Business Immigration, Workforce and Compliance Law

Benjamin N. Cardozo School of Law

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Supplemental Materials

Class #3

CYRUS D. MEHTA & ASSOCIATES, PLLC
US IMMIGRATION & NATIONALITY LAW

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May 26, 2011

B-1 IN LIEU OF H-1B VISA IN JEOPARDY: DON'T THROW THE BABY OUT WITH THE BATHWATER

By Cyrus D. Mehta and Myriam Jaidi

The "B-1 in lieu of H-1B" visa has been an important and legitimate source of flexibility facilitating the needs of global businesses and business travelers, with significant benefit to the United States economy. The April 14, 2011 letter from Senator Charles E. Grassley to Secretary of State Hilary Clinton and Secretary of Homeland Security Janet Napolitano in light of the lawsuit against Infosys, may threaten the existence of this important category. We write to clarify its utility for American businesses in a globalized world, and strongly urge that the "B-1 in lieu of the H-1B" not be eliminated as this will undermine US competitiveness.

As we noted in a recent article on the B-1 category, the B-1 business visa remains one of the "most ill-defined" visas but plays a very important role in providing flexibility to business travelers. While the B-1 visa is associated with visiting the US to participate in meetings and negotiate contracts, the "B-1 in lieu of H-1B" was created to facilitate travel to the US of individuals who would otherwise qualify for an H-1B visa, but only needed to come to the United States for a limited period of time. In the current controversy over the US of the B-1, scant attention has been paid to the "B-1 in lieu of the H-1B," which permits broader activities than the regular B-1 visa, albeit for a short period of time. Indeed, many of the activities that have been alleged to be outside the scope of the B-1 may be permissible under the "B-1 in lieu of the H-1B." Hence, what has been alleged to be fraud may not really be the case if viewed under activities permissible under the "B-1 in lieu of the H-1B."

The "B-1 in lieu of the H-1B,", which is in 9 Foreign Affairs Manual § 41.31 Note 8, and available on the US Consulate, Mumbai, website is tightly regulated and involves strict requirements. First, qualified individuals must otherwise qualify for an H-1B visa, meaning they must be working in a specialty occupation and qualify for the position by means of a bachelor degree in a specific field required for the occupation. In addition, they must show nonimmigrant intent (established by showing significant ties to their home country, including establishing that they have a residence abroad that they have no intent to abandon), must be regularly employed abroad and their salary must be paid by their employer abroad. They may perform work in the United States only for a limited time and only if they continue to be paid abroad, and not by the United States entity for which they are performing services. These are not simple showings to make, especially to consular officers trained to spot applicants who may wish to stay beyond

the term of their B-1 visa status.

One issue raised in the controversy concerning the "B-1 in lieu of H-1B" is the absence of the prevailing wage obligation by the employer. The H-1B visa is one of the few visa categories that requires that nonimmigrants in this status be paid at least the "prevailing wage" (the average rate of wages paid to workers similarly employed in the geographical area of intended employment) and to have a labor condition application (LCA) certified before the petition may proceed. Prevailing wage data is available from many sources, including the Department of Labor's Foreign Labor Certification Data Center, available here: http://www.flcdatacenter.com/. Other temporary nonimmigrant work visa categories such as the O-1, TN, L, E, P and others do not require an LCA or a promise to pay the prevailing wage in order to be approved. Thus, contrary to Senator Grassley's assertions, the fact that an LCA is not required for the "B1 in lieu of H-1B" is not so unusual within the US nonimmigrant visa system, and if properly applied, should not be viewed as an attempt to skirt the rules, nor should it be mischaracterized as a loophole.

The category plays an important role in filling a gap in the available visa categories for short-term, professional workers. Moreover, it can only be used by a multinational business that has the ability to regularly employ the individual at an overseas entity while he or she is in B-1 status. There are other companion "in lieu of" B-1 categories such as the "B-1 in lieu of the H-3" and the "B-1 in lieu of the J-1." These B-1 categories allow for short term training assignments in the US without the need for a US employer to file a lengthy petition or obtain authorization through a J sponsor. All of these are extremely useful and legitimate short term B-1 uses that allow a US business to remain competitive and responsive to spontaneous short-term needs in a globalized economy. We urge that the baby not be thrown out with the bathwater just because of ex-parte allegations by a plaintiff in one law suit against an IT consulting company, which has led to further investigations by the US authorities.

