Moving People and Material: Understanding Core U.S. Employment, Immigration and Importation Issues When Moving Foreign Nationals to the U.S.

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AGENDA

- Moving people
  - Employment document considerations
  - Work authorization

- Moving stuff
  - Moving household effects
  - Importing vehicles
  - Deemed exports
BIOGRAPHIES

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- Employment and Labor Law Attorney
- Experienced in International Employment Assignments

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- Over 18 years of immigration law experience
- Currently Chair of AILA’s Business Committee

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- Has practiced in the area of international trade law for more than 25 years
ESTABLISHING THE EMPLOYER/EMPLOYEE RELATIONSHIP

- Document the assignment!
  - Assignment letter/employment transfer letter
  - Secondment agreement
  - Local employment agreement
  - Repatriation letter
STRUCTURING THE SECONDMENT/EXPAT AGREEMENT

- Five expatriate structures
  1. Home-country affiliate employed and paid
tax issues/other concerns
  2. Home-country affiliate employed/host-country affiliate paid
tax issues/other concerns
  3. Localized with “hibernating” country affiliate agreement
tax issues/other concerns
  4. Localized (host-country affiliate employed and paid)
tax issues/other concerns
  5. Dual employment contract (paid on either home or host
country payroll or both)
tax issues/other concerns
EXPATRIATE STRUCTURES

- What is an inter-affiliate agreement?
- When is it needed?
DOCUMENTING THE TERMS

- Key considerations
  - Length of agreement
  - Duties
  - Compensation
  - Benefits
  - Work authorization
  - Tax considerations (who will pay?)
EMPLOYER/EMPLOYEE CONSIDERATIONS

- Professional
  - Clear responsibilities
  - Length of assignment
    - Change in assignment? Possible extension
  - Confidentiality/work for hire/non competition considerations
  - Benefits
    - Health insurance, STD/LTD, ER extrication, trailing spouse
  - Returning home
    - Re-integration into the home country – job guarantee?
    - Recognition of new skills
WORK AUTHORIZATION

- Only discussing professionals

- Remember – visa classifications not always available

- Does my person even need a visa?
  - Business Visitors do not need work visas
  - Travelers from most industrialized nations do not need a visa to visit
    - ESTA – Visa Waiver – 90 days
    - B-1 Visa – 6 months
  - U.S. immigration law doesn’t define “work”
  - But need a work visa to perform “work” in the U.S. – regardless as to location of pay
VISITOR VISAS

- The following may not be considered “work”
  - No U.S. compensation – it is a factor, but not the only factor
  - Sales meetings
  - Meeting with U.S. company peers to discuss best practices
  - Attending seminars
  - Technical workers coming in to install/repair a machine – P.O. must be from foreign company to U.S. company (other caveats)
  - Short (1 to 2 week) and infrequent trips (twice a year)
  - The word “training” raises warning flags – giving training requires a work visa, and there is a visa for receiving training
MOST COMMON WORK CATEGORIES

- **H-1B Visa**
  - Employee has a bachelor degree in a field that matches the position
  - Only 85,000 “new” H-1Bs are available per year
- **L-1 Visa**
  - Employee must be working with a related company (similar ownership) for one year out of the last three years as a professional/manager
- **E-1/E-2 Visas**
  - Ultimate company owner and foreign national have the same citizenship, and will work as a professional/manager
- **O-1 Visa** – the world’s elite
- **Country Specific Visas**
  - TNs (Can & Mex), E-3 (Aust), and H-1B1 (Chile & Singapore)

U.S. COMPENSATION REQUIRED

- All work visas allow for foreign compensation – except:
  - H-1B – must be paid the same as a U.S. worker – and same or similar benefits
  - E-3
  - H-1B1
  - Labor Condition Application (LCA) needed for all three above

- Important to take the right steps when terminating H-1B, E-3 and H-1B1s
  - Tell the employee he/she is gone
  - Tell Immigration that the position has ended
  - Pay for the employee’s flight home (H-1B only?)
  - Withdraw the LCA
OK NOT TO HIRE A FOREIGN WORKER?

- In a word – YES

- Protected classes
  - U.S. citizens
  - Lawful permanent residents ("green card holders")
  - Refugees and asylees
  - Caveat

- Not a protected class
  - Everyone else
  - Cannot use national origin to not hire or terminate
  - OSC letter
IMPORTING HOUSEHOLD AND PERSONAL EFFECTS

- A person moving to the U.S. may import his/her household and personal effects free of duty
  - Household and personal effects include furniture, linens, libraries, artwork and similar household furnishings
  - They must be for personal use
  - The articles must have been available for the person’s use or use in a household where the person resided for one year. The one year period does not have to be continuous or immediately prior to the move to the U.S.
  - You may bring them with you or ship them separately
  - Should I use a moving company?
IMPORTING HOUSEHOLD AND PERSONAL EFFECTS

- Exceptions
  - Alcoholic beverages – only one liter allowed duty and tax free
  - Tobacco - up to 100 cigars and 200 cigarettes (no Cuban tobacco)
  - Firearms and ammunition
    - Must use a registered dealer
  - Gifts
    - Gifts are not household or personal effects
    - Any gifts with a total value over $100 are subject to duty
IMPORTING A VEHICLE

- Non-residents may import a vehicle duty free for personal use up to one year
  - Vehicle must be imported in conjunction with owner’s arrival
  - If vehicle does not conform to U.S. safety and emission standards, it must be exported within one year
  - There are no exemptions or extensions to the one year limit
  - Vehicle may not be sold in the U.S.

- Precautions
  - Do not use vehicle as shipping container
  - Vehicle exterior must be steam cleaned prior to shipment to prevent importation of pests
DEEMED EXPORTS

- How can something be exported without leaving the U.S.?
  - The release of controlled technology to a foreign national located in the U.S. is a deemed export
  - If a foreign national working in your facility will have access to controlled technology, you must obtain an export license

- The deemed export rules most commonly applies to universities, high tech research and development companies, and bio-chemical firms, but should also be considered by any company employing foreign nationals

- Does the government enforce this rule?
  - In February 2014, a California company was fined $115,000 for releasing controlled technology (blueprints and drawings) to a Russian national employed as an engineer by the company
QUESTIONS?

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THANK YOU!

Note: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.