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Employment & Immigration Law

Employment Based Green Cards: From Here to Eternity

Simply liking the employee is not enough

By Neena Dutta

Most companies have human resources departments who are at least generally familiar with immigration practices, or at least they know that they will need to an immigration lawyer before they hire a foreign national. Often employers express to me that they really like the employee and want to keep him or her in the U.S. Simply liking the employee is not enough of a criterion to agree to sponsor him or her.

The difference between immigrant and nonimmigrant visas is commonly misunderstood. Nonimmigrant visas are temporary visas, some of which give the foreign national the authorization to work in the U.S. legally. Immigrant visas are permanent residence cards, commonly known as green cards. In order to apply for a green card, while present in the U.S., you must be in legal status. Therefore, for most immigrant visas, a foreign national must first apply for a nonimmigrant visa and maintain status until the date of their green card approval.

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There are in total five categories of employment-based (EB) green cards, of which, the 2nd and 3rd preference categories are most relevant to this discussion. For these types of employment- based green cards, there are three steps. First, there is the labor certification, which is adjudicated by the Department of Labor. Second, submitting Form I-140, when USCIS will judge whether the employer has the ability to pay the foreign national and whether the foreign national qualifies for the position. Lastly, also adjudicated by USCIS, is submitting Form I-485, which requires that the applicant and immediate family (spouse and children) have background checks, are fingerprinted, are tested medically for any communicable diseases, there is an evaluation of whether or not the foreign national has maintained legal status and they are, sometimes, interviewed by a USCIS officer.

When an employer files a labor certification on behalf of a foreign national employee, the employer is attesting to the fact that the employer was unable to locate a qualified, willing or able U.S. worker. The Department of Labor goes to great lengths to make sure that favoritism or simply liking the employee better will not influence the process, so as a result, there are numerous limitations on categories of professions and positions and the qualifications an employer can require for the position they are offering. When an employer files a labor certification, it is actually a future job offer. So while a labor certification may be filed in 2008, if it takes one year or 10 years, the permanent job offer is not accepted until the foreign national has been granted their green card.

The length of time to obtain a green card in an employment situation depends on the category for which the offered position qualifies. It can anywhere from one year to five or six years, sometimes more. First, you need an approved Labor Certification. Once the Department of Labor issues a certified LC, the employer may apply for form I-140. Without an approved "labor cert," there cannot be an I-140 petition. If the employer has the ability to pay the employee the prevailing wage and the employee qualifies for the position, then the I-140 petition may be approved. The foreign national's priority date is the date the labor certification was first filed. Based upon this date, the foreign national may apply for their I-485 only if the category and country of the applicant reflects their priority date as current. If the priority date is current when the I-140 petition is about to be filed, then the applicant may file a concurrent I-140 petition and I-485 application.

The most common scenario is that the labor certification is approved, and

then the I-140 is approved, however, the individual may have to wait several years for his or her priority date to become current in order to file their I-485. In the interim, he or she must wait and extend his or her nonimmigrant status while waiting several years until their "number is up."

In realistic terms, when an employer has hiring needs, unless the employer has a five-to-10-year plan that will not be affected by growth, the economy or any other factors, it is difficult for the employer to say "In 2014, I am going to need an accountant, so I think I will test the job market and wait." In reality, an employer has a need to fill a position; they advertise, interview and hire the best person for the job.

Labor Certifications

First the employer must set forth the requirements for the position. Not the qualifications of the FN, but the normal job requirements. For example, a dentist cannot perform the role of a dentist without a DDS and a license. However, business positions are more ambiguous. Does a CFO really require an MBA? Does a marketing account manager need a bachelor's in marketing? Or an associate's degree? Or a master's in marketing? And what does the average industry marketing account manager position require? These are important parameters to ascertain at the beginning because an employer must confirm these qualifications before recruiting for the position.