The Department of State's (DOS) response to Senator Grassley's missive is troubling in that it conveys that the "B-1 in lieu of H-1B" may be at risk. In a letter by Joseph Macmanus, Acting Assistant Secretary for Legislative Affairs, he says that DOS is "working with the Department of Homeland Security (DHS) to consider removing or substantially amending the FAM note" allowing the B-1 in lieu of H-1B category. However, all hope is not lost as Mr. Macmanus points out that problems with the B-1 category usually result from misrepresentation in the visa application, not from a misapplication of visa law. In addition, Mr. Macmanus's letter makes clear that consular officers are carefully trained to determine whether issuing a B-1 visa or a "B-1 in lieu of H-1B" is appropriate. These categories are not taken lightly and have strict requirements, carefully enforced, with fewer than 1000 "B-1 in lieu of H-1B" visas issued each year worldwide. This restrictive view of the category is sometimes too carefully enforced to the detriment of companies that need individuals from their foreign entities to come to the United States entity for training that is unavailable at the foreign entity, and that is crucial to the global operations of the company as a whole.

We hope that the DOS and DHS continue to recognize and defend the importance of the "B-1 in lieu of H-1B" and other companion "lieu of" categories to international commerce and the benefits that accrue to the United States economy, rather than eliminate it or read it out of existence as a knee jerk reaction to a Senator's objections, especially one who has generally been opposed to the existence of the H-1B and L visa programs.

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Labels: B-1 in lieu of H-1B, benefits of B-1 in lieu of H-1B, Infosys, Senator Grassley

1 comments:

Vivek Chaudhary November 27, 2011 11:12 PM

Hi,

Any further guidance on this subject will be highly appreciated. I need to know if this option is still viable and if employer can look at this option for a egnuine need of short term work in USA.

Regards,
Vivek Chaudhary

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11 I. & N. Dec. 824 (BIA), Interim Decision 1647 (BIA), 1966 WL 14373 (BIA)

United States Department of Justice

Board of Immigration Appeals

MATTER OF HIRA

In Deportation Proceedings

A-14493789

Decided by Board October 29, 1965 and March 1, 1966

Affirmed by Attorney General September 30, 1966

**1 An alien who, in behalf of his employer, a Hong Kong manufacturer of custom made men's clothing, travels to various cities in the United States to take orders from, and the measurements of, prospective customers whom he does not solicit but by whom he is contacted as the result of literature distributed in this country by his employer; who sends the order, together with the purchase price, to his employer in Hong Kong; and who receives only expense money while in this country, his monthly salary being sent to his parents in India by his employer, is engaged in intercourse of a commercial character, and, having indicated he would return to Hong Kong at the termination of his authorized stay, his sojourn here is of a temporary character, and he is eligible for nonimmigrant classification as a visitor for business under section 101(a)(15)(B) of the Immigration and Nationality Act.

CHARGES:

Order: Act of 1952--Section 241(a)(9) [8 U.S.C. 1251(a)(9)]—Failed to maintain status of admission—Visitor for business.

Lodged: Act of 1952—Section 241(a)(1) [8 U.S.C. 1251(a)(1)]—Immigrant without visa [section 212(a)(20), 8 U.S.C. 1182(a)(20)].

BEFORE THE BOARD

The case comes forward on appeal from the order of the special inquiry officer dated April 8, 1965 finding the respondent deportable on the charge contained in the order to show cause and upon the lodged charge, granting him voluntary departure with the further order that if he failed to depart when and as required he be deported to Hong Kong, in the alternative, to India.

