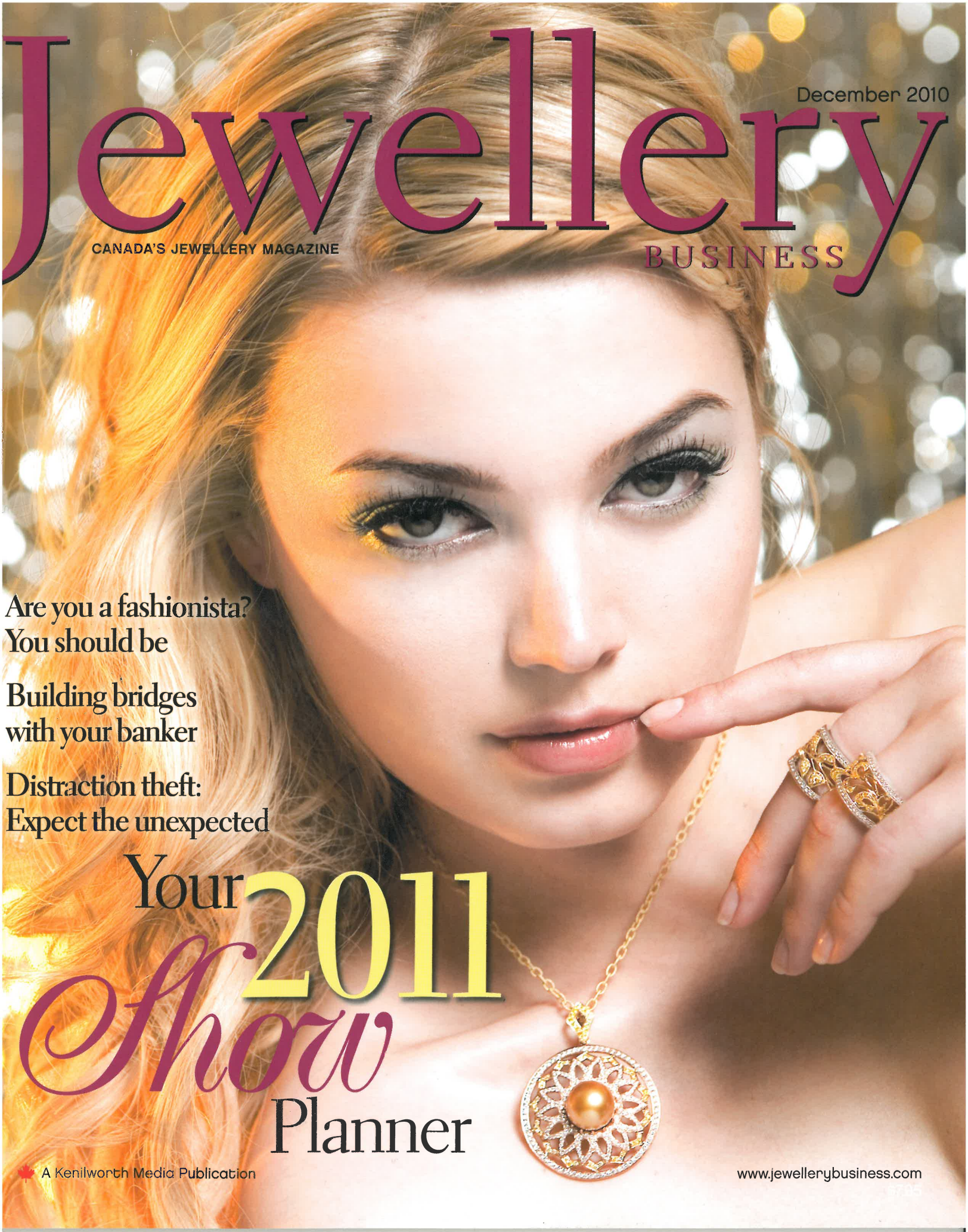
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Due south

Navigating the alphabet soup of U.S. visas

By Michael Wildes

They say diamonds are a girl's best friend. The truth is women of all ages love jewellery and it seems that no matter how many pieces they have, there is always room for one more.

With the holiday season upon us, now is the time to not only prepare for the onslaught of shoppers, but also to make plans for the coming year and evaluate the direction of your business, particularly when it comes to branching out or ramping up your operations south of the border.

