

STAYING OUT OF HARM'S WAY: IMMIGRATION PITFALLS THAT EMPLOYMENT LAWYERS AND THEIR CLIENTS SHOULD AVOID: Part 1 of 3



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Immigration lawyers and employment attorneys may at times seem to inhabit parallel universes, practicing in law firms that may look similar, but working on vastly different types of legal problems. On closer analysis, however, the two groups often share a number of things in common:

- Whether representing management or labor, we tend to encounter the same folks in the Human Resources and Legal Departments.
- Our professional lives are set against the ever-present backdrop of litigation, as we deal with common issues involving avoidance of conflict of interest and the scope of our legal representation.
- Our specialty areas of law are both code-based and, to an increasing degree, administrative, with bureaucratic guidance made available through policy memoranda issued sporadically by a variety of government agencies.
- Ultimately, we both provide legal advice that helps shape and determine the employment relationship between business entities and their employees.

Although our specialty areas overlap and intersect in many ways, particularly as employment law practice becomes more international in scope, it is somewhat surprising that open dialogues and regular exchanges of information between the two groups are comparatively rare.

This article will try to bridge that great divide by presenting employment attorneys with information concerning some basic principles of immigration law and the immigration consequences of a variety of employment decisions. The article will attempt to alert employment attorneys about actions by management or employees that may trigger adverse immigration consequences and suggest ways to limit or minimize liability or negative, unintended results affecting the work force and the employment relationship.²

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² This article is merely an overview of a complex and ever-changing subject and is not intended as legal advice, nor should it be relied upon as such. For legal advice in a given factual situation, the reader is cautioned to retain the services of competent professionals in the immigration and employment law fields.

A Word of Caution: The Maze of Immigration Laws Governing Employment Authorization for Foreign Nationals Is Complex and Often Perilous

The rules governing the employment relationship involving U.S. workers are intricate, overlapping and complex. Tax, labor, pension, and discrimination laws dealing with employees are just a few of the areas of law that corporations must address. This patchwork of intersecting laws becomes even more complex and confusing when foreign workers are included in the mix. Many employers may believe that the Immigration and Naturalization Service (“INS”) is the only governing agency concerned with administering the immigration laws. Congress in its wisdom, however, has conferred substantial authority on several federal agencies to administer and enforce various provisions of U.S. immigration laws that affect employers and foreign workers. The three primary agencies are the beleaguered and soon-to-be restructured or abolished INS (a unit of the Department of Justice), the Department of State (“DOS”), which acts through the Bureau of Consular Affairs in Washington and through U.S. embassies and consulates worldwide, and the Department of Labor (“DOL”).

At the outset of the employment relationship, when job offer and acceptance are contemplated, business entities and prospective foreign employees should be informed about the regulations promulgated by each of these agencies so that the parties concerned have a full understanding of the compliance obligations, costs and liabilities imposed in the employment of foreign citizens.

For example, employers should be aware of the Form I-9 employment eligibility verification and record-keeping requirements, the related anti-discrimination provisions, and the sanctions for failure to comply with these requirements. Sanctions or penalties can be especially harsh for employers that hire aliens whom the employer knows are unauthorized to work in the United States or for employers that willfully violate regulations, such as H-1B wage or attestation requirements.³ Although attorneys practicing employment law need not attain a mastery of employment-based immigration laws, they can nonetheless benefit from a general understanding of some of the basics, including the terms of sponsorship of employment visas, I-9 verification, the importance of monitoring the maintenance of status of employees, and the outsourcing of functions to Professional Employer Organizations.

Terms of Sponsorship

Congress has created a befuddling array of some 40 or so categories of immigrant and nonimmigrant visa classifications in a kind of alphabet-soup listing that uses letters, hyphens and numbers. An analysis of all visa categories is beyond the scope of this article. In most situations involving the hiring of a foreign national, however, the

³ For a general discussion on employment-based immigration law in the United States, see Angelo A. Paparelli and J. Ira Burkemper, “Immigration and Nationality,” Chapter 23, in *The Transactional Lawyer’s Deskbook*, published by the American Immigration Lawyers Association, 1995 Annual Conference Handbook, soon to be published in a second edition of the Deskbook.

nonimmigrant work-visa categories are comparatively few and can be grouped in logical ways. Selected visas allow employment of scholars, students and trainees, professional workers, corporate transferees from foreign affiliates, investors and traders, as well as workers with specialized knowledge, essential skills or outstanding talents.

