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ON

Cross-Border Law



When a work visa won't do

Helping B-1 business travellers get to the U.S.

If you have ever wondered whether your client will need a traditional work visa to enter the U.S., a B-1 visa may be an option — but you will need to decipher the fine line often walked by U.S. immigration counsel in advising their clients on this issue.

The B-1 visa is the most used and the least understood visa; if you do not focus your practice on U.S. immigration, you should always seek a second opinion from a lawyer who does.

The purpose behind the B-1 visa is to foster international trade relationships between the U.S. and foreign nations. With this in mind, the B-1 visa is therefore not a “work” visa per se, but geared toward business travellers who are fulfilling the mandate of building on trade relationships and international



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commerce between the U.S. and foreign nations.

The two leading decisions that set forth the definitive test on whether a foreign national qualifies as a business visitor are *Matter of Hira*, 11 I&N Dec 824 (BIA 1966) and *Matter of Neill*, 15 I&N Dec. 331 (BIA 1975). In *Matter of Hira*, a foreign national travelled to the U.S. on behalf of a Hong Kong manufacturer of custom-made men's clothing items. This particular foreign national would accept payment for the order, take measurements and send back the order to the overseas employer for handling.

The foreign national received payment for his services, but the payment was not from a U.S. source and he demonstrated that he intended to return home

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An oddity in Cross-Border Law

The case of the cannabis catapult

Border agents recently observed a group of people allegedly smuggling drugs across the border — by catapult.

U.S. Border Patrol agents were operating a video surveillance system near Naco, Arizona, when they observed an unusual structure. It turned out to be a large catapult and a group of people were allegedly preparing to launch drugs over the border with the device.

Drug smuggling appears to have reached a new high. — Natalie Fraser

Visa application options dependent on nationality

B-1

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to his country of origin after his services had been rendered. He was found to be eligible for B-1 entry by the Board of Immigration Appeals.

Contrast this result with that of Matter of Neil, where a professional engineer for a Canadian firm regularly solicited business in the U.S. and rendered consulting services to the firm's U.S. customers. The Board of Immigration Appeals held the foreign national's activities went beyond activities incidental to international trade and so the foreign national was not permitted to enter the U.S. under B-1 status.

These contrasting decisions suggest the following conclusions regarding the qualification of B-1 business travellers:

- The foreign national's stay in the U.S. must be temporary in nature (i.e. only as long as needed to fulfill his or her business travel purpose);
■ The foreign national must have the intent to return home after the purpose of the B-1 visit is completed;
■ The principal place of business for the foreign national must be abroad;

■ The foreign national must not receive any direct remuneration from a U.S. source; and

■ The foreign national's employment and purpose of his or her U.S. visit must be a necessary incident of international trade or commerce.

If the purpose of your client's visit meets these basic criteria, he or she may be an eligible B-1 visitor to the U.S.

The B-1 visa may be used in lieu of other visa categories, such as an H-1B (specialized knowledge) or H-3 (trainee). This may remove the need to make an expensive or time consuming work visa application. Given the right circumstances, this can be very helpful in moving personnel into the U.S. on an expedited basis.

Depending on your client's nationality, he or she may have different options on how to apply for the B-1 visa. For instance, Canadians are visa exempt under this category thanks to the North American Free Trade Agreement. All Canadian applicants can therefore apply for this status at the port of entry they decide to use to enter the U.S. and the U.S. Customs and Border Protection Agency will adjudicate these applications at the time of

intended entry.

Certain foreign nationals may be sponsored by the Visa Waiver Program (VWP), which also allows those individuals to avoid submitting a traditional consular application for the B-1 visa.

However, as is implicit in the name of the program, certain options afforded a regular B-1 visa holder are "waived" when entering under the visa waiver program, which may not suit your client's needs. The other route to take in applying for a B-1 visa is through the U.S. consulate where your client resides.

The B-1 visa may reduce the time and expense of applying for a traditional work visa — which will make for happy clients and in return, happy lawyers. ■

Mark Belanger is a member of the British Columbia and Washington State Bar associations, in addition to the Washington State Association for Justice (WSAJ), Canadian Bar Association (CBA) and American Immigration Lawyers' Association (AILA). He is associate counsel at Cross Border Law, practising in both Vancouver and Washington State.

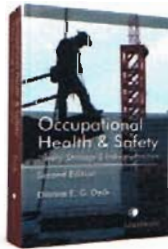
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'No convenient, authoritative means of checking' list

Corrupt

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priation of state funds by repressive foreign leaders.

"The legislation allows Canada to act upon the request of a foreign state to temporarily freeze assets that these former leaders and their entourage have placed in Canada," he said. "This new legal tool enables Canada to fight corruption and support democratic reforms and accountability by ensuring that we can freeze any misappropriated property when the authorities of a foreign state ask us to do so."

The legislation applies to any person in Canada or Canadian outside Canada with specific sectors listed in s. 8 of the Act. These include banks, trust companies, loan companies and securities firms, said Shinfield. There is, however, an exclusion mechanism available under permits issued by the minister.

Willful contravention of the legislation can result in a maximum fine on summary conviction of \$25,000 or five years imprisonment.

Barbara Cox, vice-president and chief anti-money laundering officer for BMO Financial Group, told The Lawyers Weekly the legislation is similar to already existing sanctions legislation. What's different, she said, is the trigger.

Cox said the requirements of the legislation itself are not unique and, indeed FACFAO lifts language from other legislation. But prior to FACFAO, she said, there was a lack of a trigger that would require the freezing of assets of designated PEPs in cases like Tunisia or Egypt, where there was no UN resolution or international body requesting the regulations.

"The [government] put it through in record time," Cox said. "It's pretty simple legislation. It imposes an ongoing duty to determine if you are holding property for the named people and requiring you to refrain from dealing with that property."

"The Governor in Council must satisfy itself that these individuals are PEPs before they can be designated," she said. "The concept of PEPs is not new at all as it's embodied in federal money

laundering legislation. As a result, financial institutions may have already had these individuals on their radar."

However, she cautions, there is an onus on counsel and compliance officers to ensure they are up to date with the list to see who has been added or dropped off.

"We have to just keep checking the regulations," Cox said. "There is no convenient, authoritative means of checking."

Added Shinfield, "They have an obligation to go through their databases and make sure they're clean."

And, while other names may appear on lists coming out of the Department of Foreign Affairs or the Office of the Superintendent of Financial Institutions Canada for designated persons listings and sanctions laws dealing with terrorists, terror groups and other listed and sanctioned persons and entities, Cox said FACFAO lists individuals whose assets are of interest directly in the body of the regulation. ■

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