Over the last decade, Canada has emerged as one of the most sought-after jewellery and diamond suppliers, and is today considered one of the United States' largest trading partners in the industry. The growth of Canada's market share of the U.S. jewellery industry is the result of the reputation for its raw materials and gem-quality, conflict-free diamonds.

To better navigate the U.S. immigration system, suppliers and manufacturers of jewellery and raw materials from Canada and elsewhere may find a quick introduction to the American employment immigration system useful. Specifically, the discussion will focus on 'H-1B' and 'L-1,' which are employment-based visa classes most commonly used by workers in the diamond and jewellery industries.

'H-1B' and 'L-1' employment-based visas are most commonly used by Canadian workers in the diamond and jewellery industries.

Both the H-1B and L-1 visa classifications allow employees to work temporarily in the United States, while at the same time, authorize them to seek permanent residence.

The H-1B visa

Foreign-born employees working in 'specialty occupations' are eligible to apply for the H-1B visa. This visa class is for individuals working in positions requiring a bachelor's degree to enter the field (*i.e.* lawyer, doctor, engineer, etc.). Therefore, in order to qualify for the visa, the worker must possess a degree in a field related to the offer of employment. By law, only 65,000 H-1B visas are issued every year. Due to the limited number of available visas, it is important employers seeking to hire foreign workers in H-1B visa status file the necessary petition in a timely fashion.

H-1B visas are issued initially for up to three years. However, the visa may be extended up to six years. It is possible to employ an individual in H-1B status beyond the six-year limitation, but this requires the commencement of an application to sponsor the employee for a green card. The employee is eligible for unlimited H-1B visa status for as long as it takes to obtain a green card, provided the application process begins well before the end of the six-year limitation on the temporary visa status.

Given lengthy backlogs in the immigration system, an employee routinely holds H-1B status for many years beyond the six-year limitation. Keep in mind the H-1B is employer-specific, and therefore the employee is limited to working temporarily for only the employer petitioning to sponsor their status. Dependent spouses and children are eligible for H-4 visa status, but are not eligible for authorization to work in the United States.

In response to fraudulent petitions that have plagued H-1B visa classification for years, recent trends in immigration compliance, such as strict employer-end enforcement, are commonplace. Businesses employing individuals in H status, therefore, must be especially careful to stay on the right side of the law, especially since employment-based visa petitions fall under very specific qualifying conditions.

There has been an increase in the number of Immigration and Customs Enforcement (ICE) agents dispatched into the field to conduct site visits to ensure H-1B employees are working in the capacity for which their visas were issued. This means that if ICE agents arrive at the employee's location of employment, the employer must be able to demonstrate he or she is working in precisely the professional role for which they were sponsored and that their employment duties mirror those approved by the government. To be clear, this means an H-1B employee sponsored to work as a marketing manager cannot be found selling watches to the general public.

The following list provides guidance for the employer and H-1B employees in the event of a site visit:

- Each company should designate a contact person for communication with U.S. Citizenship and Immigration Services (USCIS) and ICE;
- All foreign non-immigrant employees, including H-1B status holders, should be encouraged to maintain copies of their passport ID pages, Notices of Action (NOA), and Form I-94 arrival/departure card in their desks or work areas to quickly prove their identity and work authorization;
- Public access files containing a copy of the certified Labor Condition Attestation (LCA), proof of the prevailing wage determination, copies of the employer's compensation system, and pay scale used to determine actual wages being paid to the employee are to be maintained by H-1B employers and available in the event of an audit;

- Managers should maintain materials used to satisfy employee/union notification requirements, a summary of benefits offered to U.S. workers in the same occupation classification as their H-1B employees, and any other documents for special situations;
- The retention period for documentation connected to the H-1B application is one year beyond the last date on which the H-1B employee worked; and
- Human resource personnel should easily be able to confirm the employee's date of hire, job title, work location, and salary.

If the business is selected for a site visit, with or without advance notification, it is strongly recommended that expert immigration counsel be secured to guide the process.

