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

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Employee Travel Abroad: Beware the Unwary Traveler

One way an employer can lose the services of a foreign employee is for the worker to become stranded abroad because of his or her failure to demonstrate eligibility for admission to the United States in a lawful immigration status. The BCBP has recently limited the discretion of inspecting officers at ports of entry to admit aliens into the United States when the applicant for admission fails to produce all of the required documentation.[2]

While it may seem obvious that foreign workers must carry all necessary documentation to demonstrate eligibility to enter the United States, the documentary requirements themselves can be complex, bewildering, and, sometimes, nonsensical. For example, a nonimmigrant H-1B employee who has filed an application for adjustment of status to that of a permanent resident ("adjustment application"), but has not yet received a travel document (known as an "Advance Parole" document), generally may nevertheless travel abroad without abandoning the adjustment application using his or her H-1B visa, so long as the nonimmigrant is properly abiding by the terms of the H-1B visa.

What many nonimmigrants do not know is that the regulations allowing travel in this manner also require the H-1B employee, "upon returning to this country," to possess "the original I-797 receipt notice for the adjustment application."[3] Oddly, the regulations governing travel for the H-1B employee's spouse or child are different. Regulations for

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[2] See Michael A. Pearson, Memorandum to Regional Directors, et al. (HQ INS 10/10.10), "Deferred Inspection, Parole and Waivers of Documentary Requirements, " (November 28, 2001). This memorandum provides that during "the nation's heightened security alert and until further notice" inspectors at Ports of Entry and Port Directors no longer have authority to grant deferred inspection, a waiver of passport, visa, or other document, or to exercise parole authority." The memorandum limits the discretion to grant deferred inspection, a waiver of passport, visa, or other document, or to exercise parole authority to District Directors, Deputy District Directors, Assistant District Directors for Inspections, and Assistant District Directors for Examinations, but only if certain restrictive criteria are met.

[3] 8 C.F.R. § 245.2(a)(4)(ii)(C). This regulation also applies to nonimmigrants in L status.

the family members appear to require these nonimmigrants to be in possession of the original I-797 receipt notice when leaving the United States, and not just upon returning to this country.[4] The point is that hapless employees can easily misunderstand complex immigration laws; hence, it is understandable that foreign workers will sometimes unwittingly violate or fail to comply with the technical letter of the BCIS regulations.

In order to avoid the loss of productive employees due to technical violations discovered by BCBP officials at ports of entry, foreign employees should be warned about the risks of foreign travel, the need for all required documentation for re-entry after a trip abroad, and, when appropriate, advised to delay unnecessary travel.[5] In-house counsel and H.R. departments would be well advised to consult an immigration practitioner for guidance on these issues.

Examining Maintenance of Status Prior to Offering Employment

Often, when an employer wishes to hire an employee, the employer wants the hiring done immediately. With a new expedited procedure known as the BCIS Premium Processing Service, employers can now hire foreign national workers much more quickly than before this system was put in place.[6] Moreover, under a new law, the American Competitiveness in the 21st Century Act ("AC21"), two categories of foreign employees (workers with H-1B visa status and certain adjustment of status applicants who hold open market EADs), may now invoke a right of "portability" and likewise change employers more quickly than before.[7]

While these provisions offer greater worker mobility, employment lawyers should nonetheless counsel their clients (employers or alien workers) to watch out for status problems that may cause a delay in, or prohibit, the hiring of the foreign national. For example, an H-1B or L-1 employee who has recently been terminated by a prior

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[4] 8 C.F.R. § 245.2(a)(4)(ii)(C) specifies what documentation is needed for travel for both H-1B and H-4 (the derivative status given to H-1B dependents) nonimmigrants who have applied for adjustment of status to avoid abandoning their adjustment of status applications. This regulation provides that travel abroad by an adjustment of status applicant who is not in exclusion, deportation or removal proceedings and who is in lawful H-1 status is not deemed an abandonment of the application if, **upon returning to this country**, the alien remains eligible for H status, is returning to resume employment with the same employer for whom the nonimmigrant is authorized to work as an H-1 employee, and is in possession of a valid H-1 visa and the original adjustment of status receipt notice. For H-4 nonimmigrants, the same requirements exist, except that the regulation omits the words, "upon returning to this country," suggesting that H-4 nonimmigrants must possess the original receipt notice when traveling outside of the United States (and not just upon returning to the United States).

