INSIDE THE MINDS

Employing International Workers

Leading Lawyers on Complying with Regulations When Hiring International Employees

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ASPATORE

Assisting Employers in Applying for Visas for Foreign National Workers

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Introduction

When attorneys advise clients in the process of hiring foreign nationals on a temporary and/or permanent basis there are many factors to consider. The appropriate visa category for the foreign national, the timing of when a company can begin employing a foreign national, the cost of the visa process that must be borne by the company, the regulatory requirements involved in immigration sponsorship specific to the visa category selected, and the birth/citizenship country of the foreign national can all influence hiring decisions and the immigration sponsorship process. Attorneys should be aware of these key factors when advising clients regarding the best way to successfully sponsor a foreign national for lawful employment on a temporary and/or permanent basis.

Issues Driving International Employment Trends

The key issues driving the international employment market at this time include globalization, technology, taxation, regulation, and the end market for US products. With regard to globalization, an increasing number of companies now have workforces in multiple countries around the world, and the products of US companies are now being sold in numerous countries. Essentially, our nation's biggest companies need to expand on a global basis, and new developments in technology such as the Internet, mobile telecommunications, and cloud computing are enabling their workforces to be integrated, no matter where those employees are located. Of course, taxation issues often make a difference in terms of where companies want to operate and sell their products. Certain US companies may wish to locate assets, conduct economic activity, and earn and realize profit in other countries where taxes are lower.

US companies may seek to employ a foreign national in the United States at which time the US Immigration Laws must be successfully navigated in order to obtain US work authorization for the prospective employee in the most appropriate visa category. The most commonly used US work visas where employer sponsorship is involved are H-1B (specialty occupation), L-1 (intra-company transferee for executive, managerial, and specialized personnel employed by related foreign company continuing employment with US company), O-1 (aliens with extraordinary ability in sciences, arts,

education, business, or athletics), and TN (professional employment under the North American Free Trade Agreement). Regulation issues from an immigration law perspective may make it easier or more difficult to hire workers from one country versus another and in one visa category versus another. For example, a worker from Canada may qualify for TN status, which may be beneficial compared to H-1B status in terms of the lack of an annual cap, no requirement to pay a prevailing wage, the ability to apply for status directly at the border, and the ability to remain in nonimmigrant status for a longer total period of time.

The hiring rate of international workers in the United States has been down in recent times in tandem with the downturn in the US economy. In addition, certain interpretations of regulations in this area by the Immigration Service have become somewhat stricter, and it can be especially difficult for small companies to navigate the immigration laws. When adjudicating the immigration petitions of small companies, the Immigration Service tends to require a higher standard of proof of legitimacy of the viability of the company and job offer compared to large companies. The rationale behind this is to ensure there is no fraud going on—i.e., that the company wishing to hire a foreign worker is a legitimate business and has the ability to pay the wages of that worker. Unfortunately, smaller companies are finding that this equates to significantly more preparation in filing petitions for foreign workers in terms of both documentation and explanation, as the adjudication standards faced by smaller companies are higher. Likewise, while the Immigration Service is taking steps to provide foreign nationals the ability to obtain work authorization to create new businesses, it remains difficult for a foreign national to create a start-up company in the United States that could employ US workers.

India and China tend to be the most popular sources for hiring foreign workers due to the talent level of workers from those countries, particularly those with engineering, science, and math backgrounds. Many workers from India and China have skill sets in those areas that most US workers do not have—a major reason why India and China are becoming dominant global economic powers. Industries that are currently hiring the largest numbers of foreign workers include information technology (IT), finance, health care, and education—a trend that has remained unchanged for at least a decade.

