Global Fishing: How to Hook Highly Skilled Foreign Talent without Getting Caught in the Immigration Net

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The American Competitiveness Act,[1] which acknowledges the shortage of skilled labor in the United States, was introduced in Congress on March 6, 1998. The shortage of skilled labor not only threatens American companies' global competitiveness, but also may drive those companies to move key operations and jobs overseas. The Department of Labor projects that the U.S. economy will produce more than 130,000 information technology jobs in each of the next 10 years, for a total of more than 1,300,000. Between 1986 and 1995, however, the number of bachelor's degrees awarded in computer science declined by 42 percent. A recent study conducted by Virginia Tech for the Information Technology Association of America estimates that there are currently more than 340,000 unfilled positions for highly skilled information technology workers in American companies. This shortage of skilled labor involves not only "computer wizards", but also employees in a wide range of U.S. service and manufacturing industries.[2]

To begin to remedy the shortage of skilled labor in the United States, the bill in Congress seeks to immediately "stock the pond" by increasing the number of H-1B nonimmigrant visas available to foreign workers. H-1B visas allow foreign nationals to work in "specialty occupations" in the United States. The customary minimum requirement for an H-1B visa is a Bachelors degree (or work-experience equivalent) in the desired occupation (which must likewise require a Bachelor's degree (or work-experience equivalent)). The current annual 65,000-person cap on H-1B visas is expected to be raised to 95,000. As an example of the demand for foreign skilled labor, by April 1, 1998, almost 50,000 of this year's H-1B visas had been issued. Our economy is growing and the demand for skilled labor is not diminishing.

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[1] The American Competitiveness Act (S.1723) was introduced by Senator Spencer Abraham, the Chairman of the Senate Immigration Subcommittee, on March 6, 1998. S.1723's primary objective is to increase the numerical cap of H-1B visas before all numbers are used by May or June of 1998. The Senate Judiciary Committee passed S. 1723 on April 2, 1998. The House is expected to vote on it before the end of April.

[2] This article is merely an overview of immigration concerns in the employment arena and does not constitute legal advice. It is not intended as an in-depth legal analysis of immigration concerns in the employment area. The facts and circumstances differ in each case and will dictate the appropriate legal actions. This article is no substitute for professional advice and representation by a lawyer or law firm with experience in U.S. immigration law.

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All managers involved with the Human Resource function, even those solely hiring U.S. workers, should be familiar with certain important aspects of U.S. immigration law, such as Form I-9 (Employment-Eligibility Verification) compliance. When hiring foreign nationals, a multitude of complex immigration issues can arise regarding actions and representations by the employer throughout the process of recruiting, hiring, petitioning for immigration benefits, and managing the employment relationship. With the advent of employment ads being posted on the Internet and the trend towards corporate globalization, companies will just as frequently find the perfectly qualified employee located in Shanghai or Timbuktu as in Spokane or Louisville.

Upon locating a promising foreign national job candidate, the employer must first surmount the logistical hurdle of an interview. Qualified foreign nationals who retain a permanent residence abroad may enter the United States on a B-1 Business Visitor visa (and nationals of certain countries[3] may enter without a visa in WB Business Visitor status) to attend business meetings. Such a business meeting could conceivably include a meeting to evaluate a potential employment opportunity. Alternatively, the possibility also exists for Human Resource personnel to travel abroad and conduct interviews. Wherever the interview occurs, the employer's initial conversations and document exchanges with the foreign national are very important. Matters to consider when dealing with a potential foreign national employee are the "at-will" employment doctrine and compliance with immigration regulations.

At-Will Employment

The "at-will" employment doctrine refers to the generally accepted employment relationship under which an employer is free to discharge an employee at any time, with or without cause, and the employee is free to quit on the same terms. However, this doctrine is not globally recognized. Many countries require employers to have "good cause" for terminating an employment relationship.

To avoid negating the at-will employment relationship, all representations, whether verbal or written, must be carefully worded to avoid implying a guaranteed job contract for a specific period of time. Once a company has decided to hire a foreign national, one of the first formal and crucial documents is the job offer letter. A sample job offer letter addressed to a potential foreign hire (whom the company will assist to obtain immigration benefits) is attached. The job offer letter should contain the terms of employment, the requirement of immigration-law compliance, and the at-will nature of the employment relationship.

