



Leadership for Workforce Mobility

A Strategy for Successful Cross Border Immigration

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Any company that is involved in cross border business inevitably faces the challenge of sending employees across the border. Whether it is for a simple business visit or a long term assignment, the ability to have an employee legally cross the Canada/US border is often a strategic requirement, essential to the success of the business. Having an employee rejected at the border by an immigration officer is embarrassing and can have long term consequences for the employee and for the company.

This article is intended for managers and human resources staff who are responsible for ensuring that their employees successfully cross the Canada/US border and obtain the appropriate documentation. I outline a model approach to company immigration procedures that contains five elements. By following the steps outlined in this article, your company should be able to successfully send employees across the border all of the time.

1. Know What You Are Applying For

Both the US and Canada have a wide range of immigration programs that cover everything from business visitors to work permits to permanent residence. It is easy to be confused by all of the various classifications, but it is essential that the correct classification is used in each case. Fortunately, both Canada and the US have websites that provide information about their various programs. For the United States see http://travel.state.gov/visa/temp/types/types_1286.html. Simply follow the links on this site to learn more about each visa or work permit classification. For Canada visit www.cic.gc.ca. Canada's policy manual on temporary foreign workers is at <http://www.cic.gc.ca/english/resources/manuals/fw/index.asp>. Once you have visited these websites, it may be helpful to run a search and check other websites. Be sure to read authoritative information either from reliable government sources or from people who are recognized experts. Even if your company has a policy of outsourcing their immigration work to an outside consultant or lawyer, it is important to be aware of the immigration rules that affect your employees.

In 1994, Canada, the United States and Mexico adopted a common set of rules governing business visitors and work permits in the Trade In Services provisions of the North America Free Trade Agreement (NAFTA). The following table outlines relevant NAFTA classifications in the US and Canada:

US	Canada	Description
B-1	Business Visitor	Brief visits to attend meetings or provide after sales service
TN	NAFTA Professional	Prescribed list of professions. Work allowed only in the specific profession
L	Intra-company transferee	Allows for executives or managers (L-1A) or workers with specialized knowledge (L-1B)
E	No real equivalent other than “Significant Benefit to Canada” regulations	Treaty trader or Investor – used by the US to facilitate work permits for key staff of Canadian companies that are trading with or investing in the US.

It is important to note that NAFTA applies only to *citizens* of Canada or the United States. It does not apply to people who may be in Canada or the US as permanent residents, green card holders, temporary foreign workers, foreign students or visitors. In these cases it will be important to research the specific rules and procedures that relate to the employee’s country of citizenship. Both Canada and the US allow citizens of the other country the convenience of making applications for work permits at ports of entry.

One of the main areas of confusion for cross border travelers is to distinguish between business visits and work. Generally, business visitors are allowed to enter briefly to attend meetings or to engage in a narrow set of specific activities such as market research, sales or after sales service. If a business visitor application is contemplated it is important to ensure that the employee’s activities fall into the definition of business visitor. In these cases it is good practice to provide the employee with a letter of introduction from the company to the immigration official providing a description of the employee’s activities and the duration of the visit. *Many people confuse duration of visit with purpose of visit.* An employee who is crossing the border for a brief period – even a day – to do some task that is outside of the business visitor definition will be required to have a work permit or they will be refused entry.

2. Preparing the Application

One of the basic decisions in implementing a cross border immigration policy for a company is whether to outsource the work to a qualified immigration professional or to do the work in house. This decision is usually influenced by variables such as cost of outsourcing and availability of in house expertise. However, even if an application is being prepared by an outside professional, the responsibility for ensuring that an application is properly prepared rests with the employer and the employee.

I have two basic rules when it comes to application preparation:

1. Leave nothing to chance – Immigration officers have a difficult job and an enormous responsibility. The goal of every application should be to make it as easy as possible for the immigration officer to find all of the essential elements

- required to adjudicate an application. Forms should be completed accurately. Letters of introduction or support should be clearly written and contain all of the information required to confirm company and employee information. For example, company letters to support a NAFTA professional application must outline the employee's duties as it relates to their profession and must contain information about the employee's remuneration. Passports should be valid past the length of time of the work permit request. Supporting documents should be originals. This would include originals of post secondary documents to support a NAFTA professional application or original marriage or birth certificates to support applications made by accompanying dependents. Immigration officers are trained to be on the lookout for fraudulent documents and they will always be suspicious of photo copied documents. Clear, straight forward and well documented applications will aid in obtaining positive decisions.
2. Be Honest – Immigration officers hate being lied to and both the US and Canada have severe penalties for misrepresentation. It is not a good policy to encourage employees to lie to an immigration officer about things such as the purpose of their visit. It may be tempting to advise an employee who does not qualify for a work permit to lie to an immigration officer and say that they are going to ski or play golf, but this is never a good idea. The repercussion for the employee is that they can be excluded from Canada or the US which may mean that they can't take their kids to Disneyland or vacation in Florida. Companies whose employees engage in misrepresentation will earn a bad reputation at the ports of entry and may face more serious consequences. Given heightened sensitivities in areas such as terrorism, human smuggling and foreign worker abuse, the policy direction of Canada, the US and most countries is to increase penalties for employers and anyone who contravenes immigration laws. On the other hand, immigration officers have discretion and are more likely to exercise positive discretion for employers and employees who respect the immigration officer and the laws they are enforcing.

