

CANADIAN AND US IMMIGRATION OPTIONS FOR CROSS-BORDER TRANSFER OF WORKERS

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The Need of a Work Permit or Visa

Anyone who is neither a Canadian citizen nor a permanent resident requires a work permit to work in Canada, and anyone who is not a U.S. citizen or a Green Card holder requires a work visa to work in the U.S. Those who engage in unauthorized employment accumulate unlawful presence from the time of violating the conditions of their immigration status. As a consequence, they are deportable and subject to allegations of misrepresentation or fraud perpetrated to achieve an immigration benefit, and the employers who hire them are subject to administrative sanctions and fines. In both Canada and the U.S., the violating workers risk immediate detention and subsequent refusals of work permit and visa applications as well as future denials, which may be permanent, of entry to the country.

Employers and Employees Need Sufficient Information, Documentation and Immigration Advice

Most employers and employees are unfamiliar with immigration laws governing the work-related permits and visas. They need adequate information and advice in order to plan and implement the cross border movement of management and skilled personnel in any integrated international enterprise. Employees need sufficient understanding and documentation each time

they encounter consular or immigration enforcement officials at a Port of Entry (“POE”) of the host country. This happens at the time they apply for a visa and work permit at a consulate or embassy (if they are not visa exempt), at the time they make their initial entry through a POE, each time they travel in the employment-related immigration status, and each time they subsequently renew or change their permits or visas. Furthermore, employees who travel with their families need the appropriate visas or permits to allow their dependants to work or study in the host country. They also require advice on the development of a comprehensive immigration strategy if they contemplate applying for permanent residence in the host country.

Undetected Violations in the Past No Excuse for Present and Future Violations – It is the Employees Who Pay the Ultimate Price

The fact that other employees of the employer may have successfully traveled in the past in similar circumstances without complete required documentation is no excuse not to supply. Also, the fact that other employees have engaged in the past in impermissible work overseas for the same employer with impunity does not justify exposing other employees to similar risks. This is especially true in the toughening reality of immigration enforcement in today’s security conscious world. Situations of impermissible work happen most often when employees are asked to travel as business visitors or tourists to engage in short term work on behalf of the employer (the “project” or “fix the problem” situations) and no work permit or visa applications are made.

Both employers and employees must appreciate the fact that it is the employees who will pay the ultimate price if they are

found to have perpetrated immigration misrepresentation or fraud. If detected, such violations and any inadmissibility determinations that follow will be entered into the employee's personal records and they will adversely affect their personal lives in the future. Employees, therefore, are the most vulnerable party in this situation and they should demand from their employers and receive adequate immigration advice.

The Immigration Meaning of *Work*

At the latest American Immigration Lawyers' Association's conference in June 2006, panelists dealing with border crossings and work visas and the conference attendees agreed that the word *work* is a four-letter word when used in an immigration context and that it should be uttered as infrequently as possible when dealing with immigration officials, especially at a POE. Those who travel not to work as well as those traveling to work better have proper and complete documentation to convince the immigration officers that they are telling the truth and that they indeed qualify in the immigration category they are claiming to receive.

Immigration practitioners also agreed that it is better to err on the side of over-evidencing the case for an immigration officer than to risk border detentions, interrogation hassles and travel delays for their clients. Especially since today no immigration officer on either side of the border will take a chance of letting in a person who lacks the proper personal and work-related documentation or who is not prepared to recite the particulars of an assignment he or she is going to engage in.

Canadian immigration law defines *work* as "activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian

citizens or permanent residents in the Canadian labour market." The meaning of *work* in the U.S. immigration law is similar. As a threshold matter, then, anyone who engages in such activities in Canada and is not a Canadian citizen or a permanent resident requires a work permit, and anyone who engages in such activities in the U.S. and is not a U.S. citizen or a Green Card holder requires a work visa.

