

CORPORATE IMMIGRATION POLICY DEVELOPMENT: A CHECKLIST FOR EMPLOYERS AND COUNSEL

By William A. Stock*

Every employer, whether it hires one foreign national or hundreds per year, has an in-house corporate immigration policy. That policy may be to make decisions about hiring foreign nationals needing immigration sponsorship on a completely ad-hoc basis, or to refrain from hiring foreign nationals at all. It may be an elaborate construct, meant to balance the budgetary issues inherent in hiring workers needing employment-based immigration sponsorship against the need for talents that can only be accessed from a population of potential employees needing such sponsorship. When working with an employer in the immigration process, therefore, an immigration attorney can go beyond simply providing case processing services, and can help the employer to understand and articulate a corporate immigration policy that best serves the employer's interests. By doing so, the immigration attorney can elevate his or her role with Human Resources and line management from being a mere case processor to being a partner in realizing the business's goals. When the attorney's services are aligned with the company's policies, and the company's policies are aligned with the company's strategy, the company will value the attorney's services more highly and the relationship with the client will be more long-term and rewarding.

I. Immigration as a Strategic Human Resources Issue

In order to be able to articulate a corporate immigration policy, an employer must understand how immigration sponsorship of employees fits into its overall Human Resources strategy.

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Human Resources may also need to be disabused of certain commonly-held assumptions about sponsoring workers from abroad. For example, it would be foolish to predicate a policy on the assumption that bringing an employee to the United States on an H-1B limits the employee's ability to change employers, given H-1B portability. Similarly, it would be difficult to manage a policy based on the assumption that a labor certification or immigrant visa filing is a mere paperwork process with approval as a foregone conclusion.

The best immigration policies are driven by a business case for the employer to access talent not available in the U.S. labor market, for that is the purpose of U.S. immigration law. The employer's needs may be for esoteric talents, such as engineering or scientific skills gained by graduate students at U.S. universities, many of whom are foreign nationals; or it may be for skills, such as nursing, that are in short supply generally in the United States. Understanding the employer's need will help the attorney in assisting the employer in developing a policy that addresses that need and targets available hiring resources to those hires where immigration sponsorship will bring the most value to the company.

Thinking of immigration as a strategic Human Resources issue also helps align the employer's immigration sponsorship with the concept of "talent management," which tends to guide the overall functioning of the Human Resources organization in today's business world. The concept of talent management drives Human Resources to show its value to an organization by bringing in individuals who have the talents necessary for a highly-functioning organization, retaining those individuals who add the most to an organization, and improving the performance of those whose performance can be improved. By doing so, Human Resources attempts to avoid the need to terminate underperforming employees or employees whose talents otherwise do not create value for the organization. Given the enormous resources organizations spend on recruiting and hiring the best workforce, strategically, Human Resources will be focusing on ways to maximize that investment, of which immigration is only one cost.

A. Decision One: Whether to Sponsor

At a strategic level, Human Resources needs to lead a discussion within the organization of how a decision will be made whether or not to sponsor particular workers for immigration benefits.

Depending on the nature of the organization, centralized or decentralized decision making and budgeting may be most appropriate. Counsel can help facilitate this discussion, and point out that resources are best focused when budgeting and decision making are aligned.

1. Formalized Versus Ad-Hoc Policy

Employers do not need to have a formalized policy in which they involve line management and Human Resources in the decision making prior to each hire. While such a process will be a good fit for many organizations, it may not meet the need of every organization. The organization may appreciate an ad-hoc process, if immigration sponsorship issues arise relatively infrequently, or if the employer has relatively little experience with the process. The advantage of an ad-hoc process is that it can be much more flexible than a formalized process, and may be more able to respond to particular business needs than a more formalized process. The disadvantage of a lack of a process is that every case involves reinventing the wheel, and the lack of institutional memory about past policy decisions may lead to perceptions that decisions about immigration sponsorship are not made on an impartial basis by the organization.

2. Centralized versus Decentralized Process

A centralized process may be most appropriate if the Human Resources organization will be making the decisions about which prospective employees should receive immigration sponsorship and which should not. Under such a policy, Human Resources should also be responsible for the overall budget and for delivering performance within that budget. They will also have to be prepared to mediate discussions between departments, if some departments are seeking a greater share on the resources of the Human Resources department than others. The advantage of a centralized policy is that overall costs for the immigration process can be more easily measured and therefore, to some extent, controlled; the disadvantage is that Human Resources may be driven to consider cost at the exclusion of service, and managers may not feel responsible for the costs of the hiring decisions they make, as they will come out of another department's budget.

