

GUEST COLUMN

That counts as work? Work visa options for creatives in the entertainment field

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You want to travel to the United States, but you heard a scary story from your friend who had a terrible experience at the U.S. border. Your friend is a social media personality and when they arrived in the United States on the Visa Waiver Program (ESTA), they were pulled into secondary inspection, grilled about their social media account, and then promptly told that they needed a work visa. To top it all off, their ESTA applications keep getting denied now. They weren't hired to do any work in the United States and only wanted to create some content to post to their social media account, maybe get some ad revenue or possibly drum up some new business, but now all their travel to the United States is under scrutiny.

While it may appear an extreme case, the above hypothetical is not outside what commonly happens when a person travels to the United States without a full understanding of what may or may not count as work. This article explores the options for traveling to the United States, as well as limitations and consequences of various work visa options. Remember, individuals traveling on ESTA are essentially traveling as business visitors or tourists. ESTA allows individuals from some 40 countries to travel to the United States as business visitors or tourists without obtaining a B1/B2 visa.

What is work?

There is a misconception that for immigration purposes, "work" requires that a person be paid for their services. While being paid for services is a clear indication that someone may be working, that is not the end of the analysis. The seminal case on what is considered work is the *Matter of Hira*, 11 I&N Dec. 824 (B.I.A. 1966), which involved a Hong Kong tailor traveling to the United States to take measurements and then departing the United States to make the suits in Hong Kong. In that case, it was determined that while the taking of measurements was part of the commercial transaction, the "principal place of business and the actual place of eventual accrual of profits...remains in the foreign country," therefore the tailor's actions of taking measurements was not "work" and entering the United States on a business visa was appropriate.

Extrapolating from this analysis to the entertainment field, here are some questions to consider when determining whether you need a work visa:

- Are you taking a job opportunity?
- Are you earning money that would otherwise go to a U.S. worker?
- Are you getting paid directly for a sponsored social media post?

Additionally, U.S. immigration law is only concerned with people who are physically in the United States and working. A person working for a U.S. company who never sets foot in the United States does not need a U.S. work visa. However, a person employed by a foreign company

who lives and works in the United States needs a U.S. work visa. Thus, if you are a digital nomad looking to relocate to the United States for several months, you may need a U.S. work visa if you will continue to work for your foreign employer.

U.S. immigration regulations covering appropriate uses for the B1/B2 visa or ESTA travel to the United States can be found online in the Department of State's Foreign Affairs Manual at 9 FAM 402.2. This provides a non-exhaustive list of appropriate uses of the B1/B2 visa or ESTA.

Whether what you are doing in the United States is considered "work" is highly fact specific, and you should consult with a U.S. immigration attorney if you believe that your activities in the United States do not fall squarely within one of the approved uses.

Consequences

If you travel to the United States on a B1/B2 visa or ESTA, and at some point during your trip you knowingly or unknowingly violate the terms of your visa (i.e., you worked when you weren't supposed to); then you may be subject to a category of inadmissibility. Depending on the extent of your violation, you could be barred from traveling to the United States for three or ten years or, on the lesser side, you could be removed from eligibility for traveling on ESTA. If you trigger a three-or-ten-year bar, you would be required to apply for a waiver to travel to the United States in a nonimmigrant status,

but those waivers are very limited. If you are barred from using ESTA, there is an appeal process but no guarantee that your eligibility will be reinstated. If you no longer qualify for ESTA, you will then need to apply for a B1/B2 visa stamp if you wish to continue to travel to the United States.

Conclusion

There are a variety of work visa options for entertainers, and if you believe that you may be working in the United States, you should consult with a U.S. immigration attorney to determine your visa options. It is critical that you be fully transparent with the immigration attorney about what you want to do in the United States so that your visa petition can be prepared correctly, since an incorrectly prepared visa may limit your ability to fully achieve your goals in the United States.

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