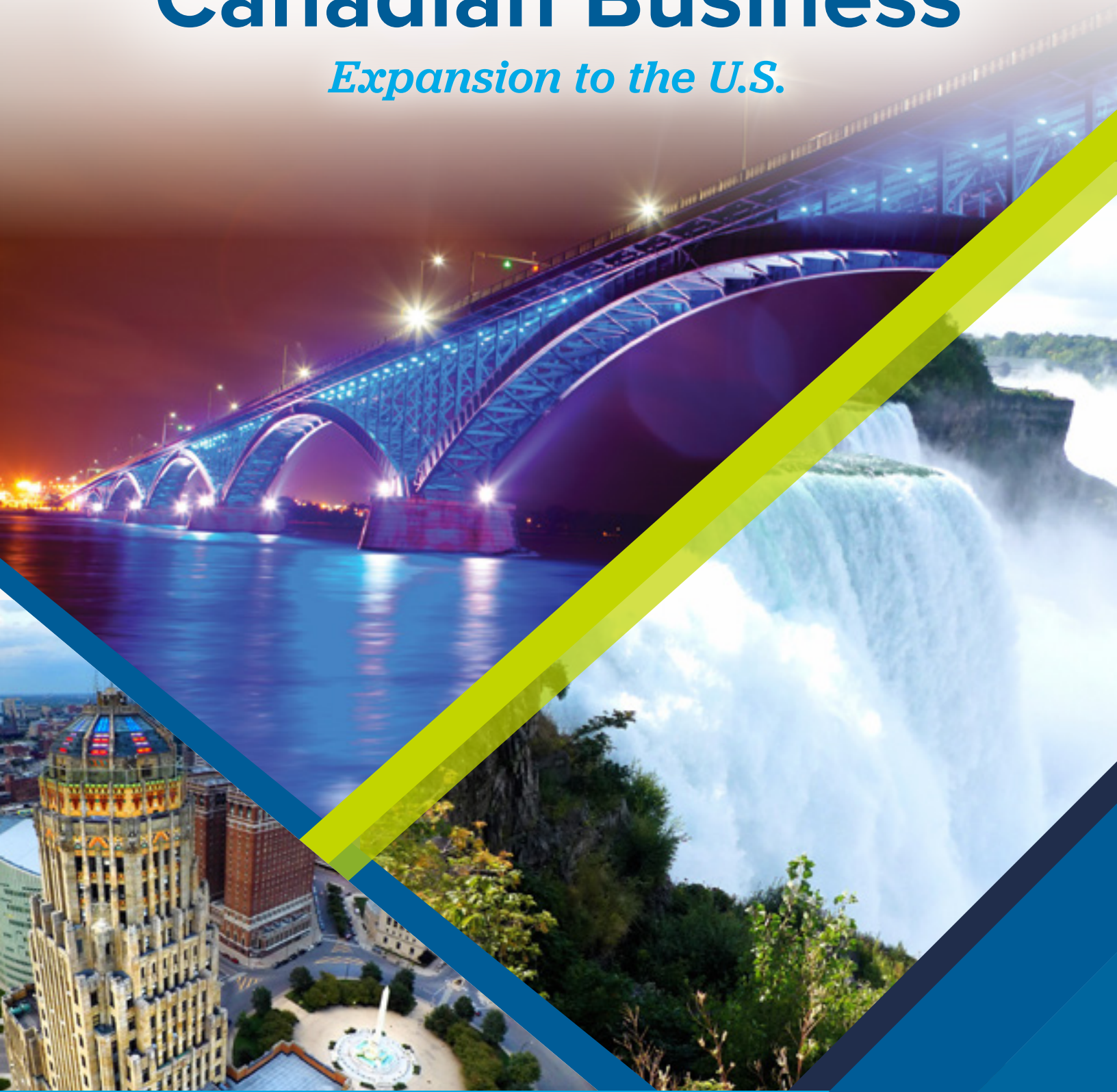


*Guide to*

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# Canadian Business

*Expansion to the U.S.*



# Overview

**There are many advantages for a Canadian business to expand into the United States:** A larger market; lowered cost; Made in the U.S.A. label. However, there are also many challenges. That's where Invest Buffalo Niagara comes in.

Invest Buffalo Niagara offers complimentary business expansion project management. We have helped over 50 Canadian businesses expand into the U.S. Each time, we lean on our extensive network of experts in their respective fields across our region. This guide to Canadian Business Expansion to the U.S. is a compilation of their proficiency.

Flip through this book, use what you need, and give us a call. We are here and happy to help.

**INVEST**  
BUFFALO NIAGARA

Come grow your  
business with us.

1-800-916-9073

257 West Genesee Street, Suite 600, Buffalo, NY 14202

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# Table of Contents

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## Useful Tools

- 4 10-Hour Drive Map
- 5 Expanding into the U.S. Checklist

## Legal

- 7 Steps to Incorporating a Business
- 9 Immigration Considerations
- 14 L-1 & E-2 Visa Comparison Chart
- 15 NAFTA Visa Comparison Chart
- 16 Importing Goods
- 18 NEXUS Card
- 19 Made in the U.S.A.
- 20 Business Asset Purchase
- 21 Your Phone at the U.S. Border

## Accounting and Tax

- 23 Tax Reform Benefits
- 24 State Tax Compliance
- 25 Record Retention Timeline

## Banking

- 27 Banking Services
- 28 International Payment Fraud
- 30 Safeguarding Your Accounts
- 31 Cross Border Card Processing
- 32 Collecting Receivables
- 33 Cash Positioning
- 34 Standard Credit Products and Terms

## Sites

- 37 Real Estate Market
- 39 Checklist for Canadian Purchasers of Commercial Property

## Human Resources

- 41 HR Considerations
- 43 Termination Pay Differences
- 44 Independent Contractor or Employee?
- 45 Payroll Costs

## Success Stories

- 47 Pride Pak
- 48 Welded Tube USA, Inc.
- 49 Lynch USA, Inc.
- 50 AMDOR LLC
- 51 Redland Food, Corp.

# 10-Hour Drive Map | Strategically Located



**10 HOURS**

The perimeter of the area shaded in green indicates a 10-hour drive from Buffalo Niagara.



The region's strategic location on the Canadian-American border is within 500 miles of 40% of the bi-national population. Our bi-national gateway for commerce facilitates \$82.5 billion in annual trade between Canada and the United States.

## Expanding into the U.S. Checklist

International businesses considering a business expansion have good reason to rank Buffalo Niagara at the top of their prospect list. Invest Buffalo Niagara has business development managers who provide a single point of contact to a roster of experts in every key area needed to successfully analyze and consider a U.S. business expansion. Since 1999, Invest Buffalo Niagara has helped over 100 international companies successfully expand their businesses to Buffalo Niagara. Our services are free of charge and confidential.

### *Legal*

- Immigration
- Incorporation
- Tax structure
- Intellectual property (patents, branding, trademarks, etc.)
- Real estate contracts and purchases

### *Accounting and Tax*

- Tax structure
- State and federal requirements and filings
- Tax reporting and timelines

### *U.S. Banking*

- U.S. deposits
- Checking and savings accounts
- Inter-company financial transfers
- Loan programs

### *Site Selection*

- What sites are available in the region?
- What are the current market rates?
- What site best meets my long and short term needs?
- Committing to a real estate site (letters of intent, lease signing)

### *Workforce*

- Wage rate data
- Employment and recruiting
- Employee benefits and medical coverage
- Training programs

### *Utilities*

- What are your requirements of this new facility?
- Is the site that you are considering able to handle that need?
- How can a site be upgraded?
- Energy efficiency programs

### *Incentives*

- State tax credits and grants
- County loans and tax abatements
- University partnerships
- NYSERDA (New York State Energy Research and Development Authority)
- Low-cost renewable power

### *Misc.*

- Insurance (for the new facility and to cover the move)
- Plant layout and efficiency

# Legal

- 7 Steps to Incorporating a Business
- 9 Immigration Considerations
- 14 L-1 & E-2 Visa Comparison Chart
- 15 NAFTA Visa Comparison Chart
- 16 Importing Goods
- 18 NEXUS Card
- 19 Made in the U.S.A.
- 20 Business Asset Purchase
- 21 Your Phone at the U.S. Border

***“Proximity to our existing operations and U.S. customers made expansion to Buffalo Niagara a wise choice.”***

- Bruce Whitehouse, AMDOR LLC

See full story on page 50

## Steps to Incorporating a Business in New York State

The following is a brief review of the necessary steps for incorporating a business in the State of New York. Please note that it is advisable to consult with an attorney on all matters pertaining to incorporation.

### *Step 1: Name Search/Reservation*

To form a corporation in New York State, it must first be determined whether or not the proposed name of the new corporation is already in use by an existing corporation, limited partnership or limited liability company. This determination can be made by forwarding a written request for a name search, along with a \$5.00 fee per name submitted, to the New York State Department of State, Division of Corporations, One Commerce Plaza, 99 Washington Avenue, Albany, New York 12231. In addition, company names on file with the New York Department of State can be searched for free online at [http://www.dos.ny.gov/corps/bus\\_entity\\_search.html](http://www.dos.ny.gov/corps/bus_entity_search.html). Requests for name availability cannot be handled by phone. Searching the availability of a corporate name, however, does not reserve the name.

A new corporation cannot use a name that is not “distinguishable” from that of an existing corporation, limited partnership or limited liability company on file with the Department of State. A corporation’s name cannot contain those certain prohibited words set forth in Section 301(a) (1) of the of the Business Corporation Law. If the name chosen is available, it is advisable that it be reserved during the completion of your business plan. The name can be reserved for a period of sixty (60) days by filing an Application for Reservation of Name. The fee for reserving a name is \$20.00.

If a name is reserved, the filing receipt issued by the Department of State for the Application for Reservation of Name must accompany the Certificate of Incorporation when presented to the Department of State for filing.

### *Step 2: Certificate of Incorporation*

The next step is to complete and file a Certificate of Incorporation. The Certificate of Incorporation must be signed by one or more incorporators and must contain the name of the corporation, names and addresses of the incorporators, the stock issuance and structure, purpose of the corporation, address for the corporation’s registered agent and county in New York where the corporation’s offices will be located. The incorporation filing fee is \$125.00 (not including legal fees). The filing fee is due at the time of filing. Payment of fees may be made by cash, check, money order, MasterCard, Visa or American Express. Checks and money orders should be made payable to the “Department of State.” In addition, a certified copy of the filed Certificate of Incorporation may be obtained from the Department of State by submitting a written request along with the Certificate of Incorporation, as well as a \$10.00 fee per certified copy.

The Certificate of Incorporation can be filed by mail with the New York State Department of State, Division of Corporations, One Commerce Plaza, 99 Washington Avenue, Albany, New York 12231, or by fax, or by using the New York Department of State Online Filing System. The Department of State offers optional expedited filing options, which cost an additional, non-refundable fee.

### *Step 3: Filing Receipt and Filed Certificate of Incorporation*

If the Certificate of Incorporation is approved for filing, a Filing Receipt and filed copy of the Certificate of Incorporation will be issued by the Department of State. The corporation exists upon issuance of the filed Certificate of Incorporation. Corporations that want to do business in more than one state must also comply with each state’s individual statutes regarding qualifications to do business, as well as all other applicable federal and state laws and regulations.

[Article continued on next page](#)

### *Step 4: Corporate Formalities*

Once the business is incorporated, certain corporate formalities must be respected. Accordingly, an organizational meeting should be scheduled to elect directors and officers, establish by-laws, properly capitalize the corporation and issue share certificates. Care should be taken not to commingle corporate and personal funds and the corporation has to have a separate bank account. Moreover, New York law requires that a meeting of the shareholders of the corporation be held annually for the election of directors and the transaction of other business. In addition, the board of the directors of the corporation has to meet regularly. The secretary of the corporation should record the minutes of the meetings of the directors and shareholders and maintain such minutes in the corporation's minute book.

#### **DOING BUSINESS UNDER AN ASSUMED NAME IN NEW YORK (“D/B/A”)**

Corporations in New York are required by statute to conduct activities under its name as set forth in its filed Certificate of Incorporation. If a corporation desires to conduct activities under a name other than its true legal name, a certificate complying with Section 130 of the General Business Law must be filed with the New York State Department of State.

A domestic or foreign New York corporation may conduct or transact business under an assumed name (commonly referred to as a D/B/A) by filing a Certificate of Assumed Name pursuant to Section 130 of the General Business Law. A fillable Certificate of Assumed Name form and instructions may be obtained on the New York State Department of Corporations website.

In addition to the \$25.00 New York Department of State filing fee, an additional county filing fee is collected based on the county or counties in which the corporation does business or intends to do business. The county filing fee is \$25.00 for each county, except for the counties of New York, Kings, Queens, Bronx and Richmond, for which the additional fee is \$100.00 for each county.

The completed Certificate of Assumed Name, together with the appropriate filing fee should be forwarded to the New York Department of State, Division of Corporations, One Commerce Plaza, 99 Washington Avenue, Albany, New York 12231.

