Nuts and Bolts of Immigration Law for Human Resources Professionals

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Before We Start

- This webinar will be available for rebroadcast and download later today from the same site.
- Please submit questions in writing through the panel on your display, and we'll try to address them at the end of the presentation.
- If you are having any technical support issues during the webinar, please let us know by using the written question box.
- Please do not hesitate to contact me afterward at amocciolo@pullcom.com.

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What will we be discussing today?

Just what the title suggests – a very basic overview of employment-based immigration law, as follows:

1 – Some background immigration principles and terminology

2 - Every employer's role in enforcing immigration law: Form I-9

3 - Transferring existing employees from overseas offices to the United States

4 - Hiring new foreign workers to fill vacancies in the United States

5 - Permanent residency based on employment

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What we will not be discussing today

This presentation does not include discussion of special situations applicable to training visas for physicians, or to entry of artists and athletes for particular performances or competitions.

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Some background terminology and principles

1 - No foreign national may enter the United States without permission from the federal government – no matter how brief the stay or what the purpose.

A "visa" is simply the permission obtained by a foreign national to enter the United States.

Not all visas are the same – they come in different types that allow their holders to enter the U.S. at different times, for different reasons, and for different durations. The types of visas are generally referred to by letter and number codes rather than names – e.g., "H-1B," "L-1," etc.

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Background terminology and principles, part 2.

2 – While the term "immigration law" is used to refer to the rules governing the presence of all foreign nationals in the United States, the law divides those individuals into two general categories:

a – "Non-immigrants" refers not to Americans, but to foreign nationals who are not authorized to remain in the U.S. permanently. The majority of people whose presence in the U.S. is based on employment fall into this category, and they will be the focus of today's presentation.

b – "Permanent residents" are immigrants in the true sense – people who have been granted permission to live and work in the United States for as long as they choose, subject to good behavior. They do not have all the rights of citizens, however – most importantly, they can be deported if convicted of certain crimes.

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Background terminology and principles, part 3.

3 - No foreign national may be employed in the United States without permission from the federal government.

That is, for non-citizens, the right to work in the U.S. is separate from the right to be present in the U.S. Some categories of visa have this permission built in while others do not.

An employer may not employ a foreign national unless the foreign national is legally present in the U.S. and has permission to work.

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Background terminology and principles, part 4.

4 - Every employer is affirmatively responsible for immigration compliance.

An employer may not hire anyone – citizen or foreign national – without ensuring that the prospective employee is legally authorized to work in the United States.

This is an affirmative obligation. That is, an employer must proactively determine whether an employee is authorized to work – not simply rely on ignorance or wait for a sign that the employee is not authorized before investigating.

There are civil and criminal penalties for violation.

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Every employer's basic immigration compliance obligation: Form I-9

The vehicle for employers to meet their basic obligation to ensure that employees are authorized to work is USCIS Form I-9.

The I-9 was introduced by the Immigration Reform and Control Act of 1986, the same law that obliged employers to affirmatively determine their employee's immigration status and made it illegal to knowingly hire unauthorized workers.

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How Form I-9 Works

1 - Employee must complete first part of form, consisting of a sworn statement indicating whether she is a citizen, a permanent resident, or nonimmigrant with work authorization.

2 - Employer completes second part of form, indicating that it has reviewed certain documents (from a specified list) that confirm the employee's identity (that she is who she claims to be) and her immigration status (whether she is authorized to work).

3– If employee cannot provide the required documents, the employer must decline to hire her.

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How the I-9 Obligation Is Enforced

Essentially a self-policing system backed up by occasional audits.

An employer does not file the completed Form I-9 with any government agency. Instead it maintains the forms itself and must produce them for audit if requested bythe government.

N.B: while not required, it is generally a good practice to also maintain photocopes of the backup documents collected from employees.

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Common I-9 Compliance Problems

- **Insufficient length of record keeping**.
  - Records must be maintained not just for every employee, but for every past employee for the longer of 3 years after he is hired or 1 year after his employment has ended.
- **Antidiscrimination measures** – law requires employers not to discriminate on the basis of citizenship both in hiring, and in administering Form I-9.
  - For example, an employer may not insist on a document that could only be provided by a citizen (such as a U.S. passport) in lieu of other documents that are on the approved list.
  - Non-uniform record-keeping: employers should not maintain copies of some employees' backup documents (i.e., foreign nationals) and not of others (i.e., citizens).
  - To avoid the appearance of discrimination, I-9 procedures should be conducted only after employment offer made and accepted.

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A Word About E-Verify

E-Verify is an electronic database administered jointly by the Department of Homeland Security and the Social Security Administration that allows employers to compare information provided by the employee on Form I-9 to government records, ostensibly to identify fraudulent documents.

The system is highly controversial because of its perceived error rate, and because of disputes about whether state governments have the authority to require employers to use it when the federal government does not. Latter issue will be addressed by the Supreme Court this year in *Chamber of Commerce of the United States v. Whiting*, docket no. 09-115.

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Transferring Existing Foreign Employees to the United States

For companies with foreign offices or affiliates, the vehicle to transfer an existing employee from one of those locations to a job in the United States is generally the **"L-1" visa**.

Divided into two categories:

- L-1A, for executives and managers
- L-1B, for workers with "specialized knowledge" of the company's products or services.

L-1s are non-immigrant visas, generally good for three years with one or two renewal periods of 2 years each. The work permission they carry is for the sponsoring company only.

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L-1 visas, continued.