In most instances, the terms of employment are circumscribed. Foreign nationals may not freely float or flit from employer to employer. Unless new permission is granted or rules of compliance are satisfied, a foreign worker is normally allowed to be employed only by the “petitioner,” the employer that sponsored the worker’s authorization for employment in the United States. Thus, the terms and conditions of sponsorship outlined in the nonimmigrant visa petition and supporting documents in most instances control the work permission. These submissions to the government identify a named employer offering a specific job to a foreign citizen, who will perform a prescribed set of job duties in a particular geographical area, for a prescribed compensation package on a full-time or part-time basis.

To complicate matters, however, the INS has also made available to numerous categories of aliens an Employment Authorization Document (commonly referred to as an “EAD”) which in most instances allows so-called “open-market” employment with any employer.⁴ Thus, employment attorneys should keep their antennae alert to changed circumstances and advise employers to consult immigration counsel whenever a change in employment is being considered for a foreign national. A promotion, demotion, job transfer or entity-restructuring can all too often eliminate the basis for a foreign national’s employment authorization.⁵ If this situation occurs, unless proactive or remedial measures are taken promptly, the foreign national may be required to leave the United States.

Three common visa categories used by businesses to hire foreign nationals with restricted terms of sponsorship include the H-1B (specialty occupation), L-1 (intracompany transferee), and E (treaty trader and investor) classifications.

The H-1B category can be used by businesses seeking to hire foreign nationals to provide services in a “specialty occupation.” A specialty occupation is an occupation requiring the theoretical and practical application of a body of highly specialized

⁴ Eligible foreign nationals may apply for an EAD using INS Form I-765. Examples of classifications of aliens who may seek open market employment by applying for an EAD include aliens admitted to the United States in refugee status, aliens granted asylum, and aliens who have filed an application for adjustment of status to lawful permanent resident. See 8 C.F.R. §§ 274a.12(a) (3) & (5); 8 C.F.R. § 274a.12(c)(9).

⁵ For information on the immigration consequences of mergers, acquisitions, and corporate changes, see Alan Tafapolsky, Angelo A. Paparelli, A. James Vazquez-Azpiri and Susan K. Wehrer, “Thriving on Change: How to Solve Immigration Problems in Merger & Acquisition Deals,” *New Rules for the New Millennium* (AILA 2001); Michael F. Turansick & Jill M. Guzman, “Corporate Restructuring & H-1Bs Under the New Visa Waiver Permanent Program Act,” *New Rules for the New Millennium* (AILA 2001); Angelo A. Paparelli & Susan K. Wehrer, “Update on Mergers and Acquisitions: Congress Toys with the H-1B,” *Immigration & Nationality Law Handbook*, vol. II (AILA 2000-01); Stanley Mailman & Stephen Yale-Loehr, “More on the Impact of Corporate Reorganizations on H-1B Workers,” 6 *Bender’s Immigr. Bulletin* 381 (April 15, 2001).

knowledge and the attainment of a baccalaureate or higher degree – or its equivalent – in the specialty.⁶ H-1B workers include professionals in such fields as computer science, engineering, accounting, architecture and an expanding array of traditional and evolving highly-skilled occupations. The terms of sponsorship for H-1B employees include requirements to perform specific job duties for the petitioning employer and the payment by the employer of the higher of the “prevailing wage” in the local area or “actual wage” at the employer’s work-site.⁷ With few exceptions, the H-1B employee must generally work solely within a defined and previously approved geographical area.