Work Permit or Work Visa Exempt Categories

Foreign nationals may come to Canada or the U.S. to perform some work-type activities without a work permit or work visa, if they qualify as *business visitors* or if their occupation or visitor classification is exempt from work permit or work visa requirement for policy or reciprocity reasons. The exempt classifications include the following: diplomats and official representatives of other countries; family members of accredited diplomats; members of armed forces; students (in most cases only on campus); performing artists and their essential supporting staff; teams, athletes and coaches (coming to compete); news reporters; public speakers; organizers and administrative staff organizing meetings or conventions; clergy; judges and referees; examiners and evaluators; expert witnesses and investigators; health-care students (only for clinical clerkships or short-term work); civil aviation and accident or incident inspectors; crew members working on foreign vehicles (for example, flight attendants and shipping crew); and emergency service providers. As the work permit or work visa exempt cases usually present little immigration difficulty when properly documented and constitute only a small fraction of border crossings, they are not discussed here. Instead, we focus on a much more common case of a *business*

visitor, which is subject to frequent POE refusals.

Business Visitors

In Canada, the *Immigration and Refugee Protection Regulations* (“IRPR”) define a *business visitor* as “a foreign national ... who seeks to engage in international business activities in Canada without directly entering the Canadian labour market” and list the following specific cases of *business visitors*:

- (1) Foreign nationals purchasing Canadian goods or services for a foreign business or government, or receiving training or familiarization in respect of such goods or services;
- (2) Foreign nationals receiving or giving training within a Canadian parent or subsidiary of the corporation that employs them outside Canada, if any production of goods or services that results from the training is incidental; and
- (3) Foreign nationals representing a foreign business or government for the purpose of selling goods for that business or government, if the foreign national is not engaged in making sales to the general public in Canada.

In addition, the *IRPR* establish two basic threshold factors that each *business visitor* must satisfy:

- (1) The visitor’s primary source of remuneration for the business activities must come from outside Canada; and
- (2) The visitor’s principal place of business and actual place of accrual of profits must remain predominately outside Canada.

In the U.S., the *Immigration and Nationality Act* defines *business visitor* as

“an alien (other than one coming for the purpose of study or performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocations) having a residence in a foreign country, which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure.” The *U.S. Code of Federal Regulations* (“CFR”) and the U.S. Department of State’s *Foreign Affairs Manual* (“FAM”) supply further elements to this definition and require that an individual:

- (1) Intend to leave the United States at the end of the temporary stay;
- (2) Have permission to enter a foreign country at the end of the stay;
- (3) Have made adequate financial arrangements to carry out the purpose of the visit and then to depart the United States;
- (4) Intend to maintain a foreign residence;
- (5) Enter the United States for a period of specifically limited duration; and
- (6) Seek admission solely to engage in legitimate activities relating to business.

The *CFR* also defines the term *business* in the context of *business visitors* as “conventions, conferences, consultations and other legitimate activities of a commercial or professional nature” and specifically excludes from permissible activities by a *business visitor* “local employment or labor for hire.” Finally, the *FAM* and some U.S. case law assist by listing more examples of legitimate activities for *business visitors*, as follows:

- (1) Engage in commercial transactions that do not involve gainful employment in the U.S.;
- (2) Negotiate contracts;
- (3) Consult with business associates;

- (4) Litigate;
- (5) Participate in scientific, educational, professional or business conventions, conferences, or seminars; or
- (6) Undertake independent research.

With respect to Canadian, U.S. or Mexican citizens the *North American Free Trade Agreement* (“NAFTA”) is more generous than the general *business visitor* category in terms of the specifically permissible activities. In *NAFTA business visitors* are those who:

- (1) Attend business meetings;
- (2) Investigate business opportunities;
- (3) Purchase property;
- (4) Research and design, including technical, scientific, and statistical research;
- (5) Work in growth, manufacturing, and production, including harvest owners supervising harvesting crews and purchasing and production management personnel conducting commercial transactions;
- (6) Work in marketing, including market researchers and analysts and trade fair and promotional personnel attending trade conventions;
- (7) Work in sales, including sales representatives and agents taking orders and negotiating contracts for goods or services, but not delivering goods or providing services; buyers purchasing for an enterprise located in the other treaty country;
- (8) Work as distribution personnel, including transportation operators delivering to, or loading and transporting from one treaty country to another, with no intermediate loading or delivery within the same country; customs brokers performing brokerage duties associated with the export of goods; and

- (9) Provide after-sales service, including installers, repair and maintenance personnel, and supervisors possessing specialized knowledge essential to the seller's contractual obligation, performing services or training workers to perform such services pursuant to a warranty or other service contract incidental to the sale of commercial or industrial equipment or machinery, including computer software purchased from an enterprise located outside the country, during the life of the warranty or service agreement.

