CATO
POLICY
ANALYSIS

October 29, 2024 Number 983

Why US Immigration Officials Should Allow "Digital Nomad" Admissions

By Angelo A. Paparelli, David J. Bier, Peter Choi, and Stephen Yale-Loehr

EXECUTIVE SUMMARY

Existing US immigration statutes, regulations, and policies do not expressly authorize the short-term admission of digital nomads: typically, college-educated professionals who use laptops, cell phones, and other digital technology to perform their occupations remotely while traveling. Nor do these rules explain how to manage the admission of noncitizens who are not digital nomads per se but who, while lawfully visiting the United States to see family or go to an industry conference, log on to their laptop or phone to review and respond to routine business matters such as replying to emails.

To address the void, we propose that the Department of Homeland Security and the Department of State promptly formulate and issue policy guidance that authorizes the admission of certain digital nomads for up to six months as visitors under sections 101(a)(15)(B) and 217 of the Immigration and Nationality Act. Such policy guidance can help fill an emergent area of the ever-widening rift between facts of life and US immigration law in the absence of congressional reform. Carefully crafted, it can do so in a manner that conforms to existing legal requirements governing travel to the United States as a visitor and that allows the country to benefit economically from their lawful visits.

ANGELO A. PAPARELLI is a partner at Vialto Law (US). **DAVID J. BIER** is director of immigration studies at the Cato Institute. **PETER CHOI** is a senior manager at Vialto Law (US). **STEPHEN YALE-LOEHR** is a professor of immigration law practice at Cornell Law School.

INTRODUCTION

Many countries have established new programs authorizing the admission of so-called digital nomads: typically, college-educated professionals who use digital technology to perform their occupations remotely while traveling.[1] These initiatives generally authorize admission for short periods, which can often be up to six months, allowing income derived from employment abroad to be spent within the country.[2]

The motivations for digital nomad initiatives vary. Some countries may view them as a way to tap into the growing trend of location-independent work, attract skilled professionals and entrepreneurs, foster a global reputation for innovation, and facilitate knowledge transfer. Other nations may seek to recover revenue lost during the COVID-19 pandemic and to support local businesses going forward.

Unfortunately, the United States has yet to announce any digital nomad initiative. To address the void, the Department of Homeland Security (DHS) and the Department of State (DOS) should promptly formulate and issue policy guidance that authorizes the temporary admission of certain digital nomads for up to six months as visitors.[3]

The authorization of digital nomad admissions would further the stated policy of the US government to "promote legitimate international travel . . . both for the cultural and social value to the world and for economic purposes."[4] The absence of public policies on digital nomad admissions engenders disrespect for laws that are oblivious to the real world, where "work" may reside inside anyone's phone. The lack of clear legal rules thus leaves officials tasked with making arbitrary decisions to facilitate or prohibit digital nomad admissions.

A MODERN PHENOMENON NOT ENVISIONED BY OUTDATED LAWS

Rooted largely in legislation enacted over 70 years ago, existing US immigration statutes, regulations, and policies do not expressly authorize the short-term admission of digital nomads.[5] Nor do these sources of authority explain how to manage the admission of noncitizens who are not digital nomads per se, but who lawfully visit the United States for personal or occupational reasons not amounting to local employment or labor for hire and log on to their laptops to attend to daily home-country business matters, such as checking emails, staying abreast of developments, and addressing urgent issues.[6] For the sake of simplicity, this paper includes the latter group in the discussion of digital nomads because the underlying legal analysis and the need for clear policy applies equally to both groups.

> "Unlike in many other countries, current US immigration laws and policies do not expressly authorize the short-term admission of digital nomads."

In meetings with US Customs and Border Protection (CBP) officials, immigration attorneys have expressed concerns that noncitizens who may otherwise qualify as visitors under the Immigration and Nationality Act (INA) risk visa refusal or denial of admission based solely on their incidental use of portable technology to engage in activities not amounting to unauthorized employment in the United States.[7] Despite recent indication in response to these concerns that DHS is taking the lead on developing relevant policy, the United States has yet to announce any digital nomad initiative.[8] In developing such policy, DHS, in coordination with DOS, has the opportunity to provide guidance that allows for digital nomad admissions, which could help fill an emergent area of the ever-widening rift between facts of life and US immigration law. Although Congress should take the lead on fixing these problems, it has shown an unwillingness to involve itself in this area. The purpose of this proposal is not to sketch out the ideal immigration policy or even the ideal digital nomad policy, but rather to explain what officials can do within the confines of existing rules, including protectionist ones that intend to limit unauthorized access to employment inside the United States.[9]

A SOLUTION IN THE ABSENCE OF LEGISLATIVE REFORM

In the absence of legislation that addresses the issue, DOS and DHS can and should formulate policy guidance on digital nomad admissions that has three main components:

1. Adoption of the position that a noncitizen's intent to use digital technology remotely in connection with employment outside the United States does not preclude eligibility for classification as a B-1 or WB visitor for business or B-2 or WT visitor for pleasure under INA § 101(a)(15)(B) if such intent is incidental to the lawful primary purpose of the visit.
2. Explanation of how the adopted position conforms to existing requirements for classification as a B-1 or B-2 visitor (and a WB or WT entrant), which prohibits illegal access to employment inside the United States.
3. Recognition that DOS and DHS officers should exercise their discretion to decide in a given case whether the intent to use digital technology remotely is in fact incidental to the lawful primary purpose of the US visit and pursuant to employment abroad.

