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IMMIGRATION LAW

Expert Analysis

U.S. Immigration Law: Barometer For Recovering Economy

U.S. immigration lawyers have long known the state of their practices to be a clear barometer of health of the U.S. and global economies. The question "are you busy" is commonly asked amongst lawyers at professional functions and also by laypeople in all settings, curious about the state of the legal profession. This question, however, for U.S. immigration lawyers has always had a special resonance as it relates to the state of the economy. Their practices are generally filled with work that requires attention whether the practice is limited to corporate, family or removal, or encompasses all U.S. immigration-related matters. It is the special nature of the practice that requires in certain cases the relationship with our clients to go on for many months or years and, in some cases, decades after the initially retained work is completed.

Even in the face of the current political climate of congressional inaction on comprehensive immigration reform, the recent delay of presidential action on administrative fixes, and the absence of policy changes that would promote drawing the best and brightest from around the globe to study and work in the United States, immigration lawyers report that the hiring of foreign nationals is clearly on the rise. In 2008 and 2009, the most frequently asked question by employers was how to legally terminate foreign national staff in compliance with U.S. immigration law. In 2014, the overwhelming majority of requests relate to getting new employees on board within the U.S. immigration law scheme.

This article will discuss some of the most frequently used visa categories accessed by U.S. employers for the temporary hiring of foreign nationals. It will further explain key concepts, requirements, and limitations of those categories, while complying with U.S. immigration laws whether in boom or bust economic conditions.

Law and Concepts

The following is a brief overview of employment-based U.S. immigration law and key concepts employers should be familiar with when contemplating a new non-immigrant hire.

By **Alexis S. Axelrad**

When an inquiry comes in from an employer or any entity interested in bringing on a new hire, experienced immigration lawyers generally ask for preliminary information to ascertain as quickly as possible what avenues may be used to bring the desire to reality. Unfortunately, under current U.S. immigration laws the open avenues are not as expansive as our evolving economy. This is the art and resourcefulness of U.S. immigration law practice: how to best utilize the available categories and keep our economic recovery headed upward.

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There are two broad categories of foreign nationals who may enter the United States: non-immigrants and immigrants. Both of these categories have undergone significant change over the years; the most comprehensive enactments came under the Immigration Reform and Control Act of 1986 (IRCA), the Immigration Act of 1990, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). While there have been some changes to the Immigration and Nationality Act (INA) and immigration-related regulations since 1996, Congress continues to fail to act on the sweeping changes that are required to bring U.S. immigration laws into the 21st century.

When working with U.S. immigration counsel to determine the best way to hire a candidate, it is crucial to have the individual provide a detailed resume with a focus on their education and any related experience, along with a detailed proposed job description, salary, and location(s) of employment. This information is critical, being the gateway for discussing non-immigrant visa categories and the best strategy to move forward. Detailed resumes will also highlight potential problems including unexplained gaps in employment and failure to maintain status in the United States.

Alphabet Soup

The most frequently utilized visa categories for temporary employment in the U.S. are the H-1B, L-1, E, O, and P visa categories. The following are key characteristics of a few of the categories which employers and non-immigration lawyers should use as an introduction to the "alphabet soup" of U.S. immigration law, not an exhaustive discussion of the nuances of these categories.

H-1B: Workhorse of the Employment-Based Visa Categories. The H-1B visa is the most well-known and expansive employment-based category, being used for members of the professions, known as "specialty occupations," which include, but are not limited to, accountants, architects, scientists, computer information systems-related positions, teachers, lawyers and finance.

To qualify, the candidate must generally have a minimum of a bachelor's degree or equivalent education and experience related to the offered position, as well as a common requirement in the industry. This category does not usually require a labor market test to demonstrate a shortage of U.S. workers for the position. It does, however, require pre-certification with the U.S. Department of Labor to confirm that the candidate will be paid the prevailing wage for the occupation. The employer must pay the foreign national the higher of the actual wage or the prevailing wage for the position, according to the best information at the time of filing the Labor Condition Application (LCA).

One of the most frequent criticisms of the U.S.

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immigration system by those who wish to limit the number of foreign workers is that their presence depresses U.S. wages. Data on wages and the benefits of hiring foreign nationals do not bear these criticisms out as accurate. With the significant fees that USCIS imposes on employers for the filing of these petitions, employers are required to make a deep financial investment to attempt to bring these individuals. This financial burden is added to the normal costs of recruitment and training without any guarantee of success.

Approval of an H-1B petition is not a foregone conclusion in the current adjudication environment at U.S. Citizenship and Immigration Services (USCIS) nor is the H-1B visa category available for most of the year. The Immigration Act of 1990 created an annual limit on the total number of H-1B visas for the fiscal year which in recent years has been exhausted during the first week of eligibility to file. The H-1B cap is a significant problem that must be addressed by Congress and continues to cause harm to the U.S. economy.