Special Rules for the *After Sales Service* Category

In addition to the general requirements applicable to all *business visitors*, those coming as the *after sales service* personnel are required to have *specialized knowledge* in the area of service they provide and must produce a contract which legally obligates their company to provide such service. *Specialized knowledge* in this context, however, should not be confused with *specialized knowledge* for the intra-company transferee categories discussed later. The first type of *knowledge* can be general in nature (for example, a crew of technicians coming to do a general service of a turbine), whereas the second type must be knowledge that is process or product specific, especially as it applies to that particular employer.

Special Rules for Truck Drivers

Most truck drivers qualify as “crew” and are exempt from the requirement of a work permit. However, they are also subject to the general or, in case of the *NAFTA* nationals, the *NAFTA* requirements for *business visitors*. Furthermore, they have been singled out for special regulatory treatment with respect to how they can handle their cargo and the types of pick ups and

deliveries they can legally make. They are as follows:

- (1) The goods must be entering or leaving the host country, and remain in the stream of international commerce;
- (2) A driver bringing goods from one country may transport those goods to one or several locations in the other country, and may pick up goods from one or several locations in that country for delivery to the country he or she came from, but the driver may not load, haul, or deliver a cargo that is both picked up and dropped off at a destination within the same country; and
- (3) The entry of the driver must be for the purpose of an international movement of goods.

Based on the foregoing, one realizes that clear examples of *business visitor* activities which can be backed up by making a specific reference to the lists from the acts, regulations, and operational manuals in both Canada and the U.S. are limited. As a consequence, when the proposed activities cannot be found on the list, making the fresh case to the immigration officer and presenting sufficient evidence is essential for success. Given the amount of discretion and subjectivity vested in the officer, this may be difficult.

Work Permits and Visas

When work in the host country is planned, a work permit or work visa is necessary. This necessitates the selection of an appropriate immigration category based on the specific circumstances of the employee and the employer. The interplay between the minimum required information and the possible work permit or visa category is illustrated by the attached tables for both Canada and the U.S. The tables list the basic categories of information an

immigration lawyer will require from the worker or his or her Human Resources (“HR”) person. Then, the tables cross-reference the categories with the types of permits and visas and simplify the importance of each category with respect to the particular permit or visa on the scale ranging from minimally relevant, through helpful, somewhat relevant to essential. This classification may assist HR personnel in the planning of collection of data before contacting an immigration lawyer about the case and in organizing the data in the file.

Canadian Work Permits with a Service Canada Labour Market Opinion

As a default rule, in order for a foreign worker to receive a work permit to work in Canada, his or her prospective employer must obtain a positive labour market opinion (“LMO”) from Service Canada (“SC”) (previously Human Resources and Skills Development Canada) with respect to the position (the Service Canada labour market opinion is hereinafter referred to as SC LMO). If a foreign worker requires a work permit as well as a labour market opinion and he or she appears at a POE without the opinion, the worker is inadmissible.

Typically, in order obtain a positive SC LMO the employer needs to advertise the position and document that it was unable to recruit a qualifying Canadian or permanent resident. The advertising and recruiting requirement is onerous and employers are looking for exemptions, especially when they have a particular foreign worker in mind who satisfies their needs. In such a case, in order to dispense with the advertising requirement, the employer must convince SC that the employment of this particular foreign worker will have “neutral or positive impact on Canadian labour market” by addressing the following issues:

- (1) Whether the employment of the foreign national is likely to result in direct job creation or job retention for Canadians;
- (2) Whether the employment of the foreign national is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadians;
- (3) Whether the employment of the foreign national is likely to fill a labour shortage;
- (4) Whether the wages offered to the foreign national are consistent with the prevailing wage rate for the occupation and whether the working conditions meet generally accepted Canadian standards;
- (5) Whether the employer has made, or has agreed to make, reasonable efforts to hire or train Canadians; and
- (6) Whether the employment of the foreign national is likely to adversely affect the settlement of any labour dispute in progress.