PRIMARY INTENT VERSUS INCIDENTAL INTENT

US immigration law categorizes nonimmigrants—noncitizens who intend to stay in the United States temporarily—under various classifications that correspond to the primary purpose of their stay and the activities that flow from it. Based on this purpose and these activities, nonimmigrants are issued a US visa in their passport and granted admission to the United States or are allowed to apply for admission under the visa waiver program, subject to satisfaction of any accompanying education, wage, work experience, nationality, and admissibility requirements. At times, if a noncitizen has an additional purpose for traveling to the country, such purpose and its corresponding activities, when viewed in isolation, could appear at odds with the requirements of the classification and seem to render the noncitizen ineligible. But if such additional purpose and activities are merely incidental to the required—and, importantly, the noncitizen's primary—purpose and activities, they are not necessarily disqualifying.

This principle is well established in US immigration law, meaning that the distinction between primary and incidental intent drawn by this paper's proposed digital nomad policy is not a novel or fabricated one.[10] For instance, an employer seeking classification of a noncitizen as an L-1A intracompany transferee who will provide services in the United States in a managerial or executive capacity must show that the services comprise job duties that are primarily managerial or executive. As such, in adjudicating petitions requesting L-1A classification, US Citizenship and Immigration Services (USCIS) acknowledges decisions holding that the noncitizen beneficiaries of these petitions "may be required to perform some operational or administrative tasks from time to time."[11] USCIS recognizes that such performance of tasks does not by itself disqualify the noncitizen from L-1A classification.[12]

> "The absence of public policies on digital nomad admissions engenders disrespect for laws that are oblivious to the real world."

Examples also exist in which, as with digital nomad admissions, the incidental purpose and activities at issue involve the performance of labor in and of itself. For example, J-1 foreign exchange visitors seeking to participate in an internship or training program are not formally work-authorized in the view of the State Department, with DOS obligating program sponsors to ensure that American workers are not displaced and that the program does not serve as a pretext to fill a labor need in the country.[13] Yet, as a practical matter, DOS also "recognizes that work is an essential component of on-the-job training"; "that in many respects there are no conceptual or legal distinctions between an employee and a trainee"; and that "[t]hese two perspectives are not inconsistent."[14] Likewise, H-3 trainees are permitted to engage in productive labor if it is incidental and necessary to their training.[15]

Using the same rationale, digital nomads and other travelers who will remotely access digital technology during their stay in the United States for reasons related to their employment abroad could be lawfully issued visas and admitted as B-1 or B-2 visitors (or WB or WT entrants) subject to existing conditions that already govern these classifications. Put differently, if digital nomads or other travelers intend to visit the United States primarily to engage in activities that are deemed to fall within the scope of "business" or "pleasure," any incidental use of digital technology remotely in connection with their foreign

employment need not disqualify them from B-1, WB, B-2, or WT classification.

This interpretation can be read as aligning with the guidance of the DOS Foreign Affairs Manual (FAM) that certain fact patterns amount to mere "intercourse of a commercial character" rather than US employment, and thus fall within the scope of permissible activities as a business visitor supporting B-1 classification.[16] Under this existing guidance, a noncitizen may be deemed a visitor for business whose primary purpose for traveling to the United States is captured by any of the guidance's enumerated fact patterns. Assuming an intended activity and the arrangement under which the activity will be carried out comprise a noncitizen's primary purpose for visiting, the question the existing guidance in the FAM seeks to address is whether such activity constitutes unauthorized "employment" in the country or, rather, merely the incidental activities of a visitor to the US that the INA permits.[17]

> "Incidental use of digital technology remotely in connection with foreign employment need not disqualify anyone from admission."

The proposed policy guidance urged in this paper assumes that a noncitizen's primary purpose for visiting the United States is indeed classifiable as such an activity (be it for business or pleasure), and the remote activities to be performed digitally in connection with foreign employment are only incidental to this primary purpose. Since nonimmigrant classifications under the INA reflect the primary intended purpose of a noncitizen's stay, any incidental work to be performed digitally in connection with employment abroad should have no bearing on eligibility for visitor classification.[18]

CONFORMING TO EXISTING REQUIREMENTS

The statutory basis for B-1 and B-2 classification is found at INA § 101(a)(15)(B).[19] This provision labels as a nonimmigrant a noncitizen "other than one coming for the purpose of study or of performing skilled or unskilled labor . . . having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure." Legal authority governing the implementation of this statutory provision can be found in sources such as Titles 8 and 22 of the Code of Federal Regulations; policy guidance such as CBP memoranda and Volume 9 of the FAM; and various decisions of administrative tribunals and federal courts.[20] Unpacking these sources reveals several conditions that noncitizens must satisfy to obtain either of the classifications:

