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Sponsoring Foreign Nationals: What Employers Should Know

By Matthew S. Dunn

President Donald Trump is moving quickly on his promise to reform American immigration laws. His next target will be employment-based visas and here's what HR leaders need to know.

President Donald Trump has recently called upon the U.S. Department of Labor to investigate all abuses of visa programs that undercut the American worker. Directly caught in the crosshairs of any government investigation will be companies that sponsor foreign workers for H-1B visas and green cards. Similar to the tax code, the current H-1B visa and green card programs are largely self-regulated, relying on employers' attestations that they are paying the appropriate wage to H-1B visa holders and testing the labor market for qualified U.S. workers prior to sponsoring foreign nationals for green cards. Many in the public believe the immigration system is rigged and that, under the status quo, employers are undercutting wages and not giving U.S. workers a fair shot at these positions. Moreover, President Trump has named some of the harshest critics of the current system, such as Senator Jeff Sessions from Alabama, to his Cabinet. It seems quite clear that the Trump Administration will advance laws to ensure that the U.S. market is adequately tested before a work visa is approved, and it will take aggressive enforcement actions against companies that don't play by the rules.

The H-1B visa is arguably the most well-known, and certainly the most debated work visa available for foreign nationals. In FY 2017, U.S. Citizenship and Immigration Services received 236,000 H-1B petitions, dwarfing the 85,000 visas available for the year. Despite its popularity among U.S. companies, the program has become a lightning rod for criticism from those claiming that the program encourages cheap foreign labor that undercuts the American workforce. This view comes primarily from the fact that, under the current system, the sponsoring employer is called upon, on its own, to select the prevailing wage for the offered H-1B position.

When choosing a salary for the H-1B job, most employers use a survey published by the DOL to determine the prevailing wage for the position. The survey identifies thousands of jobs and then breaks each job into experience levels 1 through 4, each of which is assigned a required minimum salary. The employer is charged with selecting both the job category and the proper experience level (based on the requirements for the position). In practice, it is extremely attractive for an employer to choose experience levels 1 or 2 in order to keep the required wage down. And presently, the employer has unfettered freedom to do this, as the DOL and Citizenship and Immigration Services are not regularly auditing these selections.

Similarly, some employers regularly choose catch-all job categories, i.e. "Computer Occupations, All Other," which generally have lower wage requirements than more well-defined job categories such as Computer Systems Analyst or Developer. These catch-all categories are appealing for employees with low offered salaries. However, "all other" categories will increasingly lend themselves to further inquiry and audits by the government, and will likely come under even greater scrutiny in the coming months.

Though H-1B audits occurred only rarely under the Obama administration, President Trump will almost certainly ramp up enforcement of the H-1B wage requirements. If a company has a high percentage of its H-1B staff in level 1 or level 2 jobs, they should immediately reevaluate their practices. When the DOL brings in its team of auditors, it will interview company employees, it will look at the company's website to see how the position has been advertised over the past few years, and it will compare the present application with others previously filed by the employer. If the DOL determines that the company's selected wage was too low, it will be required to raise the wage and be on the hook for back wages. If there is fraud or a pattern of low wage selection, the company could be on the hook for severe fines and criminal penalties.

HR professionals must also be vigilant in the maintenance of Public Access Files. A Public Access File is required for each H-1B employee working for a U.S. company. The file contains the supporting documentation underlying the Labor Condition Application. In the event of a government audit, the DOL places particular focus on the contents of these files. As such, it is critical to ensure that the file is complete and accurate in all respects. A first-time violation has a maximum penalty of $1,782, with increases for repeat violations -- multiply this number across numerous employees and the dollar figure adds up quickly. Employers must maintain the Public Access File for one year following an H-1B employee's last date of employment. In the event of an audit, it is critical to ensure that the Public Access File is properly maintained and accurate. Doing so will save your company time, money and unwanted publicity.

In addition to ramped-up audits for H-1B employers, companies should expect that the Trump Administration will add a U.S. labor market test to the H-1B process. This test is already a requirement of the green-card process and company efforts to recruit U.S. workers will be scrutinized by the DOL, as the President would say, "big league."

Issuance of a green card is the ultimate prize for a foreign worker. No longer constrained by the requirement that they work exclusively for the sponsor of their visa, the beneficiary of a green card has the freedom to work for any employer in the U.S. Those of us who deal with foreign nationals know how determined they can be to have the company move

the green card process forward expeditiously. However, it is critical for an employer to be sure that the foreign national is not the one driving the process, as the typical green card application requires the employer to submit a labor certification application to the DOL confirming that they were unable to find qualified U.S. workers to fill the position.

The labor certification requires that the signatory attest under the penalty of perjury that the contents of the application are accurate, and further, if a company makes willful misrepresentations in the application, it will be barred from using the green card program (prohibited from submitting future labor certification applications). Without question, the Trump Administration will dedicate major resources to the DOL, allowing the organization to scrupulously review the labor certifications and to rigorously enforce these laws. Given my deep experience having worked for the Immigration Customs and Enforcement agency, and having represented companies of all sizes in government audits over the last 20 years, I firmly believe that some of the most prominent companies in the country will be the target of these investigations, as their prosecutions will be newsworthy.

As noted, the current labor-certification process relies heavily on the good-faith efforts of the employer to assess whether there are qualified U.S. applicants available for the permanent job being offered to the green card applicant. The sponsoring employer is charged with setting the minimum requirements for the position -- in line with how it normally recruits for the job -- and must also review the credentials of U.S.-worker applicants to assess whether they qualify for the position. Currently, the labor certification application does not require that the employer actually submit the U.S. workers' resumes, nor does it seek proof that the minimum requirements set by the employer actually comport with its normal requirements for the position. Rather, it relies on the employer's assertion that it has fulfilled these obligations.

Over the past decade or so, given its lack of resources, the DOL has infrequently audited companies to verify the minimum requirements set for the position and to determine whether the applicants' credentials were fairly reviewed. This practice of infrequent auditing will certainly change under the Trump Administration. Upon investigation, the DOL can easily discern a company's true minimum requirements for a position. Therefore, moving forward, whoever is charged with developing the minimum requirements and signing the labor certification must conduct a thorough review of company data to ensure that the minimum requirements are in fact accurate. Otherwise, the employer will be highly vulnerable upon audit.

Similarly, when reviewing U.S. applicant resumes, the parties involved in the process must take into account the full resume and, based on the regulatory requirements, assess whether an applicant would be able to gain any missing experience in a reasonable amount of time. Could the DOL submit a resume from a fictitious person who has the requisite credentials to test whether the company is reviewing the resumes in good faith? It's certainly possible. Also possible, and much more likely, the DOL will be reviewing the resumes from U.S. applicants on a regular basis. To improve your procedures of resume review, I strongly recommend having at least two individuals review the credentials of the applicants. If there is debate as to whether the individual qualifies, you should call the applicant to clear the ambiguity.

President Trump has made it very clear that workplace audits and investigations will occur. At stake is a company's reputation, its future ability to sponsor foreign talent, and the risk of receiving significant civil and criminal penalties. Employers should prepare themselves by bringing a fresh set of eyes and having independent outside counsel audit their H-1B and green card sponsorship programs.