In addition, in recent years there has been a tremendous amount of scrutiny by USCIS on the employer-employee relationship and third-party employment within the H-1B filing universe. Employers must make sure that all aspects of employment are well documented. Current USCIS policy is not conducive to the approval of employment at third parties and for roving, work share and non-traditional worksite locations without significant documentation confirming the more familiar hallmarks of the employer-employee relationship.

The reality of the new workplace, especially for start-ups and cutting-edge industries, is not the mortar and brick of desks, nameplates and business cards that USCIS appears to feel most comfortable with to generate an approval. This is a tension that must be addressed by Congress and USCIS leadership to make sure the United States is truly a welcoming place for entrepreneurs and the next Google, eBay and Yahoo.

Most employers would prefer to bring on a candidate without added costs and hurdles, but the desire to hire the very best for the position that will increase productivity and success of the company and in turn strengthen the U.S. economy overall is what drives employers to do what they must under the current statutory and regulatory framework.

L-1: Transferring Key Employees Around the World in the Global Economy. The L-1 visa category is designed for intra-company transferees in managerial, executive, or specialized knowledge positions, employed by multinational companies doing business both in the United States and abroad. To qualify, the foreign organization and the U.S. employing entity must be under common ownership and control.

Three crucial criteria must be met to be eligible for an L-1 visa: the organization employing the foreign national must be a qualifying organization in accordance with regulations; the transferee must be performing in an executive, managerial, or specialized-knowledge capacity; and the transferee must have been employed abroad for at least one year over the last three years with the same international organization in one of the enumerated positions. The foreign national's prior education, training, and employment must also qualify the individual to perform the prospective job in the United States.

The ability of a company to easily transfer employees to entities around the world is an absolute necessity in the global economy. However, this visa category is also under severe scrutiny for perceived abuses at "job shops" in technology-heavy sectors, such as computer consultant placement agencies. There is of course potential for fraud in any visa category. However, the government response to instances of fraud in the L-1 category has created an adjudications environment where the most well-documented and independently substantiated cases are having tremendous difficulty being approved without significant requests for additional information.

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Explaining to a CEO of a publicly traded company why she must provide job descriptions and payroll records for all of those under her control is a difficult conversation U.S. immigration lawyers are currently having on a daily basis. Updated and realistic guidance is long overdue from USCIS in this invaluable visa category.

E: Promoting Entrepreneurship and Investment in U.S. Businesses. The E visa category is a very useful tool for foreign-owned companies that wish to make a substantial investment in the United States. It is designed solely for companies and individuals engaged in substantial trade between their home country and the United States, or where a substantial foreign investment has been made in a U.S. enterprise. The drawback to the E visa category is that it strictly depends upon the existence of a treaty between the U.S. and the investor's or trader's home country.

Approval of an E visa also requires a significant amount of documentation to be presented to a U.S. embassy or consulate before visa issuance and commencement of the activity in the United States. U.S. consular officers have absolute authority to issue visas and thresholds that vary from embassy to embassy. Motivated individuals eager to infuse new capital into an existing U.S. business are thus at the mercy of the changing preferences of particular embassies and consulates.

O and P: For Those who Have Reached the Pinnacle of Their Careers in the Arts, Sciences, Business, Sports and Entertainment. The O visa category is designed for individuals, their family members, and foreign nationals accompanying primary O visa holders who have extraordinary ability in the sciences, arts, education, business, or athletics. Extraordinary ability must be demonstrated by sustained national or international acclaim or in the field of motion picture and television production by proof of extraordinary achievement.

The O-1 visa is primarily used for those in the arts and entertainment field such as actors, models, musicians, and photographers. However, it can also be used for those that have reached the very top of their fields in many other industries as long as their achievements can be fully documented and explained to USCIS.

The P visa category is for individuals who perform as athletes at an internationally recognized level of performance, or for individuals of an internationally recognized entertainment group who are coming to perform as artists or entertainers under a reciprocal exchange program, or individuals who are coming solely to perform, teach, or coach under a program that is culturally unique. Both the O and P visa categories require a consultation letter from peer groups to accompany the petition in an effort to protect the U.S. labor market.

In the age of the Internet and ubiquitous social media outlets it is not difficult to garner publicity for one's work, or to create a footprint that appears to show extraordinary ability or international recognition. It is the quality and significance of the work that is critical for success in both visa categories. The O and P adjudications are also under significant scrutiny by USCIS in the most traditional categories requiring voluminous documentation for approval, as current policy fluctuates in many areas that had previously been stable and long-standing.

Conclusion

Immigration lawyers are constantly focusing employers and the general public on the categories that can be used for various hiring situations, especially in periods of economic and job market growth. Unfortunately, our current and fairly rigid U.S. immigration law scheme does not provide a category for every type of activity contemplated by new job opportunities in a robust economy. This is especially common in the world of start-up companies that are coming up with inventive job titles, products and services. It is hoped that while our economy continues to strengthen, the standstill in immigration reform will end.