



Business Visitors: Entry to the U.S. for Installation, Maintenance and Repair Personnel

Regulations under the North American Free Trade Agreement (NAFTA) allow Canadian citizens to enter the United States as "business visitors" on behalf of their Canadian employer.¹ Specifically, "after-sales service" activities, such as installations, maintenance and repairs, are included in this category. The Canadian worker is considered to be engaging in international commerce on behalf of his or her Canadian employer, and not engaging in work for a US employer. This is important because it allows the worker to enter the US as a "business visitor" without any special visa or work authorization document.

The following regulation defines the class of after-sales service personnel eligible for business visitor entry:

Installers, repair and maintenance personnel, and supervisors, possessing specialized



knowledge essential to the seller's contractual obligation, performing services or training workers to perform services, pursuant to a warranty or other service contract incidental to the sale of commercial or industrial equipment or machinery, including computer software, purchased from an enterprise outside of the United States, during the life of the warranty or service agreement. (For purposes of this provision, the commercial or industrial equipment or machinery, including computer software, must have been manufactured outside the United States.)

In order to understand and apply the regulation to a specific situation, it is helpful to

break it down into its component parts and examine them individually:

INSTALLERS, REPAIR AND MAINTENANCE PERSONNEL, AND SUPERVISORS

The Canadian workers can perform "hands-on" activities, or merely train or supervise US workers. The worker can bring tools into the US to perform the services.

POSSESSING SPECIALIZED KNOWLEDGE

The term "specialized knowledge" covers more than a skill level or skill set. It does not necessarily mean that the knowledge is unique or held as a trade secret, but there must be skill coupled with specific knowledge of the employer's product, service or method of doing business that is not easily obtained and not generally known in the marketplace.

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¹ Similar regulations exist for non-NAFTA entries.



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**ESSENTIAL TO THE SELLER'S
CONTRACTUAL OBLIGATION**

There must be a contract provision requiring the specialized service that is the subject of the business visitor entry. The seller often desires full control over an installation so it can stand behind any contractual warranty. The parties should make sure that the sales contract clearly states the obligation of the seller or its designee to perform the installation, and any subsequent maintenance or repair. Third part contracts for after-sales service are permitted so long as the third party agreement was contracted at the time of the sale.

**PERFORMING SERVICES OR TRAINING
WORKERS TO PERFORM SERVICES**

The Canadian worker can perform the hands-on work or supervise/train Canadian or US workers.

**PURSUANT TO A WARRANTY OR OTHER
SERVICE CONTRACT**

There must be an underlying sales contract that describes the seller's obligations, as mentioned above. If there is a separate purchase order for installation, maintenance or repair work, it should cross-reference the original sales contract. Any provision regarding the life of a renewable service contract should be in clear and definitive terms in the original contract.

INCIDENTAL TO THE SALE

As the term implies, "after-sales" services are permitted because they relate to the sale of a product. The service activity must be secondary to the sales transaction.

This "FYI" has been prepared by the Immigration attorneys at Jaeckle Fleischmann & Mugel, LLP and is intended for general information purposes only and should not be considered legal advice. You are urged to contact an attorney concerning any specific questions you have relating to your own situation.

**OF COMMERCIAL OR INDUSTRIAL EQUIP-
MENT OR MACHINERY**

This includes computer software, but has been interpreted to exclude products used in, or as part of, a residence. Construction workers are specifically excluded regardless of the nature of the product. Canadian workers cannot perform hands-on building or construction work but they are admissible to the US as business visitors to train or supervise other workers.

**MANUFACTURED OUTSIDE THE UNITED
STATES**

The Canadian worker can only provide after-sales service for products manufactured outside the United States. The product does not have to be manufactured in Canada. A US product sold to a US buyer is considered to be a purely domestic transaction under the Immigration laws, regardless of the nationality of any sales agents or other intermediaries.

Business visitor status is not automatic. In the event of any questions, the burden of proof always falls on the party entering the United States. In order to avoid problems at the border, after-sales personnel need to furnish documents upon request to prove that the entry fits clearly within the NAFTA regulations for business visitors.

If you have any questions regarding the matters discussed in this article, please contact Daniel P. Joyce at 716.843.3945 or djoyce@jaeckle.com.