Challenges with After-Sales Provision of USMCA

By Eileen M. Martin

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Canadian and Mexican businesses who want to service products that they have sold into the U.S. are gratified to know that there is an after-sales services provision of the B-1 business visitor section under the United States Mexico Canada Agreement (USMCA). The regulatory language is found at 8 CFR 214.2(b)(4)(i)(F), and reads:

After-sales services. 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 located outside the United States, during the life of the warranty or service agreement. (For the purposes of this provision, the commercial or industrial equipment or machinery, including computer software, must have been manufactured outside the United States.

The same businesses who want to use the provision are sometimes disappointed when they discover some of the details of the provision that make use of it difficult or impossible.

While citizens of Mexico require a visa to enter the U.S. and make their case at a U.S. consular office, Canadians will apply at a U.S. port of entry. In either case, they are subject to the interpretation of the after-sales service provision of the officer adjudicating their application for a visa or admission. Below are some of the areas where problems can arise.

The business visitor entering for after-sales service must have "specialized knowledge." In the L-1B intracompany transferee work permit context, the specialized knowledge beneficiary requires at least a full year of employment and unique or proprietary knowledge of a product, process, or equipment of a corporate group. While there is no requirement that this definition be utilized in an after-sales service B-1 application for admission, if an officer decides to use this test, it is an exacting, challenging standard to meet. Further, there is no requirement that the individual be employed by the business that has sold the products. However, contractors may find it more difficult to establish specialized knowledge than employees would.

The word "incidental" can be a problem for those wanting to use this provision. In this context, "incidental" means either as part of, or at the same time. Therefore, a service contract will be incidental if it is either within the sales contract for the products sold, or a separate contract entered into simultaneously with the contract of sale. Unfortunately, by the time some businesses want to send a business visitor to the U.S. for after-sales service on a pre-existing service contract that is not incidental to the contract for sale of the products, it is too late to remedy the situation to utilize the after-sales service provision for admission to the U.S.

The nature of the products sold must also fit within certain parameters in order to use the after-sales service provision to enter the U.S. The products sold must be commercial or industrial equipment or machinery, including computer software. These words are all undefined in the regulation and open to interpretation by the adjudicating officer.

Furthermore, the business selling the products must be located outside the U.S. for an applicant to use the after-sales service provision to enter the U.S. This requires a direct purchase from a non-U.S. seller. The seller does not have to be in Canada or Mexico, but cannot be located in the U.S. This can challenge a multinational business that has set up a sales arm in the U.S., if all of its technical service staff is in Canada or Mexico.

Finally, the products sold must have been manufactured outside of the U.S. For computer software that is created - not manufactured - and can be created in multiple countries simultaneously, this requirement can be a challenge. Further, an officer may have to determine where an item with a significant percentage U.S.-made parts has been manufactured. Officers at ports of entry have traditionally used a test of whether the item and/or components have been significantly altered to determine whether the product is considered to have been manufactured outside the United States.

Prior to relying on the after-sales service provision of the USMCA, businesses are advised to obtain legal representation to determine whether the documents, the individuals and the products meet the requirements, and how to best document their compliance to minimize travel disruptions for service employees at ports of entry.

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