



**FOSTERQUAN, LLP**

THE COMPREHENSIVE IMMIGRATION LAW FIRM

## Appropriate Visa Status for Employees Traveling and Working Abroad

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**FosterQuan, LLP** has focused on immigration law continuously for 40 years through its predecessor organizations, Tindall & Foster, P.C. and Quan, Burdette, & Perez, P.C., which merged in 2009. Our co-chairmen, Mr. Charles C. Foster and Mr. Gordon Quan, are two of the most respected immigration attorneys in the United States. We are one of the very first law firms in the United States to have specifically designated immigration law as its area of expertise, and we are a pioneer in developing and managing a centralized Global practice with U.S. business practices, customer service, and compliance standards. Today we are one of the largest immigration law firms in the world.

FosterQuan is also proud to be an award-winning, certified minority-owned business. We are nominated for a 2012 Expatriate Management and Mobility Award (EMMA) in the category of Best Immigration Provider, and are Tier 1-rated by Chambers and AV-rated by Martindale-Hubbell.

**Charles C. Foster** is Co-Chairman of FosterQuan, LLP (formerly Tindall & Foster, P.C.), one of the largest global immigration law firms. He is also the honorary Consul General of the Kingdom of Thailand. A native of Galveston, Mr. Foster received his Bachelors Degree from the University of Texas and his Juris Doctorate from the University of Texas School of Law. Mr. Foster serves as the founding Chairman of the State Bar of Texas Immigration and Nationality Law Section and a Board member and is past national President of the American Immigration Lawyers Association. During the 2000 Presidential Campaign, Mr. Foster served as the principal advisor to President Bush on U. S. immigration policy and was an advisor on immigration policy issues to President Bush in the 2004 campaign and President Barack Obama in the 2008 campaign. He is a recipient of 4 Royal decorations from His Majesty the King of Thailand; he received the 2000 Distinguished Friends of China Award; the 1996 International Service Award of the Houston Junior Chamber of Commerce; was the 1998 Honoree of the American Immigration Law Foundation for Excellence in the Practice of Immigration Law; and the recipient of the 2007 American Jewish Committee Institute of Human Relations Award. He was featured in the film Mao's Last Dancer. He was designated a "Texas Super Lawyer" 2003-2012 by Texas Monthly magazine; the "Top Notch Lawyer in Immigration" in the Texas Lawyer "Go To Lawyers Guide" each year published, as well as Who's Who In American Law and the #1 Ranked Immigration Lawyer in Texas by Chambers USA 2006-2011.

**Ryan C. Chargois** is the Managing Attorney of FosterQuan's Global Section. He advises corporations on expatriate transfers, complex multi-jurisdictional scenarios, large-scale international project staffing, and effective business visitor strategies. He has particular expertise in devising immigration strategy for short-term technical assignments and international services contracts, and in helping businesses expand into new countries. He manages the firm's network of providers and oversees escalations and performance metrics. He is a frequent speaker on global immigration matters at HR, legal, and international business and investor conferences.

Mr. Chargois received his undergraduate degree in the Plan II Honors Program and French from the University of Texas at Austin, and spent his final year abroad at the Université d'Aix-Marseille in Aix-en-Provence, France. He received his law degree from the University of Texas at Austin, and completed his legal studies in Paris, where he received an LL.M. in French and European Law from the Université de Paris I (Panthéon-Sorbonne). He is fluent in English and French.

# SUMMARY

## **Appropriate Visa Status for Employees Traveling and Working Abroad**

Like many industries, the hospitality industry has become increasingly international in scope. Executives need to travel abroad for sales meetings or to conclude negotiations regarding a new hotel in a foreign country. A chef's expertise and skills may be needed on location in affiliate hotels around the globe. Interns may take part in short-term assignments at a hotel abroad to gain first-hand exposure to different cultures. Or a manager may take a long-term expatriate assignment abroad to gain managerial experience and expertise.

With this increase in mobility, immigration concerns have shifted from a focus on ensuring that employees hired in the US have the correct work status, to certifying that US and non-US employees have the correct entry and work status when they travel abroad.