The SC route of applying for a work permit is onerous, time consuming (it may take up to a month for a labour market opinion to be issued) and sometimes unpredictable. Employers press immigration lawyers to find an exemption from this requirement whenever possible.

U.S. Work Visas with a Labor Condition Application (H-1B)

The closest U.S. equivalent to a Canadian work permit with an SC LMO requirement is visa H-1B. The H-1B visa is one of the most commonly used by professionals coming to work in the U.S. from all over the world. However, it is subject to the yearly caps, currently at 65,000. The H-1B visa is given to workers in occupations that require specialized knowledge and education at least at a bachelor's level and it requires the preparation by the employer of a Labor

Condition Application ("LCA") and filing it with the U.S. Department of Labor as well as the filing of a formal petition on the employee's behalf with the U.S. Citizenship and Immigration Service ("USCIS"). Due to the yearly caps, the applications for H-1B visas must be submitted as soon as possible after April 1 each year despite the fact that the workers cannot start work until October 1 (the start of the U.S. federal fiscal year). The cap for federal fiscal year 2007 has already been reached.

Intra-company Transferees

There are several work permit and visa categories under which foreign workers may apply without first obtaining an SC LMO in Canada or satisfying the LCA requirement in the U.S. In that respect, strong preference exists to facilitate transfer of professionals, executives, managers and specialized knowledge personnel between the affiliated companies – the so-called intra-company transferee categories. The most important of those categories in Canada are:

- (1) The general intra-company transferee category and the intra-company transferee under the *General Agreement on Trade in Services* ("GATS"); and
- (2) The *NAFTA* intra-company transferee category.

The intra-company transferee categories in the U.S. are in the form of visas:

- (1) The L-1A visa (senior executives and managers) and
- (2) The L-1B visa (specialized knowledge personnel).

It must be noted that in addition to the required forms (and formal petitions from an employer in the U.S.) applications in all intra-company transferee categories – inbound and outbound – require a detailed

written submission presenting the case. The submission must at a minimum include the following:

- (1) Explanation of the legal relationship between the involved affiliated companies;
- (2) Explanation and sufficient documentation that both affiliated companies satisfy the requirements of qualifying subsisting international businesses (for example, “doing business,” “regularly, systematically and continuously providing goods or services” etc.);
- (3) Documentation regarding the foreign worker’s (a) practical qualifications, (b) work experience, (c) education (including educational equivalency reports, if necessary); and
- (4) Explanation how the foreign worker operates within the structures of both affiliated businesses and how he or she “fits” the new position.

Canadian Intra-company Transferees

The first intra-company transferee category in Canada facilitates the transfer of senior executives and managers as well as specialized knowledge personnel from all over the world who have been employed for at least 1 year within the last 3-year period by an affiliate of a Canadian business. Although it is distinguished in the *IRPR* from the intra-company transferee category established pursuant to the *GATS*, these two categories are very similar and can be discussed together. In both categories, the work permits for senior managers and executives can be issued for up to 3 years in duration with the possibility of renewals (subject to the continuing requirement that the applicant remain temporarily in the country), and the permits for *specialized knowledge* personnel can be issued in one year increments for up to 3 years with no

possibility of extensions beyond 3 years. In contrast to the similar category under *NAFTA* (discussed below), the definition of a *senior manager* and *executive* in the general and the *GATS* categories excludes most middle-level managers. The meaning of *specialized knowledge*, however, is similar and extends to knowledge specific to the company’s products or processes.