### *Step 5: Employer Identification Number (EIN)*

The Internal Revenue Service (IRS) requires that businesses operating as a corporation obtain an employer identification number (EIN). An EIN, also known as a Federal Tax Identification Number, is a nine-digit number assigned by the IRS and used to identify taxpayers who are required to file various business tax returns. The online application available on the IRS website is the preferred method for customers to apply for and obtain an EIN; however, customers can also apply by completing an Application for Employer Identification Number (Form SS-4) and sending it to the IRS by fax or mail. There is no cost to obtain an EIN.

**For more information on this topic, please contact Invest Buffalo Niagara** (content reviewed by legal experts).

Reach us at: 1-800-916-9073

#### **TIPS**

The corporation formation and structure will be the foundation for the U.S. company—affecting tax, accounting functions, immigration, banking, and more.



## Immigration Considerations

Foreign workers and individuals wishing to come to the United States have many visa options to choose from. Each visa category is designed to meet the needs of specific groups of individuals in various circumstances. Following is a brief discussion of a select number of the most commonly utilized visa categories, broken down into “Temporary” and “Permanent” options.

### *Temporary Visas*

#### **BUSINESS VISITOR (B VISA)**

The B-1 visa is designed to allow an individual to enter the U.S. temporarily to carry on limited activities for the benefit of his or her foreign employer. While in the U.S., the individual must continue to be paid by the foreign employer. The business activity must be associated with international trade or commerce. Under this classification, the individual cannot perform local employment that would displace a U.S. worker.

The B-1 visa classification is often used by sales personnel to enter the U.S. to solicit sales of foreign-made products. The sales person, however, is not allowed to sell products that are made by a U.S. subsidiary of the foreign employer. The B-1 visa is also often used by executives and managers of foreign companies to enter the U.S. to do certain preliminary work necessary to start-up a business in the U.S. Such activities would include meeting with lawyers and accountants, opening bank accounts, and entering into contracts and leases for the new U.S. company. The executive or manager, however, cannot be actively involved in the management of the US business on a daily basis without proper work authorization. This would be considered local employment in the U.S. with the benefit directly accruing to the U.S. company.

Most business visitors must apply for a B-1 visa at a U.S. Consulate. However, Canadian citizens and citizens from countries that participate in the Visa Waiver Program are not required to obtain a B-1 visa and may apply for entry directly at a port-of-entry or pre-flight inspection facility.

#### **INTRACOMPANY TRANSFEREE (L-1 VISA)**

The L-1 visa is available to individuals who have been employed outside the U.S. as an executive, manager or person with specialized knowledge by a foreign company, for at least one continuous year during the preceding three-year period. The individual must seek to enter the U.S. temporarily to render services to a related U.S. company (branch, subsidiary, affiliate or 50/50 joint venture) of the foreign company in one of these capacities.

To qualify as an executive or manager (L-1A classification) the employee’s duties must primarily involve directing the work of other managerial, supervisory or professional employees, or directing a key department or function of the company’s business. First-line supervisors will not qualify unless the individuals they supervise are professional employees. A specialized-knowledge employee (L-1B classification) is one who has special knowledge of the company product, service, research, equipment, techniques, management or other interests and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

To be eligible for this classification, the foreign and U.S. operations must be related. Any proposed ownership arrangement must be carefully examined to ensure that a qualifying relationship exists for immigration purposes. The company must also continue to do business in the U.S. and in at least one other country for the duration of the employee’s stay in the U.S.

U.S. Immigration Law contains special rules regarding “new office” situations. A new office is defined as an office that has been doing business for less than one year. The employer must also show that the company has secured sufficient physical space in the U.S. to house its new office and that such space will support the nature and scope of the business activity. In addition, the employer must provide Citizenship and Immigration Services with the organizational structure of the foreign and proposed domestic business entities, the financial goals of the entities, the size of the U.S. investment, the financial ability of the foreign entity to pay the beneficiary and the financial ability to commence doing business in the U.S.

[Article continued on next page](#)

The L-1 visa can be issued for three years (only one year initially for new office situations) with the possibility of obtaining extensions. For the L-1A Visa, the maximum period allowed is seven years and for the L-1B visa, the maximum period allowed is five years. After this time, the employee must leave the U.S. for one year before being eligible to re-apply for L visa classification. However, these caps do not apply if the beneficiary can demonstrate that he or she does not reside continually in the U.S. If the employment is intermittent or consists of an aggregate of six months per year or less, the beneficiary can request unlimited extensions. The spouse of an L-1 employee, classified as L-2, is permitted to apply for general work authorization in the U.S., through the filing of an I-765 application with U.S. Citizenship and Immigration Services (USCIS), so that he/she may apply to accept employment just by virtue of their L-2 status. Children of an L-1 employee are also classified as L-2, but may not apply for employment authorization.

### **PROFESSIONAL (H-1B OR TN VISA)**

The H-1B visa category can be utilized to bring individuals to the U.S. to work in “specialty occupations”. A specialty occupation is an occupation that involves the application of highly specialized knowledge and has, at minimum, an entry-level requirement of a baccalaureate degree or its foreign equivalent in the specific specialty.

The H-1B category has an annual cap of 65,000 visas, with an additional 20,000 reserved for individuals who have earned a U.S. Master’s degree or higher, and is subject to a “labor attestation” requirement. This means that the U.S. employer will have to attest to the U.S. Department of Labor that certain employment conditions have been satisfied before hiring a foreign worker for a temporary period under the H-1B category. Some employers are considered “cap exempt” if they are institutions of higher education, non-profit organizations or entities related to or affiliated with institutions of higher education, or nonprofit research organizations or governmental research organizations.

A petition must be filed with the Immigration Service in the first instance to obtain an H-1B visa. The H-1B visa can be issued for a three-year period, with the possibility of three additional years of extension, up to a maximum of six years. Additionally, H-1B time may be extended past the maximum six years if certain permanent (green card) paperwork is pending by certain deadlines.

The North American Free Trade Agreement (“NAFTA”) contains immigration provisions allowing certain Canadian and Mexican professionals to enter the U.S. under a TN visa to work for a U.S. employer. The TN visa is valid for up to three years with the ability to obtain one-year extensions. To be eligible under this category, the Canadian must demonstrate that he or she is a member of one of a select number of professions detailed on the NAFTA professional job list. Some examples of acceptable professions include: accountants, engineers, scientists, computer systems analysts, and management consultants. If an individual’s occupation does not appear on the list, the alternative H-1B procedures can be followed. Canadian citizens can apply for TN status at most ports of entry, while Mexican citizens need to apply for a TN visa at a U.S. consular post in Mexico.

USCIS recently issued a regulation that allows some H-1B dependents (H-4s) to apply for work authorization through an I-765 submission. Eligibility to apply for work authorization, however, depends on the status of the H-1B spouse’s pending employment-based green card case. Therefore, not all H-4 dependents will be able to seek work authorization.



Niagara Falls, USA

## TREATY INVESTOR (E-2 VISA)

Nationals of certain countries having treaties of commerce with the U.S. are eligible to apply for entry as treaty traders or treaty investors under the E visa category. By virtue of the Canadian Free Trade Agreement, Canadians are eligible for this classification. The treaty trader (E-1) visa category is not covered in this summary.

The treaty investor (E-2) visa is designed for companies or individuals who invest, or are actively in the process of investing, substantial funds in a U.S. business. The U.S. business must have the “nationality” of the foreign country, meaning that at least 50% of the business must be owned by nationals of the treaty country. Each individual seeking to enter the U.S. must also be a citizen of the treaty country.

An application must show that he or she has made a substantial investment that qualifies for treaty investor status. There is no minimum dollar amount used to determine whether an investment is substantial. A substantial investment is generally defined as one that is more than half the value of the U.S. business or more than half the amount necessary to establish a new business of the type contemplated. The investment is measured by the amount that the investor has “at risk” in the U.S. business. Indebtedness such as mortgage debt or commercial loans secured by assets of the U.S. business does not count toward measuring the amount of the investment, unless personally guaranteed by the investor applicants.

The investment cannot be used solely for the purpose of earning a living for the investor. It is therefore important to demonstrate that investment will create jobs for U.S. workers. The investor must also demonstrate that he or she has assets or income from other sources that will continue after the investment is made. The investor must enter for the purpose of developing and directing the business activities.

A treaty investor application is filed directly at a U.S. Consulate abroad without the need to first file a petition with USCIS. A treaty investor is generally valid for five years and can be extended in five-year increments.

## *Permanent Visas*

A permanent visa (also known as an immigrant visa or “green card”) may generally be obtained based on the following:

- An employment-based petition; including employment creation through investment in a U.S. business
- A close relationship to a U.S. citizen or U.S. permanent resident
- Through a diversity (visa lottery) program

Since some permanent visas are subject to annual quota restrictions, there may be considerable backlogs and delays in obtaining permanent resident status.

## EMPLOYMENT-BASED IMMIGRATION

After work authorization is obtained through another visa classification, permanent resident status may be applied for under employment-based immigration procedures. For individuals in H-1B or TN non-immigrants status, an employer usually is required to first obtain a labor certification. This is a multi-step process whereby the employer “tests the market” to determine that no qualified U.S. workers are available to fill the position and then seeks a determination from the Department of Labor that their efforts warrant hiring a foreign national worker in a permanent capacity. This is lengthy process, which requires the employer to advertise, recruit and reject (if appropriate) U.S. citizens or permanent resident who apply for the position.

[Article continued on next page](#)

After labor certification is issued, or if the employer believes that the worker is exempt from labor certification, the employer will file a preference petition with Citizenship and Immigration Services. Once the preference petition is approved, the foreign worker is then ready to enter the final stage in the process – the actual application for the permanent visa. Before undertaking the third and final step, however, there must be visas available in the preference category in which the foreign worker qualifies. If visas are not immediately available because of backlogs, the worker is on the “waiting list” and must wait until a visa is available. The waiting period can vary significantly depending on one’s preference classification and country of birth.

Once a visa number is available, there are two ways a foreign worker may apply for the immigrant visa. First, the worker may apply at a U.S. Consulate (generally referred to as a “visa processing”). Second, if he or she is already working in the U.S. under a temporary visa, the application may be filed with the U.S. Immigration Service (generally referred to as “adjustment of status”).

The Immigration Act of 1990 (The Act) completely revised the categories for employment-based immigration. The Act also significantly decreased the number of employment-based visas available annually so that backlogs and delays have increased.

The Act creates five employment-based immigration categories with a relatively sophisticated mathematical formula for calculating the number of visas that will be issued in each category. For the sake of this overview, the general percentage of total visas offered will be given rather than a specific number.

### **Category #1**

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Priority Workers (28.6% of the worldwide employer-based preference level, plus any numbers not used in the fourth and fifth preference categories).

#### **Priority Workers are defined as follows:**

- Aliens with extraordinary ability in the sciences, arts, education, business or athletics
- Outstanding researchers and professors
- Multi-national executives and managers

The first two subgroups are limited to an elite group of individuals who have achieved national or international acclaim and have risen to the very top of their profession.

#### **An employee would have to satisfy at least three of the following criteria to show that he or she has exceptional ability:**

- A degree relating to the area of exceptional ability
- At least ten years of full-time experience in the area
- A license to practice the profession
- A high salary or other remuneration for services
- Membership in professional associations
- Evidence for recognition for achievements or significant contributions in the area

The third subgroup, multinational executives and managers, covers the same type of employee who is covered under the L-1 visa category. Immigration in this category does **not** require labor certification as discussed above.

### **Category #2**

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Aliens who are members of professions holding advanced degrees or aliens of exceptional ability in the sciences, arts, or business (28.6% of the worldwide employer-based preference level, plus any numbers not used in the first preference category).

An advanced degree is defined as any degree above a baccalaureate degree. An employee without an advanced degree can still qualify under this category if he or she has a baccalaureate degree and at least five years of progressive experience in his or her specialty.

### **Category #3**

Skilled workers, professionals, and other workers (28.6% of the worldwide employer-based preference level, plus any numbers not used in the first and second preference categories).

### **Category #4**

Special Immigrants (7.1% of the worldwide level). Visas under this category will be available primarily to religious workers.

### **Category #5**

Employment Creation Immigrants (7.1% of the worldwide level with some additional restrictions)

This category provides visas for foreign investors entering the US for the purposes of establishing a new commercial enterprise. A general rule of a capital investment of \$1 million will be required. The investment must create at least ten full-time jobs for U.S. workers, not including the investor and his or her family. The act establishes a program to prevent fraud under this category by providing for conditional permanent resident status. The investor can apply to have the condition removed after two years by showing that the investment has been sustained for that period of time.

## **FAMILY SPONSORED IMMIGRATION**

Relatives such as parents, spouses, children over the age of 21, and siblings are potential sponsors under the family sponsorship provisions. Labor certification is not required prior to the filing of a family-sponsored petition. Depending upon the status of the relative sponsor, backlogs can vary dramatically under these provisions.

## **DIVERSITY VISAS**

The Congressionally mandated Diversity Immigrant Visa Program makes available up to 55,000 diversity visas (DV) annually, drawn by random selection among all entries to persons who meet strict eligibility requirements from countries with low rates of immigration to the United States. The law and regulations require that every diversity visa entrant must have at least a high school education or its equivalent or have, within the past five years, two years of work experience in an occupation requiring at least two years' training or experience.

