# Enriched or Entangled? – Opportunities and Risks In Sponsoring Foreign Workers

***By Angelo A. Paparelli and J. Ira Burkemper***

In the aftermath of 9/11, as US businesses get back to business, US employers must confront two generally recognized facts of economic life: (1) to remain competitive in today's take-no-prisoners global marketplace, U.S. employers must hire and keep the most talented, well-educated employees; and (2) often, the best candidates for the most challenging positions are persons born outside the United States.

As U.S. employers discover this mother-lode of talent in the international marketplace, however, many businesses are stumbling. They are increasingly experiencing a painful learning process as they rush headlong into recruiting and hiring foreign workers without first carefully studying and complying with U.S. immigration laws and regulations. Rather than quickly reaping the benefits of employing bright and motivated foreign workers, these businesses may encounter needless red tape and expense, bureaucratic delays, legal mumbo-jumbo, negative press, and the risk of substantial fines and discrimination suits.

How can businesses avoid these problems and enjoy the benefits of employing talented foreign citizens? This article will offer a list of suggestions.[i]

**1. Spend the time to learn about work visas or get competent professional help.** Employers should recognize that the immigration laws are virtually as complex as the tax laws.[ii] Congress has created numerous classes of work visas that permit foreign citizens to enter the United States and work in this country for a few months or for prolonged periods of up to several years or even permanently. A prudent and carefully devised strategy that considers all available categories of work permission will enable U.S. companies to reap the benefits of skilled foreign labor, while minimizing the risks.

As an example, the L 1 visa for "Intracompany Transferees" is one of the most employer-friendly work visas available to U.S. businesses that have foreign offices, subsidiaries, affiliates, or a foreign parent. To qualify for L 1 intracompany transferee status, an alien must have worked for the affiliated entity abroad for at least one year in the previous three in an executive, managerial, or "specialized-knowledge" capacity. Congress recently reduced the amount of work experience abroad required for Intracompany Transferee classification to six months if the company has an approved blanket L petition -- a blanket L petition allows multinational corporations with an office in the US to obtain one approval under which multiple managers, executives and specialized-knowledge "professionals" (those with a bachelor's or higher degree related to their specialized knowledge) can enter the US under streamlined procedures). The definition of manager for intracompany transferee purposes includes not merely managers of

personnel but also individuals managing a department, function, or component within an organization, even if such "function managers" do not directly supervise other employees. The definition of specialized-knowledge is also rather broad, and includes any foreign employees who have "special knowledge of the company product and its application in international markets" or "an advanced level of knowledge of processes and procedures of the company."

Congress recently bestowed another benefit on individuals who enter the United States in L-1 Intracompany Transferee status. On January 16, 2002, President Bush signed a law that grants spouses of L-1 employees work authorization while they are in the US. Although the Department of Holeand Security has not yet issued regulations to implement this change, spouses of L-1 workers will soon be eligible to receive this benefit that is not available to spouses of temporary workers in most other nonimmigrant categories, unless they have been accorded a separate nonimmigrant classification that would permit them to work.

Another popular work-visa category is the H 1B for employees in any "specialty occupation," The list of qualifying H 1B employees can range broadly from engineers, scientists, computer professionals, fashion models and graphic designers to bankers, lawyers, accountants and teachers, among others. Butchers, bakers and candlestick makers are probably not eligible, however, because DEPARTMENT OF HOMELAND SECURITY regulations require that the position involve the theoretical and practical application of highly specialized knowledge; in addition, at least a bachelor's degree in the specific specialty (or progressively responsible specialized experience that is equivalent to at least a baccalaureate) must be required for entry into the occupation in the United States. . The H 1B visa is also quite useful for prolonging by up to six years (or more in certain instances) the period of work permission for talented foreign students who graduate from U.S. universities and are encountered in an employer's on campus recruiting efforts.

While many occupations may qualify for H 1B classification, this visa category places substantial burdens on employers by requiring H-1B employers to pay at least the prevailing wage in the community, maintain the working conditions of U.S. workers, post notices disclosing the rate of pay and the intention to introduce foreign workers to the job site, maintain documents for public inspection, and face investigation by the U.S. Department of Labor and penalties for noncompliance with Labor Department regulations (including [possible] civil monetary fines, back pay and debarment from sponsoring foreign workers for a year or more). These burdens and penalties can easily be avoided, however, if your company carefully develops a plan for compliance.

The L 1 and H 1B visas are merely two of the most frequently used categories. Other business or work visas are available for trainees, investors, entrepreneurs, researchers, scholars, writers, chefs, student workers, technicians, investment advisors, commodities brokers, consultants, and certain part-time workers, to name a few. A wide variety of further options exists under current immigration law, but these options will become more limited for many foreign nationals in the near future as the Department of Homeland Security and other government agencies charged with enforcing immigration laws implement recent anti-terrorist legislation and scrutinize applications for immigration benefits more meticulously. In addition, bills making their way through the legislative process could, if they are enacted into law,

significantly curtail legal immigration to the United States and change the way U.S. corporations do business. We recommend that you consult with an experienced immigration attorney to plan how to make the best use of existing work visa categories before they are restricted or eliminated, thereby "grandfathering" in your foreign workers, and devise a strategy to cope with the changes in immigration law that are looming on the horizon.