There are two sets of requirements for L-1 visas:

1 - The sponsoring employer must meet certain requirements with respect to its relationship with the foreign affiliate that previously employed the worker;

and

2 - The employee herself must be qualified by virtue of her job responsibilities.

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L-1 visas: employer requirements

In order for an employer to be eligible to sponsor an employee for an L-1 visa:

1 – The U.S. employer must be a parent, branch, subsidiary or affiliate of the foreign company that previously employed the candidate;

2 – The U.S. employer must be doing business in the U.S. throughout the entire period of the alien's stay in the U.S. as an intracompany transfer (and the foreign business must be maintained in at least one other country at the same time).

"Doing business" means regular, systematic and continuous provision of goods and services – not presence of an agent or sporadic deals.

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L-1 visas: employee requirements

All L-1 employees must have been employed by the foreign affiliate of the sponsoring U.S. employer for at least one continuous year within the last three years.

- Previous employment must have been in a "managerial capacity," "executive capacity," or have involved "specialized knowledge."

N.B.: these are stipulative definitions within immigration law – USCIS will look behind the employer's characterization of employee's responsibilities and decide for itself if job qualifies.

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Miscellaneous L-1 considerations

If employee is coming to U.S. to open new office, employer must show that within a year it can grow sufficiently to support a managerial or executive position.

"Blanket petitions" are available for companies using large numbers of L-1 transfers. Allows employer to skip step of proving its own qualifications, and send employees directly for consular approval. To qualify, must have had 10 L visas approved in last 12 months, or have U.S. affiliates/subsidiaries with at least $25 million annual sales or at least 1,000 employees in U.S.

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Hiring new foreign workers to fill vacancies in the United States

Most common vehicle for hiring a new foreign worker to fill a vacancy in the United States is the **"H-1B" visa**.

Allows U.S employer to hire foreign national to fill a "specialty" or "professional" position – defined as a position requiring at least a baccalaureate degree in a specific, relevant field. This is a nonimmigrant visa for three years, generally renewable for up to three more. Subject to annual quota for U.S. as a whole, which is generally exhausted immediately at beginning of the year.

N.B.: positions simply requiring an undifferentiated college degree generally will not qualify.

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Other H-1B requirements

1 - Prevailing wage determination. Employer must pay at least this wage to be eligible. Determination made by state employment services agency.

2 – Labor conditions application ("LCA"). Certification by employer to USDOL that alien will be paid prevailing wage and be granted prevailing terms and conditions of U.S. workers, and that there is no strike or lockout affecting the position.

N.B.: "H-1B dependent" employers must meet additional requirements, including demonstrating that it cannot obtain U.S. candidate to fill job, and use of H-1B will not displace a U.S. worker.

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A word about the H-2B visa

There also exists an "H-2B" visa for temporary or seasonal jobs. Unlike H-1B, all H-2B employers must show that jobs cannot be filled with U.S. workers. Also subject to annual quota that is quickly exhausted. Common used for agriculture and tourism.

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Special rules for Canadian and Mexican professionals under NAFTA

Under the North American Free Trade Agreement, immigration and work rules for professionals from Canada and Mexico differ from those for other foreign nationals:

- "TN" visa allows simplified access to the U.S. for those who are employed in scheduled professions (generally corresponds to H-1B-eligible jobs)
- Canadian and Mexican L-1 candidates can apply directly at border (similar to consular-only processing afforded to candidates under blanket petitions)

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Permanent Residence Based on Employment

It is possible to qualify for permanent residence in the United States based on employment (and in some cases even on employment-related professional or academic qualifications without a specific job attached, although this is beyond the scope of today's discussion)

1 – Such visas are limited by two quota systems: limits on numbers for different employment categories, and limits on number of aliens from any single country within categories.

2 – The visas themselves are divided into so-called "preference categories," generally corresponding to the level of educational and professional sophistication required for the work.

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Overview of the preference categories

EB-1 (first preference) – no labor certification required and visas generally current:

- "Extraordinary ability" (this is self-sponsoring category beyond scope of today's discussion)
- Outstanding professors and researchers
- Multinational managers or executives

EB-2 (second preference) – labor certification required, but visa numbers are generally current:

- Professionals holding advanced degrees
- Persons with exceptional ability

EB-3 (third preference) – labor certification required, and visas generally oversubscribed:

- Skilled workers (job requires at least two years experience or training
- Professional (job requires at least a baccalaureate degree)
- Unskilled workers

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Overview of the preference categories, continued.

EB-4 (fourth preference) – no labor certification required and visas generally current, but limited to enumerated occupations/persons

- Examples include religious ministers and Iraqi/Afghan translators

EB-5 (fifth preference) – no labor certification and visas generally current

- Immigrant investors who will put at least $500,000 to $1 million at risk in a U.S. venture – there are requirements as to creation of U.S. jobs

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What is labor certification?

Labor certification is the process a sponsoring employer must undertake to determine if a U.S. worker is available to fill the position for which the visa is sought. It is currently known as "PERM."

- Employer must document recruitment efforts to the Department of Labor. Recruitment must follow enumerated steps such as internal posting, newspaper advertisements, posting on state agency job board, etc.
- Employer must obtain a prevailing wage determination.
- DOL also makes determination as to whether employer's minimum requirements are appropriate for job and industry.
- Lengthy procedure that requires period for recruitment itself plus 3 to 6 months (or more) for agency processing. Only then can employer file visa petition with USCIS.

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Questions?

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Thank you !

We hope that this presentation was helpful.

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For questions about today's topic please email the presenter.

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