**For more information on this topic, please contact Invest Buffalo Niagara**

(content reviewed by legal experts). Reach us at: 1-800-916-9073



## Comparison Chart: L-1 Intra-Company Transferee and E-2 Treaty Investor

	L-1 STATUS	E-2 STATUS
<b>SUMMARY</b>	Available to individuals who have been employed on a full-time basis by a foreign corporation outside of the U.S. for at least one year during the preceding three-year period in either a managerial, executive (L-1A), or specialized knowledge (L-1B) capacity. Individual “transfers” to affiliated U.S. entity.	Available to principal investors or certain employees that need to remain in the U.S. for extended periods of time to oversee work in an enterprise engaged in trade between the U.S. and a foreign state. Investors must be in a position to “develop and direct” the enterprise. Employees must work in an executive, supervisory, or essential skills capacity.
<b>ELIGIBILITY</b>	<b>Available to all nationalities.</b>	<b>Available to nationals of treaty countries.</b>
<b>PROCEDURE</b>	Canadian citizens can apply for status at border for immediate decision. All other nationalities must file at a Service Center within the U.S. and apply for nonimmigrant visa at a U.S. Consulate abroad upon approval.	Canadian citizens can apply for status at a U.S. Consulate in Canada. If the individual is already in the U.S., the application can be made to a USCIS Service Center.
<b>GOVERNMENT FEES</b>	<ul style="list-style-type: none"> <li>• \$325 petition</li> <li>• \$500 one-time anti-fraud</li> <li>• \$6 I-94 card issuance</li> </ul>	<ul style="list-style-type: none"> <li>• Visa application fee varies by Consulate</li> <li>• \$325 if filing at Service Center</li> </ul>
<b>DURATION</b>	One to three years initially, L-1As may obtain seven years total and L-1Bs five years total. After maximum time limits have been reached, status may be renewable in one year increments indefinitely provided individual maintains required foreign residence abroad and is in the U.S. less than 183 days.	Two years initially, with unlimited two-year extensions so long as the applicant continues to comply with the visa requirements.
<b>DEPENDENTS</b>	Spouse and children under age 21 may be admitted to the U.S. in L-2 status. Spouses holding L-2 status may apply for employment authorization from CIS to work within the U.S.	Spouses and children under age 21 may be admitted to the U.S. in derivative E status. Spouses may apply for employment authorization from CIS to work within the U.S.
<b>CAN I OBTAIN A GREEN CARD?</b>	Category allows for “dual intent” meaning individual may apply for permanent residency and hold nonimmigrant status simultaneously. Managers and executives may be eligible to file immigrant petition without first obtaining labor certification which streamlines green card process.	Category does not allow for dual intent. An E-visa applicant must intend to depart from the United States upon termination of status.

## Comparison Chart: NAFTA Visas

	L-1 STATUS	TN STATUS
<b>SUMMARY</b>	Available to individuals who have been employed on a full-time basis by a foreign corporation outside of the U.S. for at least one year during the preceding three-year period in either a managerial, executive (L-1A), or specialized knowledge (L-1B) capacity. Individual “transfers” to affiliated U.S. entity.	Available to individuals engaged in business activities at a professional level to be performed for a U.S. corporation. Position must be on list of approved TN professions and individual must hold baccalaureate or licenciatura degree in that profession or have required experience in the field.*
<b>ELIGIBILITY</b>	<b>Available to all nationalities.</b>	<b>Available to nationals of Canada and Mexico.</b>
<b>PROCEDURE</b>	Canadian citizens can apply for status at border for immediate decision. All other nationalities must file at a Service Center within the U.S. and apply for nonimmigrant visa at a U.S. Consulate abroad upon approval.	Canadian citizens can apply for status at border for immediate decision. Canadians may apply to renew TN status from within the U.S. at a Service Center. Mexican nationals must file at a Service Center.
<b>GOVERNMENT FEES</b>	<ul style="list-style-type: none"> <li>• \$325 petition</li> <li>• \$500 one-time anti-fraud</li> <li>• \$6 I-94 card issuance</li> </ul>	<ul style="list-style-type: none"> <li>• \$50 application</li> <li>• \$6 I-94 card issuance</li> <li>• \$320 if filing at Service Center</li> </ul>
<b>DURATION</b>	One to three years initially, L-1As may obtain seven years total and L-1Bs five years total. After maximum time limits have been reached, status may be renewable in one year increments indefinitely provided individual maintains required foreign residence abroad and is in the U.S. less than 183 days.	TN status is issued in one year increments. The number of renewals permitted is currently unlimited; however, temporary intent must be demonstrated.
<b>DEPENDENTS</b>	Spouse and children under age 21 may be admitted to the U.S. in L-2 status. Spouses holding L-2 status may apply for employment authorization from CIS to work within the U.S.	Spouses and children under age 21 may be admitted to the U.S. in TD status. Spouses are not eligible to apply for employment authorization and if they wish to work in the U.S., they must qualify under their own employment- authorized nonimmigrant status.
<b>CAN I OBTAIN A GREEN CARD?</b>	Category allows for “dual intent” meaning individual may apply for permanent residency and hold nonimmigrant status simultaneously. Managers and executives may be eligible to file immigrant petition without first obtaining labor certification which streamlines green card process.	Category does not allow for dual intent. An E-visa applicant must intend to depart from the United States upon termination of status.
<b>REQUIRED DOCUMENTATION</b>	Generally requires extensive corporate documentation and detailed personal information to prepare petition for filing.	Generally requires extensive corporate documentation and detailed personal information to prepare application for filing.

For more information on the topics in these charts, please contact **Rosanna Berardi**, Managing Partner, Berardi Immigration Law 1-877-721-6100 or [rberardi@usimmlawyer.com](mailto:rberardi@usimmlawyer.com)



## Importing Goods into the U.S.

New policies, and aggressive enforcement by U.S. Customs and Border Protection (CBP), along with ongoing NAFTA negotiations, mean it is more important than ever for Canadian companies to be familiar with the legal standard for complying with U.S. customs laws and regulations governing the importation of merchandise into the U.S. Executive Order 13785 (“Establishing Enhanced Collection and Enforcement of Antidumping and Countervailing Duties and Violations of Trade and Customs Laws”), signed by President Donald Trump on March 31, 2017, has only increased the stakes in the event of non-compliance.

Canadian companies with U.S. subsidiary or branch operations may be importing into the U.S. directly from overseas suppliers, as well as from Canadian parent and affiliated companies. Many Canadian companies that have not established a presence in the U.S. are non-resident importers in the U.S., a strategy that allows them to better serve U.S. customers. For any Canadian companies with U.S. importing activities, U.S. customs laws and regulations, as well as CBP’s investigation and enforcement activities can pose significant challenges and risks.

**U.S. customs laws and CBP regulations** require all businesses and individuals to exercise “reasonable care” when importing merchandise into the U.S. However, “reasonable care” is not defined in these laws and regulations. In general, a lack of reasonable care can (and often does) lead to CBP imposing civil penalties on importers and others that CBP alleges failed to meet this legal standard.

For CBP to assess a civil penalty, the underlying violation must involve the introduction or entry of merchandise into U.S. commerce by means of a material and false act or statement (oral, written, or electronic) or a material omission. “False” does not require intent; essentially it means in error or incorrect. “Material” means information that tends to affect the decision by CBP to admit and release goods from its custody (“clear customs”) or assess accurate duties, taxes, and fees. Penalties can also be imposed against those who aid and abet a violation of the customs laws and regulations.



Unlike the Canada Border Services Agency's (CBSA) Administrative Monetary Penalty System (AMPS), CBP's civil penalties are not set according to a schedule that provides importers with some certainty as to the risk and potential exposure in the event of a violation or series of violations. Instead, CBP penalties can range from a maximum of 2x the unpaid duties (for simple negligence) to 4x (for gross negligence, generally meaning recklessness) to the U.S. domestic value of the imported merchandise (for fraud, where intent is shown by direct or circumstantial evidence).

Meeting the reasonable care standard can be shown by evidence that the importer consulted with a U.S. customs broker, legal counsel familiar with customs laws and CBP regulations, or by other means. Generally, documentary evidence and sworn statements will be required to demonstrate that an importer or other party involved with the importation exercised reasonable care to defend against CBP's allegations of a violation. The statute of limitations for negligence and gross negligence penalties is five (5) years from the time of entry, while the limitations period for a fraud penalty is five (5) years from the date of discovery of the fraudulent activity, so complete and accessible documents will be necessary to defend a CBP civil penalty proceeding.

Canadian companies, business owners, and individuals who are involved with U.S. importing activities are not immune to CBP's civil penalties if they fail to meet the reasonable care standard. The case might involve a Canadian non-resident importer facing CBP penalties for not declaring pencils imported into the U.S. from China as subject to U.S. antidumping/countervailing duties or a Canadian company facing potential penalties for importing figure skating dresses into the U.S. and, in good faith but wrongly, declaring the dresses qualified as duty-free under NAFTA. In both instances and many others, CBP will pursue penalties against the Canadian importing parties.

Even if CBP does not seek to impose a penalty resulting from a violation (a rarity these days), a new collection policy significantly shortens the time to pay a supplemental duty bill (often issued by CBP if it reclassifies goods or denies a NAFTA claim). These bills are due within thirty (30) days. Effective September 5, 2017, supplemental duty bills that remain unpaid after sixty (60) days will result in CBP placing the importer on sanctions which will delay the release of goods and require the filing of "live entries" at individual ports. This new policy has been implemented without regard to the 180-day time limit to protest CBP's adverse decision, effectively forcing importers to pay supplemental duty bills before exercising their right to protest against a CBP decision. The payment requirement or threat of sanctions exists even where a protest is pending.

**For more information on this topic and importing goods into the U.S., please contact Jon Yormick, Special Counsel at Phillips Lytle LLP. Jon can be reached at: 1-716-847-7006 or [jyormick@phillipslytle.com](mailto:jyormick@phillipslytle.com)**



## Don't be Left Out: Get that NEXUS Card

I love my NEXUS card and so does everyone I have ever met who has one. Who doesn't appreciate perks like express lanes?

NEXUS, a joint program of the U.S. Customs and Border Protection Service and the Canada Border Services Agency, provides expedited border-crossing to pre-screened, approved travelers in multiple ways:

- NEXUS cardholders may use dedicated "NEXUS only" lanes at land border crossing locations, which move much faster than the regular lanes.
- NEXUS cardholders are subjected to only minimal immigration and customs questioning, hastening their crossing. Information relevant to their admission is provided by a scan of their NEXUS cards, and border officials often determine that further questioning is not needed.
- NEXUS cardholders are provided expedited airport security screening, including the use of self-serve kiosks and dedicated lines (and may not be required to remove their shoes, open laptops or display liquid toiletries in clear plastic bags).
- In Niagara Falls, the Whirlpool Bridge is reserved for the exclusive use of NEXUS cardholders. As a result, it is rarely crowded and generally enables crossings to be completed in only a few minutes.

When crossing by car, each occupant must have a NEXUS card in order for that car to use a NEXUS lane. Cardholders become accustomed to enjoying expedited crossings and reluctant to give those up, and non-cardholders then become at risk of being excluded by cardholders from cross-border trips.

For example, I read a story some years ago about a young boy from Hamilton whose father told him he could bring a friend with him to a Buffalo Sabres' game. He was excited to bring his friend "Billy" until he remembered that Billy did not have a NEXUS card. There was no question: father and son were not going to endure an extra twenty to thirty minutes or so of time in traffic in the regular lanes each way; a NEXUS-holder friend would instead need to come.

It would in fact benefit everyone if more people had NEXUS cards. NEXUS cardholders can be processed in a quarter of the time that it takes to process non-cardholders, permitting border resources to be re-deployed to provide additional, faster service to others.

*"If fifty percent of our traffic were NEXUS, there would be next to no delays at any time on the bridge."*

-Ron Reinas, General Manager of the Peace Bridge

Although NEXUS cards are great for most frequent travelers, cardholders' cards can be confiscated and/or their membership revoked if an inspecting officer at the port of entry believes that the activities described at inspection require a work permit or other employment authorization. Travelers unsure of whether they are at risk should contact an immigration professional for further assessment.

NEXUS enrollment may be done at [www.nexus.gov](http://www.nexus.gov) and [www.nexus.gc.ca](http://www.nexus.gc.ca). Cards are good for five years and cost (USD) \$50.00 and (CAD) \$70.00 (and free for children nineteen and under). Applications may also be submitted in person at the Fort Erie Enrollment Center (10 Central Avenue, Fort Erie, Ontario L2A 6G6) and the Whirlpool Bridge (2250 Whirlpool Street, Niagara Falls, New York 14305).

**For more information on this topic, please contact Thomas J. Keable, Partner, Lippes Mathias Wexler Friedman LLP. Thomas can be reached at: 1-716-218-7563 or [tkeable@lippes.com](mailto:tkeable@lippes.com)**

## Made in the U.S.A.? Better make sure.

Any product expressly or impliedly touted as “Made in the U.S.A.” must be “all or virtually all” manufactured in the United States. Failure to meet this standard may result in an uncomfortable, and perhaps costly, run-in with the U.S. Federal Trade Commission (FTC). The FTC defines “all or virtually all” to mean that “all significant parts and processing that go into the product must be of U.S. origin. That is, the product should contain no or negligible foreign content.”