Challenges Affecting International Employment

A rule change that has recently had the most impact with respect to international employment pertains to the way in which the Immigration Service decides the employer-employee relationship in H-1B petitions—the most widely used employment visa category. The H-1B visa allows workers in specialty occupations—areas that normally require a bachelor's degree or higher—to work in the United States for up to a total of six years—and beyond if an application for a green card has been in process for at least one year or there is an approved I-140 petition but no visa number available. It is not necessary for an employer to demonstrate that there is a shortage of qualified American workers to sponsor an individual for an H-1B visa. It is only necessary for the employer to verify that the H-1B worker is being paid the prevailing wage for the work being performed in a specialty occupation and that employment of the H-1B worker is not harming conditions for American workers. To qualify for the position, the H-1B employee must have at least a US bachelor's degree in a field relevant to the position sought or a foreign degree that has been evaluated to be the equivalent of a US bachelor's degree. The H-1B employee can also demonstrate through work experience or a combination of education and experience that they have the equivalent of a bachelor's degree. An H-1B visa is a "dual intent" visa meaning that a visa will not be denied simply because a person has declared intent to become a permanent resident. H-1B petitions are usually approved in three-year increments.

In January 2010, a memo known as the "Neufeld Memo" was issued by the Immigration Service defining the nature of the employer/employee relationship that is required for a company to sponsor an H-1B worker. That rule change has greatly affected the ability of IT consulting companies that place new hires at third party locations to sponsor H-1B employees. Pursuant to the Neufeld Memo, H-1B employers must clearly show that an employer-employee relationship will exist between the petitioner and the beneficiary throughout the duration of the H-1B employment by demonstrating that the employer will be responsible for the overall direction of the beneficiary's work and have the ability to hire, pay, fire, supervise, and otherwise control the work of the employee. The Neufeld Memo sets forth factors for adjudicating officers to weigh when determining whether a valid employer-employee relationship exists and

provides examples of documentation an employer should submit with a petition to establish the ability to control the H-1B employee. The Neufeld Memo has taken away the ability of IT consulting companies to hire someone and place them at a third party worksite without actively managing that employee.

This rule change also makes it more difficult for someone who is self-employed to obtain an H-1B visa in the United States, because an employer-employee relationship is not recognized when a foreign national seeks to start their own company and be sponsored by that company for H-1B status. However, the government has amended these rules to some extent; for instance, the Immigration Service issued a memo in August 2011 providing guidance as to when the owner of a company can be sponsored by that company for H-1B status. The key is structuring the company so that the foreign national owner can be controlled by the company. The memorandum provides an example where if the employer provides evidence that there is a separate board of directors that has the ability to hire, fire, pay, supervise, or otherwise control the foreign national, the employer may be able to establish an employer-employee relationship with the foreign national. It remains to be seen how that activity will play out in actual practice.

Despite the challenges in this area, there is a need to hire more international talent in order for the United States to successfully compete in today's global economy. Consequently, companies in Silicon Valley are continually lobbying Washington for more work visas and easier terms so that they can hire the foreign talent that they need. Many companies still want to hire the best workers they can find; therefore, they are willing to go through the complications of the foreign worker hiring process. Conversely, other companies do not want to bother with the visa sponsorship process because they do not want to go through the extra hurdles involved in hiring a foreign worker.

Elements of an Effective Recruitment Program for International Workers

A company that wishes to hire a foreign worker must understand the foreign worker hiring process/system and its regulations. Management

needs to understand what type of visa is potentially available to a foreign worker, what the timing of the visa application process is, and what regulations are involved. Human resources departments usually handle these issues for bigger companies; however, in the case of smaller companies, an immigration attorney usually deals with the owner of the company directly. In most cases, larger companies are going to be much more organized in this area than smaller companies.

The attorney's role in the foreign worker hiring process includes providing legal advice in terms of what visas are available and the timing of the application process. Typically, the attorney obtains intake information from the company related to the nature of the business, the proposed position, and the salary offered, and obtains intake information from the foreign national related to educational and experience background. Upon receipt of the intake information the attorney prepares and files all of the necessary paperwork with the appropriate government agency. The attorney also advises the company on the regulations that it needs to comply with once it is employing a foreign national and advises foreign nationals about issues that they may be concerned with, such as their ability to travel outside the United States, what happens if they lose their job, and how much time they may remain in a certain visa status.