- They seek admission to the United States either
  - for "business," which refers to "conventions, conferences, consultations and other legitimate activities of a commercial or professional nature," and which excludes "local employment or labor for hire," or
  - for "pleasure," which refers to "legitimate activities of a recreational character, including tourism, amusement, visits with friends or relatives, rest, medical treatment, and activities of a fraternal, social, or service nature," and which excludes visits "for the primary purpose of obtaining US citizenship for a child by giving birth in the United States."[21]
- They will stay in the United States only for a period of specifically limited duration of not more than one year for visitors seeking admission using a visa or not more than 90 days for visitors seeking admission under the Visa Waiver Program.[22]
- They will maintain, or establish at the end of their stay in the United States, a residence in a foreign country that they are authorized to enter.[23]
- They have made adequate financial arrangements to defray the cost of their stay in the United States and their return abroad.[24]

There is no reason why digital nomads and more occasional travelers for personal or business reasons who incidentally attend to day-to-day occupational matters arising from employment abroad could not meet those requirements.

Digital nomads may lead an itinerant lifestyle for many reasons. However, generally, the thrust of any given visit they make to a foreign country is the pursuit of personal

opportunities for exploration, recreation, or enrichment—or, in the language of US immigration law, "pleasure"—even if remote work originating from abroad will be a part of their visit.[25]

Similarly, it is hardly conceivable today that more occasional travelers, whose visit to a foreign country may be driven, for example, by a business need to attend an industry conference, won't use their work laptops to respond to emails, address emergencies, and generally stay up to speed on day-to-day occurrences.

If their foreign-country destination is the United States, these digital nomads and more occasional travelers could be prepared to readily explain and document the fact that their visit is primarily for pleasure or business; the planned length of their visit; their authorization to enter another country upon departing the United States; and the financial arrangements they have made to support themselves for the visit's duration. Relevant documentation could include lodging, sightseeing, and departing flight reservations; a conference invitation or itinerary; a passport or visa issued by the country to which the noncitizen will travel at the end of their visit; and proof of employment and income outside the United States. The incidental use of digital technology pursuant to employment abroad does not, by itself, preclude the ability of noncitizens to show that legitimate business or pleasure will be the primary purpose of their visit, or to meet any of the other classification criteria.

DEFINING EMPLOYMENT ABROAD

In the absence of congressional reform, this paper's purpose is to detail how a digital nomad policy can be adopted without reforming the underlying statutes.[26] Existing laws and policies already require that generally any labor or services comprising the primary purpose for visiting the United States be performed only in connection with employment abroad.[27] To be compatible with existing rules, the proposed policy guidance on digital nomads could also expressly prohibit compensation or remuneration from a US source for any incidental work performed during a digital nomad admission.

This type of policy is already enforced in other areas.[28] DHS regulations explicitly allow B-1 classification of Canadian and Mexican citizens who seek to travel for the primary purpose of carrying out work in an occupation listed in the United States-Mexico-Canada Trade Agreement (USMCA).[29] These noncitizens would otherwise require US employment authorization pursuant to TN classification but for the fact that they will be remunerated from a non-US source outside the country.[30] The implication is that remuneration paid from a US source (other than to cover reasonable incidental expenses such as transportation or lodging costs) so strongly signals the existence of local employment that it is prohibited for B-1 visitors.[31]

> "The proposed policy guidance would benefit US workers by increasing demand for goods and services in the United States."

The present proposal would not violate this rule. As long as any incidental remote work using digital technology is performed solely in connection with foreign employment and a job located outside the United States, the proposed policy guidance would not violate provisions of the Immigration Reform and Control Act (IRCA) that prohibit employers from employing a noncitizen in the United States knowing that the noncitizen is not authorized to be employed in the country.[32] Even if it is assumed that IRCA applies to work performed incidentally, the purpose, letter, and implementation of the statute suggest that work at the direction of a foreign employer, and thus in furtherance of an employer-employee relationship established and effectuated outside US territorial borders, falls outside the scope of IRCA.[33]

IRCA is intended to prevent jobs inside the United States from being filled by noncitizens without employment authorization. Therefore, activities engaged in during a short-term visit digitally, incidentally, and remotely in furtherance of a job that is based outside the United States likewise fall beyond the purpose of the statute.

The letter and regulatory implementation of IRCA also lend support to this logic. They suggest that what is prohibited is not the hiring or continued employment, per se, of noncitizens who are not authorized to be employed in the United States, but the employment of such noncitizens by US employers domestically, inside US territorial borders.

The qualifying phrase "in the United States" is used 21 times in IRCA's opening section alone, with corresponding regulations and agency policy guidance likewise using language to suggest that IRCA's prohibitions apply only to local employment.[34] For instance, the regulations define "employer" as "a person or entity . . . who engages the services or labor of an employee to be performed in the United States."[35] This definition implies the existence of a relationship with the object of satisfying a demand for labor within the United States, not a relationship fostered outside the United States that merely may require or allow the employee to travel periodically to the country incident to the duties of a job located abroad.[36]

> "The need to resort to agency action to fix such a commonplace practice reflects the truism that our nation's immigration system needs to be updated."