Mobile employees traveling and working abroad require appropriate immigration status that will provide for both their entry into each destination country, and their permission to engage in their intended business or work related activities. Failure to procure the appropriate status creates high risks of fines to the employer and deportation or refusal of entry for the individual employee. With heightened concerns regarding labor market regulation, traveling under the right visa has become a complex matter often requiring expert outside counsel.

### **Penalties for Non-Compliance: It's Not Worth the Risk**

Penalties are levied against both the employee and the employer that will have detrimental effects on the employer's ability to send employees abroad and the employee's ability to travel.

#### Potential Risks to the Employee

- a. Refusal of entry at the border: Without the proper visa, an employee and any accompanying dependents may be refused entry at the border. Future visa applications may require disclosure of such instances, which may negatively impact a future visa approval.
- b. Deportation of individual: If an individual overstays or performs activities not permitted by their immigration status, the employee and any accompanying dependents may be forcibly removed from the country. Future visa applications require disclosure of deportation, which may negatively impact the adjudication process.
- c. Fines or Incarceration for the individual: The employee may be fined heavily or imprisoned for violating immigration laws or anti-corruption laws domestically or internationally.

#### Potential Risks to the Employer

- a. Fines levied against the company: A company with a foreign national working illegally on its premises or for its benefit may face millions of dollars in fines.

- b. Fines levied against the company's customer: A company may place an international corporate customer or affiliate at risk of fines by not ensuring its employees have the correct immigration status when they enter a foreign country.
- c. Damaged reputation for the company: Even if fines or imprisonment is imposed the sheer accusation of malfeasance may tarnish a company's reputation and ability to function.

### Anti-Corruption Legislation

As the demand for international projects continues to increase, countries have enacted legislation to prevent or stem the use of corrupt practices to obtain work permits or visas. By its terms, the Foreign Corrupt Practices Act (FCPA) applies to the worldwide business activities of many U.S. corporations. A major source of risk to U.S. companies is the provision of the FCPA that allows U.S. companies, U.S. citizens, and residents of the United States to be held liable for improper payments made by non-employee third parties, even payments of which they may be unaware. These provisions apply without regard to the nationality of the person, and in recent cases, non-US persons have been extradited to the United States to face FCPA charges for corrupt acts committed outside of the US. National anti-corruption laws, such as the United Kingdom's Anti-Bribery Act and the FCPA, that reach activities that have not occurred within the physical boundaries of the enacting country, evidence a lack of tolerance for the use of "fixers" who take a "by any means necessary" approach to obtaining work permits and visas.

### **Key Immigration Concepts**

1. Visa Waiver Travel does not Equal Unrestricted Activity: Because of treaties and reciprocity agreements between countries, individuals of some nationalities do not require visas to enter a particular foreign country. Permission to enter visa waiver, however, does not automatically permit the individual to undertake any type of activity. Visa waiver entry usually only permits business visitor or tourist activities.
2. Work does not Equate to Employment: Employment with a foreign company clearly requires work authorization. However, a much broader range of activities, not directly related to foreign employment, is considered to be "work" for immigration regulations and would require prior authorization.
3. Immigration Status Needs to Permit the Intended Activity: If an employee is eligible to enter a country visa waiver in business visitor status, it is paramount to determine whether business visitor status will be sufficient for the employee to carry out the intended activities. If it does not, work authorization must be secured. Moreover, when an individual or an employer applies for work authorization from a foreign country, the application is usually granted based on the intended activities described in the application. Therefore, the application must be prepared in a manner to ensure that the work authorization granted permits the intended activities for the employee

4. **Methods Matter:** Because of national anti-corruption legislation such as the FCPA and UK Bribery Act, the manner in which a company procures immigration status for its employees may have an effect on the global organization.
5. **Characteristics of typical business visitor activities:** Though there is not exhaustive list of activities that constitute permissible business visitor activities, trips that meet the following are usually universally considered as such:
  - Brief entry (usually 90 days or less)
  - Attending meetings, either with colleagues of the same company or with potential business partners
  - Attending conferences or seminars
  - Signing contracts or attending board meetings
6. **Procurement of Work Authorization:** Employees must be vetted to make sure they qualify for one of the categories of workers that the government will allow to undertake work. Furthermore, an application must be filed with a government agency, which will decide whether the foreign national qualifies for employment.

