



# U.S. IMMIGRATION SOLUTION: CANADA IS OPEN FOR BUSINESS

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The competition for professional foreign workers continues to increase in many U.S. business sectors. In light of changing U.S. immigration laws and impending reform, however, American companies hiring foreign talent are challenged by how to efficiently and economically recruit and retain their top talent.

In an effort to increase innovation and profits in a burgeoning global economy, large, mid-market and emerging companies are searching for solutions to ease their challenges with attracting a highly skilled immigrant workforce. One of these may be adding business interests in our neighbor to the north – Canada – to leverage the favorable economic and immigration environment.

## SITUATION ANALYSIS

With global competitive pressures, it's essential that U.S. companies in specific industries be able to recruit and retain top talent. In a perfect storm compounded by numerous factors, U.S. corporate leadership is aggressively seeking solutions that promise to enrich their competitive edge and, at the same time, create a more favorable marketplace.



## **EXISTING U.S. IMMIGRATION POLICY PRESENTS RECRUITING, RETENTION CHALLENGES**

Though immigration law reform may eventually come to the U.S., current laws are challenging, directly impacting American companies from resolving the current disproportionate state of workforce supply and demand.

Currently, the U.S. Department of Homeland Security caps the number of skilled immigrant workers allowed into the U.S. each year through the H-1B visa program at 85,000, though there are some exceptions. (For the 2017 fiscal year, the cap is 65,000 plus 20,000 foreign workers who earned an advanced degree). This year, U.S. Citizenship and Immigration Services estimated the number of applications received at nearly 199,000.<sup>i</sup>

“Across numerous industries – but particularly in IT and tech industries that rely on STEM workers – talent is a big challenge for companies,” says Matthew J. Slaughter, Paul Danos Dean of Dartmouth’s Tuck School of Business, research associate with the National Bureau of Economic Research and founding faculty director of the Center for Business, Government & Society. “And for these particular parts of the labor market, at least a bachelor’s degree or advanced degree is required under the H-1B visa program. The demand is pretty acute.”

Increasing their global competitive standing has long been a struggle for U.S. tech companies. They have lobbied aggressively for immigration reform to allow more skilled foreign workers to enter and remain in the U.S. But they also compete for available H-1B visas with the health care, science and financial industries, which also rely heavily on the program to fill gaps in their workforces.

H-1B holders are typically required to work in positions that would require, at minimum, a bachelor’s degree or its equivalent.

## **RETAINING IMMIGRANT TALENT IN MIDST OF UNCERTAINTY**

As the global economy continues to grow and innovate, U.S. companies face deep competitive concerns in both recruiting and retaining top talent. Corporate America understands that a North American platform is absolutely essential to effectively competing for excellent domestic talent. Top

international graduates are increasingly unwilling to accept professional opportunities with companies unless their immigration issues and visa status are settled as they are seeking a secure future.

In the current U.S. immigration environment, some of America’s top businesses spend thousands of dollars for every immigrant worker, sponsoring those foreign workers into the H-1B lottery system. Large enterprises know that they must protect their investment, doing whatever it takes to build from the best talent pools in the world.

According to a recent National Foundation for American Policy study, more than half of America’s multi-billion-dollar startups were founded by immigrants – many of whom first came to the U.S. on an H-1B visa. The 44 immigrant-founded companies profiled in the report held a collective market value of \$168 billion and employed an average of 760 people each.<sup>ii</sup>

“The key thing to understand about high-skill immigration is that they make the economic pie bigger because of the talents they bring”, Slaughter says. “It’s not a matter of adding people to a fixed supply of jobs. Whether they’re U.S.-born or foreign-born, innovative workers drive productivity growth and grow the economy.”<sup>iii</sup>

## **KEY CONSIDERATIONS FOR A CANADIAN SOLUTION**

U.S. corporations looking to maintain their competitive advantage and retain top foreign talent may consider opening a Canadian subsidiary or affiliate in order to facilitate employment (i.e., work permits) within North America.

With this approach – which some of the largest U.S. tech companies leverage – employers can transition international workers from the U.S. to a Canadian subsidiary either temporarily or permanently, with the option to subsequently transition back to America as an “international transferee” within the organization.

Among the many benefits of opening a Canadian subsidiary is that it keeps skilled foreign workers geographically close to the U.S. home office and within the same or a similar time zone. This ensures business operations can continue without disruption and work can be turned around and issues addressed quickly.

To this end, leading Canadian business law firm Blake, Cassels & Graydon LLP (Blakes) and well-respected Canadian immigration law boutique law firm Cumming and Partners often work together to provide a combined corporate and immigration solution to help U.S. businesses retain their highly valued skilled workers by expanding operations and forming a Canadian subsidiary location.

## CANADIAN IMMIGRATION POLICY IMPROVEMENTS

As a nation with only about one-tenth the populace of the U.S. (36.2 million to America's 322.7 million)<sup>iv</sup>, Canada's immigration system is largely based on the needs of Canada's labor markets.



On June 12, 2017, the Government of Canada implemented a new Global Skills Strategy to make it easier and faster for Canadian companies to obtain work permits for foreign workers. Special streamlined rules have been implemented for those in technology and other industries that rely on top international talent. In addition, work permits for international hires can now be expedited with approvals obtained within 30 days.

There is also a direct route to Canadian Permanent Residency for top international talent, with a processing time of 12 months or less. The new programs are specifically designed to give Canadian employers – including subsidiaries and affiliates of U.S. businesses – quick and easy long-term access to top global talent.

## CANADIAN OPTIONS THAT SUPPORT U.S. COMPANIES

With a sophisticated economy, close proximity to the U.S., familiar business culture, attractive currency exchange and universal health care, Canada is an often safe and secure place for U.S. companies looking for a solution to immigration and employment issues.

