

## Employment Law

# STOPPED at the Border

Anticipating roadblocks in the work visa application process can help ensure safe passage.

By Mark Ivener

Today's global business environment makes it necessary for most companies to know their way around the work visa application process. That's especially true since the service and benefit functions of the U.S. Immigration and Naturalization Service became part of the Department of Homeland Security as the U.S. Citizenship and Immigration Services (USCIS) after the events of Sept. 11, 2001. That, as well as structural changes at U.S. consulates, have further complicated what already was a highly technical and painstaking process.

Thus risks, liabilities and burdens lurk in the shadows for any company that employs foreign nationals. Inadvertent mistakes and seemingly minor oversights have the potential for serious legal repercussions if not addressed in a timely manner.

Managing the complexity of international recruitment and hiring requires a comprehensive immigration strategy that combines precautionary measures with advance planning. HR professionals who actively participate in designing and executing company immigration policies will be better positioned to handle immigration risks than those who take a wait-and-see approach.

Following is a discussion of several areas where challenges and difficulties commonly confront companies that employ foreign nationals or plan to in the future—and tips on how to better manage those concerns.

### Factors Leading to Visa Delays and Denials

Numerous factors can cause significant delays in the work visa approval process. HR executives must not only keep up-to-date with such factors but also educate other company officials about the delays inherent in consular screening practices, security checks and new policies concerning expedited removals and denial of entry at U.S. borders.

Here are some examples of factors that can prolong the process:

**Longer biographical questionnaires.** Consular screening practices now require an in-depth biographical questionnaire for all

males ages 16 to 45, regardless of nationality, to be submitted along with a nonimmigrant visa application.

**More security checks.** Various security checks can add 30 or more days to the approval process, following an interview by a U.S. consul. For example, if an applicant hails from one of approximately 26 predominately Muslim countries, expect additional security checks (known as Visas Mantis). Moreover, all applicants from countries that the State Department deems "state sponsors of terrorism" (currently, North Korea, Cuba, Syria, Sudan, Iran, Iraq, and Libya) require a special background security check (known as Visas Condor).

These security checks require processing and approval by numerous government agencies, including the Central Intelligence Agency (CIA) and the Federal Bureau of Investigation (FBI). This, in part, explains the long delays in securing each individual's visa.

**Suspension of automatic approvals.** Suspension of the Visas Eagle Mantis system also has contributed to the backlogs. Under that program, certain applications could be cleared after a specified time, even without the approval of every agency concerned. This procedure was replaced in 2002 by Visas Donkey Mantis, which requires all applicants to be positively cleared by all government agencies that might have an interest in them.

**Special clearances required.** Of particular relevance to foreign nationals in the scientific and technical fields is the State Department's Technology Alert List (TAL), which was created to

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## Head 'Em Off at the (H-1B Visa) Cap

The cap for fiscal year 2006 already has been met, and, with minor exceptions, no new H-1B visas for professionals will be available until Oct. 1, 2006. Applications for those visas could be filed beginning April 1, 2006, and it was projected that all new H-1B visas for fiscal year 2007 would be used by June 2006—in other words, before you read this.

If you missed out, begin to prepare for fiscal year 2008 or consider other options, which include H-1B1 visas for nationals of Singapore and Chile; E-3 visas for Australian

nationals; TN visas for nationals of Canada and Mexico; and H-3 and J-1 trainee visas for any nationality.

Companies that have workers in practical training and who plan to apply for H-1B visas to coincide with the end of the training period, as is commonly done, often find that no visa numbers are left. Emphasize to hiring managers that they are not to gamble practical training and are instructed, where appropriate, to initiate the H-1B visa application process for their foreign trainees well in advance of the end of practical training.

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address concerns about the risk of transferring sensitive U.S. technologies to foreign nations. The TAL security clearances for those teaching, conducting research, engaging in commercial transactions, or receiving training or employment also may take 30 days or more.

Additional security clearances include criminal clearance through the FBI, CIA and other databases (which might be done the same day or which can take seven or more days). These procedures produce an unfortunately high false-positive rate based on common surnames, as well as red flag alerts predicated on such factors as even a minor record of driving under the influence.

**Unlawful presence bars.** Foreign workers who overstay their visa by 180 days and then leave the United States are barred from re-entry for three years. Those who overstay their welcome by more than a year and then leave are barred for 10 years. The USCIS is strictly enforcing the overstay entry bar regulations.

