How Immigration Missteps Can Come Back to Haunt Foreign Nationals

By Elizabeth M. Klarin

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There is great speculation and a lot of fear over whether going to the U.S. has become harder under the Trump administration than in previous presidential administrations. While most legal immigration pathways have not changed significantly, there are some immigration missteps that can be — and always have been—problematic for travellers wishing to enter and/or stay short-, medium- or long-term in the U.S. Here are a few of the most common missteps:

Committing fraud in the visa application or entry process

This is the most important thing to never, ever do. There is no benefit that is worth risking inadmissibility based on fraud or material misrepresentation, as being caught in even a small lie that was relevant to whether an officer would possibly admit you or not can be devastating.

While either fraud or material misrepresentation creates a permanent inadmissibility to the U.S., it can be waived in

certain circumstances for non-immigrants, based on factors like good behaviour, time that's passed since the offence, rehabilitation of your character since the time of offence, etc. In immigration, there is no such thing as a "little" lie. If you feel you have to lie in order to qualify for a visa or be admitted, you should seek a remedy to the situation causing that problem before you find yourself unable to back down from the untruth you've told.

Understanding the importance of checking your form I-94 Arrival/Departure record

Even for Canadians who are normally visa-exempt, you absolutely must understand your period of admission. For Canadians, the default presumption (if you are not issued an I-94 Arrival/Departure record upon admission) is that you have been admitted for six months. However, sometimes the admitting CBP officer will issue an I-94 Arrival/Departure record in their online system, limiting the period of stay you would normally be granted. It is the responsibility of applicants for entry to the U.S. to check what amount of time they have been granted to be lawfully in the U.S., each time they enter, and leave by the expiration of their authorized stay. Not doing so means you accrue unlawful presence, which can lead to lengthy (years-long) bars to admission for any reason, which are not easily overcome (if an option to overcome the grounds of inadmissibility even exists in your situation).

If you have entered using a visa and overstay your authorized period of admission, your visa will be automatically cancelled, and you will only ever be able to apply for a U.S. visa from your home country, moving forward. This is especially dangerous, since you likely will not be notified of this automatic cancellation until you attempt to make a future trip to the U.S. using your (automatically cancelled) visa. In some cases, you may be permitted to enter using the old visa until an officer notices the overstay in their system.

Entering the U.S. without authorization

Some offences or violations of U.S. law are forgiven under certain circumstances; the one that universally is not — under U.S. law — is entering the U.S. without authorization. Recent policies and executive actions have caused confusion about whether there are any instances in which entering the U.S. unlawfully can result in lawful status. Immigration law is clear on this point, based on statutes put in place by the U.S. Congress: the Immigration and Nationality Act (INA). Section 212(a)(6)(A)(i) specifically states that anyone who attempts to enter the U.S. without going through the proper inspection process at a designated port of entry is considered inadmissible.

If you are in the U.S. while being inadmissible, you can be removed under the law. Also, according to INA provision 8 USC, s. 1325, anyone entering without inspection, or who commits fraud or makes a willful misrepresentation to gain admission, can be imprisoned, fined, or both. It is because of these laws that the current administration is able to take such a firm stance on deporting and removing foreign nationals who are in the U.S. illegally, or who entered without authorization (even if they have a pending asylum case). Fundamentally, no legal process can proceed unless there has been a legal admission. And as we all know from the headlines and stories of heartache in the media, the consequences of violating this immigration law can be devastating, including long-term or even permanent inadmissibility to the U.S., or the inability to convince a Department of State officer to grant you a visa to enter in the future.

Applying for the wrong status

Some people have multiple options for types of visas or work-authorized status in the U.S. For instance, business owners may be able to come to the U.S. as intracompany transferees, treaty investors, treaty traders, extraordinary

ability workers, or a plethora of other statuses, if they qualify. This is where it is critical to speak with a U.S. immigration lawyer with knowledge about all your options, and not just go with a status that your friend might have or that you believe you qualify for based on your Google search or chatbot answer to the question, “How do I qualify for work authorization to the U.S., as a foreign business owner?”

Figuring out what the best option is based on your short-, medium- and long-term goals, timelines, available resources, financial projections, etc. can save you a lot of time and money in the long run. And ensuring that you have professional support can keep you from ending up with a denial on your record, because you misunderstood what was required for the visa or status, and did not prepare a thorough application on first presentation.

It is generally easier to obtain status the first time around; once you have a denial on your record, many officers will be unwilling to overrule a prior decision by a colleague or fellow government worker, requiring you to seek alternate options, which might not be as useful, cost-effective or easy to obtain.

Port shopping

This is another firm “don’t do it.” The most common instance where port shopping occurs is where an individual or group appear at a U.S. port of entry and request admission, only to be told that the admitting officer doesn’t feel that they are admissible at that time — sometimes because of a response to an interview question, a concern about the individual’s criminal record, a concern re: a health-related issue, the need for work authorization before entering for the stated purpose, or for, really, a slew of other reasons.

Time and again, I have heard from people who felt the original decision by the first admitting officer was unreasonable or wrong, so they decided to go to a different port of entry from the one where they were refused admission, to try to get a different decision from a different officer. But when an officer denies an individual admission or allows them to withdraw their request for admission, they enter notes into the Department of Homeland Security system for tracking admissions — which can and do pop up the next time the individual tries to enter the U.S. Port shopping is seen as a highly dishonest act, raising concern about the individual’s moral character and fitness to be admitted to the U.S.

If the officer at the second port of entry believes the individual is attempting to gain entry to the U.S. dishonestly, they can subject the applicant for admission and anyone travelling with them to “expedited removal,” which is effectively an administrative deportation from the U.S. The result is that the individual(s) will then be subjected to a period of inadmissibility of at least five years, during which time they will not be able to enter the U.S. for any reason.

Presuming or assuming

Presuming you have a right to enter the U.S. (or stay in the U.S.) can lead to enormous problems. Even if you have been admitted before for the same purposes, or you believe that you are fully qualified for a visa or status you have applied for, keep in mind that being granted a visa or admitted to the U.S. is a privilege, not a right, as a non-citizen. The only time this does not apply is if you become a U.S. citizen or if you have a right to enter as a member of a Native American tribe covered under certain treaties.

Arguing with an officer about their decision

As an extension of the last point, I have yet to see a case in which arguing with an officer has resulted in a decision being overturned. Understand, there is a large difference between arguing with an officer and respectfully requesting reconsideration.

You can certainly raise points you feel might overcome any hesitation by an officer to grant a visa or admit you to the U.S., if given the opportunity, and in a respectful way. For instance, if you are Canadian and applying for a work authorized status at the border, and feel that the adjudicating officer has misunderstood or overlooked evidence, you can request that a supervisor review the application. But attitude generally has everything to do with success in these situations, where a genuine mistake has been made by an officer adjudicating your visa or work authorization application, or even your request for admission as a visitor. Whether to consider additional evidence or information is fully within the discretion of the government official adjudicating your request. And as the proverb says, you generally catch more flies with honey than with vinegar.

If you are concerned about your ability to enter or remain in the U.S., please reach out to Elizabeth M. Klarin (eklarin@lippes.com) or any of the other immigration professionals at Lippes Mathias LLP, who would be glad to speak with you about your concern and, if a solution is needed, proactively or reactively.

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