Moreover, the two select groups of visitors under INA § 101(a)(15)(B) that are permitted to accept employment in the United States, and thus remuneration from a US source—namely, personal and domestic workers employed by nonimmigrants on work visas or by US citizens normally residing abroad, as well as certain categories of nonimmigrants and employees of foreign international airlines—are explicitly allowed to do so by regulations promulgated under IRCA that enumerate the classes of noncitizens that are authorized to be employed in the United States.[37]

All other visitors, insofar as they are permitted to engage in occupational activities during their visit, can do so only in furtherance of employment they maintain outside the country. The absence of these other visitors from the list of noncitizens explicitly permitted by the regulations under IRCA to engage in local employment renders it apparent that they do not fall within the statute's ambit.

By requiring that any incidental use of digital technology be performed solely in connection with employment abroad, the proposed policy guidance ensures that bona fide digital nomad admissions do not run afoul of the requirements of IRCA and corresponding regulations. More broadly, the proposed policy guidance aligns with the dual statutory duty to facilitate international travel while also preventing unauthorized access to employment inside the United States.[38] Proposed language to add to the FAM is attached as an Appendix to this paper.

Finally, it is worth emphasizing that this proposal would demonstrably benefit US workers by increasing demand for goods and services in the United States. Foreign visitors as a group spent about $225 billion in 2023—an average of about $3,400 per visitor.[39] Digital nomads—often high-income individuals—likely spend more than the average person during their stays in the United States. If this policy is effective at increasing digital nomad admissions, US workers stand to benefit significantly.

OFFICER DISCRETION

DOS and DHS officers responsible for issuing visas and granting admission enjoy broad discretion in making their respective determinations. Under the proposed policy guidance on digital nomad admissions, officers would need to exercise appropriate discretion case-by-case since there is no legal rule that states when exactly the intent to work is "incidental" to a noncitizen's primary purpose for visiting.

But discretionary authority may be vulnerable to abuse. In efforts to facilitate a degree of consistency in the exercise of this authority, while also ensuring that meaningful discretion is retained, the proposed policy guidance should provide a non-exhaustive list of specific factors officers may consider.[40]

Of course, if an officer is satisfied that the primary purpose of the visit is qualifying, it would also remain within the officer's discretion to not pursue a line of questioning pertaining to any incidental intent to work remotely pursuant to employment abroad. Still, the proposed policy guidance would at least clarify in those circumstances that granting a visa or admission to such a noncitizen is a valid agency action on the merits in keeping with existing law and policy.

CONCLUSION

The issue of digital nomads will only become more pressing in the years to come, as more companies turn to

remote workers and use technology to link their global workforce. In the absence of congressional action directly addressing the issue of digital nomad admissions, agency policy guidance can contribute to bridging the gap between US immigration law and the realities of modern work and travel. Beyond the direct economic benefits from increased tourism, explicitly promoting and protecting digital nomad admissions promises to make America a hub for innovative collaboration and knowledge transfer as visitors meet with and learn from potential partners in their fields.

But ultimately, policy guidance leaves much to the discretion of agency officers and is legally inferior to an act of Congress. Despite what is still the general novelty of the digital nomad phenomenon, the need to resort to agency action to fix such a commonplace practice—the incidental access of digital technology to engage in foreign employment remotely while visiting the United States—reflects, if nothing else, the truism that our nation's immigration system needs to be updated to permit easier travel and migration of all types through comprehensive legislative reform. Until that happens, this paper's proposed policy guidance can help.

APPENDIX

[Proposed revision to the Department of State's Foreign Affairs Manual, Vol. 9]

9 FAM 402.2-2(F) (U) Importance of Facilitating International Travel

(CT: VISA-1730; 03-10-2023)

a. (U) The policy of the US Government is to facilitate and promote legitimate international travel and the free movement of people of all nationalities to the United States, consistent with national security and public safety concerns, both for the cultural and social value to the world and for economic purposes.

[Proposed new section] b. (U) *In facilitating and promoting legitimate international travel, consular officers should recognize that noncitizens applying for visitor visas routinely connect online even during temporary travels to the United States. Thus, a noncitizen's intent to use digital technology remotely from the United States in connection with preexisting employment abroad does not preclude eligibility for issuance of a nonimmigrant visa as a B-1 visitor for business or B-2 visitor for pleasure under INA § 101(a)(15)(B) as long as such intent is incidental to the lawful primary purpose of the temporary visit. Similarly, prior entries to the United States of temporary visitors in B-1 or B-2 visa status, or in WT (waiver tourist) or WB (waiver business) status under the Visa Waiver Permanent Program, where such incidental use of remote technology occurred, do not preclude issuance of visitor visas under the B classification.*

c. (U) You should, where appropriate, expedite applications for the issuance of a visitor visa for urgent business travelers and those with emergent or humanitarian purposes of travel, if the issuance is consistent with US immigration laws and regulations. You must be satisfied that the applicants have overcome the presumption that they are intending immigrants. See 9 FAM 403.3- 3 and 7 FAH-1 H-263.7 for more information on scheduling appointments and handling expedite requests.