Another policy option is to locate the hiring decision and sponsorship decision in the hiring department, with the guidance of Human Resources. The costs of the hiring would then be located in the hiring department's budget, and the hiring department can determine whether or not a business case can be made for absorbing those costs. For example, the hiring department may determine that a candidate with a certain number of years of experience is necessary, and may find that immigration sponsorship is the only way to obtain a candidate with that level of seniority; as such, they will need to make sure that the business case for the position and that level of seniority supports the added expense of the immigration process that would be necessary to sponsor the worker.

In terms of making a policy recommendation, the author has found that it is most helpful to develop a policy which involves line management in the decision making at that time of hire, and makes line management aware of, and even financially responsible for, the immigration expenses that will be necessary because of a particular hiring decision. Because the employee will have the most day-to-day interaction with the hiring manager, the hiring manager needs to understand the importance of the immigration issue to the employee and needs to take ownership of that process and for ensuring that the organization follows through with promises made to the employee. If not, the manager will have to deal with an unhappy employee, and Human Resources will need to deal with an unhappy manager.

3. Employee-Driven Versus Employer-Driven Policy

A final top-level consideration in developing a immigration policy is whether the policy will be employer driven or employee driven. Immigration counsel should encourage their corporate clients to think about whether the process should be driven by the employee's express desires, or by the employer's analysis of what sponsorship decisions are most appropriate for the organization. Some organizations may wish the process to be more employee driven, as employee satisfaction with the process will result in greater loyalty. An employee driven process may also be a competitive advantage in some industries, such as physical therapy or nurse recruiting, where immigration sponsorship is necessary to access a relatively large pool of individuals with similar skills, where job opportunities are also relatively similar in terms of the

work being performed. Employees in such industries often make selections of which opportunities to take based on intangible factors such as work culture, of which immigration sponsorship can be an important part.

Employers may, however, prefer to have an employer driven process, communicating to employees that immigration sponsorship is of value to the employer when the employee's performance is best aligned with the employer's goals, and making it clear that the employer makes the decisions about when and whether to sponsor immigrant workers based on the employer's business needs. Employers can counteract the "big brother" aspect of this policy by pointing out that in those cases where the employer is making a decision to go forward with immigration sponsorship, because that sponsorship will be closely aligned with its business needs, the employee can be assured that the company will have an increased chance of success in immigration sponsorship (for example, by being able to demonstrate that the skills for the position are justified by business necessity).

4. Selection and Payment of Outside Counsel as a Policy Decision

Finally, no discussion of overall policy issues would be complete without addressing the selection of counsel. Employers may prefer to have employees select and retain counsel, but must appreciate the impact of the new rules of the labor certification process,¹ as well as the H-1B regulations requiring employers to pay the H-1B fees for services provided to the employer.² While an employer may still allow the employee to select counsel, the employer will be responsible for absorbing those legal fees if it wishes to remain in compliance with those particular regulations. As other parts of the immigration process (such as immigration of family members, the immigration petition process, and the adjustment of status process) may be at the employee's expense, employers may wish to limit their exposure to immigration-related costs by shifting as many as possible onto the employee. The advantage of such a policy is to save costs on each individual case, at the cost of loss of control by the employer over the selection of

¹ 20 CFR §656.12(b).

² 20 CFR §655.731(c)(9)(ii).

counsel and needing to re-educate counsel in every case about the employer's job opportunities, etc.

Alternatively, employers can select the outside counsel but make employees pay all of those expenses that are legally allowed to be paid by the employee. This policy has the advantage of having counsel familiar with the employer's cases, while reducing exposure to legal fees. Employees may, however, feel that the employer's selection of counsel is best for the employer but not necessarily best for the employee, and may prefer to have more input into the selection of counsel.