The record relates to a native and citizen of India, 28 years old, male, single, who last entered the United States at Detroit, Michigan on or about February 12, 1965 at which time he was admitted to the *825 United States as a visitor for business until April 14, 1965. He had originally entered the United States on or about September 14, 1963 at Honolulu, Hawaii as a visitor for business authorized to remain in the United States until March 14, 1964. On August 26, 1964 the respondent applied for an extension of his temporary stay, setting forth the reason therefor that it was for the purpose of "for further study of market." On the basis of this application on August 27, 1964 he was granted an extension of his stay in the United States as a visitor for business for a period to expire April 14, 1965. The order to show cause was served March 2, 1965 and the hearing in deportation proceedings was held on March 25, 1965.

At the deportation hearing the respondent presented an Indian passport issued at Hong Kong on May 19, 1962 valid to May 18, 1965. The passport contains a "B-1" nonimmigrant visa issued to him at the American Embassy at Hong Kong on September 4, 1963 valid for an unlimited number of admissions to the United States to March 4, 1964. The application for a passport (Ex. 2) indicates that a Mr. Melwani, manager of Mohan's, the respondent's employer, appeared at the Consulate on March 15, 1963

Next

and stated that the respondent would be selling clothes at the New York store. On September 4, 1963 the application for a visa contains a notation that Mr. Melwani has submitted a statement indicating that the respondent is being sent to take orders for the Hong Kong store and the visa was issued on that date to the respondent.

**2 The facts concerning the nature of the respondent's employment are not in dispute. The respondent, in behalf of his employer, Mohan's, Ltd., of Hong Kong, travels to various cities in the United States taking the customers' measurements. The purchase price of the merchandise is sent to the employer in Hong Kong, either by the respondent or directly by the customer. The respondent testified that he does not solicit customers in the United States but takes orders only from persons who contact him as a result of literature distributed by his employer in this country making known his itinerary, the items he has available for sale and in what hotel he may be contacted.

The respondent testified that he works on a straight salary basis plus an allowance for living and business expenses. His salary is $600 Hong Kong a month, amounting to approximately $100 U.S. He testified he receives no percentage of the value of the orders which he takes but might receive a bonus depending on the volume of business upon his return to Hong Kong. While the respondent is in the United States his employer sends his monthly salary to his *826 parents in India. The expense money is estimated to amount to about $800 per month. He has no other income than that received from his employment by Mohan's Ltd., of Hong Kong.

The respondent has denied that the use of the terms "study the United States business market" and "further study of business market" in his applications for extension of temporary stay (Exs. 3 and 4) were designed to be vague or misleading. He explained that according to his understanding, further study of the market is the same as the business he was doing: a notice would be sent to Hong Kong and the company in Hong Kong would obtain a further extension for the study of the market because they would have knowledge of how much more business they could secure from the United States and he would inform them as to colors and styling which would be in fashion in the United States (pp. 36–37, 57–59). The record indicates that the respondent's employer in Hong Kong buys American textiles. The respondent also testified that his employer formerly made sales in this country entirely through the use of catalogs and other literature and that the individual under such circumstances took his own measurements and then sent the orders to Hong Kong. The respondent displays swatches of materials and he takes measurements in order to overcome complaints arising out of poor fit. The price of men's suits varies from $75 to $95, including the customs duty which must be paid by the purchaser upon receipt of his suit, the duty averaging about 20 percent of the cost of the garment which is custom made. The respondent's absence to Canada on or about February 12, 1965 was only for a few hours and apparently he was admitted upon the basis of his nonimmigrant visa.

Section 101(a)(15)(B) of the Immigration and Nationality Act defines the term "immigrant" to mean every alien except an alien who is within one or more of the following classes of nonimmigrant aliens:

3 (B) an alien (other than one coming for the purpose of studying or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) 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; *

Under the heading of "TEMPORARY VISITORS", 22 CFR 41.25 provides:

Temporary visitors for business and pleasure.

(a) An alien shall be classified as a nonimmigrant visitor for business or pleasure if he establishes to the satisfaction of the consular officer that he *827 qualifies under the provisions of section 101(a)(15)(B) of the Act and that: (1) he intends to depart from the United States at the expiration of his temporary stay; (2) he has permission to enter some foreign country upon the termination of his temporary stay; and (3) adequate financial provisions have been made to enable him to carry out the purpose of his visit and to travel to, sojourn in, and depart from the United States.