The second intra-company transferee category of work permit applications in Canada is for the *NAFTA* executives, managers and specialized knowledge personnel. This category facilitates transfers of U.S. or Mexican citizens who have been employed by an affiliate of a Canadian business located in the U.S. or Mexico for at least one year within the 3-year period immediately preceding the application. The U.S. and Mexican executives and managers may use this category for up to 7 years, the *specialized knowledge* personnel for up to 5 years. Otherwise, this category is similar to the general and *GATS* category, with the difference in the definition of a *senior manager* and *executive* noted above.

U.S. Intra-company Transferees

In the U.S., the most important LCA exempt visas for intra-company transferees are the L-1A visas for senior executives and managers and the L-1B visas for specialized knowledge personnel. Like all intra-company transferee visas and permits, in order to qualify, the L visa worker has to have been employed by an affiliate of a U.S. business for at least 1 year within the 3-year period preceding the application. Also, similarly to the rules for intra-company transferees under *NAFTA*, all L visas (that is, all visas irrespectively of the country the worker is coming from) are subject to 7-year (senior executives and managers) and 5-year (specialized knowledge personnel) caps.

The L-1A and the L-1B visas can be granted again for the same duration periods only after the worker has waited for one year outside the U.S. with one significant exception, namely, they can be used consecutively for longer periods of time than the normal 7 or 5-year caps when the worker has not resided in the U.S. for longer than half a year each year he held the visa (in which cases the visas can, theoretically, be extended indefinitely, subject to strict evidentiary requirements). Similarly to the H-1B visas, the L-1A and the L-1B visa applications require filing and approval by the *USCIS* of formal petition by the employer on behalf of the employee.

The L visas (usually the L-1As) can be also used to transfer employees to open new business operations in the U.S., that is, when the U.S. affiliate company does not yet exist but the executive, manager or employee with specialized knowledge of a prospective foreign affiliate creating it has to be transferred in order to set up the prospective affiliate's operations. Extensive evidentiary and legal submissions are required in such cases.

One should stress that applications in the L-1A and the L-1B visa categories are subject to highly scrutinized processing by *USCIS* and the payment of a US\$500 fraud detection and prevention fee to cover the cost of such scrutinized processing. Also, given the importance of this category, expedited processing of these applications (within 2 weeks) is possible upon payment of US\$1,000 premium processing fee.

Canadian NAFTA Work Permits and U.S. NAFTA Work Visas for Professionals (TN)

In addition to the *NAFTA* intra-company transferees, another group of work permits that are SC LMO and LCA exempt are for

the *NAFTA* professionals. They are available to workers whose education is at least at a bachelor's level (with several exceptions, most notably for management consultants, scientific technicians and computer systems specialists) and whose job-related qualifications and prospective occupation fall into one of over 60 categories listed in the treaty. Work permits in the TN professionals' category are for 1 year in duration and they can be renewed at one-year increments. Although the law does not prohibit consecutive renewals to be continued indefinitely, after several renewals the worker will be denied a visa on the grounds that multiple sequential renewals indicate his or her intention to reside in the host country permanently, which is contrary to the rules governing the *NAFTA* TN status.

The "Significant Benefit to Canada" Category

Finally, one more SC LMO exempt category is worth mentioning not because of its wide use but rather because of the potential it gives in appropriate cases – the so-called "significant benefit to Canada" category. This exemption has been designed to facilitate the employment of foreign nationals whose employment will "create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents." Because of this vague definition, most employers shy away from using this category. It nevertheless can be very useful in cases when clear benefits to Canada can be documented, which usually happens in case of individuals who are widely renowned in their profession, trade or art.

EXAMPLES

1. *A football coach from XYZ University in the U.S. is entering Canada to*

The coach very likely will be considered a volunteer and – as he receives no remuneration and will perform his professional activities only for a very short time – his coaching activities will unlikely constitute work. He can enter as business visitor without a work permit. The decision would very likely be different if the period of his stay were for several weeks or months. In that case, at some point he would start competing with Canadians in the Canadian marketplace and need a work permit.

Please note that, historically, Canadian immigration authorities have been more lenient with respect to accepting volunteering activities as being outside the scope of the definition of *work* than their U.S. counterparts. The same facts could very likely raise serious suspicions on the part U.S. authorities that the coach would be paid in the U.S. in some fashion and strong evidence to the contrary would be in order.