Throughout the course of obtaining proper U.S. work authorization and immigration status, many documents must be filed with the Immigration and Naturalization Service ("INS") or a U.S. consulate or embassy that require a specific period of employment authorization to be requested. Lawsuits have been filed where foreign national employees claimed to have interpreted the representations on immigration documents as a job contract for the stated validity period requested. In the following cases the courts

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[3] Visa Waiver Pilot Program Countries include: United Kingdom; Japan; France and Switzerland; Germany and Sweden; Italy and the Netherlands; Andorra, Austria, Belgium, Denmark, Finland, Iceland, Liechtenstein, Luxembourg, Monaco, New Zealand, Norway, San Marino, and Spain; Brunei; Argentina; and Australia.

have held that representations made on immigration documents did not necessarily override the at-will employment standard:

- A foreign national whose employer obtained an H-1B visa for him, but then terminated him four months later, could not prevail on his claim of a three year employment contract based, in part, on statements made in the H-1B visa petition. The court held that the employer submitted the H-1B petition to the INS with no intention that the employee would rely on the statements in the immigration forms. Moreover, the employee was not involved with the preparation of the H-1B petition, and the employee did not learn of the H-1B petition contents until after the job offer was accepted and the petition approved.[4]

- Another case involved an employer who made general statements to the potential foreign national employee about assistance in obtaining U.S. lawful permanent residence (the so-called "green card"). The employer hired the person and shortly thereafter terminated the foreign national employee. The employee tried to assert that an employment contract was created by the employer's promise of a green card. The courts again held that there was no employment contract created by the employer's statements.[5]

- Again, the at-will standard of employment prevailed in another situation where the employer's Blanket L-1[6] Intracompany Transferee visa petition included an attachment that stated "Company's intention to offer him a three year position . . .." The employee interpreted this as an offer of employment for three years. Again the courts held in favor of the employer that the statement did not constitute a promise on which the employee could justifiably rely on as a job offer for a term of years.[7]

Although the courts have held in favor of employers when an employee makes a claim that verbal or written statements equate to an employment contract, prudent employers will avoid litigation and make sure potential employees understand that their employment is at-will, notwithstanding any period of employment permission requested in government filings, by use of a carefully worded job offer letter.

New Immigration Requirements

As stated earlier, a long-standing obligation of employers is the requirement to complete a Form I-9 (Employment-Eligibility Verification) for each employee hired on or after November 6, 1986.[8] This requirement applies to all employees, including American citizens. Failure to comply with Form I-9 requirements can result in hefty fines and even criminal prosecution. In order to avoid fines, employers must complete Form I-9 correctly, without requesting specific documents or specifying too many documents regarding employment eligibility or identification.

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[4] *Geva v. Leo Burnett Co., Inc.*, 931 F.2d 1220 (7th Cir. 1991).

[5] *Francis v. Gaylord Container Corp.*, 837 F. Supp.858 (6th Cir. 1992).

[6] A Blanket L-1 Intracompany Transferee visa allows certain "qualified organizations", usually large companies with numerous transfers between subsidiaries or affiliates in the United States and a foreign country, to obtain a nonimmigrant work visa at consular facilities abroad without prior approval by the INS of an individual petition.

[7] *Van Heerden v. Total Petroleum, Inc.* 942 F. Supp. 468 (10th Cir.).

[8] The Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA") has initiated a change in the process of Form I-9 compliance and the way employers verify employees' work authorization.[9] The INS is expected to issue regulations interpreting IIRAIRA that will restrict employers to establishing both employment authorization and identity with a U.S passport, resident alien card, or alien registration card. These documents will replace "List A" Acceptable Documents on the Form I-9. Attached is the November 21, 1991 version of Form I-9, including the list of currently acceptable documents. Regulations interpreting IIRAIRA are also expected to narrow "List B and C" documents to a social security card to establish employment authorization and a state driver's license or identity card to establish identity. The most recent proposed regulations referring to these changes was published in the April 7, 1998 Federal Register. A new Form I-9 is imminent.

IIRAIRA was enacted in 1996 and made sweeping changes not only to immigration laws, but also to the tax, criminal, welfare and social security laws. It enhances information sharing and coordinated action by the INS, the Department of State ("DOS"), the Department of Labor ("DOL"), the Internal Revenue Service ("IRS"), and the Social Security Administration ("SSA"), as well as other federal and state agencies in order to prevent the unauthorized employment of foreign nationals among other goals.