(b) The term "business", as used in section 101(a)(15)(B) of the Act, refers to legitimate activities of a commercial or professional character. It does not include purely local employment or labor for hire. An alien seeking to enter as a nonimmigrant for employment or labor pursuant to a contract or other prearrangement shall be required to qualify under the provisions of section 41.55. An alien of distinguished merit and ability seeking to enter the United States temporarily with the idea of performing temporary services of an exceptional nature, requiring such merit and ability, but having no contract or other prearranged employment, may be classified as a nonimmigrant temporary visitor for business.

The case is one of first impression. Considerable difficulty has been experienced in the past in arriving at a clear and workable definition of "business" within the contemplation of the statute (Gordon and Rosenfeld, Immigration Law and Procedure, Sec. 2.8(b)). Soon after the term visitor for business was originally designated in the Act of 1924, the Supreme Court ruled that a primary aim of the statute was to protect American labor against the influx of foreign labor, that "business" contemplated only "intercourse of a commercial character," and that persons who sought to make temporary visits to perform labor were not nonimmigrants. [1] The visitor for business designation was retained in the 1952 Act. The authors, Gordon and Rosenfeld, set forth on pages 127 to 129 of their book on "Immigration Laws and Procedures" numerous examples of cases that have been found by the Board to be bona fide nonimmigrants for business and those who have been found not to come within that designation. The significant considerations to be stressed are that there is a clear intent on the part of the alien to continue the foreign residence and not to abandon the existing domicile; the principal place of business and the actual place of eventual accrual of profits, at least predominantly, remains in the foreign country; the business activity itself need not be temporary, and indeed may long continue; the various entries into the United States made in the course thereof must be individually or separately of a plainly temporary nature in keeping with the existence of the two preceding considerations. [2]

4 In the instant case we are satisfied that the "business" in which the respondent was engaged was intercourse of a commercial character. ***828 The respondent's salary is paid to him in Hong Kong (no funds accrue to the respondent in the United States). The American Consulate in Hong Kong, in granting the respondent the nonimmigrant visa as a visitor for business, had knowledge of the fact that the respondent was an order taker for the Hong Kong firm (Ex. 2). His sojourn in this country is of a temporary character, the respondent having indicated that he would return to Hong Kong upon the expiration of his temporary stay in the United States or extensions thereof.

If the respondent were engaged in taking orders for suits at a wholesale level from large distributors, there would be no questioning his status. The fact that he takes the measurements of prospective customers in the United States, in connection with the business which he does not solicit but whose customers are attracted by literature sent out by the Hong Kong firm, does not warrant a finding that the respondent is not classifiable as a visitor for business. The labor for the orders taken by the respondent is performed in Hong Kong and there appears to be no conflict with local labor. Upon a full consideration of the evidence in the case, we are satisfied that the respondent falls within the category of visitor for business as set forth in the law and regulations. The appeal will be sustained.

ORDER: It is ordered that the appeal be sustained and the proceedings terminated.

BEFORE THE BOARD

The case comes forward on motion of the Service dated December 20, 1965 requesting that our order of October 29, 1965 sustaining the alien's appeal and terminating proceedings be reconsidered and the appeal be dismissed.

Briefly, the record relates to a native and citizen of India, 28 years old, male, single, who last entered the United States at Detroit, Michigan on or about February 12, 1965 when he was admitted to the United States as a visitor for business until April 14, 1965. He had originally entered the United States on or about September 14, 1963 at Honolulu, Hawaii as a visitor for business authorized to remain in the United States until March 14, 1964 which was subsequently extended to April 14, 1965.

The order to show cause was served on March 2, 1965, the hearing in deportation proceedings was held on March 25, 1965, and an order of the special inquiry officer dated April 8, 1965 found the respondent deportable on the charge contained in the order to show cause and upon the lodged charge, but granted him the privilege of voluntary departure with *829 an automatic order of deportation to Hong Kong or in the alternative, to India, in the event he failed to depart as required. The prolongation of the time the respondent has spent in the United States by virtue of the appeal and the motion to reconsider has not been attributable to the respondent but from considerations arising out of the possible applicability of 8 CFR 3.4 wherein the departure of the respondent might be considered as a withdrawal of the appeal.