2. *An Australian citizen is coming to Canada to do research for a charitable organization. He will not be paid in Canada or Australia but will receive educational credit at his Australian university. Does this person require a work permit or is he considered a "volunteer" who does not enter the Canadian labour market?*

In this case, CIC had advised that if the position within the Canadian charitable organization constitutes a “valuable learning experience, or an internship that a Canadian student might benefit from”, then it is work

and SC LMO is required. A different result would occur if the student conducted this research for his own benefit and without taking a position within that organization (i.e. making it available to a Canadian citizen or resident).

3. *A foreign national who is a student in Canada on a valid Study Permit is working on the internet for a U.S.-based company and periodically receives cheques for his work from the U.S. Does he need a Work Permit?*

No. His activities do not fall under the immigration category of *work* as the student is engaging in activity which does not take away any opportunities from Canadians to gain employment or experience in the Canadian workplace. Furthermore, his employer is outside Canada and he is remunerated from outside Canada.

4. *Truck drivers who are U.S. citizens are entering Canada to move a Canadian citizen into the US. Do they require a work permit? If so, are they SC LMO exempt? Can they load the cargo in Canada?*

The truck drivers most likely qualify as *business visitors* and do not require a work permit. First, they seem to be engaged primarily in the international transport of cargo. Second, they do not pick up and deliver from one location to another within Canada. Third, although, in general, truck drivers should not become involved in the loading and unloading of their cargo, there are exceptions when drivers (1) have expertise in the handling of specific loads, (2) do it only occasionally, (3) do it in a non-warehouse situation, and (4) when no other assistance is available. The exceptions seem to be applicable in this case. Should the factual circumstances be different, the

drivers would require a work permit and an SC LMO.

5. *A Canadian driver is taking a shipment from Canada for delivery to a point in the U.S. The dispatcher has been notified of a shipment destined to Canada that is located in another state. May the driver take an empty trailer (deadhead) from the delivery point to the other state to pick up the shipment and deliver it to Canada?*

The Custom and Border Protection's ("CBP") response in this case was that "the driver may deadhead a trailer from one location to another within the U.S. provided the deadhead trailer is either the one the driver came in with or the one he or she is departing with." The driver, however, "may not haul an empty trailer from one location to drop it off at another location."

6. *May a foreign driver taking a shipment from the U.S. to Canada also take U.S. merchandise destined to another point in the U.S. since it is on the way?*

No. This would be clearly a case of delivering goods from one point in the U.S. to another point in the U.S. which the foreign driver cannot do.

7. *Great Canadian Windpower Inc. is attempting to make sales in the U.S. It has a designated salesman in its Mississauga office who calls on prospective customers in the U.S. Every month or so he travels and makes visits to prospective customers from New York to California. He remains on the payroll of the Canadian corporation and lives in Toronto. In the U.S., he stays in hotels and sleeps on airplanes.*

The salesman almost certainly qualifies as *business visitor*, assuming that he is not making any deliveries or sales of Canadian products while in the U.S.

8. *Supersoft.com (Canada) Inc. wants to improve its Canadian sales performance. It has decided to transfer a sales manager from its parent company in Des Moines, Iowa to take charge of the Canadian sales force. He will be based in the office in Mississauga.*

(1) If the sales manager is (a) a U.S. or Mexican citizen, (b) his managerial capacity is well-documented, and (c) he has sufficient length of employment with the parent company in the U.S. (i.e., 1 year out of the last 3), he can be classified as *NAFTA* intra-company transferee.

(2) If he is not a U.S. or Mexican citizen, he should qualify in the regular intra-company transferee category if he satisfies the above conditions.

9. *Canadian Primitives Inc. is expanding its chain of retail outlets and has hired a New York consultant to review its store location strategy and marketing programs. The consultant will recommend a new strategic plan. The consultant will spend several weeks with the company in Canada and will be paid on an hourly-based fee, plus a completion fee. A final report will be delivered in four months time.*

(1) If the consultant is a U.S. or Mexican citizen and possesses professional credentials in support of his role as consultant (i.e., credentials relating to the consulting he or she will be doing), he or she can be classified as a *NAFTA* professional.

