

## FAQs: Working in the U.S. on an ESTA or B Visa and Related Tax Risks

### ESTA or B Visa

#### **What activities are allowed under a Visa Waiver Program (VWP - i.e. ESTA) or B visa (B-1/B-2)?**

- **B-1 Visa (Business Visitor):** Allows non-resident aliens to enter the U.S. for business-related activities, such as attending meetings or conferences, but prohibits engaging in work that generates U.S. source income (such as direct employment or active participation in business operations). It's important to note that "business meetings" refer to passive attendance and networking. They do not include affirmative actions in furtherance of the business or business activities, such as direct involvement in projects, making sales, or training people.
- **B-2 Visa (Tourist Visa):** This is for tourism and personal purposes and does not allow any business or employment activities.
- **ESTA:** Grants permission for short-term visits for business or tourism but does not allow work that generates U.S. source income. Like the B-1 visa, "business meetings" under ESTA refer to passive attendance only, and do not include active business operations or contributions.

#### **What is considered prohibited work on an ESTA or B-1 Visa?**

Activities that are strictly prohibited include:

- Any paid or gainful employment in the U.S., regardless of whether the employer is foreign or U.S.-based.
- Performing services that benefit a U.S. company in ways that a U.S. worker would otherwise perform, even if you are not compensated by the U.S. company.
- Any work that is considered part of the U.S. labor market, such as project management, training U.S. workers, or other affirmative business operations.

Work, professional labor, or skilled/unskilled labor (even if unpaid) is not permitted under the VWP. Travelers visiting the U.S. for work must obtain an appropriate work visa.

#### **What are some permissible activities under an ESTA or B-1 Visa?**

Permissible activities include:

- Attending business meetings and conferences (passively)
- Conducting business-related research activities
- Negotiating a contract
- Consulting with business associates
- Traveling for a scientific, educational, professional or business convention or conference
- Attending or participating in a trade show or conference
- Installing or servicing equipment only in very specific instances where there is a foreign sale and the foreign company sends a technician to fulfill contractual obligations.
  - This contractual obligation must be outlined ahead of time in the terms and conditions of the sale.
- Certain types of work performed on the U.S. Outer Continental Shelf (OCS).

- In this case, the foreign national's B-1 Visa stamp must have the correct annotations & permissions prior to any work being performed on the OCS. This means a normal B-1 visa, lacking the required annotations, will not comply with U.S. immigration laws.

### **Can I engage in business meetings while on an ESTA or B-1 Visa?**

Yes, you can attend business meetings, conferences, or conventions. However, these meetings must involve passive participation, such as networking, negotiating, or consulting. You cannot perform any tasks that actively contribute to business operations or generate income. Affirmative actions in furtherance of business are not allowed.

### **Can I perform work in the U.S. for a foreign company under the ESTA or B Visa?**

No, performing any work, even for a foreign company, without a proper work visa is not allowed under the ESTA or B Visa. This is true even if the work is unpaid or the traveler is compensated by a foreign entity.

### **Can foreign workers use a B-1 visa for work on the Outer Continental Shelf (OCS)?**

Yes, foreign workers can use a B-1 visa with an OCS annotation to perform specific duties on the Outer Continental Shelf, such as roles related to wind energy projects and offshore oil and gas exploration. The B-1 visa, with the proper annotation, allows these workers to travel to the U.S. for transit to the OCS for non-employment purposes, such as installation, maintenance, or servicing of equipment.

### **What types of activities on the OCS are covered under the B-1 visa?**

The B-1 visa covers activities such as:

- Installation and maintenance of equipment and infrastructure for wind energy and oil projects.
- Marine logistics and transport of personnel and materials to OCS sites.
- Routine inspections and repairs of wind turbines or oil platforms.

However, activities that involve direct labor or replace U.S. workers are generally not allowed under the B-1 visa.