For any overstay past the date on the I-94 entry card, the applicant generally is no longer eligible to obtain a new visa for re-entry to the United States via Canada or Mexico and must return to the home consulate. There, visa denial is still a risk if the overstay was lengthy.

**Expedited removal.** The Department of Homeland Security's Expedited Removal Authority is an informal process for deportation that removes certain inadmissible foreign nationals from the United States at an airport or land border.

Denial of entry occurs when individuals materially misrepresent themselves or lack proper immigrant or nonimmigrant visa documentation. Such information usually is provided beforehand (and verified through the Advance Passenger Information System—a questionnaire filled out before boarding a flight to the United States) and at Customs and Border Protection (CBP) inspection.

Potential causes of denial and removal can include serious matters such as a previous criminal record or past overstays. However they also can include seemingly minor matters, such as too many visits on the B-1 or B-2 visa (business or tourist) if prior unauthorized employment in the United States is discovered.

### Use Advance Planning to Deal with Delays

HR professionals can help anticipate and deal with potential delays—or, at the very least, ensure that hiring dates are realistically established—by taking certain steps, such as conducting effective background screens.

## Compliance Tips

As the U.S. system of immigration law grows more complex, the chances for violations of regulations increase correspondingly. Here are some steps HR professionals can take to help ensure their organizations remain in compliance.

**Recordkeeping.** HR professionals must institute a tracking system for H-1B workers to ensure proper maintenance of files according to USCIS and U.S. Department of Labor (DOL) standards. The DOL estimates that 60 percent of companies violate H-1B posting and public access file maintenance rules, and further claims to investigate all complaints.

**Tracking.** HR professionals also should make certain the company or its immigration counsel electronically tracks all immigration

cases and expiration dates to guard against employee overstays, unlawful presence and other severe immigration violations, and to facilitate planning far ahead of expiration dates for renewals and extensions.

**Self-audits.** Companies should conduct in-house audits of their I-9 processes and documentation to uncover violations before federal immigration or labor officials do. Advise managers that if immigration officers do show up to conduct an I-9 audit, the company has three days to collect necessary documentation, except in cases of raids involving search warrants. Department heads immediately should take steps to involve immigration counsel to negotiate various steps of the inspection process.

During the domestic hiring process, employers routinely conduct background checks—covering credit, education, previous employment and criminal records—to determine applicants' suitability for employment. But in the work visa process, both applicants and their spouses are subject to greater scrutiny, and if a spouse can't get a visa, the worker is unlikely to come.

Thus, HR professionals should:

**Prescreen applicants.** The question of whether a petitioning individual or spouse has ever violated visa status by working illegally in the United States must be answered on the visa application; it also will inevitably come up during consular interviews. Accordingly, HR professionals should screen for this information early in the process of hiring a foreign worker and have a plan of action—for example, have a backup candidate—if the answer is in any way affirmative.

**Allow time for interviews.** As of July 2003, an individual interview—previously required only in certain cases—is mandatory for almost all nonimmigrant (temporary) applicants. It can take weeks to schedule such an interview at very backlogged U.S. embassies or consulates. Advance planning is critical to ensure entry and work authorization for key personnel.

**Continue to monitor.** The prospective employer's due-diligence obligation does not end when the USCIS approves the new hire. HR or immigration counsel must continue to monitor the situation by:

- Preparing consular applications.

- Checking on the timing of consular processing to ensure that the employee is on track to be hired by the date needed.
- Thoroughly reviewing the case with each prospective employee and spouse before a consular interview to make sure they understand the procedure and potential questions.

### After Workers Arrive

When employees arrive in the United States, HR's immigration concerns still aren't over. Several situations can arise that will threaten a worker's visa status and cause potential legal problems for the employer. As a result, HR should take the following steps after foreign workers reach American soil:

**Respond to restructuring.** Organizational, structural and corporate ownership changes can affect employees' legal status and work eligibility. If an organization fails to assess the status of foreign workers in a timely manner, critical employees could discover that a reorganization has invalidated their authorization to continue working in the United States. Inadequate attention to this matter could expose the organization to potential violations of federal immigration and employment regulations and could result in deportation or denial of re-entry to the United States for the workers in question.