NOTES

1. See Inge Hermann and Cody Morris Paris, “Digital Nomadism: The Nexus of Remote Working and Travel Mobility,” *Information Technology and Tourism* 22 (2020): 329–34, 331 (citing a description of digital nomads as “location-independent workers who can work almost anywhere, anytime, thanks to the ubiquity of digital infrastructure and technological advances”). See also Bryan Lufkin, “Is the Great Digital-Nomad Workforce Actually Coming?,” BBC, June 15, 2021 (quoting a McKinsey and Company partner who notes that digital nomads predominantly comprise “college-educated, office-based, white-collar workers”); and Carla Vianna, “Everyone Wants to Be a Digital Nomad. Here’s How to Do It Ethically,” *Washington Post*, May 30, 2023 (“Studies paint digital nomads as tech-savvy, well-educated professionals”). See also *Merriam-Webster Dictionary*, “digital nomad” (defining “digital nomad” as “someone who performs their occupation entirely over the Internet while traveling”). As used in this policy analysis, the term “digital technology” refers broadly to electronic systems, tools, or devices that process, store, or transmit data, ranging from longstanding varieties like email, the internet, computers, and personal or enterprise software to more recent innovations such as social media, analytics, and, increasingly, mobile devices. See Michael Fitzgerald et al., *Embracing Digital Technology: A New Strategic Imperative*, *MIT Sloan Management Review* Research Report (Massachusetts Institute of Technology, 2013).

2. See Celia Fernandez, “Costa Rica, Greece and 42 Other Countries with a Digital Nomad Visa—the US Isn’t One of Them,” CNBC, May 14, 2024; Emma Agyemang, “Countries Wooing Corporate Digital Nomads Hope to Make Them Stay,” *Financial Times*, May 18, 2024; and Ward Williams, “Countries Offering Digital Nomad Visas,” *Investopedia*, updated August 15, 2024 (identifying 49 countries and regions that offer digital nomad visas). For general background on various digital nomad programs, see Adam Hayes, “Digital Nomad,” *Investopedia*, updated July 27, 2021.

3. In using the term “policy guidance,” this paper refers to a guidance document under the Administrative Procedure Act (APA). Under the APA, guidance documents comprise interpretive rules (statements of general applicability and future effect that set forth an agency’s interpretation of a statute or regulation) and policy statements (statements advising the public of the manner in which an agency proposes to exercise a discretionary power). See Kate R. Bowers, “Agency Use of Guidance Documents,” Congressional Research Service, April 19, 2021, pp. 1–2. Some combination of the two may form the policy guidance proposed by this paper. See 8 U.S.C. § 1101(a)(15)(B). “Visitors” includes noncitizens who qualify for the visa waiver program under INA § 217, 8 U.S.C. § 1187. To qualify for the visa waiver program, noncitizens must show that they intend to travel to the United States as visitors under INA § 101(a)(15)(B). Entrants under the visa waiver program are classified as WB (waiver business) and WT (waiver tourist). References in this paper to visitors for business (B-1) and to visitors for pleasure (B-2) under § 101(a)(15)(B) are intended to include WB and WT entrants.

4. See “Importance of Facilitating International Travel,” Foreign Affairs Manual, US Department of State, 9 FAM 402.2-2(F), March 10, 2023.

5. McCarran-Walter Act (Immigration and Nationality Act of 1952), Pub. L. No. 82-414, 66 Stat. 163.

6. The term “noncitizen” is used throughout this paper in the same manner it is used by the federal agencies responsible for administering US immigration laws: to refer to a person who is not a citizen or national of the United States. See, for example, “Glossary,” US Citizenship and Immigration Services; and Jean King, Acting Director, US Department of Justice, Executive Office for Immigration Review, “Terminology,” Policy Memorandum 21-27, July 23, 2021. Although noncitizens include US lawful permanent residents and persons granted asylum or refugee status, this paper excludes them from the digital nomad policy proposal.

7. See AILA Research Library, “AILA CBP Liaison Committee Meeting with US Customs and Border Protection, Washington, DC, Thursday, April 27, 2023,” AILA Doc. No. 23033001, posted July 7, 2023; AILA Research Library, “AILA CBP OFO Liaison Committee Meeting with US Customs and Border Protection, Office of Field Operations (OFO), Washington, DC, Wednesday, October 19, 2022,” AILA Doc. No. 22100700, posted December 16, 2022; and AILA Research Library, “AILA South Florida–CBP Liaison Meeting—12/2/2022: Questions and Answers,” AILA Doc. No. 23010932, posted January 9, 2023.

8. AILA Research Library, “AILA CBP Liaison Committee Meeting with US Customs and Border Protection, Washington, DC, Thursday, April 27, 2023,” AILA Doc. No. 23033001, posted July 7, 2023.

9. The proposed policy guidance would be similar to the digital nomad initiatives recently adopted by the United Kingdom and Canada. See Millicent Machell, “Tourist Visa Changes Will Allow Remote Working,” *HR* magazine,

January 17, 2024; and Scott Titshaw, “International Digital Nomads: Immigration Law Options in the United States and Abroad,” *Georgetown Immigration Law Journal* 38, no. 1 (2023): 71–88, 74, 75–76.