### **What are the restrictions for qualifying for a B-1 visa for work on the Outer Continental Shelf?**

To qualify for a B-1 visa for work on the OCS, several important restrictions apply:

1. Non-employment Role: The B-1 visa is meant for temporary business activities and non-employment purposes. The visa holder cannot engage in direct employment or labor that replaces U.S. workers. Permitted activities include tasks like supervision, maintenance, installation, inspections, and repairs of equipment.
2. OCS-Specific Annotations: The visa must be annotated for OCS-specific work. For example, for offshore wind projects, the annotation might read "B-1 for Transit or Travel to the OCS for Wind Activities; Not OCS Activity," or for oil and gas projects, "B-1 for Transit or Travel to the OCS".
3. No Displacement of U.S. Workers: The work performed must not compete with or displace U.S. workers. It must be related to foreign-controlled projects on the OCS, such as maintaining equipment or providing support without engaging in the U.S. labor market.
4. Limited Duration: The B-1 visa is for temporary stays only. The visa holder must show that their stay is for a specific business purpose, such as conducting an installation or inspection, and is limited in duration.

5. **Proper Documentation Required:** Applicants must provide documentation, such as a letter from the employer or project sponsor, that clearly outlines the purpose of the visit and confirms that no employment will occur in the U.S.

### **Does the Outer Continental Shelf Lands Act (OCSLA) apply to foreign workers on offshore wind and oil projects?**

Yes, the Outer Continental Shelf Lands Act (OCSLA) extends U.S. jurisdiction to the OCS, meaning that workers involved in offshore energy projects, including wind and oil exploration, are covered by U.S. laws, such as the OCSLA and other applicable regulations. This includes protections under laws like the Longshore and Harbor Workers' Compensation Act (LHWCA) for those engaged in maritime-related activities.

### **What are the risks of working in the U.S. while on an ESTA or B visa?**

If a foreign national performs work while in the U.S. on an ESTA or B visa, the risks include:

- **Visa violations:** Engaging in unauthorized work violates visa conditions, leading to potential visa revocation, deportation, or bans from re-entering the U.S.
- **Tax consequences:** The IRS may determine that the income earned while in the U.S. is U.S. source income, which could result in tax liabilities, even if the individual is paid by a foreign company.

### **What happens if the foreign national performs prohibited work while on an ESTA or B-1 Visa?**

Performing prohibited work while in the U.S. on an ESTA or B-1 Visa can result in:

- **Immediate denial of entry** by a CBP officer.
- **Deportation** if discovered while in the U.S.
- **Visa or ESTA revocation**, complicating or preventing future travel to the U.S.
- **Overstaying consequences** (if you remain in the US &/or work past your allowed period of stay), which can include a ban on re-entry for several years or even permanently

### **What are the consequences of being denied entry under the ESTA?**

If denied entry under the ESTA:

- You will be **detained** and sent back to your departure country on the next available flight, often at your own expense.
- You will be **banned** from using the ESTA, meaning you will need to apply for a visa for any future travel to the U.S.
- You must also **disclose the denial** of entry when applying for future U.S. visas

### **How can I minimize the risk of being denied entry under the ESTA?**

To minimize the risk of denial of entry:

- Ensure that your planned activities are permissible under the ESTA or B Visa.
- Be honest and accurately describe the purpose of your visit to CBP officers.
- Understand the difference between permissible business activities and prohibited work under the ESTA or B Visa.

### **What are the consequences of overstaying on an ESTA or B-1 Visa?**

Overstaying even by a single day is considered a violation of U.S. immigration law. Consequences can include:

- Ban on re-entry for several years (3 to 10 years depending on the overstay duration).
- Permanent ineligibility for future visas.
- You may also face fines or penalties for the overstay.

### **Can U.S. Customs and Border Protection (CBP) search my electronic devices when I enter the U.S. on an ESTA or B-1 visa?**

Yes, CBP officers have the authority to search your electronic devices—including your cellphone, laptop, and other personal electronics—when you enter the U.S. on an ESTA or B-1 visa. This search can include reading your texts, emails, and other forms of communication to ensure you are complying with the terms of your nonimmigrant visa.

### **How can CBP misconstrue the purpose of my travel based on what's found on my devices?**

Even seemingly harmless data or personal information can be misinterpreted by a CBP officer. For example, if your emails or texts mention work-related topics, CBP could mistakenly conclude that you intend to engage in unauthorized employment while in the U.S. This can lead to a finding that you have violated the terms of your visa, even if that was not your intention.

### **What are the consequences of CBP finding information that contradicts my stated purpose of travel?**

If CBP believes that the purpose of your travel violates your ESTA or B-1 visa, they may issue an expedited removal order. This can result in:

- Immediate denial of entry to the U.S.
- A 5-year ban on re-entry.
- The expedited removal order is extremely difficult to reverse, and legal options to challenge it are limited.