Accordingly, HR executives should closely monitor any corporate restructuring—whether it occurs through a merger, acquisition, asset sale, stock sale, joint venture or spin-off. While other senior managers will focus on financial and regulatory risks during the merger period, HR must play a key role in overseeing the immigration considerations of corporate reorganizations.

Specifically, regular immigration and employment reviews from the premerger stage through completion would do much to preserve the status of essential foreign employees, as well as to ease the integration of the two organizations' workforces.

For example, if employees are transferred to a subsidiary or affiliate, these job changes generally must fall within the terms of employees' existing visas. Approved visas are contingent on the terms of employment in existence at the time of their issuance. Also, if the nature of visa holders' jobs—or their job duties—are altered during the transition, their visas could be rendered immediately invalid.

**Visa waivers.** HR departments also need to carefully monitor overseas employees who come to the United States on business trips. Pay particular attention to those who arrive on "visa waivers" that are authorized if the individual comes from one of 27 participating countries.

The lack of a visa requirement creates the illusion that entry and departure requirements are lax. In fact, if such personnel overstay the 90-day visitation period by even one day, the CBP will stop them on re-entry and, in most cases, send them back to their home country without delay. After that, they would need an actual visa stamp to re-enter the United States. That can be obtained only at the consulate or embassy in their home country.

### Grapple with Green Card Grief

HR's effective management of the green card or immigrant visa process is a best practice that allows a company to recruit for qualified candidates from all over the world.

Each month the State Department publishes a Visa Bulletin effective for the following month outlining visa availability for employment-related green card applications. Individuals whose employment category is "current," or available, or whose priority date falls before the stated cutoff date (the waiting list is based on when a particular country has used its visa quota) may apply for adjustment of status, or consular processing—the final step of the Green Card process.

The July 2005 Visa Bulletin prompted a flurry of activity in both corporate and legal sectors nationwide. In one month's time, from June—when all employment categories were in current status—to July, the situation changed dramatically. After many years of current availability, the July Visa Bulletin showed widespread cutoff dates for many employment categories—including skilled workers and professionals who were previously thought to be resistant to the quotas.

Currently, companies employing nationals from India, China, Mexico and the Philippines are particularly affected by the cutoff dates. The Visa Bulletins issued since October 2005 (the beginning of the federal government's fiscal year) have seen only minor movement forward in these dates, and the prognosis for the rest of 2006, and future years, is mixed, unless a USCIS regulatory or legislative fix is forthcoming.

As an example, the May 2006 cutoff dates for Indian nationals with a bachelor's degree is March 1, 2001, and the consensus is that it will be many years before recent petitions in this category will be issued a visa number.

Nationals of China, Mexico and the Philippines also face long wait times. Even for other nationalities, the current cutoff date for bachelor's degree petitions is currently May 1, 2001, which has moved forward only slightly since the October 2005 bulletin.

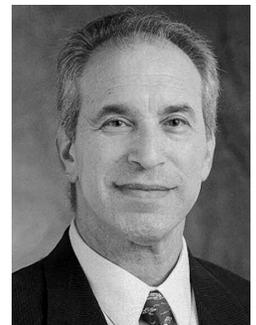
The message? Constant monitoring of State Department updates is vital, and organizations should devise their immigration strategies well in advance of any pending corporate deadlines.

For organizations facing visa problems brought on by green card delays, there are possible work arounds. Though H-1B visas generally are subject to a six-year maximum, extensions do exist for those awaiting a green card priority date—as long as the Labor Certification was filed before the end of the fifth year of H-1B status. An approved I-140 petition allows a company to apply for extensions of the H-1B in three-year increments if the country limit has been reached.

Even without an approved I-140 petition, extensions are permitted in one-year increments while awaiting a current priority date. ■

*Editor's Note: This article should not be construed as legal advice or as pertaining to specific factual situations.*

*Mark Ivener is managing partner of the immigration law firm Ivener & Fullmer LLP and is the author of five books on immigration and visas.*



**IVENER & FULLMER**<sup>LLP</sup>  
**I M M I G R A T I O N   A T T O R N E Y S**

**Los Angeles Office**

11601 Wilshire Boulevard, Suite 2280  
Los Angeles, California 90025  
Telephone: (310) 477-3000 Fax: (310) 477-2652

**New York Office**

410 Park Avenue, Suite 1530  
New York, New York 10022  
Telephone: (212) 358-9500 Fax: (212) 223-4343