- (2) If the consultant is a U.S. or Mexican citizen but does not possess adequate professional credentials, he can still be classified as *NAFTA* professional in the management consultant category, if he can document at least 5 years of experience as consultant in the line of business or closely related to the one he will be consulting about.
- (3) If the consultant is not a U.S. or Mexican citizen, a Work Permit with SC LMO will be required.

Note that since the consultant has been just hired by the U.S. business, he probably does not qualify as intra-company transferee in the *specialized knowledge* category as he does not have the requisite 1-year of employment.

10. Great Canadian Windpower Inc. has made a breakthrough sale of its proprietary wind generators to a small municipality in upstate Ohio. It will send its chief engineer and two technicians to Ohio for three months to do the installation and commissioning of the facility. It will rent an apartment for them to live in. They will continue to be paid their regular salaries. They will hire local contractors to build foundations and to provide crane services.

The engineer and the technicians probably qualify as *business visitors* in the *after-sales service* category, but they cannot hire or manage personnel. Such personnel must be hired by the city or the “facility” (whatever its business structure).

We need more information in this case, at least the following:

- (1) Do the employees possess specialized knowledge of company’s products, systems, procedures etc.?
- (2) Is the U.S. assignment to perform after-sales services? If not, we have a problem. Possible way out: third party service, but we would need a specific contract to establish such obligations.
- (3) What are the employees’ specific duties in the U.S.?

Also ...

- (4) Will they be performing any hands-on building or construction? If so, they need a work visa, which will be hard to get for these jobs. If not, they may supervise the installation, initial maintenance, repair the generators, or even train workers to perform these services, but not more.

11. Encouraged by this success, Great Canadian Windpower Inc. decides to set up a sales office in Chicago, famous as a windy city. Initially, Mary Brown, a 50% shareholder of Great Canadian Windpower Inc., will be the only person in the Chicago office. She will remain on the payroll of the Canadian corporation and spend her weekends and every second week (together with her rather considerable vacations) in Canada. Her children will remain in Cabbagetown with her partner. Mary says "it will be nice to get away from them for awhile".

- (1) Mary may qualify for L-1A visa to set up a new office, if she satisfies the “senior executive” or “managerial” capacity tests and has worked with Great Canadian Windpower Inc. for at least 1 year during the last 3.

(2) If not, she may qualify for L-1B visa to set up a new office, if she possesses specialized knowledge about the company in order to get the office started.

We need more information in this case, at least the following:

- (1) What is Mary's education?
- (2) What is Mary's current job title and position with Great Canadian Windpower Inc.?
- (3) Has she held any executive or managerial position with Canadian Windpower Inc.?
- (4) Does Mary possess any specific qualifications or specialized knowledge of company's products and systems?
- (5) What are Mary's prospective duties in the U.S.?
- (6) What is Mary's salary in Canada?
- (7) For how long is Mary needed in the U.S.?

12. Surprisingly, the sales office worked and significant sales prospects were developed. The other shareholders of Great Canadian Windpower Inc. have decided that Mary will have to come back to the kids and they want to send one of their best salesmen to live in Chicago to manage the U.S. marketing operations. The tax lawyers have now got into the act and told Great Canadian Windpower Inc. that they should form a U.S. subsidiary. Their manager will be immediately hiring full time staff and additional sales representatives.

(1) The salesmen may qualify for L-1A intra-company transferee visa, if they qualify as managers and have worked with Great Canadian Windpower Inc. for at least 1 year during the last 3;

(2) The salesmen may qualify for L-1B intra-company transferee visa, if they do not qualify as managers, but have specialized knowledge of company's products or systems and have worked with Great Canadian Windpower Inc. for at least 1 year during the last 3.

FURTHER ASSISTANCE

If any of your employer or employee clients should need assistance in navigating the thickets of immigration rules affecting employee movement across the Canada/U.S. border please call on us.