I have found that most companies will recruit for the best talent they can find, and if it turns out that the best person to fill the job is a foreign national, they will do everything possible to utilize the immigration process to hire that person. An employer wants to know the timing issues with respect to when a foreign worker can begin employment; the feasibility of the foreign worker obtaining the appropriate work visa; the legal requirements and cost that must be borne by the employer as a matter of law for filing a visa application; and how to meet all of the legal requirements once the foreign national is actually working for their company.

At the same time, everybody involved needs to understand the long-term aspect of the employment relationship: is there a possibility of green card sponsorship down the line? Is the client looking to hire the employee temporarily/for a short period of time, and then is the employee going to move on? It is always important to think about the long-term issues that are

involved when an attorney is preparing the initial visa application, because what the attorney is doing initially could have an impact on long-term strategy. For example, if an employer is planning on filing a green card application for the employee, the ability to file in the second preference visa category could depend upon how the employer initially proceeds with an H-1B petition. For example, if an employer indicates to the Immigration Service in an H-1B petition that a position requires a bachelor's degree, that employer cannot later indicate that the same position requires a master's degree for purposes of a labor certification application.

Difficulties in Complying with the Laws for Employing International Workers

The most difficult laws in the area of hiring foreign nationals in terms of compliance are probably those involved in obtaining an H-1B visa. After an offer of employment is made, the first step for an employer is to ensure that the H-1B employee will be paid at least the prevailing wage paid to similarly employed workers in the geographic area where the H-1B employee will be employed. The employer also guarantees that it will not pay the H-1B employee less than the actual wage paid to its other employees with similar qualifications. Once the wage information has been obtained, notice is provided to American workers that the employer will be hiring an H-1B employee. Thereafter, a Form ETA-9035 Labor Condition Application (LCA) is submitted to the US Department of Labor. On this form, the employer submits the wage to be paid, the prevailing wage, and makes certain attestations. When the LCA form is returned to an employer, it is submitted to the Immigration Service as part of the H-1B petition package. Also included in the H-1B petition package to the Immigration Service are documentation of the H-1B employee's qualifications, the employer's type of business, and the type of work the H-1B employee will be performing. Once the LCA is filed it is necessary for an H-1B employer to maintain a public access file containing documents that include the original signed and dated LCA, the prevailing wage survey, benefit plan information, and a copy of the posting notice. Also, any salary increase must be reflected in the public access file. If the employer is going to change the work location of the H-1B employee they must post a new notice in that location, and depending upon whether the new position is outside of the initial area of employment, they may also need to file a new LCA and an amended H-1B

petition. Furthermore, the Immigration Service conducts employer site visits to check on the validity of H-1B employment. These are among the many types of ongoing requirements that an attorney must explain to the company and the foreign national.

Another complicated area for employers of foreign workers involves a PERM labor certification case where the employer sponsors an employee for a green card by demonstrating that there are no ready, willing, qualified, and available US workers for the proffered position. Again, the employer must follow stringent wage and recruitment requirements that are promulgated by the Department of Labor designed to protect the US workforce.

The level of compliance required depends on the visa category in which the employer is employing the foreign worker and compliance is generally less burdensome in the L category for intra-company transferees, the TN category for Canadians and Mexicans, and the O category for extraordinary ability aliens. For example, these categories do not require the payment of a prevailing wage, the payment of certain fees by the employer, or the maintenance of a public access file.

Ultimately, it is the attorney's responsibility to inform the client of the compliance requirements with respect to their particular case. The attorney needs to thoroughly know the law and regulations in this area, and then explain them to the client; it is not the client's job to read and figure out the Code of Federal Regulations. Obviously, the client is going to be held to the standards they need to meet, but the attorney should explain all of the compliance requirements for a particular visa category. Attorneys can help clients comply with the regulations by providing a detailed reference letter outlining the requirements of a visa program and by providing clients with a checklist for public access file requirements. I often assist clients in compiling a compliance manual covering what the company needs to do when they are employing a foreign worker—such as maintaining a public access file, setting forth the steps that must be followed if they are going to employ the worker at a different location, and making it clear that they need to notify the Immigration Service if they terminate an H-1B worker. A good compliance manual elaborates what processes the company needs to follow in order to comply with the regulations for employing foreign nationals.