**5 The facts as to the nature of the respondent's employment are not in dispute. In behalf of his employer, Mohan's Ltd., of Hong Kong, a manufacturer of custom or made to measure men's clothing, the respondent travels to various cities in the United States and takes orders from customers whom he does not solicit but who contact him as the result of literature distributed by his employer in this country making known his itinerary, the items he has available for sale and in what hotels he may be contacted. The respondent displays swatches of cloth from which the customer makes his choice, he takes the customer's measurements and sends the order together with the purchase price to his employer in Hong Kong. This practice succeeded a prior practice engaged in by the respondent's employer in which the employer made sales in this country entirely through the use of catalogs, the individual taking his own measurements and then sending the order to Hong Kong. However, complaints arose due to poor fit and the present procedure was adopted. The respondent earns a salary of about $100 a month plus a bonus depending upon the volume of his business, the amount of such bonus being undisclosed. The employer sends respondent's salary to his parents in India and the respondent receives only expense money amounting to about $800 per month while in the United States.

Aware that the term "visitor for business" contemplated only "intercourse of a commercial character," [1] and bearing in mind that the significant considerations to be stressed were that there is a clear intent on the part of the alien to continue a foreign residence and not to abandon any existing domicile; the principal place of business and the actual place of eventual accrual of profits, at least predominantly, remains in the foreign country; the business activity itself need not be temporary and indeed may long continue; the various entries in the United States made in the course thereof must be individually or separately of a plainly temporary nature in keeping with the existence of the two preceding considerations, we found that the respondent fell within the category of a visitor for business *830 as set forth in the law and regulations. We found that the business was intercourse of a commercial character, and the fact that he took measurements of prospective retail customers in the United States in connection with the business, under the circumstances of the case, did not warrant a finding that the respondent was not classifiable as a visitor for business.

We recognize that the line of demarcation between a visitor for business, and a person in seeking to enter as a nonimmigrant for employment or labor for which the procedure referred to 22 CFR 41.55, the provisions of section 214(c) of the Act and the supporting evidence required by 8 CFR 214.2(h)(ii) is applicable, is sometimes difficult to draw. However, the Act in section 101(a)(15)(B), still retains the category of a visitor for business. There is no indication that Congress intended to eliminate this category. Upon a determination that the business the respondent was engaged in was intercourse of a commercial character, and after carefully weighing the significant considerations set forth in prior administrative decisions, we came to the conclusion that the respondent was truly a visitor for business. The argument of the Service that the respondent is not a "businessman" within the meaning of the statute appears to be fallacious. The cases set forth in Matter of G--, 6 I. & N. Dec. 255, in note 3 list a great many cases in which it was held that the alien was entitled to the status of a temporary visitor for business. An examination of these cases shows that the great majority were aliens who could not be considered as "businessmen" or even skilled, but in every case there was involved international trade or commerce and the employment was a necessary incident thereto.

**6 Upon a full consideration of the matters set forth in the motion, we affirm our prior decision. The motion will be denied.

ORDER: It is ordered that the motion be and the same is hereby denied.

BEFORE THE ATTORNEY GENERAL

Matter of Hira, 11 I. & N. Dec. 824 (1966)

The decision of the Board of Immigration Appeals in this case holding the respondent Hotu J. Hira alias Harry Hira to be a temporary visitor for business within section 101(a)(15)(B) of the Immigration and Nationality Act has been certified to me by the Board for review, pursuant to 8 CFR 3.1(h)(1)(iii), upon motion of the Commissioner of Immigration and Naturalization.

For the reasons stated in the Board's opinions of October 29, 1965 and March 1, 1966 the decision of the Board of Immigration Appeals is affirmed.

Footnotes

1 Karnuth v. Albro, 279 U.S. 231 (1929).

2 Matter of Cortez Vasquez, Int. Dec. No. 1342; Matter of G--P--, 4 I. & N. Dec. 217; Matter of G--, 6 I. & N. Dec. 255.

1 Karnuth v. Albro, 279 U.S. 231.

11 I. & N. Dec. 824 (BIA), Interim Decision 1647 (BIA), 1966 WL 14373 (BIA)

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