**2. Create internal procedures to assure your company complies with immigration laws.** Most companies give little thought to the decision about whether a particular foreign worker or job applicant should be sponsored for a temporary work permit, or the so-called "green card" which allows permanent residence in the United States. Few businesses have articulated any standards or criteria for immigration sponsorship. Often, the sponsorship decision is made at the middle-management level with virtually no knowledge of the sponsorship or input on the part of the company's executive offices, general counsel or human resources department. U.S. employers should realize, however, that the sponsorship of foreign workers – while good for business – nonetheless triggers the potential for substantial liabilities. Only deserving job candidates and proven workers should merit an employer's sponsorship. Thus, U.S. companies should develop and articulate a set of criteria and procedures for sponsoring nonimmigrant work-visa petitions and applications for green cards. Companies that follow this advice should have an easier time in complying with U.S. immigration laws, will probably reduce their human-resource recruitment expenditures and potential liabilities under the immigration laws, and attract and retain the best and the brightest workers without regard to nationality.

A company's internal procedures for immigration sponsorship should, at a minimum, identify the executive or department responsible for approving the sponsorship decision and the signing of documents that are submitted to various government agencies, should prescribe in general or specific terms the standards the company uses to determine which of its current and prospective foreign employees to sponsor for work permits or permanent residence, and provide a process for vetting and approving the release of required financial, business or personnel data that will be disclosed to the government in the immigration applications.

**3. Take an active role in selecting a competent immigration lawyer to assist the company and the alien in applying for the work visa or Green Card.** All too often companies leave the selection of the immigration lawyer (or worse yet, an unlicensed immigration consultant or "notario") to the foreign worker, and expect the worker to pay all fees and costs. This approach is penny wise and pound foolish. When an employer agrees to allow a prospective or current foreign worker to find an attorney (or unlicensed service provider) and apply for work authorization, the employer may well be asking for trouble. Although the California Rules of Professional Conduct would ordinarily impose on the attorney in this situation an ethical duty to both the foreign worker and the employer, human nature is such that the attorney may be tempted to concentrate on advocating the interests of the foreign worker, the party paying the bills, and consider the best interests of the employer to be a lower priority. This concern is compounded, given that foreign employees' visa petitions are all too often reviewed and signed by lower-level management personnel who may overlook or be unaware of immigration-compliance obligations.

Thus, the employer should participate actively in the selection of immigration counsel. In this effort, the employer should seek referrals to only qualified immigration lawyers who spend all or a substantial part of their professional time in business-related immigration representation. Two sources of referrals are the State Bar of California Board of Legal Specialization, which maintains a special designation program for Certified Specialists in Immigration and Nationality Law, and the American Immigration Lawyers Association (a bar association of more than 7,500 attorneys and law professors who practice and teach immigration law), which sponsors an immigration lawyer referral service.

**4. Think twice before requiring foreign employees to pay the legal fees for obtaining work visas.** Employers expect the foreign worker or job candidate to assume responsibility for paying all legal fees and costs for processing the paperwork involved with obtaining the necessary work authorization or Green Card from the Department of Homeland Security and with other federal agencies that administer U.S. immigration laws and regulations. However, the employer should exercise extreme caution in agreeing to such an arrangement; even employers who do not pay immigration-related legal fees are exposed to liability if immigration laws are not followed. The dangers are perhaps best illustrated by recent changes to laws and regulations governing the H 1B (specialty occupation) and other comparable work-visa categories.

U.S. immigration laws require employers of H 1B workers to document that they are paying these alien employees at least as much as similarly qualified U.S. citizens performing similar job duties in the area of employment (the "prevailing wage"). The Department of Labor ("DOL") has interpreted these laws to require an employer to treat lawyer's fees, paid for the lawyer's assistance in obtaining H 1B visa status, as a business expense that may not be shifted to the foreign worker. Therefore, if an employer chooses to allow the alien to pay the attorney's fees, the DOL will subtract the amount of the attorney's fees form the alien's salary when calculating whether the employer is paying the alien the prevailing wage. For example, if the alien is earning $51,000 in a job in which the prevailing wage is $50,000, the employer will be violating H 1B prevailing wage rules if the alien paid his or her own attorney's fees and these fees amounted to more than $1,000. Violations of these laws can be costly; the DOL is authorized to impose substantial fines, back pay awards and other penalties. Hence, to protect their interests, employers would be well advised to swallow hard, pay the lawyer's fees and avoid entanglement with the DOL, and better control the legal representation in H 1B and other immigration matters.

**Conclusion.** In today's fiercely competitive global market for products and services, the lack of an available supply of highly skilled and talented domestic workers all but requires that successful U.S. businesses seriously consider hiring foreign labor. We recommend that employers make a commitment to learn more about U.S. immigration laws and procedures, and thus minimize the risks associated with negligent or willful violations. Moreover, as managers and executives learn the requirements for compliance with immigration laws, it will be easier for them to develop and implement internal policies to ensure compliance with immigration laws. By following the advice in this article, U.S. employers will avoid becoming snared in the tangled web of U.S. immigration laws while ensuring they are employing the best workers that the world has to offer.

[i] This article is written as a brief discussion of some of the traps and opportunities that can arise in the world of employment-based immigration. It is intended primarily for the non-lawyer business community. The article 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 a competent attorney who practices U.S. immigration law.

[ii] The courts have observed that the immigration laws and procedures are complicated and difficult to comprehend:

> "The statutory scheme defining and delimiting the rights of aliens is exceedingly complex. Courts and commentators have stated that the Immigration and Nationality Act (the "INA") resembles 'King Mino's labyrinth in ancient Crete,' Lok v. I.N.S., 548 F.2d 37, 38 (2d Cir. 1977), and is 'second only to the Internal Revenue Code in complexity' Castro O'Ryan v. I.N.S., 821 F.2d 1415, 1419 (9th Cir. 1987) (quoting E. Hull, Without Justice for All 107 (1985)". Chan v. Reno, 95 Civ. 2586, (S. Dist. N.Y., LEXIS 3016, 1997).

See also, Castro O'Ryan v. United States Dep't of Immigration & Naturalization, No. 86 7502, 847 F.2d 1307 (9th Circuit, 1987).