Globalization, Technology, and Telecommuting: Does Where You Are Mean Anything Anymore?

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INTRODUCTION

The modern ability to travel so quickly and frequently and the ability to perform the components of work in such a mobile manner through electronic means have combined to challenge traditional notions about the location of work and the regulations governing places of work.

We carve out from this discussion the implications of travel from office locations and the roving from one worksite to another on the PERM process and on the acquisition and maintenance of H-1B, L-1, and B-1 status. We address a larger issue: if one's work is not related to where one is located while performing it, then where is one working, and where is one allowed to work?

Immigration law has come to embody interests in protecting work opportunity for Americans by prohibiting work by foreign persons who have not been given an immigration status that authorizes that work. The question is whether one's work can be so disconnected to one's physical location that its performance in a place cannot be seen as threatening to the work opportunities of others in the area one is occupying.

EXTRAPOLATION FROM PERSONAL EXPERIENCE

As attorneys we can all identify with the problem when we consider our own travel to foreign lands. We go for a conference or tourism, but while we travel, we carry with us a brief on which we have been working and some related notes and research (to connect the scenario to older modes) or more commonly these days we carry a mobile computer or some handheld device that increasingly is a computer with connections to vast stores of information through the internet and

private networks. Through these means many of us can be—to the chagrin of our family and friends and even ourselves—as productive in our underwear from a hotel room or in our swimsuit beside the resort pool as we could be in our offices in the United States. And the work needs to be done, so we do it from wherever we are.

Are we authorized to "work" in those places to which we travel as visitors? We don't go there in order to work, and our presence is not limiting the work opportunities of people in the country we are visiting. In fact, our presence is making work opportunities for the hotel and resort staff and the local restaurants. No country that is a tourist destination would dare to declare that workaholics on vacation make themselves deportable by preparing and sending emails and the documents we attach to them, because we would go somewhere else instead. The United States is one of the planet's most popular tourist destinations with a robust tourism economy, and as a nation we must hope that U.S. Customs & Border Protection (CBP) does not instruct its officers to interrogate travelers about whether they will be monitoring their business email while visiting here.

LIMITED U.S. RULES AND GUIDANCE

But there are essentially no written rules about this. True, the *Foreign Affairs Manual* (FAM), in discussing visitors for pleasure or business boldly states, "The policy of the U.S. Government is to facilitate and promote international travel and the free movement of people of all nationalities to the United States both for the cultural and social value to the world and for economic purposes."[1] And FAM notes on business visitors recognize as acceptable "business activities other than the performance of skilled or unskilled labor," for example a foreign tailor's taking of U.S. customer's measurements for suits to be manufactured and shipped from outside the United States, because the principal place of business and the actual place of accrual of profits from that activity is deemed to be in the foreign country.[2] The notes for 9 FAM 41.31 list a host of types of endeavors that tend to involve gainful activities that have a necessary nexus to places and people in the United States—e.g., having all kinds of meetings with people physically here, researching conditions here, competing in various games and competitions here, photographing scenes here, recording music in facilities here, training here—as long as the activities are not of a type that take away opportunities of Americans.

The FAM allows as a business visitor "[a]n artist coming to the United States to paint, sculpt, etc. who is not under contract with a U.S. employer and who does not intend to regularly sell such art-work in the United States."[3] That provision of course covers artists whose work is connected to a subject physically located in the United States, but it seems also to cover artists who produce art purely out of their imagination while they happen to be physically present in the United States. And why not?

The spirit of the FAM thus arguably authorizes a visitor to do any work at all as long as it is not connected to the United States in a way that draws employment opportunity away from U.S.

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[1] 9 FAM 41.31 N5.
[2] 9 FAM 41.31 N7.
[3] 9 FAM 41.31 N11.10.

workers or takes advantage of the U.S. market for the services performed. But it does not explicitly say this.

Most visitors and immigration inspectors have the good sense not to tell or ask about intended activities in the United States that constitute casual or even prolonged cybercommuting to a work location outside the country. But without clearer written guidance allowing such activity as part of visiting, those who make very productive use of their time in the United States over a significant time period take a slight risk of a future finding that they misrepresented their purposes when not disclosing their productive purposes in seeking admission to the country.

If one presents him– or herself as a visitor stating, "I can perform my work for my employer in Germany from anywhere, and for this five months I intend to do it from the beach house I have rented in the U.S.," will she be admitted? A thoughtful inspector, comprehending the whole and spirit of the rules, might confirm that her work does not draw on her physical presence or exploit the U.S. market (at least by her presence here), and admit her. But she should have the benefit of clearer rules when committing to the rent on the beach house.

