


Key US and UK Business Immigration Issues for Employers

For many employers in the United States and United Kingdom, talented workers from outside the US or Europe respectively are essential to the continued success of the business. However, numerous considerations must be taken into account, and sound legal advice taken, each and every time a non-domestic worker is hired, retained, transferred or even terminated, thanks to the various intricacies of current immigration law in both jurisdictions.

This article aims to provide a brief overview of some of the most important and pertinent issues that must be considered, firstly for those employers based in the US, and then for their UK counterparts, before commenting on an issue of equal importance in both jurisdictions.

Considerations For US Based Entities

Explore Your Employment Options For Hiring Foreign-Born Individuals

Notwithstanding last year's lengthened period of H-1B availability under the cap, employers were still left with more than a nine month gap (from December 22, 2009 until October 1, 2010) for new H-1B visas to become available for FY 2011, the filing season for which will begin on April 1. So what is your business to do in the meantime? While there are a limited number of options presented by the "alphabet soup" of temporary visa categories currently available under the law, there are, indeed, viable alternatives for potential hires for whom you cannot (or will not) wait until October 1, 2010 to employ (e.g. B-1 in lieu of H-1B, O-1, E-2, H-3).

Consider Strategies To Expedite Hiring

The following are strategies that may be available to an employer to expedite the employment of foreign national workers:

- **H-1B portability:** Visa portability provisions allow a foreign national accorded H-1B status to begin working for a new H-1B employer as soon as the new employer files a "nonfrivolous" H-1B petition on behalf of the foreign national. Such portability provisions relieve the foreign national from the need to await approval notification from US Citizenship and Immigration Services ("USCIS") before commencing his/her new H-1B employment.
- **The availability of premium processing:** USCIS established a premium processing program to expedite the adjudication of certain employment-based petitions and applications within fifteen calendar days upon payment of the premium processing fee. The following non-immigrant visa categories are eligible for premium processing: E-1/E-2, H-1B, H-2B, H-3, L-1, O-1, P-1/P-2/P-3, Q-1, R-1, and TN.

Plan Ahead For "Administrative Processing" Delays At US Consulates Abroad

When an employee is required to travel outside of the US, it will be necessary for that employee to have the appropriate valid visa prior to re-entering the US. Such visa must be obtained from a US Consulate abroad after a personal interview. Due to a rise in "administrative processing" delays at US consulates abroad, you should prepare your employee and your business for such a delay. Indeed, even without an "administrative processing" delay, it could take a month or longer to obtain a visa appointment. Thus, the employee should plan ahead for their trip abroad.

While these delays are generally unavoidable, there are a few steps to minimize the work interruption should an employee become subject to administrative processing:

- **Confer with immigration counsel** to ensure that the written materials the employee will bring to his/her interview are complete and up-to-date and that the employee has completed the necessary steps to schedule the interview at the US Consulate within the appropriate time period;
- **Inform the employee's supervisor** of the possibility of a delay in visa issuance on account of security checks; and
- **Develop an alternative work plan:** With today's technology, it is often possible for your employee to work abroad during such delays. If your employee has the ability to do so, he/she should bring the necessary devices/materials on his/her trip abroad.

Have A Policy In Place For Terminating The Employment of Foreign Nationals

Of course, lay-offs are a fact of life, especially so in today's economic environment. In circumstances involving a reduction in force, US company policies typically offer a few weeks of "severance" (with the date of termination effective immediately) in lieu of providing the employee with notice of the actual termination. While such severance packages may be fair, they (often unknowingly) present a unique set of problems to employees working pursuant to a work visa, since most work visa classifications are "employer specific". This means that the foreign national worker is not only dependent upon his/her employer for wages, but for his/her ability to remain in legal status in the US. Indeed, the US Department of Homeland Security considers a foreign national worker to be "out of status" as of the date of termination – regardless of the duration or amount of severance.

As such, for a terminated foreign national to remain in the US in an authorized period of stay, an application for an extension of stay (assuming new employment is found) or a change of status to another non-immigrant classification (e.g. B-2 visitor for pleasure) must be filed prior to or contemporaneous with the termination of one's employment. This is true not only for the worker, but also for his/her family. A failure to do so will likely render the entire family "out of status" and subject to removal from the US.

To ameliorate these harsh effects, employers should consider providing their foreign national employees with a fair period of notice before they are actually terminated from employment.

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Considerations For UK-Based Entities

Establish Which Rules Are In Force

Since the UK Border Agency ('UKBA') introduced its new points-based system ('PBS') in late 2008, there have been several amendments made to both the immigration rules themselves and their accompanying guidance. Although these have been largely welcomed, there have been 'teething problems', and it is sometimes difficult to keep track of which rules are currently applicable to the situation in hand.

For example, several major changes to the PBS will be taking place on 6 April 2010. It is therefore important to ensure that relevant staff receive regular and adequate training to avoid inadvertent breaches of the UK immigration rules, and if you are unsure as to the nature or source of the new rules, that specialist legal advice is taken from immigration counsel.

Should The Entity Become A Registered Sponsor?

There are pros and cons to each available route under the PBS, which will require careful analysis before any role is offered to an employee who is not a citizen of a European Economic Area state or Switzerland. A larger international organisation hiring non-EEA/Swiss employees on a regular basis may prefer to use the Tier 2 sponsorship route, where available, as once the initial administrative hurdle of becoming licensed by the UKBA has been overcome, time will be saved when each qualifying migrant employee is offered a role.

This route is not a method of avoiding the strict points requirements for business migrants however, and the initial registration process can be cumbersome and expensive. Ongoing sponsor compliance obligations and duties are also onerous and the UKBA will often monitor licensed organisations closely.

Smaller entities or those offering a one-off role to a non-EEA/Swiss employee should therefore consider other routes. For example, although the Tier 1 scheme is aimed towards individuals, this can also be very useful for employers not wishing to become registered sponsors.

What Is Best For The Employee?

A happy workforce is invaluable, and it is therefore not simply the employer's best interests that will be relevant in most cases.

Communication with the employee in question will often be vital, so that all bases are covered but also to ensure that their family and future needs are considered. For example, if they wish to eventually settle in the UK, a particular PBS route may facilitate this for them, whilst another PBS route may not.

Keeping Internal Records Up To Date

Finally, whichever route is chosen by the UK organisation to employ foreign workers, essential housekeeping of personnel files must be done on a regular basis. This means HR organisation in terms of, for instance, keeping track of which employees require visas and the dates on which those visas are due to expire, to avoid any inadvertent breaches of the immigration rules.

The UKBA has powers to issue warnings and both civil and criminal penalties, and fines will be issued of up to £10,000 per illegal immigrant employed by an organisation, which can prove extremely costly. In addition, sponsorship status will be demoted or revoked, and individuals can be deported and banned from re-entering the UK if found to have breached the immigration rules.

An Important Consideration For Both US And UK Based Entities

Develop Long-Term Immigration Strategies For Your Workforce

To help accomplish your staffing goals and thus remain competitive in today's global economy, it is the role of immigration counsel, in partnership with business owners and/or human resources personnel, to focus on "the bigger picture" for key, foreign-born personnel to ensure that those individuals are in a position to gain entry to and then remain in the US or UK for as long as necessary to achieve the goals of the business. Such long-term strategies should be discussed prior to (if necessary), or at the time of, hiring each foreign national (leaving sufficient time to collect relevant documents and submit immigration applications), and should be revisited over the course of the business' employment relationship with each such employee. These plans should never be left to the eleventh hour as poor planning will likely result in short-changing your long-term employment options with a valuable employee.

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