HR Professionals: Beware Of Common US Visa Myths

The law firm of Ortega-Medina & Associates often receives enquiries from HR Professionals regarding employees that have suffered United States immigration consequences due to their reliance on erroneous information found on the Internet. Whilst much information found on the Internet may be accurate, we are aware of an abundance of visa myths arising out of incorrect information that is perpetuated across the Internet on sites ranging from chat boards to government information pages.

Unfortunately, these visa myths often lead to legal consequences of varying degrees, including the following: a.) A foreign employer may send one of its employees to the United States mistakenly believing the employee is authorised to carry out certain business activities that are, in fact, prohibited by law, leading to refusals of entry, visa denials, or worse; or b.) A business person may forego applying for a specific visa category that would otherwise allow her to establish a profitable business in the United States, due to a mistaken belief that she is ineligible for the category.

The fact of the matter is that United States immigration law is rarely, if ever, straightforward - and it is important to distinguish between the reality and the myths. In this article, therefore, we address nine visa myths most commonly brought to our attention by our clients, in the hopes of helping HR professionals, and individuals engaged in cross-border business activities, to avoid costly missteps.

Myths Associated with Short-Term Business Activities

Myth 1: "We need to send one of our employees to the United States to do some work on our behalf. Our employee will not be paid by a United States company and will stay only for a short period of time. Therefore, he can travel on the Visa Waiver Program/ESTA."

The Reality: The Visa Waiver Program does not authorise productive work, regardless of where the business traveller's employer is located, and regardless of whether or not the business traveller is paid for his work. This same rule also applies to individuals holding a standard B1 Business Visitor visa. The business activities allowed under the Visa Waiver Program and standard B1 Business Visitor visa include, but are not limited to, attendance at business meetings, conferences, seminars and exhibitions. However, conducting leadership and management training seminars, or other training events, is not authorised on the Visa Waiver Program.

It is important to be entirely clear on whether your employee's business activities are authorised under the Visa Waiver Program. If your employee performs unauthorised work in the United States, he may be removed from the United States or refused entry to the United States on a later trip. Your employee may thereafter be unable to travel to the United States on the Visa Waiver Program, even as a tourist, and may face problems in securing a B1 Business Visitor visa in the future. Such personal legal consequences could potentially lead to a claim by the employee against the employer that sent him to the United States, as the trip may have been made under pressure.

Within the B1 visa regulations there are special subcategories of B1 visas that, when issued, allow different types of productive work. The most common of these subcategories is a Special Business Concession (also known as B1 in lieu of H1) that allows qualifying individuals to perform productive work in the United States on behalf of a foreign employer. Employers generally find applications for the Special Business Concession to be less onerous compared with more traditional visa categories, as the application is presented directly to the United States Embassy or Consulate abroad. However, the presented application must clearly demonstrate the employer's need to send the applicant to the United States, as well as the applicant's eligibility for the concession, and must be presented within the frequently changing procedural requirements of the US Department of State ("DOS"). We recommend that you consult with a US-qualified business immigration attorney if you wish to pursue this option for one of your employees, given that a failed visa application, even through a simple misstep, may also permanently render the applicant ineligible to travel on the Visa Waiver Program.

Myths Associated with L1 Intracompany Transfers

Myth 2: "Our company's United States affiliate must be trading for at least one year before we can transfer one of our employees on an L1 visa."

The Reality: This is not the case under the special L1 "New Office" regulations. The "New Office" regulations allow an individual employed by an affiliated company abroad in a managerial, executive, or specialised knowledge capacity to be transferred to a brand new United States company to commence the operations of the company.

The L1 visa under the "New Office" regulations will be issued for up to one year initially, and the sponsoring company must demonstrate in its petition that the transferee will be in a position to step away from any duties in the set-up of the company that are not strictly managerial, executive, or that do not require specialised knowledge, by the end of year one.

A reverse version of this myth suggests that the transfer can occur even before the establishment of the United States affiliate. In actuality, whilst an L1 visa may be issued to a transferee prior to the actual commencement of operations, USCIS must be satisfied in reviewing the visa petition that there is an already-established United States entity prepared to receive the transferee in formal business premises. To facilitate the visa process and to avoid any unnecessary delays, business immigration law firms often assist foreign companies in this initial establishment of their United States business entities, simultaneous with the preparation of the target visa petition.