Signaling an uptick in enforcement activity, the FTC issued “closing letters” to four companies in August that had “overstated the extent to which” their products were made in the United States. Closing letters are administrative tools the FTC uses to exact significant remedial measures, including phasing out use of “Made in the U.S.A.” materials, sending compliance notices to customers and vendors, deleting social media posts, and introducing “qualified claims,” such as “Made in U.S.A of U.S. and Global Parts.” In exchange for such concession, the FTC agrees to close out its pending investigation, unless public interest requires further action.

### *So, what can you do to reduce the risk of running afoul of the FTC?*

- Visit the FTC website to understand the law.  
(<https://www.ftc.gov/tips-advice/business-center/guidance/complying-made-usa-standard>)
- Carefully calculate how much of your manufacturing costs are linked to U.S. parts and processing.
- Keep reliable evidence supporting your “Made in the U.S.A.” claim.
- If appropriate, consider using qualified claims to indicate that your product is not entirely of domestic origin.

**For more information on this subject, please contact John G. Horn**, Partner at Harter Secrest and Emery, LLP. 1-716-844-3728 or [jhorn@hselaw.com](mailto:jhorn@hselaw.com) | [www.hselaw.com](http://www.hselaw.com)



## Business Asset Purchase in the U.S.

Our office often works with Canadian lawyers to affect their client's purchase of businesses located in the United States. Most often these transactions are initially negotiated by the Canadian principals with a U.S. seller. There are, however, opportunities for a Canadian business to purchase the assets of a U.S. business where that business has filed a petition in U.S. Federal Bankruptcy Court under the provisions of Chapter 11 of the United States Bankruptcy Code (Bankruptcy Code). As long as there is value in the U.S. business, purchasing the assets of a closing business through a properly structured sale under the Bankruptcy Code can work to the advantage of a Canadian purchaser.

### *Acquisitions*

Buying assets or an on-going business, or some or all of its assets, from a company while it is in Chapter 11 can be an excellent way of acquiring valuable assets free and clear of liens, claims, encumbrances and other interests. In fact, many Chapter 11 proceedings are commenced primarily, if not exclusively, to facilitate this type of sale.

### *Advantages*

A sale of assets of a Bankrupt Company (Debtor) pursuant to Section 363 of the Bankruptcy Code, commonly referred to simply as a "363 Sale", is a procedure to facilitate the sale of the Debtor's assets within the context of the Debtor's bankruptcy case. A 363 Sale allows the Debtor to fulfill its fiduciary obligations to its creditors and ownership by maximizing value and minimizing transaction costs. Purchasers, on the other hand, typically get enhanced value by proceeding quickly in often times deteriorating circumstances, by obtaining the protections of a "free and clear" sale order, and the enhanced finality of the sale.

The Bankruptcy Court must approve a 363 Sale after notice of the sale is provided to all creditors and parties in interest of the Debtor. Depending on the transaction, there may be an auction with competing bidders. Once the purchaser or successful bidder is identified, the Bankruptcy Court conducts a hearing and at its conclusion, if the sale is approved by the Bankruptcy Court, the sale order is entered. One of the goals is to have the Bankruptcy Court find that the sale of the assets by the Debtor was for "fair consideration", thus minimizing the risk of a fraudulent conveyance challenge. A finding by the Court that the sale was "in good faith" is also necessary to protect against reversal of the sale order on appeal. Section 363(m) protects sales made in "good faith" from reversal on appeal unless the court stays the implementation of the sale order while the appeal is pending. This provision essentially moots the ability of any party to contest the transaction once the sale is closed, thus providing a degree of finality not available to purchasers outside of bankruptcy.

Significantly, Section 363 also allows a Debtor to assign to the purchaser or a third party favorable unexpired leases or executory contracts (contracts unperformed by both parties), but does not require the purchaser to assume the Debtor's obligations under unfavorable unexpired leases or contracts. The ability to selectively accept or reject executory contracts of the Debtor is one of the most attractive features of Chapter 11 as a whole, and can be accomplished through the 363 process.

### *Limitations*

While there are benefits to a 363 Sale, there are also limitations. First, a Section 363 Sale cannot be used to circumvent other requirements of Chapter 11. Oftentimes 363 Sales of substantially all of the assets of the Debtor are not approved because they appear to violate the rights of creditors which they might otherwise assert, as, for example, their right to vote for or against a Chapter 11 reorganization plan. Courts have struggled to differentiate between allowable 363 Sales and sales that appear to be disguised reorganization plans and therefore attention must be paid to this issue when structuring the sale transaction.

Another limitation is that potential purchasers may not like that the 363 Sale process takes place in a relatively transparent atmosphere of the bankruptcy case.

Finally, and probably most significantly to purchasers, the “free and clear sale order” ultimately obtained as a result of the 363 Sale does not act as an absolute bar against the imposition of future successor liability. While courts have developed several tests to determine whether a claim survives against a purchaser of assets of a Debtor as a “successor in interest”, a buyer can minimize the risk depending on the specific facts of each case by, for example, 1) building protections into the asset purchase agreement, 2) setting aside a reserve fund for unknown claims, and/or 3) discount the purchase price for possible significant unknown claims in amount to cover potential successor liability.

These potential hurdles can be addressed, however, and should not deter a potential purchaser from considering the acquisition of financially distressed assets. With advance planning, a transaction that maximizes value and fulfills the fiduciary obligations of both buyers and sellers can be structured under the provisions of Section 363 of the Bankruptcy Code, with the resulting benefits of speed in completing the transaction and the finality that comes with a 363 “free and clear sale” order.

**For more information on this subject, please contact David H. Alexander**, Attorney at Law, New York and Florida Bars, Foreign Legal Consultant in Ontario, Gross Shuman P.C. 716-854-4300 x216 or [DAlexander@gross-shuman.com](mailto:DAlexander@gross-shuman.com)

## Your Phone at the U.S. border

Our lives are extensively documented on phones, laptops, and social media. Some of this information is very personal, and a lot of travelers may wish to keep this sensitive data private. However, each time you enter the United States, regardless of your status or documentation, Customs and Border Protection (CBP) determines your admissibility to the country, and part of this determination may include searching a traveler’s electronic devices. With these types of searches becoming increasingly common, it has never been more important for individuals to know and understand their rights at the border.

The U.S. border is considered a legal gray zone. This means that certain rights and freedoms granted to individuals under the U.S. Constitution do not necessarily apply. For example, the Fourth Amendment protects persons from unreasonable search and seizure. This is a fundamental right that has been engrained in the fabric of U.S. society, but it does not apply at the border. A customs officer’s subjective belief that someone has, or is, engaged in any wrongdoing is enough to justify inspection. Officers can search a traveler’s physical luggage, digital devices, social media accounts, and email accounts without a warrant. They can even keep your electronic devices for further examination, which could include copying your data. These standards apply to all travelers regardless of your immigration status.

If you are stopped at the border and asked for your passwords or the PIN to access your device, be careful in deciding how to answer. Refusing to provide this information can have serious consequences. A foreign national could be denied entry into the U.S., a green card holder could find themselves standing before an immigration judge, and a U.S. citizen could end up spending several hours waiting in secondary inspection. Keep in mind, these are worst case scenarios, but situations like this do arise.

If you travel to the U.S. on business and have sensitive corporate or client information on your devices, care should be taken when crossing the border. This means erring on the side of caution. You may want to consider leaving any privileged or sensitive information behind, and start using a travel computer and/or cell phone when entering the U.S. If that is not an option, another way to protect sensitive data is to store it on the cloud. This is a useful strategy for shifting data online, so that it is not present on your electronic devices when you cross the border. CBP can search your phone, but it does not have the authority to look through any information you have stored on a cloud service without first obtaining a subpoena or warrant. While this subject is expected to develop further over the next few months, it is still best practice to travel to the U.S. with “clean” electronic devices.

**For more information on this subject, please contact Rosanna Berardi**, Managing Partner, Berardi Immigration Law 1-877-721-6100 or [rberardi@usimmlawyer.com](mailto:rberardi@usimmlawyer.com)

# Accounting & Tax

- 23 Tax Reform Benefits
- 24 State Tax Compliance
- 25 Record Retention Timeline

*“We see great potential for our product in the U.S. market and a great opportunity to develop that potential right here in the Buffalo Niagara region.”*

- Robert Pike, Welded Tube USA, Inc.

See full story on page 48

## New York Tax Reform Benefits Manufacturers

Canadian companies that expand into the U.S. often apply for and receive major tax incentives. But what if the tax law were amended to create a significant incentive across the board, without companies even having to apply? Well, that is exactly what New York State has done.

On March 31, 2014 New York State enacted significant changes to reform its corporation tax laws, most of which took effect January 1, 2015. Many of the changes are aimed at simplifying an overly complex system of taxation and include the elimination of some taxes and revisions to the tax bases. Included in the corporate tax reform are changes that will greatly benefit qualifying New York State manufacturers by reducing the income tax rate to 0% and creating a 20% real property tax credit.

To qualify, a manufacturer must have property in New York that is principally used by the taxpayer in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing and during the tax year more than 50% of its gross receipts are derived from the sales of goods produced by these activities.

*To be eligible for the zero percent tax rate the manufacturer must have either:*

- Property located in New York with an adjusted basis for federal income tax purposes at the close of the taxable year of at least \$1 million
- All of its real and personal property is located in New York.

The zero percent tax rate applies to the business income tax base and is only available for qualified manufacturing corporations taxed under Article 9-A, franchise tax on business corporations.

The real property tax credit for qualified manufacturers is a credit equal to 20% of real property taxes paid during a tax year for real property located in New York and principally used in manufacturing. The property can be owned or leased by the taxpayer. Leased property must be leased from an unrelated third party. The lease must be in writing and require the lessee to pay the real property taxes. The lessee must make the real property tax payment directly to the taxing authority.

For those that are not qualified manufacturers, the tax rate on business income will be reduced from 7.1% to 6.5% beginning January 1, 2016.

The legislation is a huge step forward for encouraging businesses to expand and grow in New York and it doesn't stop there. New York offers a number of attractive incentive programs available at the state and local levels to help businesses locate and grow here. Additionally, there is no sales tax on machinery, equipment, tools or supplies used in manufacturing and New York State does not have a personal property tax on inventories, machinery and equipment either.

**For additional information on this topic or other cross border tax and accounting questions, please contact Andrew J. Toth, CPA, Partner at Tronconi Segarra & Associates, LLP. Andrew can be reached at: 1-716-633-1373 or atoth@tsacpa.com**

### TIPS

Outlining the end location and purchaser of your products will help determine your corporate and sales tax obligations.

## State Taxes – Are You in Compliance?

States are aggressively looking for taxpayers that are doing business in their state and not filing returns. Rather than wait until your company receives a state tax notice, we recommend that you proactively look at where your company may have state tax return filing requirements. Once a state has contacted you or determined you have NEXUS, the chances of negotiating a favorable outcome are greatly reduced. If a state has determined your company has NEXUS, the state has the right to request tax returns back to the date you began doing business in the state. This can be quite costly, not only in taxes, but also time spent resolving the matter.

For example, ABC Company has been selling products in State Z for 10 years and never filed sales tax returns. State Z determines ABC Company has nexus for sales tax purposes. State Z can request sales tax returns for the past 10 years (practically speaking most states will go back 6 to 8 years). Assume ABC Company had annual sales of \$50,000 a year in State Z. ABC Company could owe \$40,000 or more in sales tax, penalties and interest. This amount could have been reduced to less than half that amount had the company identified and addressed the matter proactively.

To reduce or prevent the risk of state tax underpayments, it is important to consider if your company is doing business in other states.

### *Start by asking yourself the following questions:*

- Do we have sales in other states?
- Do we have locations in other states?
- Do we have employees or representatives that are residents of other states or making sales calls in other states?
- Do we send employees or subcontractors to make repairs or perform installations in other states?
- Do we have inventory, equipment, or other assets in other states? If you are selling through Amazon's "Fulfillment by Amazon" program, you likely have nexus in multiple states because your inventory could be held in Amazon fulfillment centers across the country.

If you answered yes to any of the above questions, your company should consider conducting a nexus study. A nexus study is a detailed review of sales and business activities by state to identify and quantify the risk of tax underpayment. Once nexus with a state is determined, a proactive plan can be put in place to reduce the risk of potential unreported liability.