One of the most common scenarios for extended cybercommuting is for spouses accompanying foreign nationals in work authorized status, such as those in H-4 or F-2 status. The accompanying spouse has been working in the home country, and now the "principal alien" has a long-term work or school-related purpose in the United States that has been sanctioned by the United States through issuance of H-1 or F-1 visa. The spouse consents to uproot himself for the good of the family, and his employer agrees to allow the spouse to cybercommute on a full-time basis from the United States. Is this allowed?

Even people authorized to work for U.S. employers may wish to perform "moonlight" cybercommuting work for a foreign employer. Is this allowed?

8 CFR §214.1(e) provides:

> Employment. A nonimmigrant in the United States in a class defined in section 101(a)(15)(B) of the Act as a temporary visitor for pleasure, or section 101(a)(15)(C) of the Act as an alien in transit through this country, may not engage in any employment. Any other nonimmigrant in the United States may not engage in any employment unless he has been accorded a nonimmigrant classification which authorizes employment or he has been granted permission to engage in employment in accordance with the provisions of this chapter. A nonimmigrant who is permitted to engage in employment may engage only in s uch employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status within the meaning of section 241(a)(1)(C) (i) of the Act.

Immigration & Nationality Act[4] §101 does not define employment, and the general regulatory definitions at 8 CFR § 1.2 do not either. The definitions of "hire," "employment," and related terms at 8 CFR §274a.1 for employer sanctions of unauthorized employment essentially define

[4] Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq.*).

employment as any service or labor performed by an individual for wages or other remuneration within the United States.

Perhaps these provisions should be amended to recognize that "employment" does not include work that has no meaningful nexus to the United States other than the physical presence of the person performing it.

But, of course, people will tend to push the edges of any policy. And the lure of the U.S. market and its many opportunities tends to draw the cybercommuter out of the shadows and into the active economy. The cybercommuter may be asked to visit a U.S. customer who happens to be nearby, or the cybercommuting journalist may be asked to cover an event in the United States. We can imagine software companies, frustrated by the cap on H workers and the increasingly narrow approach on L-1 specialized knowledge and job shopping, being tempted to stretch the limits of a policy friendly to visiting cybercommuters. Clear rules should be explored and set through legislative process or agency formal notice and comment rulemaking process.

TAX AND OTHER CONSIDERATIONS

Arguably, any advice and policymaking about cybercommuting from the United States should take into consideration the treatment of such activity by tax law, of which we claim only superficial awareness. Under Internal Revenue Service (IRS) Publication 519, its "U.S. Tax Guide for Aliens," any income from services performed for a foreign employer by someone present in the United States is deemed "U.S. source income" unless that income meets *ALL THREE* of the following conditions:

1. Total annual earnings from such services are less than $3,000;

2. The nonresident foreign national is physically present in the United States for not more than 90 days in the year; and

3. The services are performed under contract with a nonresident foreign national individual, foreign partnership, or foreign corporation.

This exemption arguably covers the emails and rush projects performed by the overwhelming majority of tourists to the U.S., but it does not cover regular cybercommuting from frequent or long term visitors who regularly cybercommute. There is a separate carve-out for persons in F, J, or Q status and their spouses and children, whose pay from a foreign employer is not considered U.S. source income no matter the amount or duration. Pay that becomes subject to income tax also becomes subject to requirements on the employer to withhold for the IRS substantial portions of the worker's pay.

The physical presence of a cybercommuter may trigger the application of various rules of employment law including minimum wage, overtime, discrimination, and whistleblower laws. Of course, home country laws still may apply as well, with possible conflict. The foreign employer could become subject to jurisdiction of the courts and laws in the location of the employee's residence.

OUTBOUND ISSUES

U.S. employers need to consider the same issues in the other direction in relation to workers who may find themselves cybercommuting from another country. Again, these arrangements usually are managed by a silent, de facto "don't ask, don't tell" policy. Workers from other countries authorized for work in the U.S. often take vacations of several weeks or months visiting their home or other countries, and increasingly they take their work with them through electronic means. U.S. employers could find themselves subject to lawsuits in other countries under those countries' laws more generous to workers in terms of severance pay, privacy protection, etc., and they could be subjected to unexpected taxation.