Some of these ambiguities are clarified by the Department of Labor's Standard Occupational Classification System, commonly known as SOC codes. However, to the frustration of many immigration practitioners, some of these codes require a lower level of education than reality might suggest. As a colleague addressing a DOL panel recently posed, the coding for nuclear engineers requires a minimum of a bachelor's degree. Do you really want someone with only a bachelor's degree to perform research at nuclear plants?

In order to test the job market, the regulations as of March 28, 2005, require that for a professional position, the employer place two Sunday newspaper advertisements, a state workforce job order, a notice of job opportunity or job posting at the place of work and three additional forms of advertising, such as Internet job sites, the employer's Web site, radio ads, etc.

At the end of the period of recruitment, the employer must evaluate whether any of the candidates who applied qualify for the position. If they qualify, the employer must interview the candidate and evaluate whether the person is "qualified, willing and able" to perform the position. Employers may not disqualify a candidate based upon being over-experienced or for qualities not mentioned in the recruitment. If you want a marketing analyst who speaks French, then your recruitment must state that fact. An employer cannot evaluate the candidate and reject them for not having a skill which was not mentioned in the recruitment but which the foreign national possesses. In the same vein, if a candidate has 10 years of experience as a chartered accountant and the position is for an internal auditor, then as long as the employer ascertains that the chartered accountant does not possess the skills, then they may disqualify the candidate. The employer will evaluate the candidate's résumé, and interview them if need be. The employer is under an obligation to seriously evaluate each candidate in good faith.

If an employer is found to have violated the outline for a labor certification, and favored the foreign national, the penalties are significant. The labor certification can be denied and both the employer and employee are left with nothing.

Second and Third Preference

The definition of second preference or EB-2s is as follows: "Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability." Third preference is split up into two groups, the first being "Professionals with bachelor's or equivalent degrees or skilled workers with at least two years experience" and "Other workers, considered unskilled workers, requiring less than two years of experience for a position."

These distinctions are crucial because each fiscal year, there are 140,000 immigrant visas available. Of those, there are 40,000 EB-2s and 40,000 EB-3s. The EB-3s are divided into two categories. The professionals and skilled laborers are one category, with 30,000 allotted, and unskilled laborers are allotted 10,000 visas. Generally there are fewer positions which require an advanced degree. Hence, there are normally more EB-2 visas available. Likewise, the EB-3 unskilled or "other workers" are far backlogged since there are more unskilled workers than there are numbers of visas. Going further, each of those categories has country quotas. Therefore, if your country quota is filled, then you must wait.

Costs to the Employer

In July 2007, the *Federal Register* announced that it would become illegal for employees to pay or reimburse employers for recruitment costs, filing fees or legal fees as a way to circumvent fraud. Labor certifications became the sole responsibility of employers. These costs can range from $5,000 to $12,000, between advertising, legal fees, and filing fees (although there are no filing fees associated with labor certifications currently). The other costs are maintaining an employee's nonimmigrant status in the interim.

If the FN has been an H-1B holder for one year already in 2001 when his application is filed, then in 2003 he must extend his H. There is one three-year extension available. However, in 2006 what does the FN do? There is a provision which says if the labor certification has been pending for more than one year, the employer may extend the employee's H-1B for a year. Again, if the FN is an

Indian national, who was unable to apply for an adjustment of status and file an I-485, he may be able to apply for an I-140 after his labor cert approval on April 1, 2007. Another provision provides that an extra three-year extension for an H-1B may be applied for if there is an approved I-140 and no country numbers available. The FN has now applied for H-1Bs four times. The result is four sets of legal fees, government filing fees (which are now up to $2,320, depending on the size of the company), as well as the sheer agony of waiting for so long.

In this economy where companies are going out of business by the second, a green card application which seems to have been pending for an eternity will also disappear along with the company's closure. Hopefully, there will be immigration reform which facilitates more efficient sponsorship and promptly adjudicated green cards. ■