**For more information regarding state income or sales tax nexus, please contact Andrew J. Toth, CPA, Partner at Tronconi Segarra & Associates, LLP. Andrew can be reached at: 1-716-633-1373 or [atoth@tsacpa.com](mailto:atoth@tsacpa.com)**





## Record Retention Timeline for Businesses

		Years						
		2	3	4	7	8	10	Indefinitely
<b>ACCOUNTING</b>	Bank statements & deposit slips	■	■					
	Payroll (time cards)	■	■	■	■			
	Dividend checks (concealed)	■	■	■	■			
	Expense reports	■	■	■	■			
	Subsidiary ledgers (including A/P & A/R ledgers)	■	■	■	■			
	Trial balances (monthly)	■	■	■	■			
	Checks (payroll & general)	■	■	■	■	■		
	Payroll (individual time reports & earnings records)	■	■	■	■	■		
	Vouchers (for payments to vendors, employees, et al.)	■	■	■	■	■		
	Audit reports							■
	General ledgers & journals							■
<b>CORPORATE RECORDS</b>	Mortgages, notes and leases (expired)					■		
	Bylaws, charter & minute books							■
	Cash books							■
	Capital stock & bond records (certificates, transfers)							■
	Checks (taxes, property & fulfillment contracts)							■
	Contracts & agreements							■
	Copyrights & trademark registrations							■
	Deeds & easements							■
	Patents							■
	Proxies							■
	Retirement & pension records							■
	Tax returns & working papers							■
	<b>CORRESPONDENCE</b>	General	■					
Production		■	■	■	■	■		
Legal & tax								■
<b>INSURANCE</b>	Policies (all types-expired)	■	■	■	■			
	Accident reports	■	■	■	■			
	Fire inspection reports	■	■	■	■			
	Group disability records	■	■	■	■	■		
	Safety reports	■	■	■	■	■		
	Claims (after settlement)	■	■	■	■	■	■	
<b>PERSONNEL RECORDS</b>	Contracts (expired)	■	■	■	■			
	Daily time reports	■	■	■	■			
	Disability & sick benefits records	■	■	■	■			
	Personnel files (terminated)	■	■	■	■			
	Withholding tax statements	■	■	■	■			
<b>PURCHASING &amp; SALES</b>	Purchase orders	■	■					
	Requisitions	■	■					
	Sales contracts	■	■					
	Sales invoices	■	■					
<b>TRAFFIC (Shipping/Receiving)</b>	Export declarations	■	■	■				
	Freight bills	■	■	■				
	Manifests	■	■	■				
	Shipping & receiving reports	■	■	■				
	Waybills & bills of lading	■	■	■				

Canadian companies expanding into the U.S. should be aware of U.S. policies, procedures and requirements for maintaining records and important documents. Record retention guidelines may differ slightly between Canada and the U.S. On both sides of the border all businesses must maintain documents and records, allowing accounting of business activities to be performed. Whether for an audit, tax return, or strategic planning, businesses must gather, summarize and analyze facts and figures to support financial documents. After financial statements are issued and tax returns are filed, companies must continue to retain records. This list offers general guidance compiled from federal and state resources.

For more information please contact Mark Janulewicz, CPA, Partner, Lumsden & McCormick, LLP. Mark can be reached at: [mjanulewicz@lumsdencpa.com](mailto:mjanulewicz@lumsdencpa.com) or 1-716-856-3300

# Banking

- 27 Banking Services
- 28 International Payment Fraud
- 30 Safeguarding Your Accounts
- 31 Cross Border Card Processing
- 32 Collecting Receivables
- 33 Cash Positioning
- 34 Standard Credit Products and Terms

*“The collaboration between Invest Buffalo Niagara and various agencies in Orleans County was a key factor in the success of this project.”*

- Steve Karr, Pride Pak

See full story on page 47

## Banking Services in the United States

When considering expanding your business into the United States, you will find that there are many differences between the way you manage finances in Canada and the banking methods observed in the U.S. This is true for consumers and businesses alike. As a Canadian business owner expanding into the U.S., there are some important things to know when it comes to financing options for your U.S. operation.

### *Deposit account with an associated corporate credit card*

This is a convenient way to finance U.S. travel and entertainment expenses, and it can help establish credit for employees who end up staying in the U.S. and eventually look to finance a home or car. Many banks offer card programs that provide on-line access and cardholder controls (e.g., custom cardholder spending limits, merchant restrictions, and daily/monthly transaction limits). The majority of corporate card programs require a minimum of 10 cards to be issued, although some may allow for smaller programs.

### *Accept credit card payments from U.S. customers*

While there is a cost to receiving payments this way, it can help cash flow and may attract more customers. With this, and with most credit products, the company will undergo a credit approval process with its bank or third-party merchant processor. The company must demonstrate it has the ability to manage the risks of merchant processing, including covering any charge-backs.

### *Lending Services*

Other lending services that may be beneficial to a company expanding into the U.S. include:

- Lines of credit to support short-term working capital needs
- Term loans or leases for new equipment
- Commercial mortgages for property purchases

Based on the risk profile of a business or project, or because a company has limited credit history in the U.S., a U.S. bank may look for a personal or corporate guaranty (from a Canadian parent or affiliate) to support a U.S. loan. Getting approval for financing will depend on the complexity of the request, the size of the loan and the planned use of the proceeds. With that being the case, companies expanding into the States should expect approval to take a reasonable amount of time as a bank needs to conduct due diligence on the U.S. company and the Canadian operation. We recently assisted a Canadian-based client in the hand-tool distribution business that was purchasing the assets of a U.S. company in a similar industry. The Canadian company was smart to start its financing discussions with us two months before the transaction was scheduled to close. This gave us sufficient time to conduct our due diligence on both sides of the border and allowed us to prepare a financing package in advance of the acquisition.

**For more information on this topic please contact Lauren Schellinger**, Vice President, M&T Bank, Commercial Banking, Relationship Manager. Lauren can be reached at: 1-716-848-7398 or [lschellinger@mtb.com](mailto:lschellinger@mtb.com)

## The Rise of International Payment Fraud

Fraud is an ever-present risk for any business, regardless of geography. Sixty-two percent of companies were subject to payments fraud in 2014. Manipulation of business-to-business payment channels has resulted in an increasingly challenging environment for business owners and controllers alike. Consider the following case study as an illustration of the threat:

### Case Study

Widget Manufacturing does business with a variety of international vendors, and frequently initiates wires online through their bank's information reporting platform. The vendor relationships are handled by the President of the company. Widget Manufacturing uses a secure online platform with their bank, authentication that requires a token device and dual approval for outgoing wires above \$25,000.

One Tuesday morning, the Controller at Widget Manufacturing receives an e-mail from the President introducing her to a new contact at their long-time vendor, Substrate Supply. The President's e-mail appears to be from his Blackberry as it has a few misspellings, but is otherwise unremarkable. The Controller follows up on the introduction, and enters the new contact into the vendor database.

Two weeks later, the Controller receives an e-mail from the new contact at Substrate Supply including updated wire instructions. With the next invoice (for \$30,000), the accounting manager initiates the wire payment, and the Controller approves it. Because the wire is going to a new destination, the bank calls the Controller for verification and the Controller approves again.

The following month, the old contact at Substrate Supply contacts the Controller inquiring about a late payment. It's quickly surmised that the \$30,000 wire was fraudulent, and the chance of recovering those funds is very low.

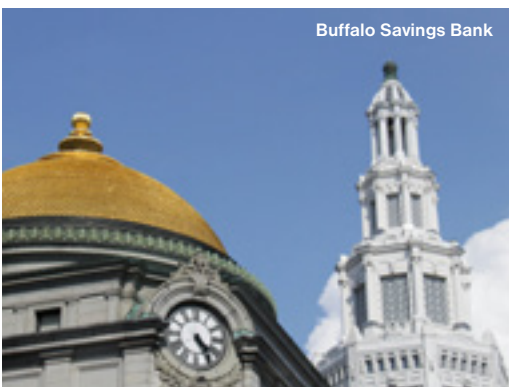
### Fraud Statistics

This type of "masquerading" fraud is increasingly common, and prevention requires a keen eye and diligent adherence to processes. Masquerading fraud is far from the only type perpetrated against small and middle-market businesses. In 2014 the incidents of payments fraud were rampant in North America. While those perpetrators committing payments fraud seemed to focus especially on high-profile retailers, breaches of payments systems impacted companies of all sizes and in a variety of industries.

- Sixty-two percent of companies were subject to payments fraud in 2014
- Wire fraud incidents nearly doubled, from 14% in 2013 to 27% in 2014
- Paper checks continue to lead as the payment type most susceptible to fraudulent attacks, even as their overall use continues to decline.
- Credit and debit cards experienced a decline in fraudulent activity, down from 43% in 2013 to 34% in 2014, largely due to enhanced security with CHIP technology.



M&T Bank



Buffalo Savings Bank



### *Special Considerations for Cross-Border Companies*

Payments that cross international borders are especially susceptible, as accounting staff can be separated geographically, and there are often silos of country-specific financial information. Additionally, criminals may target a company that operates in another geographic jurisdiction to complicate intervention by law enforcement.

### *Prudent steps to take*

Though the threat can be daunting, there are experts available to advise you and simple steps you can take to mitigate your risk. Your banker should be able to offer guidance on all the steps below.

- Educate all employees on current payments fraud practices
- Institute company-wide internal processes to prevent fraud
- Migrate check payments to electronic where possible,
- Use more secure check stock, including watermarks and dual signatures
- Reconcile accounts daily, segregate accounts to limit potential losses
- Institute the usage of Chip enabled corporate cards and merchant processing machines
- Be skeptical of unusual phrasing, spelling or formatting anomalies in e-mails
- Always use an out-of-channel verification for changes to payment instructions (phone and e-mail)
- Implement fraud protection services such as Positive Pay and ACH Monitoring
- Adopt a multi-layer authentication for access to bank services and payment initiation
- Restrict company network access for payments to only company-issued PCs
- Dedicate a PC for payment origination (with no links to e-mail/web browsing/social networks)

**For more information on this topic please contact Lauren Schellinger**, Vice President, M&T Bank, Commercial Banking, Relationship Manager. Lauren can be reached at: 1-716-848-7398 or [lschellinger@mtb.com](mailto:lschellinger@mtb.com)

## Safeguarding Your Accounts

In light of recent fraudulent activity reported in the news, it's a good time to review your internal policies and procedures regarding your bank accounts. Many small businesses have a few trusted employees that are relied upon to help with various business activities, and there is often a lack of segregation of duties. This can leave a business vulnerable for fraudulent activities. Two areas that are especially susceptible to this are your bank account and credit cards. Below are a few steps that can be taken to safeguard these accounts:

### *Bank Accounts*

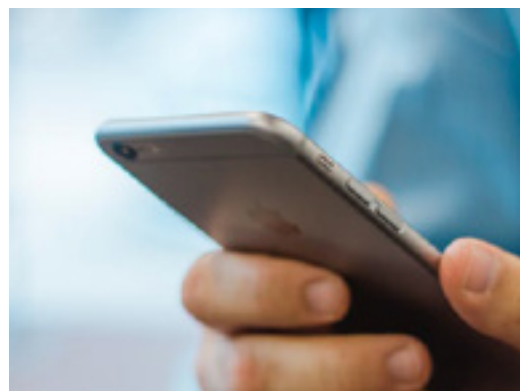
- Review monthly bank statements. Since all bank activity is now online, it can be reviewed in real time. This is the single most important thing to do to determine unauthorized activity. Most cashed checks are online for you to review, so make a habit of checking them each month.
- Either perform or review all monthly bank reconciliations on a timely basis.
- When signing a check, request the documentation that backs up anything you are unsure about.

### *Credit Cards*

- Limit the number of employees that have company credit cards. Make sure there is a need for that employee to have a company credit card.
- Only issue fleet cards, which will limit the type of items that can be charged, whether it is for gas, repairs and maintenance, or for business meals.
- Put a cap on the credit limit. Only request the amount that is needed.
- Have a written company policy for use of the credit cards.
- Require original receipts be submitted by employees for each purchase.
- Reconcile the statements monthly against the receipts in a timely manner.
- Review your company's credit report to determine that there are no unauthorized credit cards in the company's name.

**It is important that you take time to perform the steps outlined above. If time is an issue and you need assistance with reviewing your bank and credit card accounts for potential fraudulent activity, please contact:**

**Mary Shetler**, CPA Tronconi Segarra & Associates. Mary can be reached at: 1-716-633-1373 or [mshetler@tsacpa.com](mailto:mshetler@tsacpa.com)



## Cross Border Card Processing

*“Money is just the poor man’s credit card.”*

-Marshall McLuhan, Canadian educator, writer, and social reformer

Today, credit cards and their vast applications are so much more. They are an essential form of trade for many businesses, an excellent source of reward points and rebate programs and a guaranteed method of immediate collections.

Accepting credit cards from business to business represents one of the fastest growing channels of e-commerce today. A handful of elite Merchant Credit Card Processors can provide business to business card acceptance in both Canada and the United States on a single entry platform. Funds can be deposited into the firm’s Canadian and/or U.S. dollar bank accounts in the respective domestic currency. Having the flexibility to identify which currency should be applied to the sale can both optimize foreign exchange gains and minimize trading risks on the currency fluctuation. This methodology is applicable to business to business transactions only and is used in a card not present environment (such as telephone or Internet orders).

For more sophisticated global merchant processors, this single entry, multi-national platform is not only applicable to Canada and the U.S., but countries in Europe and Asia as well, depending on their international reach. It should be noted that the more traditional retail business, where the card is present and the transaction occurs in person between the merchant and the consumer, still requires dual entry platforms, and in most cases, separate country processors under the current MasterCard and Visa Operating Agreements.

### *Corporate Purchasing Card*

Using card on your payment side can be as efficient as using it on the receipt side.

- Are you still paying your vendors by check?
- Are your employees submitting expense reports for reimbursement?