The Role of Immigration Authorities in the Employment of International Workers

The Immigration Service authorities ultimately decide whether to grant employment authorization to a foreign national. Employers and their attorneys basically interact with four agencies when they are dealing with the employment of foreign nationals. These agencies are US Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE), which are part of the Department of Homeland Security; the Department of Labor; and the Department of State.

USCIS is generally the governmental authority that makes decisions on whether to grant work authorization, although that decision is sometimes made by ICE. For example, a Canadian who is trying to gain TN status may apply for that status directly at the border as opposed to first filing a petition with USCIS. The Labor Department handles PERM labor certification cases and the investigation of any violation of H-1B regulations. The State Department issues travel document visas that allow foreign nationals to travel back to the United States after time spent outside the United States. An attorney will ultimately wind up dealing with all of these government agencies.

Choosing a Visa Category

As noted, the most common employment-based visa types are the H-1B, L, TN, and O visa category. With respect to hiring for non-professional jobs, companies will often use what is called an H-2B visa, which is generally a seasonal type visa that landscapers or hotel workers often apply for in the summer.

In deciding which visa category to apply for, an attorney should evaluate each case on an individual basis, and then come up with a strategy for the particular situation. For example, if an employer wants to hire someone who is working for a company overseas that is related to the US company, but the worker does not have a degree, then you might wish to file an L-type visa. If the H-1B cap has already been reached, an employer might try to apply for an O visa for a prospective employee—a category where there is no visa cap. I have successfully obtained O visas for extraordinary ability

aliens including a world-renown tennis coach, a thoroughbred horse trainer, and a disc jockey. If an employer wishes to hire a Canadian employee, it could be easier to hire them in TN status because there are fewer regulations involved. However, due to the fact that H-1B is a "dual intent" visa whereas TN is not, it is important to keep in mind that it may be easier to get a green card if someone has an H-1B visa. Determining the best immigration strategy must be done on a case-by-case basis.

Key Forms and Filings When Employing International Workers

The predominant employment form for a temporary work visa is Form I-129—i.e., the petition for nonimmigrant worker. When applying for a green card, you need to file a permanent labor certification, which is Form ETA-9089; followed by a Form I-140—i.e., the petition for immigrant worker; and the green card application itself, which is Form I-485.

US employers that wish to hire foreign nationals primarily deal with agencies of the US government, not foreign governments, particularly the US Department of Homeland Security, as well as the US Departments of State and Labor, as previously noted. Attorneys rarely need to communicate with a foreign government in order to employ nonimmigrant workers, unless the worker has a J status visa and requires a waiver of the two-year home residency requirement—in which case they will typically need a no-objection letter from their home government.

The E-Verify system is an electronic system for verifying the legal work authorization of a prospective employee. The E-Verify system does not play a major role in terms of posing challenges for companies that are looking to legitimately hire foreign nationals. Rather, E-Verify could present problems to companies that seek to employ an illegal workforce as a company registered with the E-Verify system would face substantial fines and penalties for hiring a worker not authorized by the E-Verify system. Unfortunately, I have found that the E-Verify system contains many errors. For instance, US citizens and permanent residents can be erroneously flagged for not having proper employment authorizations which could delay the hiring process.

