Staying Out Of Harm's Way: Immigration Pitfalls That Employment Lawyers And Their Clients Should Avoid: All Parts Compiled

By Angelo A. Paparelli and John C. Valdez[1]

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 Bureau of Citizenship and Immigration Services ("BCIS") 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 BCIS 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

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[4] Eligible foreign nationals may apply for an EAD using BCIS 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]

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[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 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 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 BCIS should be filed with the BCIS 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.

I-9 Verification, Record-Keeping and Anti-Discrimination Measures

In order to avoid liability for failing to comply with the duty of Form I-9 verification, the employee and employer must correctly complete the Form I-9 on a timely basis. The employee must complete Section 1 of the I-9 on or before the first day of hire and attest to his or her basis for employment in the United States as a citizen, lawful permanent resident or foreign national with temporary work permission. Within the first three days of hire, the employer must inspect original documents of identity and work permission proffered by the worker, confirm that they relate to the new hire, and complete Section 2 by verifying that the foreign national is authorized to work in the United States.

While performing this task, the employer may not engage in prohibited discrimination ("document abuse") by requesting too many documents or requesting particular documents. These seemingly contradictory and confusing legal mandates originated with the Immigration Reform and Control Act of 1986 ("IRCA") and have been amended since original enactment.[14] These laws require employers to verify that all

[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.

[14] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, §§ 411- 413; Pub. L. No. 104-208.

employees, regardless of their nationality, hired on or after November 6, 1986, are authorized to accept employment in the United States, and that – in the case of a foreign national with a temporary work permit – work authorization continues throughout the foreign national's employment.[15]

Several I-9 concerns can be addressed and resolved through the development of a corporate compliance policy on employment eligibility verification. A number of issues need to be addressed in an I-9 compliance review.[16] The company, with counsel's guidance, should ask a number of questions, including:

- Are qualified management representatives assigned to monitor and supervise I-9 verification procedures?
- What are the safeguards for assuring that I-9s are completed by the new employee on the first day of hire and by the company within three days after the worker begins employment?
- What measures are in place to confirm that document abuse and other forms of prohibited discrimination do not occur?
- Has the employer adopted a policy (and applied it consistently) either to copy all documents of identity and employment eligibility provided by new hires (and retain such copies for the required retention period) or to decline to copy such documents?
- Has the employer developed an adequate file management system (separate from personnel records) for proper maintenance of the verification documents, and the docketing of deadlines for reverifying the continued employment eligibility of workers with time-limited permission to work?
- Has the employer developed an employee training system to assure that assigned employees understand the compliance policy so that a consistent, correct application of I-9 verification procedures occurs?

Forethought in this area of law may well save the employer substantial costs by placing the company in a better position to defend itself against an I-9 investigation by the BCIS, the DOL or the Office of Federal Contracts Compliance Programs.[17]

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[15] For information on I-9 verification procedures, see the BCIS Office of Business Liaison web site, www.BCIS.usdoj.gov./graphics/services/employerinfo/oblhome.htm; see also, Angelo A. Paparelli and Catherine L. Haight, "If It Can Happen To Mickey Mouse, It Can Happen To You: Avoiding Hidden Perils of Immigration Law When Hiring U.S. Citizens and Foreign Workers," published in ABA Section of International Law and Practice, New Rules and Institutions, New Markets and Challenges, April, 1994 Annual Spring Meeting.

[16] To review a checklist for the prevention, response and defense against BCIS employer sanction investigations, see Ann L. Lamdin, Michael D. Patrick, Richard A. Gump Jr. and Angelo A. Paparelli, "When Uncle Sam Knocks: Representing Employers Who Face or Fear Government Investigations," Immigration & Nationality Handbook, (AILA 1997).

[17] An employer's failure to position itself to defend against a potential I-9 investigation can prove costly, because if the government finds fault, the sanctions can add up. Failure to complete or maintain the Form I-9 properly and required documents subjects an employer to a fine from $100 to $1,000 for each violation. INA § 274a(e)(5), 8 U.S.C. section 1324a(e)(5). If the government determines that the employer hired or continued to employ a worker after November 6, 1986 while knowing that the worker was unauthorized to work, the possible penalty range is:

Moreover, under a presidential Executive Order, federal contractors face additional potential liability for knowingly hiring unauthorized foreign nationals. This order subjects federal contractors to a one-year government contract bar if the contractor has been found to have employed alien workers with knowledge that the employees lack the right to work in the United States.[18]