Corporate Purchasing Cards offer an all-in-one solution that can help increase your purchasing power, reduce costs associated with routine business purchases and streamline your reporting and accounts payable activities. As an added benefit, most programs come with rewards attached.

### *Global Travel and Purchasing Card*

- Do you have an overseas operation?
- Staff who regularly travel abroad for extended period of time?

Global Travel and Purchasing Cards are an easy to use card solution, with a powerful reach. This solution offers simplified processing and robust reporting capabilities, helping to gain greater control over your travel and procurement expenses throughout the world.

Global card programs offer the flexibility of transacting and settling in local currencies to minimize foreign exchange expense.

**For more information on this topic please contact Joanne Campagna**, Senior Vice President, Bank of America. Joanne can be reached at: 716-847-4120 | joanne.m.campagna@baml.com Or, **Cindi Seaman**, Senior Vice President, Bank of America at 1-716-847-7391 or cynthia.seaman@baml.com

## Collecting Receivables in the U.S.

If you have ever spent time in the United States, chances are you have encountered some difficulty navigating the American banking system. There are many differences between the way you manage finances in Canada and the banking methods observed in the U.S. This is true for both consumers and businesses. As a business owner operating in the U.S., there are some important things to know when it comes to paying suppliers and collecting funds from customers. The focus of this article is to highlight ways in which Canadian companies doing business in the U.S. can collect receivables.

### *ACH Account*

Generally, the most efficient way to collect funds is via ACH using an account held at a U.S. financial institution. ACH, short for the Automated Clearing House, is a secure, private electronic payment transfer system that connects U.S. financial institutions (think EFT in Canada). ACH has become the most popular method of payment within the U.S.. ACH is far cheaper than a wire transfer, but takes longer – generally 24 to 48 hours – to receive payment. In the last twelve months, some banks have made cross-border ACH and same-day ACH available. A wire, on the other hand, is typically received same day, but is more costly for the sender and recipient.

### *Lockbox*

Another collection method to consider is Lockbox. This is a service in which your company receives payments by mail to a post office box, and your bank picks up the payments throughout the day; the bank deposits the checks into your account and then notifies you of the deposit. This allows you to put the money to work as soon as it's received. Image Lockbox is an enhanced service whereby your bank scans the documents associated with your lockbox receivables, including checks, invoices and other correspondence. Then, shortly after deposit processing, images of your checks, documents, and envelopes are available for you via the Internet. In addition, you may also request a direct transmission of the images for longer-term storage.

### *Remote Check Deposit*

Lastly, a collection service common in the U.S. banking system is Remote Check Deposit. This service allows you to deposit checks securely without ever having to leave the office, saving you both time and money. Customers send checks directly to you. From your office, you can scan the checks using a desktop scanner attached to your PC. The check images are then deposited with your bank over a secure internet connection. There is no need to photocopy the checks prior to scanning, and checks can often be viewed for up to several days after the deposit. This service can eliminate expensive courier runs or free staff from making non-productive trips to a branch. It can also improve cash flow as “desk float” is reduced; there is no need to have checks sit idle when they can be deposited, from your desktop, within minutes.

**For more information on this topic please contact Lauren Schellinger**, Vice President, M&T Bank, Commercial Banking, Relationship Manager. Lauren can be reached at: 1-716-848-7398 or [lschellinger@mtb.com](mailto:lschellinger@mtb.com)

### TIPS

Establishing a local banking relationship will allow you to begin an establish credit line in the U.S.—a key to continued success.





## Standard Credit Products and Terms

Commercial banks are for-profit institutions that offer business and consumer banking services such as business loans, cash management, checking, savings and money market accounts, time deposits, trust services and financial planning. They are categorized as federal, state member or state nonmember commercial banks, and all are insured by the FDIC (Federal Deposit Insurance Corporation). Commercial banks in the United States range in size from small single branch institutions to large global financial institutions with billions of dollars in assets.

The breadth of commercial credit products and services offered by U.S. based commercial banks can vary depending on the size of the bank and its target market. Most banks, however, whether big or small, have a similar set of credit products and lending criteria.

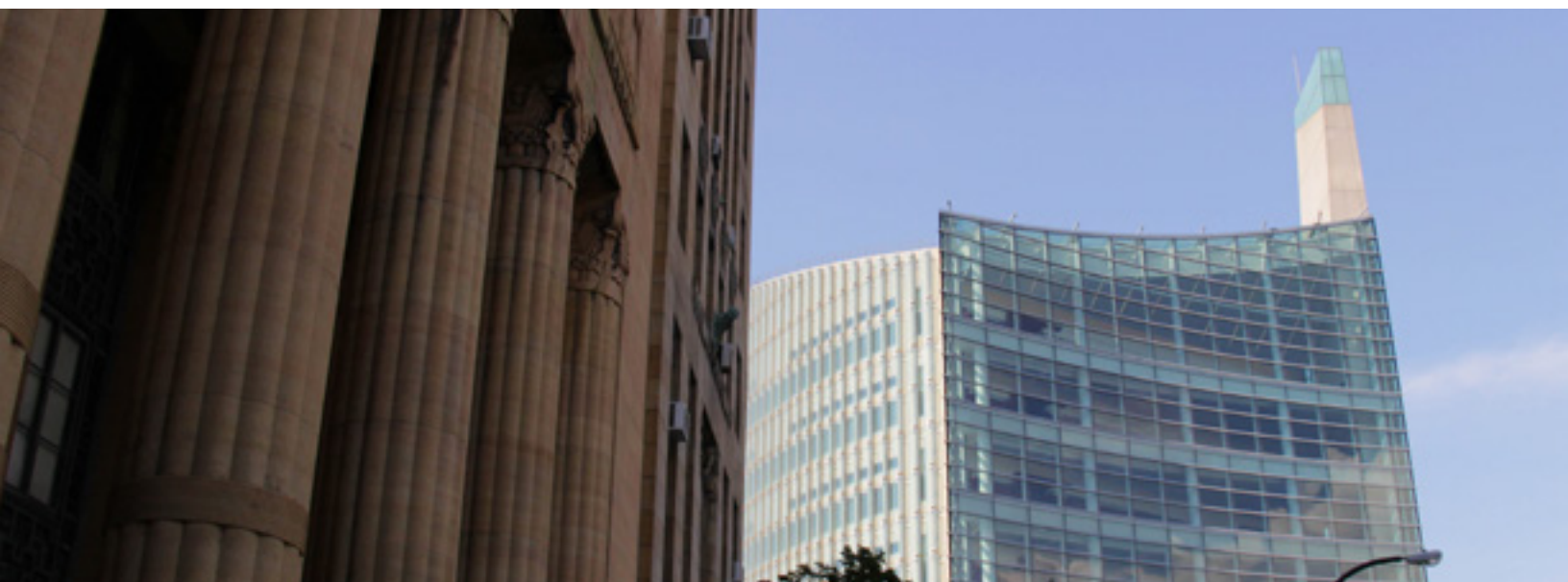
Below is an outline of the typical credit products and terms offered by most of the commercial banks in the United States:

### *Long-term Financing (Term Loans)*

Term loans are made available to finance fixed assets (including real estate) or permanent working capital. They have specific maturity dates of one year or more, with set repayment schedules typically derived from earnings or cash flow from operations rather than from the conversion of current assets. Maximum term loan maturities typically do not exceed 10 years and are more often set at 5–7 years depending on the assets being financed. Banks will typically fund up to 90 percent of new fixed assets and 75 – 80 percent of used or existing fixed assets, including commercial real estate. Term loans can be secured by fixed assets, accounts receivable and inventory.

### *Lines of Credit*

Lines of credit are pre-established facilities that a business may use to fund temporary increases in inventory, accounts receivable, or other short-term credit needs. A line will be issued on demand or with an actual maturity date. Lines of credit that are secured by accounts receivable and inventory are often structured to be advanced and repaid according to a formula. The formula permits advances against a certain percentage of accounts receivable, typically up to 80 percent of receivables aged not more than 90 days and up to 50 percent of raw material and salable finished goods inventory.



### *Leases*

A form of financing fixed assets whereby a bank purchases a fixed asset and retains ownership while a customer uses it. Depending on the terms of the lease, asset ownership may or may not transfer to the customer once the lease ends. As purchaser of the asset, the bank enjoys certain tax advantages (such as depreciation) that come with ownership. For the customer, a lease arrangement has some advantages over a term loan such as 100% financing.

### *Letters of Credit*

Formal documents which state that the bank will provide a defined amount of credit when certain, very specific conditions are met. Letters of credit are typically used in commercial loan transactions for either stand-by or performance purposes. Letters of credit are governed by the Uniform Customs and Practice for Documentary Credits and the Uniform Commercial Code, which transfers risk from one party in a transaction to the issuing bank. The collectability of the letter of credit is based on the financial strength and rating of the issuing bank. Banks will underwrite a letter of credit request similar to how a term loan or line of credit is underwritten.

Commercial banks will lend to qualified corporations, partnerships, sole proprietorships, limited liability companies and professional persons. Typically, banks will require that the sponsors have a minimum of two years of experience in the business line and be of solid character with acceptable personal and business credit histories. There are various governmental agencies such as the U.S. Small Business Administration that have programs providing support through either direct funding, loan guarantees, grants and interest rate subsidies. Depending on the program, governmental assistance can be provided on a stand-alone basis or in conjunction with bank financing.

A commercial relationship manager from a bank that has offices in the community in which your company is doing business or is planning to do business will be a valuable source of information regarding credit qualification requirements, available loan programs and financing options, and potential governmental assistance available in the market.

**For more information on this topic please contact Michael E. O'Brien** Senior Vice President and Regional Credit Officer at KeyBank in Buffalo. Michael can be reached at: 1-716-270-8969 or [michael\\_e\\_o'brien@keybank.com](mailto:michael_e_o'brien@keybank.com)



# Sites

- 37 Real Estate Market
- 39 Checklist for Canadian Purchasers of Commercial Property

*“Invest Buffalo Niagara played an important role in supporting our decision-making process and connecting us to suppliers, services and customers in the WNY area.”*

- Brian Paul, Redland Food Corp.

See full story on page 51

## Real Estate Market in Buffalo Niagara

When working with Canadian companies considering a Buffalo Niagara business expansion, availability, costs and market conditions are always the primary concerns. Canadian business owners are unsure of the availability of commercial properties, average sale rates, and the current trends relating to Buffalo Niagara real estate.

### *Some of our most frequently asked questions:*




- How does Buffalo Niagara compare to the national U.S. real estate market?
- How are real estate prices and landlord incentives trending locally?
- Is there a shortage of properties which tenants and buyers are competing for?

To help address these concerns we refer to our partner CBRE Buffalo, and its annual MarketView report. This helpful publication summarizes the real estate market in Buffalo Niagara. Listed are some excerpts from the Annual EOY 2016 report that Canadian businesses owners find particularly useful:

### *Industrial Market*

The U.S. and Buffalo Industrial Markets have had a great run in recent years; however, the 2016 Buffalo Industrial Market did experience a slight increase in the overall availability rate, increasing from 3.6% (historic low) to 4.6%. This local shift in absorption is contrary to national trends, but the 4.6% still represents a very low availability rate.

Nationwide availability rates continued to decrease year-over-year with the national availability rate falling from 9.6% to 8.2% in Q4 2016. The national market has now experienced 24 consecutive quarters of availability rate decline and this rate is at its lowest since Q3 2001. For Buffalo/Erie County, 2016 marks the 12th consecutive year that the industrial market availability rate has remained below the national average.

QUICK STATS	CURRENT YEAR	CHANGES FROM LAST YEAR
VACANCY	4.6%	
NET ABSORPTION	1,444,985 sq. ft.	
CONSTRUCTION	197,000 sq. ft.	

\* The arrows are trend indicators over the specified time period and do not represent a positive or negative value. (e.g., absorption could be negative, but still represent a positive trend over a specified period.)

[Article continued on next page](#)

*Office Market*

The Buffalo Office Market vacancy rate continued to decline to 12.5%, a 1.0% decrease from last year’s 13.5%. In contrast to last year, the market is outperforming the National Office Vacancy of 13%. Downtown continues to be a bright spot with strong activity and interest by tenants, while the suburban submarkets were generally flat. Over 300,000 sq. ft. in completions were added to the office inventory with 257,824 sq. ft. projected. Projected construction has slowed leading into 2017, but projects have been announced and will enter the pipeline in coming years.

An increase in activity was experienced throughout the second half of 2016. High density office tenants seeking efficient layouts and parking remain drawn to the suburban options. The back-office industry continues to thrive in Western New York and has become a critical element in the overall stability of the suburban office market. The healthcare industry remains a major driver in medical office building construction nationally and the same is true for Buffalo.

QUICK STATS	CURRENT YEAR	CHANGES FROM LAST YEAR
VACANCY	12.5%	↓
CLASS A LEASE RATES	\$19-\$26	→
CLASS B LEASE RATES	\$15-\$20	→

\* The arrows are trend indicators over the specified time period and do not represent a positive or negative value. (e.g., absorption could be negative, but still represent a positive trend over a specified period.)

