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Immigration law: Opportunities and land mines

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Long Island is a diverse region. Many of our leading businesses are owned, managed or staffed by individuals who are not U.S. citizens or "green card" holders. These foreign workers are noncitizens who are here on different work and student visas.

The success of Long Island's economy, which is centered to a large degree on our national research laboratories, hospitals, universities, sports teams, financial institutions, pharmaceutical companies, research-and-development centers, etc., is dependent on attracting the best and brightest talent from around the world. Logically, these individuals need to obtain some sort of an employment visa or green card to be able to lawfully work in the United States. This article will provide a broad overview of the key issues that employers should be aware of when employing foreign workers.

A foreign worker is authorized to work based on the grant of permission by the U.S. Citizenship & Immigration Service, which is a part of the Department of Homeland Security. Since we are talking about employment, the U.S. and New York State Departments of Labor are usually involved in the immigration process as well. Before hiring a foreign worker, employers must assure themselves that the prospective employee is authorized to work in the United States. Except in very limited cases, the employer must file a petition to obtain some type of work visa for the foreign worker.

Here is where the fun starts.

Each of the several visas for which a foreign worker may be sponsored has very specific requirements. The failure to comply with applicable USCIS and DOL requirements may result in the foreign worker falling out of status as well exposing the employer to significant liability.

Employment visas are typically available only to "skilled workers," those whose jobs require a minimum of a bachelor's degree and whose degree or its equivalent is in a field related to the job. This rather simple analysis is not always so and requires experienced immigration counsel to review a case before hiring a foreign worker.

Once a decision to hire a foreign worker is made, it is imperative that a carefully drafted application be filed with the DOL and/or USCIS so as to avoid delays and denials. Lesser-skilled foreign workers can be hired on a temporary basis as trainees or seasonal employees.

What happens after an employer successfully hires foreign workers? If they are valued employees, the employer will wish to permanently retain them. Consequently, the employer must sponsor them for a green card. For most jobs, this requires the employer to file an Application for Permanent Employment Certification with the DOL. The process is very involved, designed to test the job market and will result in approval only if no qualified U.S. workers can be found.

In instances where a foreign worker possesses unique skills; has achieved a level of acclaim in her/his field; made an impact in her/his field; or is otherwise exceptional, outstanding or extraordinary, the employer can bypass the DOL and sponsor the foreign worker directly for a green card. This is frequently the case for executive-level employees and those engaged in R&D, academia, sports and entertainment, and the creative professions.

Regardless of whether an employer hires a foreign worker on a temporary visa or sponsors her/him for a green card, compliance with USCIS and DOL regulations is critical. It is every employer's obligation to verify the employment eligibility of all workers by properly completing and keeping on file an Employment Eligibility Verification Form, also known as Form I-9.

Although the I-9 is a relatively simple form, experience shows that nearly all employers are in violation of the I-9 requirements and at risk for substantial fines and penalties.

In a recent case, a family-owned business on Long Island was visited by officers of Immigration & Customs Enforcement for an I-9 audit. In reviewing the I-9s of the company's 150 employees, ICE found more than 120 technical violations and fined the company more than $60,000, even though all employees were legally authorized to work in the United States.

Besides the I-9 audits, employers can expect to be visited by DHS or DOL officials regarding the status, working conditions or other information related to foreign workers. Therefore, employers should be diligent in assuring compliance with the several applicable regulations.

While attracting the best and brightest is critical to the growth and success of Long Island's economy, hiring foreign workers need not expose employers to risk.

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