The L-1 visa category is available to foreign employees working abroad for a qualifying parent, subsidiary, or affiliate of the U.S. entity. L-1 visas may be issued to employees of a foreign entity who have been employed abroad for the qualifying entity in an executive, managerial, or “specialized-knowledge” position for at least one year out of the three years immediately preceding entry into the United States.⁸ The terms of sponsorship for L-1 employees include requirements to perform specific job duties at a particular U.S. parent, subsidiary, or affiliate of the foreign entity abroad. In some cases, an employer can qualify employees to come to the United States under a “blanket L-1,” a special status granted to certain midsize and large multinational corporations with more than one U.S. office, which permits mobility for its L-1 employees.⁹

The E visa classification is authorized under various Friendship, Commerce and Navigation treaties and Bilateral Investment treaties between the United States and other countries. These treaties authorize foreign entities from particular treaty countries to employ selected personnel at their U.S.-based subsidiaries, and/or affiliates. Congress has implemented this treaty right through its enactment of INA § 101(a)(15)(E)¹⁰, which permits issuance of visas under two categories of work authorization: The E-1 Treaty Trader and E-2 Treaty Investor.

These visas may be granted to foreign nationals of a treaty country who are or will become owners or qualifying employees of a U.S.-based treaty enterprise.¹¹ The E-1 treaty entity must satisfy various criteria demonstrating that it engages in trade principally conducted between the United States entity and the treaty country, whereas the E-2 treaty entity must demonstrate that an individual or entity has invested (or is actively in the process of investing) a substantial amount of capital in the U.S. based company.¹²

⁶ INA § 214(i)(1), 8 U.S.C. § 1184(i)(1); 8 C.F.R. § 214.2(h)(4)(ii).

⁷ The actual wage is defined in the regulations as the wage rate paid by the petitioning employer to all other company employees with “similar experience and qualifications for the specific employment in question.”

⁸ 8 C.F.R. § 655.731(a)(1). The prevailing wage is defined as the prevailing wage paid employees in an occupational classification “in the area of intended employment.” The employer must base the determination of the prevailing wage “on the best information as of the time of filing the application.”

⁸ 8 C.F.R. § 655.731(a)(2).

⁸ See INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L); 8 C.F.R. § 214.2(l).

⁹ For information on the blanket L-1, see Alan Tafapolsky & A. James Vazquez-Azpiri, “Global Warming: The L Blanket Program and the Transitional Corporation,” 99-04 Immigr. Briefings (Apr. 1999).

¹⁰ 8 U.S.C. § 1101(a)(15)(E).

¹¹ For more information on the E visa category, see The Transactional Lawyer’s Deskbook, supra.

¹² 8 C.F.R. § 214.2(e)(1) & (2); 22 C.F.R. § 41.51(a) & (b).

The terms of sponsorship for an E-1 and E-2 alien include requirements that the employee work for the sponsoring entity in an executive or supervisory position or a position in which the employee renders services “essential to the operation of the employing treaty enterprise.”¹³

The failure to understand the terms of sponsorship and the immigration implications of a proposed change in the employment of a foreign national can result in considerable liability for an employer. For example, if a sponsoring employer promotes a foreign engineer to a new position, such as project manager, the terms of the previously approved sponsorship may be adversely affected. If the employee will no longer be performing the same core duties, an amended petition to INS should be filed with the INS and approved by the agency prior to implementing the change in the employee’s duties.

Even if the core duties have not materially changed, the employer may need to consider other terms of sponsorship. For example, recall that a corporation hiring an H-1B employee must pay that employee the greater of the prevailing wage or the actual wage in the specialty occupation. If the corporation does not research the actual or prevailing wage for project managers prior to changing the job assignment, a wage violation may occur, which could subject the corporation to an enforcement action by the DOL, the agency responsible for policing underpayments to H-1B workers.

¹³ 8 C.F.R. § 214.2(e)(17) & (18); 22 C.F.R. § 41.51(c). For a discussion of the interplay between and among employment law, immigration law and tax law in the E visa context, see Angelo A. Paparelli and Suzanne J. Holland, “The Quasar Case: Hidden Problems of Employment, Immigration, and Tax Law,” published in *The International Lawyer*, Winter 1992.