\* Source: CBRE Research, Q3 2015/CBRE Limited    \*\* Source: CBRE Buffalo New York, LLC Q4 2015

*Additional thoughts:*

Two recent transactions, Amazon’s leasing of approximately 500,000 sq. ft. of warehouse space in Lancaster, and Strategic Financial Solutions leasing of back office space in Amherst, both suburbs of Buffalo, are collectively expected to create in excess of 1,800 new jobs and are prime examples of the upbeat activity occurring in both of these market sectors.

**For more information on this topic please contact Steve Blake**, CCIM Partner, CBRE Buffalo. Steve can be reached at: 1-716- 362-8707 or [steve.blake@cbre-buffalo.com](mailto:steve.blake@cbre-buffalo.com)

**TIPS**

Invest Buffalo Niagara has a wide set of connections in commercial real estate. We can help you find the best site for your business.

## Checklist for Canadian Purchasers of Commercial Property

The process of purchasing commercial or industrial real property in the U.S. can include some surprises for the unprepared or those not familiar with real estate closing in the U.S. Here are some key considerations for Canadian investors when entering the U.S. market:

### 1. *The Purchase Contract*

**Your Purchase Contract should include the following vital protections:**

- Authorization to perform structural and financial due diligence
- The right to review all title work for the property
- The right to perform an engineering inspection and Phase 1 Environmental Report to identify any unknown conditions
- The right to cancel the Purchase Contract if unable to obtain adequate financing
- Other potential contingencies if the purchase will require public financing

### 2. *Choice of Purchasing Entity*

One of the most important decisions a purchaser will make is the type of entity or organization to form to own the real property. Although there are many options to consider, Canadian investors often choose, due to income tax and liability considerations, a limited partnership. A limited partnership offers liability protection to its limited partners (who are often the Canadian investor(s)) while its general partner bears the full liability for all debts and obligations. In most instances, this general partner will be a U.S. Corporation, solely owned by a Canadian entity, which further insulates such investor(s) from potential liability. From an income tax standpoint, the limited partnership is a pass-through entity; namely gains or losses and net income pass through directly to the individual limited partners.

It should be noted that when purchasing residential real property in the U.S., this analysis may change and other vehicles (including an irrevocable trust, for example) may become a better option for a Canadian investor.

### 3. *Timing*

Once the choice of entity analysis described above is complete, the typical timeline for purchasing U.S. commercial real property is approximately 60 to 90 days from contract signing.

These are just a few of the items to consider when entering the U.S. industrial real estate market. We would be happy to work with you to establish the most effective plan for your purchase.

**For more information on this topic please contact Thomas M Gordon** of Gross Shuman P.C. Thomas can be reached at: 1-716-854-4300 Ext 287 or [tgordon@gross-shuman.com](mailto:tgordon@gross-shuman.com)



# Human Resources

- 41 HR Considerations
- 43 Termination Pay Differences
- 44 Independent Contractor or Employee?
- 45 Payroll Costs

*“Owning a business is like making a painting that never dries.”*

- Ernie Lynch, Lynch USA, Inc.

See full story on page 49



## HR Considerations When Entering the U.S.

If you are a Canadian company looking to expand into the U.S. and you will have U.S. employees, it will be beneficial for you to know some of the human resource differences between the two countries. It is important to establish policies and procedures that focus on employees and comply with federal & state labor laws. U.S. laws can vary from state to state. Although there are a number of similarities, here are a few of the more commonly asked questions asked by Canadian firms entering the U.S. market:

### *1) Can a U.S. employee be dismissed without minimum notice or “pay in lieu of notice” (severance)?*

**Answer** – Yes. “At will employment” exists in most states in the U.S. This allows an employer to dismiss an employee, usually for good reason, without the obligation of paying severance or minimum notice as is required in the Ontario Employment Standards Act (ESA).

In some states, if an employer requires notice of termination, then the employer is required to give the same notice to the employee or pay out the time covered by the notice period.

### *2) What are the minimum vacation periods and mandatory holidays in the U.S.?*

**Answer** – There aren't any. Decisions as to how many vacation days or the paid holidays that an employee earns are at the discretion of the employer and can be designed to meet the needs of the company as well as the employees. U.S. employers will typically offer employees a standard number of holidays and vacation/personal time as a recruiting and retention tool but again these are not government mandated. Typical holidays offered by local manufactures/distributors are New Years, Memorial Day, Fourth of July, Labor Day, Thanksgiving, and Christmas.

### *3) How is medical insurance obtained?*

**Answer** – Employee benefits play an increasingly important role in the lives of employees and their families and can have a significant financial and administrative impact on a business. Employee benefits in the U.S. are handled differently than Canadian public insurance (eg. OHIP) and health insurance plans and premiums can vary dramatically across the U.S. Typically, the company will negotiate with insurance plan providers to determine the best plans for that worksite. The employer then determines how much of the premium will be company-paid based on financial capabilities and what they need to be competitive in order to recruit the caliber of employees they need.

### *4) What are the allowable payroll frequencies in the U.S. (weekly, biweekly, etc)?*

**Answer** – Similar to Canada, the choices can be weekly, bi-weekly, semi-monthly, and monthly. It is important to know which one to use based on the state in which you have operations. For example, in New York State – laborers are mandated to be paid no less than weekly while administrative staff can be paid bi-weekly.

[Article continued on next page](#)

### 5) Can I mandate that my workers receive their pay via direct deposit?

**Answer** – No. You cannot mandate that employees receive their pay via direct deposit only. A company is required to provide a live paycheck if preferred by the employee.

### 6) What are the mandatory U.S. policies for medical and/or maternity leave?

**Answer** – In the U.S., it depends on the state you are in and the number of employees you have. On a federal level, employers with over 50 employees, maternity and medical leave are covered by a 12 week “UNPAID” time frame under the Family Medical Leave Act. Employers have the availability to allow employees to use accrued vacation/sick time as well as crafting their own policies as to what benefits will be made available during the employees leave. These policies should ensure equal treatment of employees so as to avoid being seen as discriminatory.

Some states and cities have new paid leave policies that are being rolled out and can vary in their design. These policies affect all size employers. A well-crafted paid time off policy can usually accommodate some of these requirements but not all of them.

### 7) What is the minimum wage rate in the U.S.?

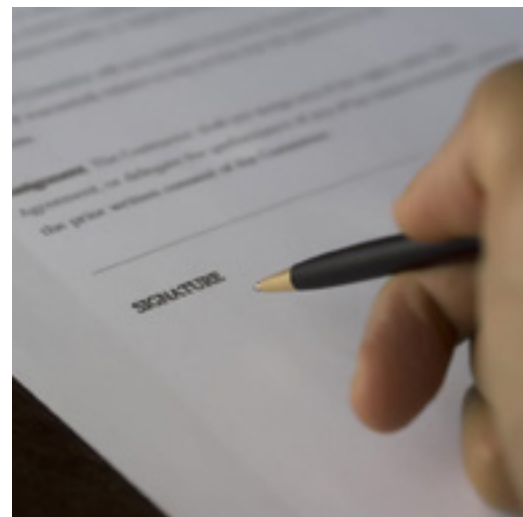
**Answer** – Minimum wage varies by state in the U.S. While the federal minimum wage is \$7.25, some states set a higher minimum wage through state legislation. In New York State, the minimum wage will be \$10.40 effective 12/31/17 (higher rates for NYC and Long Island/Westchester).

There are also “minimum” salary thresholds for exempt employees (salaried) that need to be met or the employee is deemed non-exempt and is entitled to overtime pay.

**For more detailed information, please contact John H. Bradley, Vice President WNY of Alcott HR.** John can be reached at: 1-716-626-9500 or johnb@alcotthr.com

## TIPS

Holidays are not lawfully mandatory in the U.S. Though there are best practices, a new business must decide on which days to give employees off.



## Termination Pay Differences

When a Canadian company enters the U.S. to expand their business, one of the major differences in our labor laws that they typically need guidance on is termination and/or severance pay. In Canada, there is no such thing as at-will employment and therefore an early termination would give rise to notice or pay in lieu of notice and/or severance pay depending on their length of employment with the company. In general, employees are entitled to notice or pay in lieu of notice after the completion of three months of employment.

In the U.S., we have employment-at-will where the employer or employee can terminate their relationship at any time, provided it does not violate any statutory law or employment agreement. For Canadian companies new to the U.S., this discussion includes a review of the following:

### *Statutory Laws*

- Companies need to become familiar with the laws of the Department of Labor (<https://www.dol.gov/general/aboutdol/majorlaws>)

### *Wrongful Termination*

Terminating an employee for any of the following reasons may constitute wrongful termination:

- **Discrimination:** The employer cannot discriminate against an employee and terminate their employment as a result of one of the following protected statuses under Federal and State Law: race, color, religion, sex, age (over 40), national origin, disability, veteran status, protected leave such as Family Medical Leave Act or military leave, immigration status, Collective Bargaining Rights and in some jurisdictions sexual orientation and conviction status.
- **Retaliation:** An employer cannot fire an employee because the employee filed a claim of discrimination or is participating in an investigation for discrimination based on a protected status. In the U.S., “retaliation” is forbidden under civil rights law.
- **Employee’s refusal to commit an illegal act:** An employer is not permitted to fire an employee because the employee refuses to commit an act that is illegal.
- **Employer is not following the company’s own termination procedures:** Often, the employee handbook or company policy outlines a procedure that must be followed before an employee is terminated. If the employer fires an employee without following this procedure, the employee may have a claim for wrongful termination.

### *Benefits and Pay*

- This will vary by State and the reason for termination. The variance will be regarding severance pay, payment for accrued vacation, overtime and sick pay, entitlement for healthcare benefits, eligibility for unemployment insurance, and timeline to pay the employee. Generally speaking, for privately held companies unless there is a written policy regarding the accrual of vacation, holidays or severance, these benefits are not required for at-will employees.

**For more information on this topic please contact Christopher Beckage** of Superior Group. Christopher can be reached at: 1-716-630-2910 or [beckagec@superior.com](mailto:beckagec@superior.com)

## Independent Contractor or Employee? Why Getting It Right Matters

Treating workers as independent contractors has many benefits for employers, including avoiding the cost of payroll taxes and benefits and not having to deal with the administrative requirements associated with employees. These benefits make independent contractor status an attractive alternative to classifying a worker as an employee, if the worker meets the legal tests for independent contractor status. Unfortunately, many employers mistakenly believe that simply calling a worker an independent contractor or having the worker sign an “independent contractor agreement” satisfies the legal requirements for independent contractor status. Rather, whether a worker is properly classified as an independent contractor or employee depends on the nature of the relationship between the worker and the company as determined under applicable law. Employers who misclassify a worker as an independent contractor face significant federal and state monetary liabilities and penalties. These penalties can be imposed not only on the company but also on the individuals responsible for the misclassification. Therefore, an employer must conduct a careful analysis before classifying a worker as an independent contractor.

### *Independent Contractor v. Employee*

Several federal and state laws apply in determining whether a worker is an employee or independent contractor. The most important are the federal Internal Revenue Code (IRC) enforced by the IRS, and the federal Fair Labor Standards Act (FLSA) enforced by the United States Department of Labor (DOL). The IRC applies what is called the “right to control” test to determine employee or independent contractor status. The “right to control” test looks at whether the company for which the worker is performing services has the right to control or direct the worker to such a degree that he or she is an employee. It consists of 20 factors that are analyzed to determine the company’s control over the worker’s behavior (e.g., where, when, and how the work is performed), the financial control the company has over the worker (e.g., whether the worker is paid by the hour or by the job, whether the worker can realize a profit or loss, and whether the worker makes his/her services available to others), and the nature of the relationship (e.g., is there a written independent contractor agreement, how integral are the worker’s services to the company and the permanency of the relationship). The FLSA uses what is called the “economic reality” test to determine whether a worker is economically dependent on the company for which he or she renders services so as to qualify as an employee. The “economic reality” test consists of only six enumerated factors but in actuality they incorporate all of the IRC’s “right to control” factors. Thus, both tests essentially use the same factors and a worker classified as an employee or independent contractor under one will in most cases be classified the same under the other statute. No one factor is controlling and the importance of a factor will depend on the position at issue and the circumstances under which the services are rendered. Even the existence of a written independent contractor agreement and both parties’ desire for independent contractor status will not be determinative of the issue as the agency or court will look behind any such arrangement to determine the parties’ actual relationship.

### *Legal Consequences of Misclassification*

In addition to having to pay back payroll taxes, the employer’s share of FICA contributions and unemployment taxes, and accompanying civil penalties, companies that misclassify a worker as an independent contractor can be liable for unpaid overtime, retirement benefits, medical claims, stock options and any other economic benefit that the worker would have been entitled to if he or she had been properly classified. In addition, if this issue is determined in a lawsuit, the employer may be liable for the worker’s attorneys’ fees. That is why it matters to get it right when classifying a worker as an independent contractor.

**For more information on this topic please contact James R. Grasso, Partner, Phillips Lytle LLP. James can be reached at:**  
1-716-847-5422 or [jgrasso@phillipslytle.com](mailto:jgrasso@phillipslytle.com)



## Payroll Costs

As a Canadian company moves closer to establishing its first U.S. location, drafting a budget is a key consideration and one that comes with challenges. Even with an estimated hourly wage, a prudent company will want to understand its 'true cost of employment'. To do so, one must factor taxes and required insurances.

