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OVERCOMING COLD FEET WHEN HIRING IMMIGRANTS

by ANN PINCHAK

You won't find an area of law with more hot-button issues than immigration. Even though the concept of immigration is a core tenet of our nation's identity and crucial to our economic health, U.S. immigration policies and procedures are broadly scrutinized and vehemently criticized by politicians, policy wonks and virtually everyone who deals with the current system.

Nonetheless, smart businesses and their attorneys understand that hiring the best and brightest — including foreign nationals — is critical to success.

Rapid changes in immigration policies and procedures make it difficult for those who don't practice in the area of immigration law to keep up. Even the Immigration and Naturalization Service (INS) is gone, chewed into pieces and swallowed by the Department of Homeland Security (DHS).

While this caused short-term inconvenience, there are many reasons to suspect the changes will improve immigration processing in the future.

America has a complex love/hate relationship with immigration. When jobs become scarce, Americans tend to be less supportive, even though immigration has encouraged economic vitality since the nation was founded and recent economic booms were fueled by immigration.

A study by Andrew Sum, Neeta Fogg and Paul Harrington of the Center for Labor Market Studies at Northeastern University in Boston concludes that recent immigrants accounted for half the new wage-earners who joined the labor force, and nearly one of every four new immigrant workers held a professional, management, technical or high-level sales position in 2000-2001.

Anti-immigrant rhetoric should not discourage businesses from hiring highly qualified foreign talent. Even in a slow economy, the U.S. has shortages of 1. experts in deep-sea oil exploration; 2. nurses; 3. doctors in underserved areas; and 4. bi-lingual science and math teachers, among other professions.

Enlightened companies plan now for long-term needs. These include investing in technology and research, embracing innovation and hiring the most talented human capital in

a global economy.

Businesses with diverse, flexible workers have the advantage. A seamless workforce, able to function equally well in the United States, United Kingdom and Brazil is invaluable to a multinational corporation.

Fortunately, the Homeland Security Act corrects some past mistakes. The now-defunct INS had been responsible for border enforcement and adjudication of immigration filings. At times, it caused a bi-polar push and pull in its various functions.



Now, the Bureau of Border and Transportation Security takes care of enforcement, and the Bureau of Citizenship and Immigration Services handles adjudication. Section 476 of the Homeland Security Act even separates the financial accounting of the two bureaus. This ensures that each will keep its own fees, and those responsible for enforcement will no longer siphon money from adjudications in order to underwrite enforcement efforts.

Meanwhile, the act creates a citizenship and immigration services ombudsman, with local offices of the ombudsman. For the first time, someone within the immigration service is solely responsible for identifying, reporting and proposing solutions to processing problems.

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Finally, §458 of the act requires elimination of the immigration backlog by December 2003. To put this in perspective, *The Wall Street Journal* reported recently that the backlog was more than 25,000 cases as of last fall. The majority of those cases kept waiting for visas have advanced technology skills. In fact, more than 100 overseas delegates to last year's World Space Congress in Houston could not get visas and missed the meeting.

Tips to Avoid Trouble

These changes could speed up the processing of filings if they are properly prepared and the person responsible knows the ins and outs of the new system. The following tips should help attorneys for companies that deal with immigrant labor:

- Establish a method of tracking expiration dates. Whether this important task is delegated by corporate counsel to outside counsel or handled by the internal human resources team, the key is to have a system in place to ensure the company does not violate the law. There are severe penalties for knowingly employing someone who is not authorized by the immigration service to work — with fines and possible jail time for the third offense.

- File early. Foreign nationals face severe consequences if they are out of status. If a foreign national stays in the United States one day past the date on his or her I-94 card, the visa for travel in that passport becomes void. They only will be able to return to the United States by first going to their home country and getting a new visa. Unlawful presence in the United States for 365 days results in a 10-year bar to re-entry. Companies should file for an extension of status for a foreign national employee four to six months prior to the expiration date.

- Take advantage of opportunities in the system. Just as a patron can get the best seat in the house by tipping the maitre d', the government provides businesses with the

opportunity to obtain faster processing for an up-front fee of \$1,000. So-called "premium processing" provides 15-calendar-day processing to employers who file a Form I-129 to classify a beneficiary under one of the following non-immigrant categories: E-1, E-2, H-1B, H-2B, H-3, L-1, O-1, O-2, P-1, P-2, P-3, Q, R and TN.

- Beat the clock on the H-1B cap. Even if an employer doesn't plan to use an H-1B employee for several months, a company should lock one in early to ensure it doesn't get shut out by the annual cap. This fiscal year, which ends Sept. 30, the cap on H-1Bs visas is set at 195,000. Next fiscal year the number goes down to 65,000. Don't wait until the end of a foreign student's practical training to file for an H-1B. Do it in advance.

- Instruct employees to prepare. Many foreign nationals travel abroad and have trouble re-entering the U.S. because of problems with their visas. Employees should not leave the country without making sure the appropriate valid visa is in their passport. When possible, renew the visa in the United States through the U.S. Department of State. If an employee must apply for a visa abroad, be aware of extra security checks that can slow processing dramatically.

Given the importance of hiring and retaining top professionals, many of whom will be foreign nationals, corporate counsel should make it their business to master the basics of immigration law and refer to experienced outside counsel in this complicated, ever-changing niche of the law. ■■■

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