IIRAIRA also created severe penalties for foreign nationals "unlawfully present" in the United States. "Unlawful presence" refers to persons who overstay their period of admission, usually noted on the Form I-94 Arrival Record issued upon their entry to the United States, and those who enter the United States without being inspected by the INS. The severity of the penalty depends on the length of time the foreign national spends unlawfully in the United States. Unlawful presence for more than 180 days may result in inadmissibility to the United States for three years, and unlawful presence for one year or more, in the aggregate, may result in inadmissibility for 10 years or a permanent bar in certain circumstances. Indeed, so much as a single day's overstay may result in perpetually being barred from seeking visa issuance anywhere other than in the visaholder's home country.

There are some exceptions to the "unlawfully present" law. In addition, periods of unlawful presence are tolled for up to 120 days for persons who were admitted or paroled into the United States, filed a "non frivolous" application for change or extension of status before their authorized stay expired, or were not employed without authorization.

Another Immigration Snare: The Lure of Outsourcing

Many companies try to avoid the all too familiar burdens associated with the direct hiring of employees by outsourcing for workers. These companies are discovering to their surprise and dismay, however, that outsourcing for workers may pose serious legal risks. Possible violations of U.S. immigration law can arise even if services offered through an outsourcing firm are provided exclusively by U.S. citizens, but – as would be expected – penalties can be even more severe when the outsourced personnel are foreign nationals.

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[9] IIRAIRA, 9/28/96, Federal Register.

The INS may deem outsourced workers to be de facto “employees” and, thus, require Form I-9 compliance. The INS regulations clearly define “employer”, “employee”, and “independent contractor”.[10] Whether outsourced services constitute authorized or unauthorized employment depends on the facts and circumstances in a given case. A clearly drafted written agreement delineating the rights and duties of the outsourcing firm and the corporate customer, as well as full disclosure in the documents submitted to the government when applying for an immigration benefit may help avoid unauthorized employment. These measures may still fail when the corporate customer cannot resist the temptation to control the work of outsourced personnel on its premises. The exercise of control over the worker will lead to a finding of an employer/employee relationship rather than that of independent contractor.

Immigration laws also prohibit discrimination on the basis of citizenship or document abuse. A potential concern of this type includes accusations of discriminatory practices by hiring outsourced workers who are foreign nationals rather than hiring U.S. citizens. Document abuse refers to the Form I-9 compliance obligation and may arise when an employer asks outsourced workers for more or different documents than normally required under the immigration law. The most obvious immigration violation occurs with the direct or indirect hiring of a foreign worker by an employer who has knowledge that the person lacks proper work authorization.

From the foreign nationals’ perspective, providing outsourced services without a proper work permit may lead to another type of immigration violation. Work that is not authorized under the foreign national’s work visa may cause the person to fail to maintain lawful status and thereby subject him/her to removal from the United States. For example, when an outsourcing firm dispatches a nonimmigrant worker to the premises of a corporate customer, the worker may be violating the terms of his or her work visa.

The nonimmigrant work visa categories that corporations are most likely to encounter are the B-1 (Business Visitor), E-1 (Treaty Traders), E-2 (Treaty Investors), H-1B (Workers in Specialty Occupations), and L-1 (Intracompany Transferees). Relevant attributes of these visa categories are noted below.

B-1 business visitors in most cases are not authorized for employment, may not engage in productive labor or services which displace U.S. workers, and may not receive a salary or other remuneration from a U.S. source, other than for reimbursement expenses. Thus the rendition of productive labor by a B-1 business visitor to a corporate customer at the direction of an outsourcing firm is likely to violate U.S. immigration law, even if they receive no U.S. source income. There are a few circumstances that provide an exception to this general rule.

Nonimmigrants in E-1, E-2, H-1B, and L-1 status may be compensated from a U.S. source and may be employed and render services to the petitioning entity that sponsored the individual’s work visa. As noted in the documents submitted to the INS, the terms and conditions of these visaholders’ employment are limited. Thus, whether or not a foreign national in one of these work-visa categories may be authorized to render services on assignment by an outsourcing firm at the location of a corporate customer will depend

[10] 8 C.F.R. §274a.1(f), (g), (h) and (j).

