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Can I Work for My Foreign Employer While Physically Present In The U.S.?

We are regularly asked by our clients—both those in non-work-authorized statuses such as B (tourist or business), and those in work-authorized statuses such as H-1B (specialty occupation) who want to do side jobs—whether they can perform remote work for a foreign employer while physically present in the U.S.

This is a grey area of immigration law, but based on a review of relevant legal precedent and practice, we believe the best answer is **"NO"** because:

- **Immigration laws require an employment-authorized status for any "employment" in the U.S.:** The immigration regulations at 8 CFR 214.1(e) clearly state that a temporary visitor in the U.S. is prohibited from engaging in any employment "unless he has been accorded a nonimmigrant classification which authorizes employment" and that "[a]ny unauthorized employment by a nonimmigrant constitutes a failure to maintain status." The question is whether remote work for a foreign employer constitutes employment under the immigration laws. It is our opinion that it does.
- **The employer compliance provisions of the immigration laws apply to foreign employers with employees in the U.S.:** Even though they are based in another country, foreign employers who employ foreign nationals (FN) who are physically present in the U.S. are subject to employer compliance laws as outlined by INA §274A. These employers cannot employ a FN who is in the U.S. without having a U.S. agent to act as their representative before U.S. immigration authorities. Immigration authorities can discipline the foreign employer via the U.S. agent for employing a FN who is working for them in the U.S. without work authorization.
- **It may violate U.S. tax law:** Foreign nationals without work authorization are prohibited from earning "U.S. source income." Income is of a U.S. source if the services provided in exchange for it occurred while the FN was physically present in the U.S. It doesn't matter if the FN was paid by a foreign company via a foreign bank account or even if the income came from freelance self-employment. U.S. source income of any kind is subject to taxation by the U.S. federal government. Earning such income without U.S. work authorization means it will likely not be reported to the Internal Revenue Service (IRS) and therefore not taxed, ultimately violating U.S. tax law. Further, paying people to work while physically present in the U.S. could create corporate income tax exposure for the foreign employer, since the employer would likely be deemed to be engaging in business in the U.S., resulting in a requirement that the foreign corporation allocate a portion of its worldwide income to the U.S. and pay U.S. corporate income tax.

Since each case is different and fact-specific, we recommend you consult with a Grossman Young attorney if you have questions about your ability to work while you are in the U.S.

If you have questions about U.S. tax liability while working in the U.S., we recommend contacting our trusted colleague Len Wolf at https://thewolfgroup.com.