10. The examples mentioned in the body of this section are but a few of many. One not mentioned is the accommodation made for the incidental performance by noncitizens of routine, staff-level job duties without undermining their eligibility for classification as employees of an E-1 treaty trader or E-2 treaty investor on the basis of their executive or supervisory position; see 8 C.F.R. § 214.2(e)(17)(iii). Another example is the allowance made for the performance by H-2A temporary agricultural workers of job duties not specified in the prerequisite labor certification if these duties are minor and incidental; see 8 C.F.R. § 214.2(h)(5)(iii)(A). Examples also exist in policy guidance. See, for example, “Visitors for Pleasure,” Foreign Affairs Manual, US Department of State, 9 FAM 402.2-4(A)(6), April 1, 2024 (allowing B-2 visitors traveling primarily for tourism to incidentally engage in a short course of study, despite enrollment in a course of study being otherwise expressly prohibited by 8 C.F.R. § 214.2(b)(7)). See also “Choice of Classification,” Foreign Affairs Manual, US Department of State, 9 FAM 402.1-3(a), July 20, 2021 (“Principal Purpose of Admission: An applicant desiring to come to the United States for one principal purpose, and one or more incidental purposes, must be classified in accordance with the principal purpose”).

11. See *Matter of Z-A-, Inc.*, Adopted Decision 2016-02, 5 (AAO April 14, 2016).

12. See *Matter of Z-A-, Inc.*, Adopted Decision 2016-02, 1, 7 (AAO April 14, 2016).

13. See 22 C.F.R. § 62.22(f).

14. Daryl Buffenstein et al., *Business Immigration: Law and Practice*, 2nd ed., vol. 1, *Nonimmigrant Concepts* (American Immigration Lawyers Association), pp. 837–911, 848 (quoting from 72 Fed. Reg. 33669 (June 19, 2007)).

15. See 8 C.F.R. § 214.2(h)(7)(ii)(A)(3), (iii)(E), (iv)(B)(1).

16. See *Karnuth v. United States*, 279 US 231, 244 (1929); and “Business Visas (B-1),” Foreign Affairs Manual, US Department of State, 9 FAM 402.2-5(B)–(G).

17. See “Commercial or Industrial Workers,” Foreign Affairs Manual, US Department of State, 9 FAM 402.2-5(E)(1) (authorizing B-1 classification of noncitizens who, pursuant to the terms of a sales contract, will travel to the United States for the specific purpose of installing, servicing, or repairing commercial equipment purchased from a company abroad if they will not be remunerated, other than for incidental costs, by a US source and if they hold unique knowledge essential to carrying out such installation, service, or repair).

18. Another commentator has pointed out that, per existing CBP guidance, noncitizens “may not engage in business activities while admitted under a B-2 visa,” even though, conversely, they “may engage in B-2 visa activities while admitted under a B-1 visa.” See Scott Titshaw, “International Digital Nomads: Immigration Law Options in the United States and Abroad,” *Georgetown Immigration Law Journal* 38, no. 1 (2023): 71–88, 82 (quoting US Customs and Border Protection, “B-1 Permissible Activity FAQs,” July 11, 2014; last modified January 4, 2022). As a way to reconcile this guidance with a proposal for granting admission in B-2 classification to noncitizens who act remotely as digital nomads for a foreign employer, Titshaw notes on page 87 that such conduct could be viewed as purely incidental to the activity for pleasure that serves as the noncitizen’s primary purpose for visiting (as this policy analysis also maintains and further explains).

19. 8 U.S.C. § 1101(a)(15)(B).

20. See 8 C.F.R. §§ 214.1–2; 22 C.F.R. §§ 41.31–33; “Tourists and Business Visitors and Mexican Border Crossing Cards—B Visas and BCCs,” Foreign Affairs Manual, US Department of State, 9 FAM 402.2; and AILA Research Library, “US Customs and Border Protection Officer’s Reference Tool,” AILA Doc. No. 18112701, posted October 21, 2019. The Officer’s Reference Tool provides internal agency guidance to CBP officers regarding the inspection and admission of individuals at US ports of entry. See also *Matter of Hira*, 11 I&N Dec. 824 (BIA 1965; AG 1966); and *Karnuth v. United States*, 279 US 231 (1929).

21. 22 C.F.R. § 41.31(b)(1).

22. “Temporary Visitors,” Foreign Affairs Manual, US Department of State, 9 FAM 402.2-2(B); “Temporary Period of Stay,” Foreign Affairs Manual, US Department of State, 9 FAM 402.2-2(D); and 8 C.F.R. § 214.2(b)(1)–(2); INA § 217(a)(1), 8 U.S.C. § 1187(a)(1); 22 C.F.R § 41.2(k)(1).

23. See INA § 101(a)(15)(B) (requiring that a noncitizen seeking B classification have “a residence in a foreign country which he has no intention of abandoning”). See also “Residence Abroad Defined,” Foreign Affairs Manual, US Department of State, 9 FAM 401.1-3(E)(2) (clarifying that the required residence in a foreign country does not need to be the noncitizen’s current residence and does not require maintenance of an independent household by the

noncitizen; explaining, for example, that "an applicant who has been living in Germany may meet the residence abroad requirement by showing a clear intention to establish a residence in Canada after a temporary visit in the United States").