Myth 3: "The candidate we would like to move to the United States is paid as an independent contractor, not as an employee. Hence, she is not eligible for an L1 transfer to our United States affiliate."

The Reality: The candidate may still be eligible. Contractors that work exclusively for the foreign company, but are paid as contractors simply for payroll reasons, may still be transferred to the affiliated United States company on an L1 visa, if otherwise eligible. During an employer's initial consultation with its US business immigration lawyer, a frank and detailed discussion should take place regarding the candidate's current and target roles to ensure that both of these qualify under the relevant laws and regulations. If the candidate does not meet the requirements for the L1 visa, there are often other visa options available.

Myths Associated with Company Registration under an E2 Treaty

Myth 4: "Our company must invest at least $250,000 USD in the United States to be eligible for registration under the E2 Treaty category, in advance of any E2 Employee Transfers."

The Reality: Not necessarily. The US Department of State ("DOS"), the United States government agency that handles E2 company registrations does not set a minimum investment figure. Instead, the DOS simply states that the investment must be substantial. The dollar figure required for a substantial investment depends on the nature of the business to be started or purchased. Your company's investment must represent a substantial proportion of the total value of the business to be purchased or it must be sufficient to start up a profitable new business.

Our firm has handled successful E2 registration applications for companies investing as little as $50,000 USD, when this was the full amount that was required to start up the business to the point of operation. Following successful registration of the company with the DOS, E2 Employee transfers can be arranged quickly and at relatively low cost, as compared with categories such as L1 or H1B.

Myth 5: "Our director may apply for an E2 visa to allow her to travel to the United States to invest in the creation of an affiliate or branch office."

The Reality: This is not correct. Before one may legally apply for an E2 visa, the investment of money, goods or intellectual property must be completed, and commercially at risk. Certain regulations do allow travellers to visit the United States pursuant to the B1 category for the purpose of making E2-qualifying investments. However, such matters must be handled carefully to ensure that the activities carried out by the investor are all authorised under the regulations. For example, the investor will not be eligible to actively manage the investment, or otherwise work in the US business, until the company has been granted E2 registration, and the corollary visa has been issued. The officer at the port of entry must be satisfied that the investor will only be engaged in authorised activities or she may be refused entry or administratively deported.

US business immigration law firms customarily work with companies at this initial stage of their expansion to the United States. They will typically offer services to review the proposed investment activities in the United States and to provide documents for presentation at the port of entry in support of the investor's proposed activities in the United States, in anticipation of a future E2 application.

Myths Associated with Arrests, Cautions and Convictions

Myth 6: "Our employee has a criminal record. He is therefore required to apply for a visa before travelling to the United States."

The Reality: It depends on the record. This myth most commonly arises in relation to Question B on the Electronic System for Travel Authorization ("ESTA") required to travel to the United States. Question B asks:

Have you ever been arrested or convicted for an offense or crime involving moral turpitude or a violation related to a controlled substance; or have been arrested or convicted for two or more offenses for which the aggregate sentence to confinement was five years or more; or have been a controlled substance trafficker; or are you seeking entry to engage in criminal or immoral activities?

When one answers "yes" to Question B, US Customs and Border Protection reviews the application and determines whether travel will be authorised or whether the traveller must apply for a visa at the United States Embassy or Consulate abroad before travelling to the United States.

The portion of the question that generally causes confusion is whether the arrest or conviction was for a crime involving moral turpitude ("CIMT"). Common law in the United States defines moral turpitude ambiguously as "conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." Furthermore, the punishment imposed does not shed any light as to the presence or absence of moral turpitude. For example, some crimes punishable by only a fine may be considered crimes involving moral turpitude, whilst other crimes generally considered by the general public to be serious are not.

The determination as to whether a "foreign arrest or conviction" involves moral turpitude requires a comparison of the subject criminal record against both the equivalent United States federal or state criminal statutes and the relevant United States immigration laws. Our firm recommends that you consult with a US-qualified business immigration lawyer before instructing the subject employee to complete the ESTA questionnaire or contacting the United States Embassy or Consulate to schedule an appointment for a visa application. The United States Embassy or Consulate does not advise in advance as to whether it will consider a particular arrest or conviction to be a CIMT. Only a qualified business immigration lawyer with substantial experience dealing with issues of criminal inadmissibility will be able to provide insight into this in advance of the consular appointment, and will be able to assess the likelihood of success in such an application.