There are two corollaries to the honesty rule:

1. Criminal Records – It is incredibly awkward for both employers and employees to deal with situations in which an employee has a criminal record. Normally, employers will not know if an employee has a criminal record as it is not usually relevant. Further, employees may not disclose the fact that they have a criminal record for all kinds of reasons. However, cross border travel requires full disclosure of criminal records as both the US and Canada have laws that exclude criminals and immigration officers of both countries have comprehensive sources of criminal record information. Employees need to disclose information about a criminal record before they travel. Both Canada and the US have procedures in place to adjudicate applications involving criminal records and in some cases, people with criminal records are granted admission in spite of the criminal record. Again, full disclosure and cooperation with the immigration officer will go a long way to obtaining a positive decision in these cases. Note also that, for some reason, many Americans do not think of an impaired driving conviction as a criminal offense. However, Canada does view these cases as being criminal and

- immigration officers will ask specifically if an individual has a conviction related to driving under the influence.
2. The Internet is a Great Source of Information – It is good policy to assume that an immigration officer will conduct a search on the internet for information about an applicant. For this reason, it is prudent to do an internet search of an employee before they travel in case embarrassing or contradictory information about the employee exists in the public realm.

3. Counseling the Employee Before They Travel

The ultimate responsibility for making a successful immigration application rests with the employee. It is the employee's documents and qualifications that will be considered by the immigration officer. It is the employee who will be interviewed and who must be able to defend their reasons for making an application. Therefore, it is good practice to ensure that an employee is properly briefed and counseled before they make an application. The employee should be required to go over application forms to ensure that they are accurate. They should read letters of introduction and support so that they know what is being said about them by their employer. They should know the immigration rules that relate to their specific category.

Moreover, I believe that applicants should be counseled as to how to answer questions in an immigration interview. Immigration officers are well trained in interview techniques. They can read body language and they will often ask unrelated questions to gauge an applicant's responses. The immigration officer does not want to be the applicant's friend, nor do they want to be entertained by the applicant. Employees should be counseled to answer questions directly and completely. They should stick to the point and provide enough information to answer the question. Above all else they should be honest.

It is very stressful to make an immigration application and to be interviewed by an immigration officer. Employers should do everything possible to alleviate the employee's stress through correct selection of immigration category, careful preparation of the application and counseling the employee before they travel.

4. Dealing With Refusals

There will be situations in which applications are refused in spite the careful steps that have been taken to prepare the application. In some cases it may be possible to deal with a refusal or potential refusal at the point at which the immigration officer is making their decision. Applicants should be prepared to ask the immigration officer to contact their employer or counsel if the officer is contemplating a refusal. Immigration officers do not have to do this, but if they have been dealt with respectfully, they may take the time to discuss the application with an employer or counsel before they refuse it. Employers who write letters of introduction and support should always include their specific contact information in the letter so that the immigration officer can call to verify or discuss the information contained in the

documents. If an immigration professional has assisted in the application, include that individual's name in the letter and specifically authorize the officer to discuss the case with the professional. Regardless of who discusses the case with the officer, every effort should be made to pinpoint the reasons why the application is being denied.

Some applications may be refused because they are missing a document or vital piece of information. In these situations it may be possible to quickly send the officer the information they need before they make a final decision.

In other cases, the officer may not agree that the application meets the requirements of the specific immigration classification. In these situations they will likely allow the applicant to withdraw and submit a new application under a different category. For example, a US immigration officer may not agree with an "L" classification for an employee and may require a TN application if they feel that it is better suited to the situation. A Canadian immigration officer may not agree with a NAFTA application and may require the employer to obtain a Labour Market Opinion (this is a document that is issued by Service Canada if an employer has demonstrated that they have made efforts to hire a Canadian before offering the job to a temporary foreign worker). In these situations it is usually a good practice to agree to disagree with the officer and make a new application.

There will also be times when the immigration officer makes an incorrect decision because they may not have adequate training or understanding of the regulations that relate to a specific immigration classification. An immigration officer may feel that it is easier to refuse an application of which they have a limited understanding rather than approving it and risking the possibility that they have made an error in allowing admission to an unqualified applicant. The best way to avoid these types of refusal is to have employees travel through large ports of entry where immigration officers have access to resources to make well informed decisions. Large ports of entry have subject matter experts or NAFTA examiners who are well trained to properly adjudicate work permit applications. It is also a good idea to have employees make applications during normal business hours. Avoid booking travel on weekends or off-peak hours.

5. Follow up Procedures

It is good policy in all cases of cross border travel to institute a feedback process in which employees are required to advise whether they were successful in their application and provide any information they have that relates to the application process. This would be true for business visitors and work permit holders. Employees should be encouraged to provide information about what was said in the interview, how the application was received and any other information that would be relevant to assisting the company to develop better immigration procedures as it relates to their business.

In the case of work permit holders, it is important to have the employee send a copy of their work permit to their manager or appropriate human resources department. Employers should check the documents for accuracy and they should be sure that steps are being taken to ensure that the employee complies with other regulations that relate to foreign workers. This would be true of accompanying dependents as well. If there is a possibility that the employee will require an extension to their work permit, employers should ensure that the employee's work permit file is reviewed in a timely manner six months before the expiry of the work permit. Preparation of a new work permit application should begin as early as possible.

It is important to remember that US and Canadian immigration policies are constantly changing in response to changes in the political and economic conditions of our two countries. Just because an application succeeded once, doesn't mean it will automatically be renewed. The process of researching and keeping abreast of changing immigration requirements should be ongoing.

Conclusion

Canadians and Americans are blessed by the fact that our two countries enjoy an excellent relationship and it is easy to forget that there is an international border between our two countries. While the border presents somewhat of a restriction to the free flow of capital, goods and labor, it doesn't need to be an insurmountable obstacle. With respect to immigration, companies that are proactive and adopt the approach to immigration that is outlined in this article should be successful sending their employees across the border.

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