24. "Unlawful Activity While in Visitor Status," Foreign Affairs Manual, US Department of State, 9 FAM 402.2-2(E).

25. See, for example, Caroline Castrillon, "Why the Digital Nomad Lifestyle Is on the Rise," *Forbes*, July 17, 2022 (ascribing the digital nomad phenomenon, in part, to a growing prioritization of events and experiences, such as concerts and sporting activities, over personal possessions); and MBO Partners, "Digital Nomads: Nomadism Enters the Mainstream," MBOPartners.com, August 2023 ("[Digital nomads] are united by their passion for travel, desire for adventure, and interest in new cultures").

26. Furthermore, nothing in this policy analysis should be read as undermining or disregarding compliance with federal and state income tax and payroll withholding laws and US tax treaties with foreign nations that would apply to the US-based activities of digital nomad entrants and their foreign employers.

27. See, for example, "Business Visas (B-1)," Foreign Affairs Manual, US Department of State, 9 FAM 402.2-5(B)–(G).

28. See, for example, United States Attorney's Office, Eastern District of Texas, "Indian Corporation Pays Record Amount to Settle Allegations of Systemic Visa Fraud and Abuse of Immigration Processes," US Department of Justice, October 30, 2013. The settlement announced in this press release resolved allegations that an Indian technology company skirted legal requirements by acquiring B-1 visas for its employees rather than H-1B work visas. The settlement agreement involved no determination of liability. It is cited here to illustrate the government's concern in ensuring that the visitor classification does not impair US workers' job opportunities.

29. Agreement Between the United States of America, the United Mexican States, and Canada, July 1, 2020, Pub. L. No. 116-113 (replacing the North American Free Trade Agreement).

30. See 8 C.F.R. § 214.1(a)(2), 22 C.F.R. § 41.12 (assigning "TN" designation to nonimmigrant professionals granted visas or admission under the USMCA and implementing statutory provision at INA § 214(e)(1)). See also 8 C.F.R. § 214.6(c) (codifying occupations listed in the USMCA); and 8 C.F.R. § 214.2(b)(4).

31. See, for example, *Matter of GP*, 4 I&N Dec. 217, 220 (BIA 1950) ("Where a Mexican national was found admissible to pursue the selling of green peppers . . . this activity was held not to deprive the applicant of the status of a temporary visitor . . . since 'the major portion of his time is not spent in the United States nor his major source of income earned in the United States'") (quoting *Matter of G----*, A-7182159 (July 1, 1949, CO)); *Matter of Hira*, 11 I&N Dec. 824 (BIA 1965; AG 1966) (affirming the B-1 eligibility of a tailor who took customer measurements for his employer located in Hong Kong, was paid his salary in India, and received only expense money to cover his visit); and *Matter of Hall*, 18 I&N Dec. 203 (BIA 1982) (finding unauthorized employment despite no fixed salary or remuneration when a noncitizen admitted as a visitor carried out fundraising activities as part of his missionary work for a church in the US territory of Puerto Rico and, in return, received compensation that included payment for entertainment, recreation, and other discretionary costs).

32. INA § 274A(a), 8 U.S.C. § 1324a(a).

33. The extraterritorial application of IRCA has rarely been litigated. One case is *Lardy et al. v. United Airlines, Inc.*, 4 OCAHO no. 92B00085, 595 (1994). This case involved the provisions at INA §274B prohibiting citizenship-status discrimination in hiring decisions made by United Airlines, a US carrier, for flight-attendant positions based in the United Kingdom to serve flights between Europe and the United States. The Administrative Law Judge (ALJ) found that it was not necessary to determine whether IRCA's anti-discrimination provisions applied extraterritorially to decide the case. This was because the ALJ deemed employment in the positions at issue not to be extraterritorial since it plainly fell within the definition of "employment" at 8 C.F.R. § 274a.1(h), which expressly includes "service or labor performed on a vessel or aircraft that has arrived in the United States and has been inspected." Although 8 C.F.R. § 274a.1(h) formally implements IRCA's provisions prohibiting the unlawful employment of noncitizens at INA § 274A, not its anti-discrimination provisions at INA § 274B, the ALJ concluded, based on a combination of general principles of statutory construction and IRCA's legislative history and statutory scheme, that "employment" means the same thing under both sets of provisions. The employment at issue in *Lardy* can be materially distinguished from the type of work contemplated by the proposed policy guidance on digital nomad admissions in that the latter includes work that is neither performed in connection with a US employer (such as United Airlines) nor clearly encompassed by the definition of "employment" under IRCA.

34. See INA § 274A, 8 U.S.C. § 1324a; 8 C.F.R. § 274a; and USCIS Policy Manual, Volume 10, Part A.

35. See 8 C.F.R. § 274a.1(g).

36. An additional legal basis for this paper's espoused policy authorizing digital nomad admissions of noncitizen visitors is the legal presumption that US laws are not to be applied extraterritorially unless the governing statute expressly provides that it should apply outside the United States. See, for example, *Abitron Austria GmbH et al. v. Hetronic International, Inc.*, 600 US 412, 417 (2023); *RJR Nabisco, Inc. v. European Community*, 579 US 325, 335 (2016); *Sale v. Haitian Centers Council, Inc.*, 509 US 155 (1993) (declining to apply the INA extraterritorially); and *Daramola v. Oracle America, Inc.*, 92 F.4th 833 (9th Cir. 2024) (declining to apply whistleblower anti-retaliation provisions in the Sarbanes-Oxley and Dodd-Frank Acts to conduct outside the United States even though some activities occurred in the United States). The court held that "[T]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case" (quoting *Morrison v. National Australia Bank Ltd.*, 561 US 247, 266 (2010)). Emphasis in original.

