

P
R
E
S
E
N
T
A
T
I
O
N

Risks of In-House Processing of Immigration Petitions for Foreign Faculty and Staff

Wendy Padilla-Madden

BAKER DONELSON

EXPAND YOUR EXPECTATIONS™

Overview

- Institutions of Higher Education (IHEs) are increasingly diversifying their faculty and staff by hiring foreign nationals (FNs).
 - FNs account for at least 22% of faculty at IHE
- Hiring a foreign national employee **differs significantly** from hiring a U.S. citizen or lawful permanent resident.
 - FNs are generally not allowed to work for a U.S. employer until proper work authorization is issued by the U.S. government.
 - Sponsorship of FNs involves time, money and also additional employment responsibilities.
 - Hiring of FNs imposes additional compliance obligations on employers.

Opportunities, Issues and Risks in Hiring FNs

- Benefits
 - Recruitment, hiring and retention of top talent
 - Promotes internationalization of IHE
- Challenges
 - Multiple stakeholders
 - Immigration sponsorship involves legal, detailed, complex and specialized work
 - GC's office or Legal Dept. may not have required expertise
 - Significant costs of sponsorship
 - High stakes are involved
 - IHE reputation
 - FN's ability to work and reside in U.S. (or to continue to)
 - Difficulty of integrating FN hiring into normal hiring process

Immigration Sponsorship Policy

- Does your IHE have one?
 - Approximately 30% of IHEs do not have one.
 - Does it need to be updated?
- Key Issues
 - Institutional long term goals
 - Faculty and staff recruitment
 - Nature of applicant pool
 - Stakeholders
 - Legal, HR, international office, colleges and departments
 - Available institutional resources

First Questions to Ask

- Policy development
 - Who will own the policy?
- Hiring decisions
 - Who has the authority to hire an FN?
- Program parameters
 - What positions and FNs will the IHE sponsor?
 - What visa categories will the IHE use and when will it do so?
- Processing of petitions
 - Authority to approve sponsorship
 - Primary responsibility for day-to-day work
 - Involvement of internal legal dept., HR and outside counsel
- Oversight
 - Who is responsible for ensuring compliance with issues related to FN hiring?

Processing of Petitions: Different Institutional Models

- **Full-service:** In-house team at institution
- **Split-service:** NIV versus IV
- **Combo:** Combination of services outsourced and/or produced in-house
- **Scraps:** Overflow or complicated cases
- **Anything goes:** individual picks
- **Attorney**

Poll – Which Institutional Model Fits Best in Your Case?

- 2011 NAFSA Survey revealed that IHEs:
 - Do not use outside counsel: 16
 - Use university counsel who performs work for entire university system: 5
 - Use private counsel at one law firm contracted by school: 21
 - Use attorneys on approved list of law firms: 17
 - Use any counsel that foreign national decides to hire: 5

<http://myweb.fsu.edu/khagen/poll2.html>

Issues and Risks

- Program Control
 - Hiring
 - Sponsorship policy communication
 - Exceptions to stated policy
 - Contract promises
 - Processing of petitions
 - Day-to-day responsibility
 - Involvement of internal counsel
 - Involvement of external counsel
 - Competence of institutional resources
 - Initial qualifications
 - Training

Is There an Attorney in the House?

- Unlicensed practice of law
 - In-house immigration advisor(s)
 - Role
 - Petition processing
 - Internal department liaison
 - Direct contact with FN
 - Scope of advice
 - Level of independent decision making authority
 - Competence, training and proper staffing
 - Collaboration with in-house counsel
 - Collaboration with external counsel
 - Collaboration with HR
 - Department staffing and cross-training

Using Outside Counsel

- Advantages
 - Legal expertise
 - Lesser legal liability
 - Possible faster case preparation and higher rate of success
 - Consistency in protocols, preparation time and access
 - Access to legal expertise for non-case-specific issues
 - Additional services
 - Training for international staff
 - Presentations and workshops for foreign students and faculty
 - Cost control
 - Negotiated fees
 - Free consultations

Using Outside Counsel

- Disadvantages
 - Still need in-house staff to coordinate program responsibilities
 - Loss of control
 - Higher costs
 - Lack of institutional knowledge

External Counsel Selection

- One or many?
- Level of expertise and specialization
 - Experience representing IHEs?
 - Do they need to be local?
- Staffing levels
 - Solo practitioner
 - Firm
 - Handling L&E or other issues already?
- Cost structure
 - Case specific advice
 - General compliance advice
- Scope of work
- Point of liaison with IHE
- Conflict of interest resolution

Interacting with the FN

- Dual representation issues
 - Differing end goals
 - FN wants to pursue a different course of action
 - FN wants to file self-petition as well as employer-based petition
 - FN has criminal issues
 - FN plans to jump ship
 - FN has performance issues or IHE no longer wishes to employ
 - When a case goes wrong
 - Who pays for what?
 - Petition fees
 - Dependent petitions

Usual Types of Petitions

- Temporary Employment
 - No Sponsorship Needed
 - CPT – Curricular Practical Training
 - OPT – Optional Practical Training
 - STEM OPT Extension (requires E-Verify Enrollment)
 - Handled by Foreign Student Department
 - No required wage
 - Time limited

Usual Types of Petitions

- Sponsorship Required
 - **H-1B**
 - Prevailing wage issues
 - Academic year appointments
 - Furloughs
 - Fees
 - Return transportation
 - **TN**
 - Canadians and Mexicans
 - **E-3 for Australians**

Usual Types of Petitions

- **Permanent**
 - Three step process
 1. Labor certification (some petitions do not require this step)
 2. I-140 – Immigrant Petition for Alien Worker
 3. Adjustment or consular process of immigrant visa
 - Labor Certification (PERM)
 - Special handling (18 months from hire)
 - Exempted from PERM
 - Outstanding professor and researcher
 - National interest waiver
 - Alien of extraordinary ability

Green Card Processing – Survey Results

	In-House	Outside Counsel
Outstanding Prof/Researcher	43	28
Labor Cert/2nd Pref	44	32
Labor Cert/3rd Pref	21	22
Nat'l Interest Waiver	8	28
Extraordinary Ability	15	31
Exceptional Ability	9	27

I-9 and E-Verify Compliance

- I-9 compliance
 - Timeliness violations
 - Missing I-9s
 - Who tracks employment when student is not on payroll?
 - De-centralized hiring
 - Electronic I-9s
- E-Verify enrollment
 - Mandated by state law
 - Required for STEM OPT EAD extension
 - Increased compliance

Export Control Compliance

- Increased focus on IHE
 - Must balance need for international collaboration with compliance
- Certification on I-129 Non-Immigrant Visa Petitions
- Top issues for IHE
 1. Sharing controlled information with FN in the United States
 2. Misusing the fundamental research exception
 3. Inadvertently disclosing controlled information
 4. Forgetting to monitor the transfer of your FN employees
 5. Forgetting to screen end users even if the export is EAR99
 6. Misclassifying information and items
 7. Assuming a third party has the export control responsibility
 8. Failing to document your compliance properly

Questions?