### **What can I do to help mitigate issues with CBP regarding the purpose of my travel?**

To help mitigate misunderstandings:

- Be cautious about the information stored on your electronic devices that could be misconstrued by CBP.
- Ensure your communications (emails, texts, etc.) do not inadvertently suggest that you plan to work or violate the terms of your visa.
- Be prepared to explain the contents of your devices if requested by CBP and have clear documentation supporting the true purpose of your trip.

### **What should I bring when entering the U.S. on an ESTA or B-1 Visa?**

It is advisable to bring:

- A letter from your employer detailing your purpose for travel, itinerary, and confirming your employment with the foreign company.
- Recent pay stubs from your employer to demonstrate ongoing foreign employment.

- Copies of your return flight ticket and documents showing the temporary nature of your visit, such as proof of ties to your home country (job, property, family).
- Documentation of hotel reservations, evidence of scheduled business meetings, trade show or conference registrations, and other such material can also serve as evidence of your purpose for traveling to the US.
- Be prepared to explain your purpose of travel briefly but clearly to CBP officers at the port of entry

### **Can I "reset" my ESTA stay by briefly traveling to Mexico or Canada?**

No, travel to Mexico, Canada, or adjacent Caribbean islands does not reset the 90-day ESTA period. You must leave the North American region entirely to reset your stay. Repeatedly attempting to re-enter the U.S. after short stays abroad can raise red flags with immigration officials

### **Does approval through ESTA guarantee entry to the U.S.?**

No, approval through ESTA, or any US visa, does not guarantee entry to the U.S. While ESTA screens for eligibility to travel, final admission is determined by U.S. Customs and Border Protection (CBP) officers at the port of entry. Even with ESTA approval, travelers can still be denied entry.

## **U.S. Source Income**

### **What types of income are considered U.S. source income for non-resident aliens?**

U.S. source income for non-resident aliens includes:

- Income from U.S. trade or business: Such as services provided or business operations conducted within the U.S.
- Investment income: Interest, dividends, and rents from U.S.-based sources.
- Wages and salaries: Income earned from employment in the U.S., even if the income is paid by a foreign employer.
- Real property income: Rent or proceeds from the sale or exchange of U.S. real estate.
- Other specific types of income: Including pensions, annuities, or royalties tied to U.S. sources.

### **What is considered U.S. source income for wages and salaries?**

U.S. source income for wages and salaries is defined by the IRS as income earned from services performed within the U.S. This applies regardless of where the employer is located, and even if the payments are made outside of the U.S. If a foreign national performs work while physically present in the U.S., the wages they earn for that work are considered U.S. source income, which may make it taxable in the U.S.

### **How can a foreign national's income be U.S. source income if they are working for a foreign company while on an ESTA?**

Even if a foreign national is employed by a non-U.S. company, the IRS determines the source of income based on where the work is performed, not the location of the employer. If the individual is physically present in the U.S. and performs services (e.g., working on a project or fulfilling job duties) while in the

country, the income earned for those services is considered U.S. source income. This applies regardless of whether the company is foreign or whether the payment is processed abroad.

### **How does the IRS determine if income earned by a non-resident alien is taxable U.S. source income?**

The IRS determines income as U.S. source based on where the work is performed. If services are performed in the U.S., the income may be classified as U.S. source, even if the foreign national is paid by a foreign employer and even if the payment is made outside of the U.S.

### **Does it matter that the foreign national is being paid in their home country for the work done while in the U.S. on an ESTA?**

No, it doesn't matter where the payment is made. What matters is the location where the services were performed. Even if the foreign national continues to receive their salary in their home country or in a foreign bank account, the IRS considers the income to be U.S. source if the work was done while they were physically present in the U.S. on an ESTA.

### **Why is performing work in the U.S. on an ESTA for a foreign company considered U.S. source income?**

The IRS rules are clear that any services performed within the U.S. result in U.S. source income, regardless of who the employer is or where the payments are made. This applies to all foreign nationals working in the U.S., whether they are employed by U.S. companies or foreign companies. When a foreign national enters the U.S. under an ESTA, they are only permitted to conduct limited activities, such as attending business meetings or conferences (passively). However, performing actual work – even for a foreign employer – generates U.S. source income because the services are rendered on U.S. soil.

