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FOREIGN INDEPENDENT CONTRACTORS NEED PROPER VISAS

Stringent, limiting requirements can make process burdensome

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The conundrum of engaging the services ▲ of the foreign independent contractor never ceases to frustrate U.S. companies. The usual scenario is: U.S. Company needs a consultant for a project. U.S. Company is introduced to the "perfect" consultant for its needs. However, the individual is foreign and in the U.S. as a visitor. Luckily, the project can be completed through a series of brief trips into the U.S.

Because the consultant isn't an "employee" and there is no obligation to complete a Form I-9, the question of obtaining U.S. work authorization never arises until about the consultant's third entry into the U.S. as a visitor within a brief period of time. Then a Customs and Border Protection officer probes the foreign independent contractor about the exact purpose of his visit. The foreign national answers honestly that he is fulfilling a consulting contract with U.S. Company ends up frantically calling its lawyer to report that its key contractor has been denied entry to the U.S. with instructions to not enter again unless he has a "work visa." Until the mess is straightened out, U.S. Company's project is on hold.

There is no magic solution to engaging the services of the foreign independent contractor. The few visa options have stringent and often limiting requirements which either preclude engaging the foreign independent contractor's services or make the engagement too burdensome. Therefore, the best way for U.S. companies to engage foreign independent contractors is to consider the available visa options before the engagement.

B-1 Business Visitor

It is important to understand what a B-l business or visa waiver visitor can and cannot do in the U.S. A B-1 visitor cannot engage in productive employment in the U.S. either as an employee or as an independent contractor. An employee of a foreign business

can enter on the B-1 to consult with a U.S. client for work that will be performed abroad.

For example, a computer software designer can enter the U.S. to consult with a U.S. company about its requirements for a new system and to examine its current hardware and network if the principal activity — the designing of new software — will be performed abroad.

The self-employed foreign national, however, will find entry difficult even for this permissible B-1 activity. In the eyes of CBP, the arrangement appears to be a circumvention of work authorization laws by paying a foreign individual in exchange for work, even when payment is made to a foreign account. Furthermore, in the independent contractor situation, the actual "work" often involves consulting, research or analysis that primarily takes place on U.S. soil. If the principal activity happens in the U.S. and the benefit is retained

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by the U.S. company, it will constitute unauthorized employment by a business visitor.

Foreign business heads who wish to expand their business by entering into contracts for services with U.S. companies often look to the L-1A Multinational Executive and Manager visa. This might be a viable option. A crucial question is whether the foreign company will continue to operate while its business head is in the U.S. performing services. If the foreign office will be empty with its lights off, then the foreign business head does not have the existing foreign company needed for the L-1A.

In addition, even the foreign contractor with an existing foreign company must commit to establishing a new office in the U.S. with other employees to obtain an L-1A visa. Such a commitment is rarely justifiable economically unless the foreign contractor is confident of obtaining multiple contracts with U.S. companies.

E Treaty-Traders

Some countries have entered into reciprocal treaties with the U.S. allowing their

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foreign nationals to come into the U.S. to conduct trade or oversee a U.S. investment, including the trade or investment of a service. To be eligible for an E visa, it must first be determined whether the U.S. has an applicable treaty with the foreign national's home country. For example, the U.S. has no such treaties with India.

Therefore, Indian foreign nationals cannot obtain an E visa. Second, the trade or investment must be "substantial," as in substantial trade between the two countries or a substantial investment risking the investor's own resources. In the case of the independent contractor as a treaty-trader, it is often hard to show that contracting work results in an exchange of services between two countries.

As to an independent contractor treatyinvestor, the foreign national would have to invest personal funds into an actual U.S. business rather than engage in a brief consulting relationship. The business investment is further expected to create U.S. jobs, rather than support just the foreign independent contractor.

TN Visas

Canadian and Mexican independent contractors have more options available through the TN visa under the North American Free Trade Agreement. Under NAFTA, Canadian and Mexican professionals can engage in self-employment under a prearranged service contract with a U.S. company for a work product generated in the U.S.

In these circumstances, the foreign national must be in a profession that qualifies for the TN, and the TN visa holder may not establish a business in the U.S. in which he is self-employed. NAFTA also expanded

the scope of allowable B-1 business visitor activities for Canadian and Mexican nationals. However, even under NAFTA the self-employed business visitor must be paid from an overseas source, and the principal activity must be predominantly performed abroad.

Unless the proposed independent contractor meets the high "extraordinary ability" O-visa standards or U.S. Company wishes to pursue employment rather than a contractual relationship, these are the only visa options available to foreign contractors. None lend themselves to the traditional "independent contractor" relationship envisioned by U.S. companies. It is best to consider these limited options before entering into a contractual relationship rather than receive the unexpected news during a crucial project that the key foreign contractor can no longer gain entry into the U.S.