

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

Maria Fracassa Dwyer

(248) 988-5899

mdwyer@clarkhill.com

Michael P. Nowlan

(313) 965-8666

mnowlan@clarkhill.com

R. Kevin Williams

(312) 985-5907

kwilliams@clarkhill.com

CLARK HILL

AGENDA

- Moving people
 - Employment document considerations
 - Work authorization
- Moving stuff
 - Moving household effects
 - Importing vehicles
 - Deemed exports

BIOGRAPHIES



Maria Dwyer

Member

248-988-5899 • mdwyer@clarkhill.com

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



Michael Nowlan

Member and Immigration Law Co-Practice Group Leader

313.965.8666 • mnowlan@clarkhill.com

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



Kevin Williams

Member

312.985.5907 • kwilliams@clarkhill.com

- 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)

More is at <http://www.clarkhill.com/temporaryVisas.aspx>

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
<http://www.justice.gov/crt/about/osc/pdf/publications/TAletters/FY2014/180.pdf>

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?



Maria Dwyer

248-988-5899

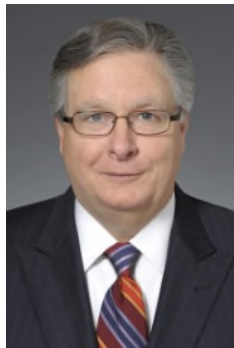
mdwyer@clarkhill.com



Michael Nowlan

313.965.8666

mnowlan@clarkhill.com



Kevin Williams

312.985.5907

kwilliams@clarkhill.com

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.

CLARK HILL