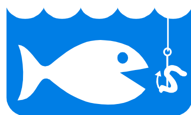
on the representations the outsourcing firm made to the government (assuming of course that the firm, in fact, formally sponsored the worker and the government approved the terms of the sponsorship).

In order to identify whether any potential immigration violations have occurred or are likely to arise, companies must begin outsourced relationships with a written or at least a verbal agreement regarding relevant immigration law consequences and the form of the contractual outsourcing.

Changes in a business' activities can also trigger immigration issues. A wide range of business changes, including an entity's stock or asset ownership, an entity's business activity or location, a foreign national's job location, title, or duties, a foreign national's managerial responsibilities, use of essential skills or specialized knowledge are material events that may affect immigration status. Whenever there is a material change to the documents submitted to the INS that resulted in an immigration benefit, the INS must be notified. Steps should be taken before any material change in circumstances in order to avoid incurring liability for unauthorized employment.

As noted throughout this article, immigration law concerns can readily arise in the hiring of employees, both U.S. workers and foreign nationals. Well thought out and clearly written documentation are key elements in establishing and maintaining all working arrangements as well as preventing potential litigation. Employers are now offered a greater pool of potential workers. But, when "angling for aliens" employers must remain vigilant in their representations and actions while keeping well informed of the current and continuously changing and complex immigration regulations and procedures.

[Sample Job Offer Letter][11]



American Anglers, Inc.
4 Park Plaza, Suite 200
Irvine, CA 92614

Mr. John Bass
Technology Park
London, England

Dear John:

American Anglers, Inc. is pleased to offer you employment as Chief Lure Designer at our Irvine, CA location at a base salary of $ _____ per month. The effective date of the salary action will be April 1, 1998. In addition to your base salary, you will receive a transfer bonus of $______. The first installment of $ ___________ will be paid to you on the first pay period following April 1, 1998, and the second installment will be paid to you on the first pay period following April 1, 1999, provided you continue to be an employee in good standing with American Anglers. The compensation associated with your transfer is valid until March 27, 1998. Please contact Mr. Halibut at (123)456-7890 to accept or reject this offer. If you choose to accept our offer, please sign below and return this letter to Mr. Halibut.

You will be eligible for American Anglers benefits on April 1, 1998. The compensation and benefits information you receive should answer many of the questions you have about these programs. Please feel free to call me if you have any questions at (987)654-3210 or any other American Anglers employee referenced in the information provided.

This offer is contingent upon your obtaining the proper grant of authorization by any and all responsible U.S. government agencies allowing you to work in the United States and otherwise comply with United States immigration laws.

American Anglers will also provide and pay for the cost of legal counsel to represent the company and you in applying for your authorization to work in the United States and related work visa status. The

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[11] This sample job offer letter and the accompanying article merely overview immigration concerns in the employment arena and do not constitute legal advice. These documents are not intended as in-depth legal analysis of immigration concerns in the employment area. The facts and circumstances differ in each case and will dictate the appropriate legal actions. The sample job offer letter and article are no substitute for professional advice and representation by a lawyer or law firm with experience in U.S. immigration law.

attorney chosen by the company and American Anglers' internal human resources specialists will require your full cooperation, as well as all information and documents that may be necessary from you in order to prepare any and all U.S. work visa petitions and applications completely and accurately.

Please recognize that your employment with American Anglers is "at will". This means that either party may terminate the employment relationship at any time without cause. This "at will" relationship will govern your employment at American Anglers even though in submitting your nonimmigrant application for work-visa status to the U.S. immigration authorities, American Anglers may reserve and request a particular period of employment permission that may be available under immigration regulations.

Thus, please complete and return to American Anglers the enclosed Nonimmigrant Visa Questionnaire as soon as possible. In addition, please provide us with a complete copy of your passport pages, college degrees, educational transcripts, resume and any previously held United States visas.

We are looking forward to your joining us. Your signature below is an acceptance of this offer. Please contact Mr. Halibut or me if you have any questions concerning this offer.

Very truly yours,

________________________________ ___________________

Rod N. Reel — Date
American Anglers, Inc.
Director of Human Resources

________________________________ ___________________

John Bass — Date