### **What are the potential consequences for foreign nationals performing work while on an ESTA in the U.S.?**

- IRS Tax Liability: Since the income is considered U.S. source, the foreign national may be required to report this income to the IRS and may be liable for U.S. income taxes on the wages earned for work done in the U.S.
- Visa Violations: Performing work for any company, including a foreign company, while on an ESTA is a violation of the ESTA conditions. The ESTA allows only passive business activities (like attending meetings or conferences), and engaging in work could lead to visa revocation, deportation, and bans from future U.S. entry.

### **What risks does a foreign company face for paying a foreign national while they work in the U.S. on an ESTA or B visa?**

- Permanent Establishment (PE) Risk: If a foreign company pays an employee for work performed in the U.S., the IRS may determine that the company has created a permanent establishment (PE) in the U.S., leading to potential U.S. corporate tax obligations.
- Employment law violations: U.S. labor laws strictly regulate employment. A foreign company may face legal consequences for violating U.S. immigration and employment laws if they allow unauthorized work on ESTA or B Visa.
- Withholding and reporting obligations: Even if the salary is paid outside the U.S., the IRS may still require the foreign company to withhold taxes or report the income as U.S. source if the work is performed in the U.S.

**How does the IRS enforce these tax rules for foreign nationals working in the U.S. on an ESTA?**

The IRS uses various mechanisms to determine if foreign nationals have earned U.S. source income. This includes cross-referencing tax filings, employer reporting, and immigration data. If a foreign national works while in the U.S. and earns income, the IRS can tax that income regardless of where the payments are made.

**Are there any exceptions to U.S. source income for services performed in the U.S. for a foreign company?**

Yes, there are limited exceptions under which income for services performed in the U.S. might not be considered U.S. source income if all three of the below conditions are met:

- If the foreign national is temporarily present in the U.S. for less than 90 days during the tax year.
- The foreign national works for a foreign employer (a non-resident alien individual, a foreign partnership, or a foreign corporation that is *not engaged in a U.S. trade or business - i.e. does not have a presence in the U.S. or sell in the U.S.*).
- The total compensation for services performed in the U.S. does not exceed \$3,000. If all three conditions are met, the income may be exempt from U.S. tax.

**Are foreign workers subject to U.S. income tax while working on the OCS?**

Yes, foreign workers performing services on the OCS may be subject to U.S. federal income tax and related employment taxes (FICA, FUTA) if their services are related to natural resource exploration or exploitation on the OCS. The U.S. tax law treats services performed on the OCS as work conducted within the U.S. for tax purposes.

**Can tax treaties between the U.S. and other countries provide any relief for foreign nationals performing work in the U.S.?**

Tax treaties between the U.S. and other countries may offer relief from double taxation or clarify the tax treatment of income earned. However, these provisions typically only apply when the work is legally allowed. Since performing work in the U.S. on an ESTA or B visa is generally prohibited, these tax treaties may not offer protection in these cases.

**What are the consequences of creating a permanent establishment (PE) in the U.S.?**

If a foreign company creates a permanent establishment in the U.S. by allowing an employee to work in the U.S., it may face:

- U.S. corporate tax obligations on income attributable to the PE.
- Requirements to comply with U.S. tax filing, reporting, and possibly payroll withholding obligations.

**How can foreign nationals avoid U.S. source income tax while on an ESTA?**

To avoid generating U.S. source income, foreign nationals on an ESTA must not perform any work or services while in the U.S. They can attend business meetings or conferences, but active work or services that generate income for their employer could trigger U.S. tax liabilities.

**Additional Resources**

- <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html>

- <https://travel.state.gov/content/travel/en/us-visas/business.html>
- <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/visa-expiration-date.html>
- <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/waivers.html>
- <https://www.uscis.gov/laws-and-policy/other-resources/unlawful-presence-and-inadmissibility>
- <https://www.cbp.gov/travel/cbp-search-authority/border-search-electronic-devices>
- <https://www.irs.gov/publications/p519>
- <https://www.irs.gov/individuals/international-taxpayers/taxation-of-nonresident-aliens>
- <https://www.irs.gov/businesses/industry-directors-directive-2-employment-tax-and-the-employees-on-the-us-outer-continental-shelf>
- <https://www.govinfo.gov/content/pkg/PLAW-104publ208/pdf/PLAW-104publ208.pdf>

**\*\* The guidance provided here is for informational purposes only and should not be construed as legal advice.**