[5] For a discussion of post-September 11 changes in immigration laws, see Angelo A. Paparelli and John C. Valdez, "September 11 Ushered in a New Era in Immigration Law and Practice," Bender's Immigr. Bulletin (April 1, 2002 and April 15, 2002) and ILW.COM (2002).

[6] Premium Processing allows employers to pay a $1000 fee to INS in return for the promise of an adjudication of certain petitions within 15 business days (or, if additional information is requested from the employer, within fifteen business days after the request is answered by the employer). For information on the premium processing program, see: www.immigration.gov/graphics/shared/services/employerinfo/premprsv.htm.

[7] For a discussion on AC21 and "portability" issues, see Angelo A. Paparelli and Janet J. Lee, "'A Moveable Feast': New and Old Portability Under AC21 § 105," Bender's Immigr. Bulletin (Feb. 1, 2001).

employer may not be eligible for a change of status or change of employer petition approval even though the worker's period of authorized stay on the entry document issued upon arrival to the country has not expired. BCIS has stated that it is considering whether to allow a certain grace period that would permit a recently terminated H-1B employee to seek new employment with a United States company without first leaving the United States, but BCIS has clearly stated that, currently, no grace period exists.[8] In other words, if an H-1B employee is terminated, and does not immediately leave the United States, the BCIS may consider the employee out of status the next day.

While BCIS can exercise the discretion in extraordinary circumstances[9] to grant a change of employer or change of status petition on behalf of such an individual, it need not do so.[10] Since September 11, 2001, there have been signs that BCIS will limit its discretion to permit a grace period.[11] In view of the possible issues involved with recently terminated foreign nationals seeking new jobs, employers should investigate the probability of a petition approval before expending money on costs associated with the filing of the petition.

Professional Employer Organizations

Many companies outsource their human resource function to what are sometimes called professional employer organizations ("PEOs"). This outsourcing can result in a situation where a foreign national, for whom the company submitted a petition with the BCIS, may actually be paid and nominally employed or co-employed by another entity.[12] This situation has generated confusion among attorneys and employers as to which of the entities is or should be treated as the sponsoring "petitioner" for purposes of immigration petition filings.

The BCIS has informally addressed the issue of PEOs in the H-1B context in correspondence, stating that "an entity can file an H-1B petition on behalf of an alien even though the alien's salary is paid from another source, provided that an employer-employee relationship exists. The existence of the employer-employee

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[8] See Yoshiko I. Robertson, "Avoiding the Abyss: H-1B Strategies When Facing Reductions in Force," Immigration and Nationality Law Handbook, vol. 2 (AILA 2001); Naomi Schorr & Stephen Yale-Loehr, "Corporate Cuts: Reductions in Pay and Hours for Nonimmigrants," Bender's Immigr. Bulletin (Apr. 15, 2002).

[9] Extraordinary circumstances are defined as circumstances "beyond the control of the applicant or petitioner, and the Service (INS) finds the delay commensurate with the circumstances." 8 C.F.R. § 214.1(c)(4)(i).

[10] Michael Pearson, Memorandum to Service Center Directors et al (HQ 70/6.2.8), "Initial Guidance for Processing H-1B Petitions," (June 19, 2001).

[11] One official from the INS Nebraska Service Center commented recently that an H-1B employee terminated from his H-1B employment thirty days ago would be out of status too long for the INS to exercise favorable discretion to grant a change of employer petition. AILA, INS Nebraska Service Center Liaison Minutes, posted on AILA InfoNet, Doc. No. 01101833.