Finally, employers may opt to select and retain the outside counsel, but minimize their cost exposure by having employees sign "pay back" agreements, under which the employee undertakes the employer's expenses in the event the employee leaves employment either during or shortly after the immigration process is completed. While such "pay back" agreements may not cover the costs of the labor certification process,³ they may cover other processes, including most of the H-1B process.⁴

II. Policy Implementation Checklist

When developing the corporate immigration policy, there are several items counsel should review with the employer, which may be just as important on a day-to-day basis as the overall strategic policy decisions. The first area of discussion should be in the management of work flow, and what the employer's expectations are with respect to how information will be gathered from prospective hires or new hires, how that information will be communicated to the employer, how case strategy will be decided, and how the petition paperwork will circulate between the employer and outside counsel. Attorneys should not neglect careful development of these steps and ensuring that they follow the steps agreed upon with the employer, since employer dissatisfaction with an attorney's willingness to follow the rules or procedures set

³ 20 CFR §656.12(b); *see also* the Supplementary Information interpreting that regulation to prohibit payback agreements at 72 Fed. Reg. 27904, 27922 (May 17, 2007).

⁴ 20 CFR §655.731(c)(10)(i)(B). The "pay back" agreement may not cover the \$1500/\$750 ACWIA fee. *Id.*

down by the employer is often a factor in deciding whether or not to continue to work with an attorney.

Date tracking, including expiration dates and PERM process deadlines, is an essential part of immigration practice, and responsibility for date tracking should be clearly divided between the outside counsel and inside counsel. Various immigration software products can provide automated access to the outside counsel's expiration date reports, but counsel should work with their clients to develop a protocol for tracking and periodic reporting of such necessary information as nonimmigrant visa expiration dates, nonimmigrant status expiration dates, employment authorization document expiration dates and, most importantly, issues such as nonimmigrant visa maximum times, so that employers know when they need to make decisions about whether or not to sponsor nonimmigrant visa holders for permanent residence. Such efforts not only create a helpful partnership between Human Resources and outside counsel, but also provide opportunities for counsel to develop further assignments from the employer, as counsel points out the need for extensions to be filed or permanent residence processes to be initiated. While each office needs to make its own decision about how to allocate the costs necessary for this process, both in terms of technology and, more importantly, in terms of the large amount of ongoing staff time necessary to keep such information up-to-date and communicated back and forth with the employer, an employer who perceives such date tracking work as a value added service provided by the counsel at no additional expense to the client will be more appreciative of the counsel's services.

Communication protocols are an essential area of company policy that need to be developed. Some employers will prefer that outside counsel handle all communications with the employees, in which case counsel will need to be very clear about how they communicate back and forth with the employee to ensure that they do not create an expectation in the employee that the company's overall policy will not support. Counsel also needs to be very sensitive to issues that require escalation to their Human Resources contact, since Human Resources will be relying on counsel to provide the day-to-day communication, but to bring HR into the loop on items about which they should be informed (such as employee dissatisfaction with the pace of the process or a strategy decision that has been made). Other employers may prefer to have all communication

with the employees handled through the Human Resources or Legal Department, so as to control the messages being given to employees about their immigration sponsorship and align those messages with other messages about the employee's performance.

It is also helpful, when developing communication protocols, to deal with the question of "managing expectations" of both employees and their managers. Clear communication about processing times, time frames for cases, and expectations about how a case will progress, clearly stated at the outset, will save both Human Resources and outside counsel a great deal of grief later in the process. Managing expectations also includes frequent updating of those expectations as they change. Employees need to understand why changes, such as longer than expected processing times or new strategies have taken place, and what is being done to manage them.

Another frequent area of policy development is handling questions of travel. International travel can be quite a challenge for international employees, including requirement to obtain U.S. visas in order to return to the United States and foreign visas to enter other countries from the United States. Employers and counsel should develop together a policy regarding how such travel questions will be answered, and whether it will be the employee's responsibility to find out how to obtain a visa, or whether the employer would like its outside counsel to be involved at every step of the process. Employees should also understand the importance of communicating their travel plans with Human Resources and/or outside counsel, so that avoidable visa delays (or predictable ones) are managed in such a way that the employer is not unexpectedly deprived of the services of the employee.

One final area of policy development should be how to handle changes in position or job location during the immigration process. In this area, as with travel, communication is often key: employers should be encouraged to consult with outside counsel before any change in the employee's position, even where such a change of position may not have an adverse effect on immigration processes currently under way. A protocol should be developed for involving outside counsel in promotion discussions, and outside counsel should be prepared to address such job changes as proactively as possible, seeking to accommodate the employer's business

needs with a minimum of disruption to the immigration process. Employees should understand that Human Resources and outside counsel are not out to limit their advancement opportunities, but are looking to make sure that their advancement does not deprive them of the opportunity to complete the permanent residence process.