Challenges when Employing Foreign Workers: Mistakes to Avoid

One of the biggest challenges that companies face in this area is the cost involved with hiring a foreign worker, including all of the filing and attorney's fees that need to be paid. Again, employers must make sure that the foreign worker is qualified for a particular visa, and they have to worry about the Immigration Service potentially denying the case because of the qualifications of the person or the nature of the company. Essentially, the onerous regulations that companies need to deal with when hiring foreign nationals are among the biggest challenges in this area. Another challenge is the waiting time that is often involved in bringing the foreign national into this country along with the waiting time to convert a temporary employment situation into a permanent employment situation involving a green card.

In assisting clients in this area, an attorney must, once again, evaluate each situation on a case-by-case basis. Attorneys must consider each individual foreign worker with respect to their qualifications, their employment situation, what country they are from, and what visa category they are seeking.

Some major challenges in this area pertain to the backlog of green card applications filed by Chinese and Indian nationals, which extend to several years in both the second and third preference categories. The second preference category pertains to someone with a master's degree or its equivalent, and the third preference category is for someone with a bachelor's degree or at least two years of experience. The wait time in the second preference category had typically been about five years, but has recently been reduced to about two years because of a reduction in demand for employment-based visas. It is expected that the waiting times will again retrogress at some point in the future. With respect to the third preference category, the wait time can be many years for individuals from all countries, and even longer for Indian and Chinese nationals, based on the number of applicants and how many visas are available in that category.

A mistake that many employers make in temporarily hiring foreign nationals is not anticipating long term, permanent hiring needs. Again, it is important to understand that what an employer does initially may have an impact on

whether the employee can ultimately obtain a green card. All too often, employers do not choose to apply in the best available visa category. Other mistakes include filing papers without following the law, not providing enough supporting documentation, or not providing the correct supporting documentation. For example, when filing a petition on behalf of a small company the attorney should include documentation about the company such as copies of the articles of incorporation, company brochures, website information, copies of recent tax returns and bank statements, a copy of the deed or lease to property, copies of contracts with customers, and copies of invoices to customers, etc.

Conclusion

Looking ahead, I believe that there is going to be an increasing need for US employers to hire foreign workers. As technology continues to evolve, US employers will need smart people to work in IT companies as well as companies in other industries, and they are not going to be able to find all of the employees that they need in the United States; therefore, employers will need to hire workers from abroad. Unfortunately, we are currently dealing with antiquated immigration laws in the United States: there are not enough H-1B visa numbers available; it is difficult to be self-employed and start a company that could benefit the US economy; the wait times for green cards are long; and the appeal process of a denied petition takes too long. Simply stated, the laws in this area have not changed to keep up with the way in which the global twenty-first-century economy is moving forward.

Would-be immigration attorneys need to know that this is a complicated and intricate practice area. There are many different aspects to the immigration process and complicated regulations to comply with.

In summary, when an attorney is contacted about a US company hiring a foreign national the attorney should determine the most appropriate visa category in which to apply, obtain the intake information about the employer and employee, properly and timely file the required governmental applications, ensure that all parties are complying with the appropriate regulations both prior to and during employment, and keep an eye toward potential future green card sponsorship.

Key Takeaways

- Give employer clients who wish to hire foreign workers legal advice in terms of what visas are available and the timing of the application process. Obtain intake information from both the company and the foreign national, and then prepare and file all of the necessary paperwork with the appropriate agency.
- Advise the company on the regulations that it needs to comply with once it is employing a foreign national; and advise foreign nationals about issues that they may be concerned with, such as their ability to travel outside the United States, what happens if they lose their job, and how much time they will remain in a certain visa status.
- Think about the long-term issues that are involved when preparing the initial visa application. What the attorney does initially could have an impact on long-term strategy.
- Inform employer clients of the step-by-step process involved in sponsoring a foreign national for employment.
- Evaluate each situation on a case-by-case basis. Consider each individual foreign worker with respect to their qualifications, their employment situation, what country they are from, and what visa category they are seeking.

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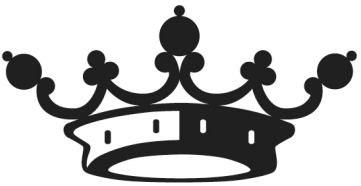

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