37. See 8 C.F.R. § 274a.12(c)(17).

38. US Citizenship and Immigration Services (USCIS) guidance on the administration of IRCA and its implementing regulations explains that the identity and employment eligibility verification procedures instituted by these regulations, including completion of Form I-9, apply only with respect to employees "hired *in the United States* after November 6, 1986," the date IRCA was signed into law. (See US Department of Homeland Security, USCIS, *Handbook for Employers M-274*, Chapter 2.0. Emphasis added.) Form I-9 itself, in requiring the employer to provide its address, also makes geographic reference only to street address, municipality, state, and zip code, connoting the presence of the employer within the United States' territorial boundaries. See US Department of Homeland Security, USCIS, "Form I-9 (Edition 08/01/2023)."

39. "Fast Facts: United States Travel and Tourism Industry," National Travel and Tourism Office, International Trade Administration, July 2024.

40. See *Matter of Hira*, 11 I&N Dec. 824, 829 (BIA 1965; AG 1966); "Business Visas (B-1)," Foreign Affairs Manual, US Department of State, 9 FAM 402.2-5(B)–(G); and AILA Research Library, "CBP/AILA South Florida Liaison Meeting Minutes (12/2/2022): Questions and Answers," AILA Doc. No. 23010932, posted January 9, 2023.

RELATED PUBLICATIONS FROM THE CATO INSTITUTE

Green Card Approval Rate Reaches Record Lows by David J. Bier, Briefing Paper no. 173 (February 15, 2024)

Why Legal Immigration Is Nearly Impossible: US Legal Immigration Rules Explained by David J. Bier, Policy Analysis no. 950 (June 13, 2023)

Streamlining to End Immigration Backlogs by David J. Bier, Policy Analysis no. 943 (April 20, 2023)

Processing Backlogs in the US Immigration System: Describing the Scale of the Problem by David J. Bier, Briefing Paper no. 141 (October 6, 2022)

Deregulating Legal Immigration: A Blueprint for Agency Action by David J. Bier, Study (December 18, 2020)

Reforming the Immigration System: A Brief Outline by David J. Bier, Study (November 11, 2020)

RECENT STUDIES IN THE CATO INSTITUTE POLICY ANALYSIS SERIES

982. **Is There Life After NATO?** by Marc Trachtenberg (October 22, 2024)

981. **A Bigger Government Means Giving Up Almost Half Your Paycheck** by Adam N. Michel (October 10, 2024)

980. **Reforming State and Local Economic Development Subsidies** by Scott Lincicome, Marc Joffe, and Krit Chanwong (September 19, 2024)

979. **Broken Trust: The Pervasive Role of Deceit in American Policing** by Andrew Eichen (September 12, 2024)

978. **Are Carbon Border Adjustments a Dream Climate Policy or Protectionist Nightmare?** by Gabriella Beaumont-Smith (July 30, 2024)

977. **Illegal Immigrant Murderers in Texas, 2013–2022: Illegal Immigrant and Legal Immigrant Conviction and Arrest Rates for Homicide and Other Crimes** by Alex Nowrasteh (June 26, 2024)

976. **Helping Families Navigate the Changing Education Landscape** by Colleen Hroncich and Jamie Buckland (June 25, 2024)

975. **Slashing Tax Rates and Cutting Loopholes: Options for Tax Reform in the 119th Congress** by Adam N. Michel (June 17, 2024)

974. **A Guide to Content Moderation for Policymakers** by David Inserra (May 21, 2024)

973. **A Case for Federal Deficit Reduction Spending Cuts to Avoid a Fiscal Crisis** by Ryan Bourne (April 18, 2024)

972. **Terrorism and Immigration: A Risk Analysis, 1975–2023** by Alex Nowrasteh (April 9, 2024)

971. **A Return to US Casualty Aversion: The 9/11 Wars as Aberrations** by John Mueller (April 2, 2024)

970. **Biden Short-Term Health Plans Rule Creates Gaps in Coverage: Rule Would Deny Care after Patients Fall Ill** by Michael F. Cannon (March 14, 2024)

CITATION

Paparelli, Angelo A., David J. Bier, Peter Choi, and Stephen Yale-Loehr, “Why US Immigration Officials Should Allow ‘Digital Nomad’ Admissions,” Policy Analysis no. 983, Cato Institute, Washington, DC, October 29, 2024.

The views expressed in this paper are those of the author(s) and should not be attributed to the Cato Institute, its directors, its Sponsors, or any other person or organization. Nothing in this paper should be construed as an attempt to aid or hinder the passage of any bill before Congress. Copyright © 2024 Cato Institute. This work by the Cato Institute is licensed under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International License.