But Canada does have a different legal and regulatory regime. It is, therefore, important to retain experienced counsel with a deep understanding of cross-border structures and transactions.

While Blakes does not practice U.S. law, it collaborates with U.S. and international clients and their legal and financial advisors to provide advice on the Canadian aspects of transactions.

Among the considerations for U.S. corporations to evaluate when looking into a Canadian outpost:

### 1. Corporate considerations

- In Canada, businesses can incorporate under either the federal statute (Canadian Business Corporations Act) or, an individual province (e.g., Ontario or British Columbia).
- Most corporations in Canada require resident directors – with the British Columbia Corporations Act being an exception.
- Companies will want to carefully consider their choice of corporate entity – corporation, general or limited partnership, branch office, etc.

### 2. Corporate tax considerations

- The Canadian Scientific Research and Experimental Development (SRED or SR&ED) Tax Incentive Program provides support in the form of tax credits and refunds for certain R&D activities.
- Withholding, dividend and value-added taxes are additional tax considerations that companies should be aware of.
- The choice of business entity can have tax consequences: Canadian unlimited liability corporations and U.S. limited liability companies can be treated as “disregarded” entities or partnerships for U.S. federal income tax purposes while being taxed in Canada at the same time as corporations.

**Canadian business tax costs** are the lowest in the G7 and **46 PERCENT LOWER** than those in the **United States.**<sup>vi</sup>



- Provincial tax rates vary – income of a business is allocated to a province based on various factors.

### 3. Employee tax considerations

- There are specific tax treatments for non-resident employees in Canada, and companies will need to be aware of the Canadian federal rate as well as additional taxes – and ways to manage them, if applicable.
- Stock option benefits in Canada are typically taxed under the Income Tax Act, with cross-border business introducing additional factors – including for those working in both Canada and the U.S.

### 4. Employment law considerations

- All labor and employment regulations are governed by province rather than federally.
- There is no employment-at-will in Canada, rather it is a “notice period” regime.
- Disability considerations are even more stringent than in the U.S., requiring all employers to fully accommodate employees with disabilities – even if not work-related.
- Random drug and alcohol testing is typically not allowed, even for safety purposes.
- Adapting employment contracts, benefits plans, etc.

### 5. Current Canadian business environment:

- Canada has a long history of political stability.
- The Canadian banking system has been declared among the soundest in the world.<sup>v</sup>
- Canada led all G7 countries in economic growth between 2006 and 2015.<sup>vii</sup>

## STRUCTURED SOLUTION TO INCREASE NORTH AMERICAN PLATFORM

By engaging an experienced legal team and trusted business and immigration law advisors, U.S. clients can unlock an economical, turnkey solution for identifying and effectively addressing the requirements and considerations of establishing a Canadian outpost.

On an à la carte basis, a similar process would likely take much longer and cost much more. To that end, the teams of Blakes and the immigration law professionals with whom

they work have developed a coordinated methodology for working through the necessary channels and processes to represent its many satisfied cross-border clients. These teams that manage these complex issues are leaders in cross-border business and immigration solutions that have created defined and successful processes for large, mid-market and smaller emerging companies.

## GETTING STARTED

To benefit fully from the expertise of these legal teams, U.S. companies will be guided through a comprehensive business platform audit and situation analysis. Then, a custom workflow solution will be developed.

For mid-market and emerging U.S. companies – which may not have a Canadian outpost or cross-border immigration counsel – these teams will be especially valuable.

To compete in the global marketplace, U.S. businesses are adopting a comprehensive and proactive North American immigration and business strategy. Your company’s success has never been more dependent on retaining the best and brightest business and legal teams, both at home and abroad.

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## ABOUT BLAKES

As one of Canada’s top business law firms, Blakes provides exceptional legal services to leading businesses in Canada and around the world.

**For more information**, please contact Geoff Belsher (geoff.belsher@blakes.com, tel: 212-893-8223 (New York)) or Cheryl Slusarchuk (clsx@blakes.com, tel: 416-863-5817 (Toronto) or 604-631-4242 (Vancouver)).

<sup>i</sup> “USCIS Completes the H-1B Cap Random Selection Process for FY 2018.” U.S. Citizenship and Immigration Services. April 17, 2017. <https://www.uscis.gov/news/alerts/uscis-completes-h-1b-cap-random-selection-process-fy-2018>.

<sup>ii</sup> Anderson, Stuart. “Immigrants and Billion Dollar Startups.” National Foundation for American Policy. March 2016. <http://nfap.com/wp-content/uploads/2016/03/Immigrants-and-Billion-Dollar-Startups.NFAP-Policy-Brief-March-2016.pdf>

<sup>iii</sup> Ibid

<sup>iv</sup> “What Can the U.S. Learn from Canada’s Immigration Policy?” Knowledge@Wharton. September 16, 2016. <http://knowledge.wharton.upenn.edu/article/what-the-u-s-can-learn-from-canadas-immigration-policy/>

<sup>v</sup> “Competitive Alternatives 2016: Focus on Tax.” KPMG. July 12, 2016. <https://home.kpmg.com/ca/en/home/media/press-releases/2016/07/canada-maintains-top-spot-as-the-most-tax-competitive-country-for-business-globally-kpmg-study.html>

<sup>vi</sup> “Global Competitiveness Survey.” World Economic Forum. 2017. <http://reports.weforum.org/global-competitiveness-index/competitiveness-rankings/#series=EOSQ087>

<sup>vii</sup> OECD Data. <https://data.oecd.org/canada.htm>