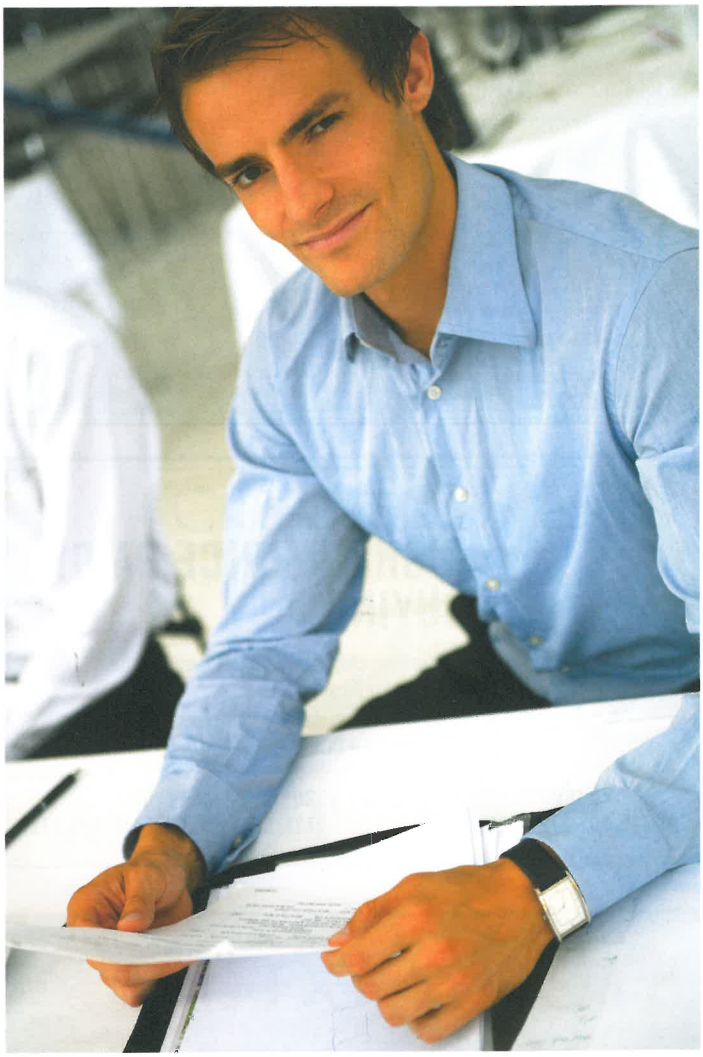
The L-1 Visa

L-1 visas are intended for individuals transferring from an overseas office to the office of a U.S.-based subsidiary, affiliate, or branch of the same company. Managers or executives transferred intra-company may apply for an L-1A visa, while individuals who are considered to be 'specialized knowledge' professionals may apply for the L-1B visa.

In order to transfer a foreign employee of a foreign company to a U.S. office, the individual must have worked for the foreign entity for at least one year during the three years preceding the transfer in the capacity of executive, manager, or employee with specialized knowledge.

Like the H-1B visa, the L-1 is a non-immigrant visa and is initially valid for a temporary period of generally three years. L-1A visas are capable of being extended in two-year increments for a maximum of seven years and L-1B visas may be extended for a total of five years. Both the H-1B and L-1 visa classifications allow employees to work temporarily in the United States, while at the same time, authorize them to seek permanent residence. This doctrine of dual intent is especially useful in those situations where the employer and the employee anticipate a long-term relationship in the U.S. arena. Unlike the H-1B category, however, dependent spouses of L-1 visa holders are permitted to obtain authorization to work in the United States.

While ICE has not been conducting site visits for L-1 visa holders with the same tenacity as they have for H-1B employees, it has nevertheless become increasingly difficult to get L-1 petitions approved. With the hope the United States will emerge stronger and more financially secure at the end of the current recession, the government seems to be adopting a very limited stance on admitting foreign-born workers, even for qualified positions. This means individuals being transferred to an American office must possess a more unique or proprietary knowledge not otherwise found in American employees. As such, unless the employee is truly qualified, the petition may not be favourably adjudicated.



To qualify for a H-1B visa, the worker must possess a degree in a field related to the offer of employment.

Canadians are not limited to H and L visas, but instead have other options for additional visa categories. Although the United States is considered a melting pot of people and businesses, trying to navigate the alphabet soup of visas can be confusing to the layperson. In order to achieve the most satisfactory result and to ensure the growth and success of your organization, consultation with an experienced U.S. immigration attorney is highly recommended. ✧

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