By having these discussions at the outset, formalizing them into an immigration policy document, and then ensuring that the processes are followed, immigration counsel can create a partnership with Human Resources in which they act together as a team to provide services to the business and to the employees for the benefit of both. Such team atmosphere is most conducive to the development of a long-term employee, attorney-client relationship.

III. Commonly Occurring Immigration Policy Questions

While outside counsel may wish to develop a corporate immigration policy with respect to policy and procedure for handling cases with every single client, some clients may want a more detailed immigration policy document to help guide their decision making, and to be communicated to line managers so that they are aware of the company's practices in this area. Such a policy document can be used to sensitize the managers to the importance of immigration issues and to the risks faced by the business and its employees if immigration compliance is not assured.

When making a hiring decision, the employer policy should reflect the fact that the H-1B cap, the expiration of students' Optional Practical Training, and the limitation of available alternative options to H-1B visas mean that every hiring decision should be thoroughly reviewed before an offer of employment is finalized. A good corporate immigration policy, however, goes beyond merely looking at the immediate options for an employee's status. In particular, since employees will have H-1B max-out issues to manage, employers should develop a policy of reviewing the employee's immigrant options at the time of hire and before a hiring decision is made. In that way, the employer, both Human Resources and line management, can make an informed decision about the long-term prospects for the employee's success.

How does such a policy work in process? Take the example of an employee being hired on a portable H-1B after a year and a half with another employer. The Human Resources Department at the employer can bring outside counsel into the process and discuss what had led line management to make the decision to hire the employee. If the employee was one of seven candidates who met all of the requirements for the position, but was perceived as being a better “fit” for the department than the other six candidates, the counsel can look at whether or not a labor certification is the only available immigrant visa option. For positions such as outstanding scientists or researchers, or national interest waiver-eligible positions, the employer may decide to proceed with the hiring, because the availability of other people meeting certain minimum requirements is not an issue in obtaining permanent residence for an excellently-qualified prospective employee.

Where the labor certification requirement will be part of the green card process, however, the employer can be advised that the apparent broad availability of U.S. workers having similar skill sets will be a challenge in the labor certification process. In fact, since the employer will not be able to rely on skills gained by the employee with the petitioning employer, the employer may be counseled that one of the other qualified candidates should be hired in preference to an immigrant worker for whom there is no long-term prospect of employment.

A similar policy discussion can be held about how decisions will be made when an employee might have an option in the extraordinary ability, outstanding researcher or national interest category, but that case’s chances of success are lower than the chances for a labor certification would be. Since the employer is bearing the cost of such a process, it might prefer the lower preference category inherent in the labor certification process, even though the chance of success may be greater than 50% in an outstanding research case. A good immigration policy will not necessarily resolve that issue for every case, but will provide a process through which the employer will make that decision. The process could be flexible, and could allow the employee to pursue additional options at the employee’s own expense, for example, in order to balance the employee’s desire for the most favorable preference category with the employer’s desire to only file one type of permanent residence application on behalf of the employee.

IV. Compliance Policies

In addition to policies on how to initiate and manage various immigration processes, employers' immigration policy should address the compliance issues that have become so prevalent in today's enforcement-oriented environment. In particular, the company's policy on I-9 compliance, how questions about workers' status or documents will be escalated, and a clear articulation of the company's policy against hiring workers who do not have authorization for employment should be laid out. In addition, the policy should make someone responsible for date tracking for those I-9s where employment authorization expires.

Similarly, other aspects of immigration and compliance, such as maintaining LCA audit files, should be assigned to a particular department or position within the company, and responsibility for ensuring that compliance should be assigned. A good policy will not only provide rules, but will also provide procedures, such as annual audits of I-9 compliance or LCA file compliance, possibly with the assistance of outside counsel, to ensure that the policy is being followed.

Conclusion

Developing a corporate immigration policy with a new client may be a daunting endeavor for an attorney who has never developed such a policy. To prepare one's first policy, an attorney may wish to simply sit down and review the actual practices of the attorney's other existing clients. The policy discussion can then be driven by what the attorney perceives to be advantages and disadvantages of how other employers have handled these policy decisions.

Finally, the most important aspect of policy development bears repeating: a policy will be most successfully implemented when it is aligned with the organization's strategic goals and, where possible, with the types of hiring decisions favored under the immigration law. Properly designed, a policy document will assist the company in reaching its goals, and in maintaining a corporate culture which encourages both compliance with immigration law, as well as strategic use of immigration law where it will benefit the company.