 - Ideal For Larger Companies With Locations In Several Countries Or With Employees From Different Countries
 - Blanket L Is A Great Solution For Big Companies
- Duration Of L-1 Depends On How Long The Us Entity Has Existed:
 - If Less Than One Year, Initial Visas Can Be Granted For Only One Year (New Office Visa)
 - If More Than One Year, Visas Can Be Granted For An Initial Period Of Three Years
 - In The Case Of L-1a Visas, Executives Or Managers Are Expected To Be Removed From Day-to-day Activities Before Renewing Their First Visas. Hard For New Office Visas.
 - Renewals In 2-year Increments For Up To Total Of 7 Years

Luxembourg-Owned Company: E-2 Vs. L-1

	E-2	L-1
Non-Luxembourg Nationals Eligible	NO	YES, with 1 year at LUX or related company
No Foreign Company	YES	NO
Small Company	YES	NO
Not Capable of Creating U.S. Hierarchy Quickly	YES	NO
Where Adjudicated	U.S. Embassy in LUX – Lower Denial %	USCIS – 70% RFE rate and much higher denial %
Filing Fees	\$205	\$2,370
Visa Period	Up to 5 years with unlimited renewals	1 or 3 years with 2 year renewals (7 yr. max)
Renewals	YES with jobs created	<u>MAYBE</u> :higher denial %

L-1/E-2: Real Case Examples

- Luxembourg Hotel Company Plans Expansion To US And US Entity Is Incorporated As Subsidiary Of The Luxembourg Company
- Executives And Managers Travel To U.S. On Visa Waiver/ESTA To Lay Groundwork For US Entity
- Entity Is Properly Funded To Meet First-year Operating Costs For 1st Year
- Once First Project Is Set To Begin, Project Manager (Luxembourg National) Is Sponsored For E-2 Visa For 5 Years
- After US Entity Has Been In Existence For One Year, Application Made To Immigration Services For L-1a Visa For Project Manager For UK National Working At The UK Branch For More Than One Year
- Hierarchy Was Created Where Executives And Managers Are Removed From Day-to-day Activities And Are Supervising Another Level Of Employees, So That Other Luxembourg Nationals Can Be Hired And Non-Luxembourg Employees Can Be Transferred



Common Mistakes – Reasons For Potential Denials

- Making Tax Minimization The Controlling Decision-making Factor
- Not Putting Up Full Funds To Cover First Year Of Operating Costs
- Sending Funds Back To The Foreign Parent Company As Soon As Petitions Are Submitted
- Not Securing Sufficient Office Space
- Spending Invested Funds In The US To Bankroll Visiting ESTA Employees To Pass Them Off As Real Costs
- Sending Foreign Employees Without Work Visas Under ESTA Or B1 Visas To Train US Employees – Can Be Seen As Working
- Not Hiring Sufficient American Employees Once First Visa Is Issued And Hindering Chance At Renewals Or Additional Visas



Final Comments

- E-2 Is Almost Always The First Choice If Nationality Test Is Met And The Employee Is Eligible
- Job Creation Is The Single-most Important Factor To Keep In Mind When Deciding Which Path To Take And When
- Do Not Put Saving Money On Taxes As Priority #1 – If It Looks Like You Are Creating A Pass-through Company Which Will Not Pay Its Fair Share Of US Taxes, The Applications May Be Denied
- E-2 Is The Ideal Category For Start-ups Without The Resources To Create Large Staff Numbers, As The Expectations For Job Creation Are Lower
- L-1 Is A Multinational Business Model And Fits Organizations That Are Already Well-established Overseas And Have The Resources To Create More US Jobs In The Short-term
- Take The Time Necessary To Make Sure All These Steps Are Taken And A Full Commitment To The Venture Is Made, **Before** Applying

6. Snapshots









Be Part Of The Luxembourg American Chamber Of Commerce In New York

“Alone We Can Do So Little; Together We Can Do So Much.”
- Helen Keller

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