### **Components of Immigration Compliance and Challenges to Compliance**

1. **The Decision Maker:** Foreign nationals in every country must be present in the correct immigration status that permits work, when needed. A company must determine who makes travel decisions and when work authorization is required. This determination often requires expert legal advice.
2. **Case Tracking:** Foreign nationals must maintain appropriate status so that they are present legally. A structured tracking system that consolidates information regarding status documents and expiration dates is crucial to ensure global compliance with national immigration laws.
3. **Anti-Corruption as a Matter of Policy:** Immigration status must be secured legally and in compliance with all anti-corruption legislation. To facilitate this many companies have internal anti-corruption policies. Global Immigration Compliance now rises to the level of the corporate compliance officer rather than remaining a local concern.

For a company with a global work force, we recommend that an anti-corruption policy be formulated and distributed for adherence by all domestic and foreign 3<sup>rd</sup> party service providers.

Because of the risks described above, companies need to ensure that they are following the immigration rules of other countries. However, from determining whether a work permit is required to starting the work permit or visa application process with enough lead time, many challenges frustrate efforts to comply with immigration laws.

### Business Visitor Status vs. Work Authorized Status

Rather than first asking whether the employee requires a visa to enter the destination country for 30 days, the first step in this process should be to determine whether business visitor status will be sufficient or if work authorization will be required. As described below, the answer to this question varies from country to country, so there is no cookie-cutter approach to this issue.

Canada, the United Kingdom, and China: In Canada, the United Kingdom, and China, an employee may conduct training in techniques and work practices on an intra-company basis while in business visitor status. As the employee will be travelling to a hotel that is the subsidiary of his US employer, business visitor status should be sufficient for the manager.

Brazil: Conducting training in Brazil is not allowed in business visitor status under any circumstances. Therefore, the manager must obtain work authorization in order to carry out the assignment.

Poland: US nationals may carry out work for 30 days over a 1 year period in business visitor status, which includes training. Some other nationalities, however, would not be afforded the same benefit and would require work authorization.

### Nationality Often Determines Whether a Visa is Required for Business Visits

Should business visitor status be sufficient for an assignment, the employee's nationality will then determine whether a visa must be obtained prior to travelling to the country.

Examples:

Norwegian national: Norwegian nationals do not require a visa for business visits to Poland, the UK, or China. They do not require a visa to Brazil for trips shorter than 90 days or to Canada for trips shorter than 6 months.

Mexican national: Mexican nationals require a visa to enter Brazil, the United Kingdom, China, and Canada for business purposes. However, Mexican nationals do not require a visa to enter Poland for a stay of less than 90 days for business purposes.

Indian national: Indian nationals require a visa prior to entering Canada, the United Kingdom, Brazil, Poland, and China for any purpose.

### Processing Time for Work Permit and Visa Applications May Require Considerable Lead Time

Obtaining a work permit or a visa may require a lead time of anywhere from 1 day to 6 months. Moreover, the processing times at consulates and government agencies may vary unexpectedly due to the local political climate or the agency's case load. Companies often underestimate lead time for application processing. Planning ahead is essential.

### Tailoring is Required for each Application, Which May Cause Additional Lead Time and Cost

As the above considerations demonstrate, each application in every country is unique. Different factors may cause additional lead time. For example, advertising or a test of the local

labor market may be required, adding a possible 2 – 10 weeks of additional lead time. The United Kingdom requires that biometrics be submitted, with lead time depending on the availability of an appointment. The local company may be required to have a specific registration or sponsor license in order to host the employees. An application for this corporate status may take months to obtain.

Countries such as Brazil and Poland require that certain documents be authenticated at a consulate or through the Apostille process, adding months of lead time. An FBI clearance which takes 4 – 12 weeks to complete may be required as a background check.

### **FosterQuan Recommendations for Global Immigration Compliance:**

We present the following recommendations to ensure compliance with immigration laws:

1. Plan ahead
2. Utilize an employee status tracking system
3. Consult qualified immigration counsel
4. Vet how decisions are made regarding work authorization
5. Evaluate the process of obtaining work authorization through company employees and 3<sup>rd</sup> party agents
6. Monitor Anti-Corruption Law compliance and training domestically and abroad.
7. Evaluate the procedure for verifying whether new hires have the appropriate work status domestically and in foreign offices.