*The following is a breakdown of such costs here in New York State (NYS):*

- FICA (Federal Insurance Contributions Act Tax)- 6.2%
- FICA Med (Medicare Tax) -1.45%
- FUTA (Federal Unemployment Tax)- 0.6%
- SUI (NYS Unemployment Insurance) 1.7%-9.5% depending on company's experience. New companies to NYS start out at base rate of 1.7%. (this is paid on the first \$10,900 of an employees' earnings)
- SDI (NYS Disability Insurance) - 0.50% to maximum of \$0.60 per week per employee
- Workers Compensation Insurance- based on company's industry classification. Approximate range for manufacturing or logistics companies 3% - ~9%

So, for a new company in NYS with a base unemployment rate of 1.7% and workers' compensation classification of 4%, the total burden with all applicable Federal taxes would be 13.95%.

In addition to these mandatory payroll costs, employers in the U.S. also must determine if they will offer other benefits. The most common additional benefit is sharing in a portion of employees' health insurance premium costs. Other benefits can include contributions/matching to retirement plans, tuition reimbursement, flex time and others. It is up to each employer to determine the level of benefit they will offer, finding the right balance between cost and attracting/retaining top talent.

**For more information on this topic or other workforce questions please contact Jeff Weber**, Owner, Remedy Staffing. Jeff can be reached at : 1-716-831-4800 or [jeff.weber@remedystaff.com](mailto:jeff.weber@remedystaff.com)

# Sucess Stories

47 Pride Pak

48 Welded Tube USA, Inc.

49 Lynch USA, Inc.

50 AMDOR LLC

51 Redland Food Corp.

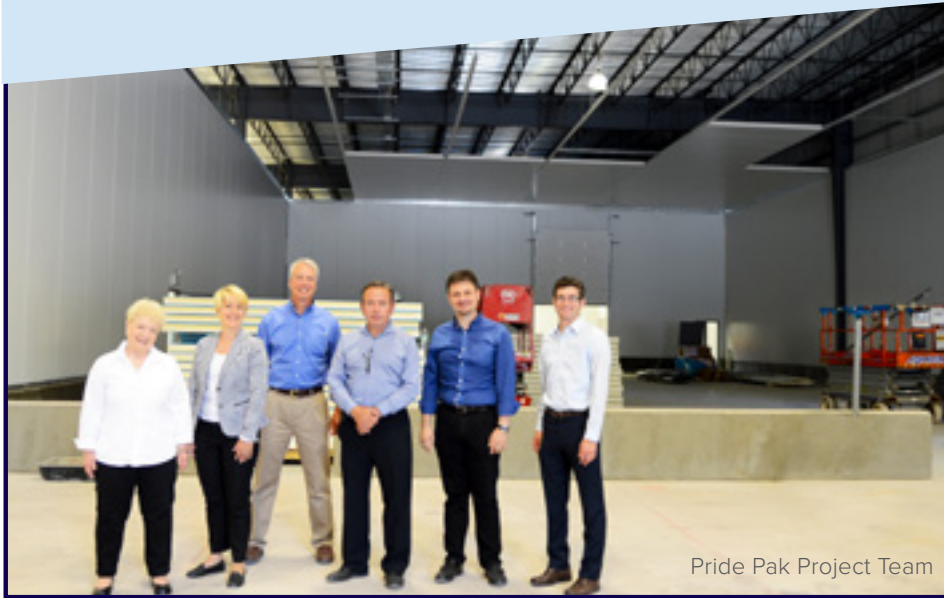
*“There is a lot that goes into a Canadian expansion into the U.S. Start with us to help manage you through the process.”*

- Tom Kucharski, President & CEO

Invest Buffalo Niagara



# Pride Pak



**PROJECT TYPE:**  
AGRIBUSINESS EXPANSION

**JOBS:** 206

**INVESTMENT:** \$36,889,000

**REQUIREMENTS:**

- Access to large quantities of water and food waste removal
- Available workforce
- Reduce transportation time for longer shelf life

**INCENTIVES:**

- PILOT; Sales & Mortgage Tax Abatement; Excelsior Tax Credit
- Office of Community Renewal Grant
- National Grid Grant to assist with electrical infrastructure upgrades
- Allocation of low-cost hydropower
- Municipal infrastructure improvements (water, sewer & road)

**COMPANY OVERVIEW:**

Canadian-headquartered Pride Pak processes fresh vegetables, making ready-made salads in a bag and chopped vegetables. The company also sources raw vegetables from both the US and Canada. Pride Pak was started in 1984 and has their main office in Mississauga with another facility in Newfoundland. They currently employ over 200 people and sell to grocery retailers and into the restaurant industry.

With growing sales in the US, Steven Karr, CEO sought a new facility across the border to grow his business. In 2014, Pride Pak reached out to multiple regions within New York State to locate their new facility.

**PROJECT SOLUTION:**

Pride Pak selected the Medina Business Park in Orleans County for their new location; choosing to construct a new 68,000 sq. ft. facility on 13 acres in Medina, NY and investing \$36M+ over five years in their new operation. They recently completed the building construction and equipment implementation for this new facility which will produce Wegmans-branded bagged salads and other products. According to Karr, “This building is the ultimate of buildings when it comes to food safety and flow of product.”

Many organization’s provided support and facilitated the company’s Medina-based pathway. InBN assisted with cross-border due diligence, site selection, workforce data and direction, and incentive introductions and applications.

“The collaboration between Invest Buffalo Niagara and various agencies in Orleans County was a key factor in the success of this project.”

- Steve Karr, Pride Pak CEO



# Welded Tube USA, Inc.



## COMPANY OVERVIEW:

Headquartered in Concord (Toronto), Ontario, Welded Tube is a manufacturer of steel tubing, whose process is comprised of taking flat steel and forming it into round tubing 4½ to 9 inches in diameter, in custom lengths. The tubes are used for well casings and for other purposes at natural gas drilling sites, a growing market as drilling activity has grown rapidly in shale formations in Ohio and Pennsylvania. The company currently employs more than 600 people in North America. The major driver for Welded Tube’s expansion in the United States was its goal of increasing US sales by having a “Made in the USA” label.

## PROJECT SOLUTION:

Invest Buffalo Niagara facilitated meetings between the company and our partners; Empire State Development, Erie County Industrial Development Agency, National Grid, New York Power Authority, the Department of Labor, National Fuel, City of Lackawanna, Erie County, Phillips Lytle and Lumsden McCormick who assisted Welded Tube with: incentives, workforce recruitment, power, site related issues, cross border due diligence, and immigration. With the help of InBN, Welded Tube began its real estate search in an attempt to locate a site that met all of their requirements.

After touring several sites, Welded Tube decided to invest approximately \$48 million on the construction of a new facility on 45 acres of the long dormant Bethlehem Steel site in the Tecumseh Business Park in the City of Lackawanna. This site is also a Brownfield, meaning that the redevelopment or reuse of it may be complicated by the presence of contaminants such as hazardous waste and petroleum. However, the New York State Department of Environmental Conservation Brownfield Cleanup Program provided the company with benefits for the cleanup and redevelopment of the site including liability relief and tax credits.

Welded Tube’s \$48 million investment consisted of a 100,000 sq. ft. manufacturing facility, a 34,000 sq. ft. hydro testing facility, and a 30,000 sq. ft. pipe threading and coupling facility.

## PROJECT TYPE:

ADVANCED MANUFACTURING

**JOBS:** 121

**INVESTMENT:** \$48M

## REQUIREMENTS:

- Low cost hydropower
- Proximity to Canadian border
- Available workforce
- Supply chain

## INCENTIVES:

- Brownfield Tax Credits
- Excelsior Jobs Program
- Tax Abatement Program (ECIDA)
- Low Cost Hydropower (NYPA)

“ We see great potential for our product in the US market and a great opportunity to develop that potential right here in the Buffalo Niagara region. ”

- Robert Pike  
Vice President  
Welded Tube USA, Inc.





# Lynch USA Inc.



## COMPANY OVERVIEW:

Lynch Fluid Controls Inc., established in 1987, is a manufacturing company based in Ontario, Canada producing hydraulic and motion control products. They supply the aerospace, military, material handling, construction, oil and gas industries. In Canada, they own multiple facilities totaling 63,000 sq. ft. and employing upwards of 90 employees.

They started to see potential in the U.S. market in rising sales numbers on this side of the border. They were also bringing nearly half of their raw materials over from the U.S. Rather than buying-out an existing business in the area, Lynch decided on its own expansion project.

## PROJECT SOLUTION:

Invest Buffalo Niagara worked with Lynch to set up cross border meetings so that they could get information on incorporation, tax and accounting, banking, immigration, and human resource compliance in the U.S. Research concerning workforce, and colleges and universities was given to help the business case.

Invest Buffalo Niagara also coordinated the site selection process and helped find their ideal site. In their first phase, they have set up a warehousing and distribution space. In each of their first 10 months, Lynch USA has hit targets set, reaching 210% of their goal in June. Their current location in Niagara County has space for eventual expansion into manufacturing.

## PROJECT TYPE:

ADVANCED MANUFACTURING

**JOBS:** 10

**INVESTMENT:** \$1,540,000

## REQUIREMENTS:

- Existing 2,500-5,000 sq. ft. building
- Understanding of setting up a new U.S. corporation
- Connection to local colleges and universities

“Owning a business is like making a painting that never dries.”

- Ernie Lynch  
Founder and President  
Lynch USA, Inc.



# AMDOR LLC



## COMPANY OVERVIEW:

Headquartered in Burlington, Ontario, Whiting Group is an advanced manufacturer with multiple divisions and facilities including Lancaster, NY. The company needed to expand its AMDOR division, which manufacturers roll up doors for fire apparatus, ambulances and other specialty vehicle applications. AMDOR considered expanding at its existing facility in Burlington, or establishing its first U.S. site in Buffalo Niagara, Wisconsin or Florida.

## PROJECT SOLUTION:

Invest Buffalo Niagara helped AMDOR complete a real estate search for their new facility. In addition, employee wage data, worker availability and potential benefits costs based on the specific job positions and descriptions were provided for the potential expansion. Through the help of Invest Buffalo Niagara and other regional agencies, the company gained a better understanding of Buffalo Niagara's incentive process and completed various incentive applications, meeting required deadlines. AMDOR applied for and received benefits from Lancaster Industrial Development Agency, Empire State Development, New York Power Authority, and New York State Energy Research and Development Authority. To ensure the company had the needed utilities and supply, Invest Buffalo Niagara connected AMDOR with New York State Electric and Gas Corporation and National Fuel.

AMDOR chose Buffalo Niagara for their first U.S. location and purchased a 21,000 sq. ft. existing facility on eight acres in Lancaster, NY with plans to complete a 10,000 sq. ft. addition. The company will hire 28 full time employees over the first five years and invest \$5.5M into the new facility.

## PROJECT TYPE:

ADVANCED MANUFACTURING

**JOBS:** 28

**INVESTMENT:** \$5.5M

## REQUIREMENTS:

- Cost effective location, including infrastructure, workforce and facility
- Existing building or build-to-suite options that could meet budget and timeline expectations
- Available and talented workforce
- Close proximity to Canadian headquarters

“ Proximity to our existing operations and U.S. customers made expansion to Buffalo Niagara a wise choice. This investment is vital to our strategy of delivering superior performance for our customers, employees and the company. ”

- Bruce Whitehouse  
President & Owner  
AMDOR LLC



# Redland Food Corp.



## COMPANY OVERVIEW:

Canadian based Trophy Foods Inc. is a manufacturer of nuts, dried fruits, and confectionery and bulk foods. They work with grocery retailers, mass merchandisers, drug channels, and food service customers across Canada and the U.S. to create and produce a wide variety of private label branded products. With headquarters in Mississauga, ON and a second location in Calgary, AB, Trophy Foods has been in operation since 1967.

## PROJECT SOLUTION:

In 2013, Trophy Foods, experienced significant growth and required additional space. The company needed to expand, and with 5% U.S. sales sought a U.S. facility in order to extend into the American market. A large percentage of Trophy's Foods raw material was already being imported into Canada from the U.S., furthering its desire to set up shop in the U.S. They considered undertaking the expansion in the greater Detroit area or Buffalo Niagara, making it imperative for Invest Buffalo Niagara to provide the necessary data and guidance to ensure Trophy Food's expansion took place in our region.

After exploring both potential locations, Trophy Foods found Buffalo Niagara's close proximity to its Canadian headquarters, strong workforce, and low cost of doing business critical in its decision to locate in the region. Invest Buffalo Niagara also helped Trophy Foods navigate immigration requirements, Food and Drug Administration regulations and the incentive process. Trophy Foods received benefits from Empire State Development through the Excelsior program.

## PROJECT TYPE:

AGRIBUSINESS EXPANSION

**JOBS:** 40

**INVESTMENT:** \$4,637,000

## REQUIREMENTS:

- U.S. facility to extend into American market
- Proximity to Canadian border

“Redland Foods is excited to begin a new chapter in an almost 50 year history of bringing snacking, baking and confectionery food products to consumers with our new facility in Cheektowaga. Invest buffalo Niagara played an important role in supporting our decision making process and connecting us to suppliers, services and customers in the Western NY area.”

- Brian Paul  
President & COO  
Redland Food Corp.



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business with us.

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