It is quite common for an individual that legally could have answered "no" to Question B, to nevertheless book a visa interview, either because he is uncertain about the definition of CIMT, or because he directly consults with the DOS call centre and is instructed to do so. At the visa interview, even if the attending officer is unable to find that the arrest, caution or conviction is a CIMT, she may nevertheless deny the visa application on other grounds, such as "medical inadmissibility" in the case of a Drink-Drive arrest, or for the less comprehensible "insufficient ties outside of the United States." A visa denial on these grounds will render the individual who would have otherwise received ESTA approval unable to travel on the Visa Waiver Program. Furthermore, the visa denial remains on one's DOS record for life and is quite difficult to overcome in a future application, as embassy officials typically defer to the previous denial

unless there has been a material change of circumstances.

Myth 7: "Our employee's criminal conviction is now spent (or expunged) so he does not need to disclose it to the US immigration service or to the Embassy of the United States."

The Reality: The United States government does not recognise the concept of spent convictions. An arrest or conviction that falls under a category requiring disclosure must be revealed, regardless of how long ago it occurred and regardless of whether it has been removed from ones record.

Other General Immigration Myths

Myth 8: "Once one has spent several years in the United States on a non-immigrant visa, one is automatically eligible to receive a "Green Card" (i.e., Legal Permanent Resident status).

The Reality: Unlike many countries, an individual does not automatically become eligible for Legal Permanent Resident ("LPR") status after living in the United States for a certain number of years. The United States grants LPR status following approval of a sponsored petition or application process that is distinct from the non-immigrant visa.

These sponsored petitions may be lodged by qualifying US employers, or by certain United States citizens or LPRs. A number of different categories exist to petition for LPR status and each category maintains its own requirements and time scales. These categories normally face higher scrutiny and more requirements by the US Citizenship and Immigration Service than non-immigrant petitions, and is it wise to consult with a US-qualified business immigration lawyer before commencing the process.

Myth 9: "Our employee has remained in the United States for the full 90-days authorised by the Visa Waiver Program, but is not yet ready to come home. Hence, we will fly her out for the day so that she will be able to stay on for another 90 days when she re-enters the United States."

The Reality: Maybe. Each time one seeks to enter the United States, a US Customs and Border Protection officer determines one's eligibility to enter the United States and, if admitted, how long one may stay. Lengthy stays of more than a few weeks and, particularly, stays for the entire ninety (90) days followed by a quick return to the United States, may arouse the suspicion of the US Customs and Border Protection officer. Re-entering the United States after a full ninety day stay and brief departure is not strictly prohibited, but a port officer may nevertheless deny one's entry based on suspicions that the visitor will not leave by the expiration date recorded on her electronic I-94, that she will engage in unauthorised work while in the United States, or that she intends to permanently reside in the United States.

One should always discuss one's need to keep an employee in the United States for more than ninety days with a US-qualified business immigration lawyer to determine if there is a visa that may help facilitate his or her travel to the United States throughout the year. It is also wise to consult with an accountant or tax advisor familiar with United States tax laws, as the individual may be subject to United States tax liability after remaining in the United States for more than 180 days in the aggregate in any given year – even on the Visa Waiver Program.

Conclusion

These are just a handful of the visa and immigration myths that abound in the public domain, including on Internet forums and chat rooms. Reliance on these myths can lead to serious consequences, including unnecessary visa denials, invalidation of ones right to enter the United States on the Visa Waiver Program, loss of money and business opportunities and even removal or deportation from the United States. Even if you intend to handle your company's visa or immigration matter on a DIY basis, it is best to consult with an experienced US immigration lawyer - if only to confirm your understanding of the relevant US immigration laws and regulations. Seeking professional advice will minimise the danger of misstepping as you attempt to navigate the US immigration minefield.

Orlando Ortega is the Senior Attorney for the US business immigration law firm of Ortega-Medina & Associates, headquartered in London, England (UK). The firm also maintains an Of Counsel relationship with associated firms in San Francisco, California and Miami, Florida. Attorney Ortega has particular expertise and insight into complex US business immigration cases, and is frequently called upon to troubleshoot consular-level visa denials.
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