[12] For a further discussion of outsourcing, see Angelo A. Paparelli, "Yes, We Have No Employees: The U.S. Immigration Consequences of Corporate Outsourcing and Secondment," 13 Immigration Law Report No. 16 (Aug. 15, 1994).

relationship can be demonstrated by evidence establishing that the entity has control over the H-1B nonimmigrant even though the alien's salary is paid from another source."[13] In earlier informal correspondence addressing employee leasing companies, the BCIS indicated that if both companies exercise a degree of control over the alien, "one of the firms involved in the leasing agreement would either have to designate itself as the petitioner for immigration purposes, provided it meets the regulatory definition of a United States employer, or both firms could petition for the alien."[14]

Thus, when an employer has outsourced more than the payroll function, it runs the risk of being deemed a co-employer for immigration purposes. Under certain circumstances, to avoid the need for both entities to file a petition on behalf of each nonimmigrant worker, it may be possible for the company and the PEO to execute a written agreement designating which party will serve as the employer for all immigration purposes. It may be safer, however, for H-1B and other nonimmigrant workers to be taken off of the payroll of the PEO and instead be paid and supervised solely by the petitioner.

Selected Best Practices

Because of overlapping areas of laws, there are good reasons for employment lawyers and immigration practitioners to develop good working relationships. Employment attorneys often draft or litigate employment policies and procedures. These guidance documents should help employers to comply with immigration laws dealing with the hiring and retention of foreign nationals.

One good practice the employment attorney can follow while working with immigration counsel is to encourage the employer to establish a policy and procedure for tracking the status of foreign nationals. This can be done with a tickler system that will inform the employer of the proper time to begin the process to extend the work status of employees in order to avoid a lapse in employment authorization.

Another good practice is to recommend that the employer inform nonimmigrant employees of their obligation to notify BICS within 10 days of a change in address on Form AR-11,[15] as required under the immigration laws.[16]

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[13] Letter from Efren Hernandez III to Kari Ann Woodward (Dec. 20, 2000), *posted on* AILA Infonet, Doc. No. 01062632 (June 27, 2001). Immigration counsel should note that adjudicators are not bound by such correspondence. *Matter of Izumii*, Int. Dec. (BIA) 3360, 1998 WL 483977 (BIA) (Jul. 13, 1998) ("[The] OGC [INS Office of General Counsel] is not an adjudicative body and is in the position only of being an advisor; as such, adjudicators are not bound by OGC recommendations.")

[14] Letter from Yvonne M. LaFleur, Chief, Business & Trade Services, Adjudications, to H. Ronald Klasko (Feb. 5, 1996), reproduced at 73 Interpreter Releases 342 (Mar. 18, 1996).

[15] Form AR-11 is available on the BICS website at http://www.immigration.gov/graphics/formsfee/forms/ar-11.htm. For information on subjects involving the maintenance of status, see Angelo A. Paparelli and Susan K. Wehrer, "Troubled Times for U.S. and Foreign Clients: Immigration Tips All Lawyers Can Use," Orange County Lawyer (March 2002); see also,

In addition, as noted above, because the terms of sponsorship of a nonimmigrant visa are important for the maintenance of nonimmigrant status (and employment authorization), a system should be in place that requires an examination of the immigration consequences of a change in the working conditions or benefits of an employee before the change takes place.

Thus, the drafting of sound policies and procedures to address the specific issues involved in the hiring and continued employment of foreign nationals can be critical for employers that rely on the employment of foreign workers.

Conclusion

As employment attorneys and immigration lawyers continue to occupy parallel universes, as the international elements of employment practice take on greater significance, it seems increasingly certain that our two specialty areas will inevitably draw closer to each other. Will they collide or will they dock safely? Let us hope that we can be helpful colleagues to each other as we travel in time and space where few lawyers have ventured before.

Angelo A. Paparelli, "Importance of Maintaining Status after September 11," American Immigration Law Foundation, (2002).

[16] INA § 265(a), 8 U.S.C. § 1305(a). Evidence of the BCIS' newfound interest in enforcing this law is its reference to this reporting requirement in recently issued proposed rules on changes to the B visa category. "[T]he Service is restating these existing requirements [reporting requirements] here for the benefit of readers, so that aliens who apply for nonimmigrant status will be advised of them." 67 Fed. Reg. 71 (April 12, 2002).