Employment lawyers should also be aware of a recent development involving the interplay of the I-9 verification obligation and the employer's duty to comply with tax and payroll withholding obligations. Recently, the Social Security Administration ("SSA") has taken to mailing to employers so-called "mismatch" letters. These letters inform employers that the agency is unable to post earnings reported on a W-2 tax form on behalf of an employee because of a discrepancy in the reported Social Security Number ("SSN") and the worker's name. Under a new policy, the SSA has increased dramatically its issuance of letters informing employers of discrepancies in data reported to the SSA.[19]

Employment lawyers must be careful about the way they advise a business client on what to do after it has received a mismatch letter. A mismatch letter may lead an employer to ask the worker to explain the discrepancy. The employee's response may cause the employer to learn about the unauthorized employment of the worker or merely about some other innocent change in circumstances.[20] Employers should be cautioned against moving forward too quickly in investigating employees who are the subject of a mismatch letter, without first receiving immigration advice on the proper course to pursue. As discussed above, an employer may face sanctions for knowingly employing workers who have no work authorization, but the employer also must follow anti-discrimination rules that limit the information that may be requested of an employee. The employer, as noted, can also be liable if it violates other immigration or employment laws prohibiting unlawful discrimination.

$250 to $2,000 for the first offense (for each worker);
$2,000 to $5,000 for the second offense (for each worker); and
$3,000 to $10,000 for the third offense (for each worker).

INA § 274a(e)(4)(A), 8 U.S.C. § 1324a(e)(4)(A). If BCIS determines that the employer committed a pattern or practice of violating Form I-9 laws, criminal sanctions of six months in jail and a $3,000 fine may be imposed. INA § 274a(f)(1), 8 U.S.C. § 1324a(f)(1).

[18] Executive Order 12989 (February 13, 1996).

[19] In the past, the SSA issued mismatch letters to employers whose annual wage reports showed discrepancies in the names or SSNs of employees and SSA records for at least 10% of an employer's employees. Beginning with the SSA's processing of 2002 W-2 reports, the SSA will issue mismatch letters to all employers whose W-2 data shows at least one discrepancy in the SSA data. See J. Ira Burkemper, "The 'Mismatch Letter' Is in the Mail: The Social Security Administration Ramps Up Its Warnings to Employers," ILW (2002).

[20] An employee's use of a false Social Security Card is only one of many reasons why an employer's records and the SSA's records do not match. For example, a person may neglect to inform the employer or the SSA of a name change following marriage.

The Importance of Confirming that Foreign Workers Maintain Lawful Immigration Status

The events of September 11, 2001 have changed, perhaps forever, the way of business and of life in America. The terror attack has heightened security at airports, altered the way we travel, created adverse affects on the economy, especially in the tourism industry, caused the loss of jobs, and threatened the federal surplus by requiring taxpayers to absorb the cost of fighting a multi-front war on terrorism. Foreign nationals are particularly affected by the U.S. government's reactions to the events of September 11. Indeed, foreign nationals can expect to face additional scrutiny of their status in the United States as part of the government's effort to enforce immigration laws and protect national security. Some of these issues are of particular concern to employment lawyers.

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 BCIS 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.[21]

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."[22] Oddly, the regulations governing travel for the H-1B employee's spouse or child are different. Regulations for 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

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[21] 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.

[22] 8 C.F.R. § 245.2(a)(4)(ii)(C). This regulation also applies to nonimmigrants in L status.

just upon returning to this country.[23] 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.[24] 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.[25] 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.[26]

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 employer may not be eligible for a change of status or change of employer petition

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[23] 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).

[24] 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 (2002).

[25] Premium Processing allows employers to pay a $1000 fee to BCIS 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.BCIS.usdoj.gov./graphics/services/employerinfo/eibulletin.htm.

[26] 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).

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.[27] 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[28] to grant a change of employer or change of status petition on behalf of such an individual, it need not do so.[29] Since September 11, 2001, there have been signs that BCIS will limit its discretion to permit a grace period.[30] 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.[31] 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 relationship can be demonstrated by evidence establishing that the entity has

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[27] 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).

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

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

[30] One official from the BCIS 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 BCIS to exercise favorable discretion to grant a change of employer petition. AILA, BCIS Nebraska Service Center Liaison Minutes, posted on AILA InfoNet, Doc. No. 01101833.

[31] 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).

control over the H-1B nonimmigrant even though the alien's salary is paid from another source."[32] 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."[33]

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 BCIS within 10 days of a change in address on Form AR-11,[34] as required under the immigration laws.[35]

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[32] 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 [BCIS 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.")

[33] 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).

[34] Form AR-11 is available on the BCIS website at www.BCIS.usdoj.gov/graphics/formsfee/forms/index.htm#chart. 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, Angelo A. Paparelli, "Importance of Maintaining Status after September 11," American Immigration Law Foundation, (2002).

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.

[35] 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).