Tips to Effectively Recruit, Retain and Terminate Foreign Workers

by Scott R. Malyk and Anthony F. Siliato

In today's global economy, U.S. employers (and human resource leaders, as the case may be) are faced with the task of not only finding sufficiently qualified workers, but also having to deal with the maze of U.S. immigration issues when they arise in the employment context, including caps and quotas, limitations of stay, delays in processing, security clearance delays at U.S. consulates abroad and interruptions of employment that are often inherent in the process of hiring foreign national employees.

Successful employers should be equipped with not only the know-how to drive their business but also the functional knowledge and expertise to navigate the employment-based U.S. immigration system to recruit and retain top talent for a particular job opportunity when necessary.

In that regard, while there are any number of best practices that can turn a good recruiter/human resources professional into a great one, a common trait among successful hiring professionals, as it relates to the U.S. immigration laws, hiring rules, benefits and compensation requirements, is the ability to stay ahead of the U.S. immigration process to better anticipate challenges or bumps in the road. In this way, they are able to maintain control over hiring, retention and termination situations, as they apply to their foreign national workers. The building blocks of developing such control are good habits, as developed through effective training and utilizing experienced, sophisticated immigration law partners. Good habits are typically supported by clear, well-designed internal policies and goals—they are never reactionary. As such, having the foresight and training to understand how each step serves to get an organization to achieve those goals is more than half the battle.

Following are some tips on how to effectively recruit, retain and, when necessary, terminate foreign workers, to help take an organization from yesterday to tomorrow.

Recruiting Tips

1. **Establish uniform hiring guidelines, including pre-hire questions.** During the initial screening assessment conducted by the recruiter, there are two recommended questions[1] a recruiter should ask of every job applicant (applied evenly across the board to every candidate) so the employ-

er is on notice of any required visa sponsorship requirements now, or at any point in the future.

a. Are you authorized to work in the U.S.?
b. Will you require visa sponsorship now or at any time in the future for employment with our company?

If a candidate states that he or she will require visa sponsorship, an employer is under no obligation to consider the candidate for employment. If, however, the employer will consider hiring a foreign national who will require immigration sponsorship, the recruiter should aim to collect more data to assist in the employer's decision-making process. The business reason for such additional inquiry is, *inter alia,* a practical one: There are maximum periods of stay associated with most work visas in the United States, which will be discussed in greater detail in tip three, below. On that basis, the candidate should be further vetted to determine whether immigration sponsorship makes business sense for the employer.

The recruiter may ask the following additional questions:

c. Have you ever applied for a U.S. work visa before? If yes, what category of visa classification was it?
d. Has an H-1B[2] petition ever been approved on your behalf? If yes, provide the period of time that you have been in H-1B status.
e. Are you currently in the green card process? If yes, at what stage of the green card process?
f. Do you have an approved I-140 petition?

Equipped with this information, the employer will now have some key facts upon which it can make an informed decision on whether to hire the individual and formulate both a short-term and a long-term strategy regarding the retention of the employee.

2. **Make job descriptions uniform throughout the organization.** Properly defining roles not only align employees with an organization's drivers and goals, but can also greatly assist with recruiting, onboarding, and managing the green card-related goals and expectations of foreign national employees.

In the employment-based green card context, when a case is based on the program electronic review management (PERM) labor certification process,[3] there are two employment-based (EB) preference options available to foreign national employees: the EB-2 (employment-based second preference) and EB-3 (employment-based third preference) categories. For those foreign national employees who are natives of heavily backlogged countries (India, Mainland China or Philippines), the difference between these two preference categories can be fairly significant in terms of overall green card eligibility/processing times. Simply stated, the preference category directly impacts the timing of eligibility for filing the final step of the green card process, the application for adjustment of status (Form I-485) or the immigrant visa application abroad, either of which ultimately results in the grant of U.S. permanent residence.

The analysis in determining which preference category a foreign national employee will qualify for ultimately turns on the requirements for the position offered to the foreign national upon approval of his or her green card (*i.e.,* the green card application is prospective in nature). In order for any given position within an organization to be classified as EB-2 (*i.e.,* an advanced-level position), the job offered to the foreign national must require a minimum of a master's degree or a bachelor's degree plus five years of experience. An EB-3 position is generally a professional-level position that requires anything less than that of an EB-2 advanced-level position. Thus, the requirements of the job are the driver of this analysis; it is not the educational credentials or experience possessed by the foreign national.

The backlog differences between the EB-2 and EB-3 categories can present a significant difference in wait times for foreign national employees. Making job descriptions (and their attendant education and experience requirements) uniform throughout the organization will, in effect, eliminate the discretion (or a tendency for the foreign national and/or his or her supervisor) to want to bend or tailor the job requirements to the qualifications of the employee.

Another reason to make job descriptions and requirements uniform throughout an organization is to allow for the opportunity to combine the mandatory pre-filing recruitment for multiple foreign national employees in connection with the PERM process. Department of Labor PERM regulations require the employer to undergo a fairly extensive, nuanced round of pre-filing recruitment that is not only time consuming but can be very costly for the employer. In the case of a larger organization that employs multiple foreign nationals in the same roles and at the same work location, the regulations allow for the combination of the recruitment effort—one set of recruitment for multiple cases, provided the requirements for the position are substantially the same. By exercising long-term planning around the PERM process for

similarly employed foreign national employees, an employer can not only consolidate the cumbersome recruitment process but also substantially cut down on recruitment costs, which must be borne by the employer.

On the basis of the foregoing, for immigration purposes, a well-written job description should include the following:

a. Job title;
b. Salary range;
c. Work location;
d. Travel required, if any;
e. Organizational chart or description of reporting structure;
f. Tasks, duties and functions of the position;
g. Education requirement, if any, including specific degrees, professional certifications, and/or licenses required to perform the job and whether the employer is willing to accept: 1) alternate combinations of education and work experience (*e.g.,* a master's degree plus three years of experience or a bachelor's degree plus five years of experience) or 2) a degree equivalence (provided by a credential evaluator) based on a combination of education and experience; and
h. Specific qualifications and special skills required, including the number of years of experience or proficiency/knowledge with any specific technologies, tools, or instrumentalities.

Employee Retention Tips

3. **Understand the limitations on temporary nonimmigrant work visa categories.** The employer/human resources professional must take into consideration that some work visa classifications are limited by annual quotas (*e.g.,* H-1B professionals, E-3 professionals and H-2B temporary or seasonal workers), while others are limited to citizens of certain countries (TN-1 [Canada], TN-2 [Mexico], H-1B1 [Singapore and Chile] and E-3 [Australia]). And the most commonly used are limited in duration (H-1B [six years], H-3 [two years], L-1A [seven years], and L-1B [five years]).

While the H-1B and H-2B quotas have been reached in recent years, the H-1B1 [Singapore and Chile] and E-3 [Australia] have never been met.

4. **Plan short- and long-term strategies for foreign nationals to maximize outcome (and possibly minimize spend).** While many employers are willing to sponsor foreign national employees (many of whom are recent graduates from U.S. universities) for temporary, nonimmigrant work visa classifications, historically the question remained for many employers whether this would be a temporary benefit offered to the foreign national employee or, alternatively, whether the employer would be willing to make a longer-term investment in the foreign national employee, which would include the pursuit of the green card process (permanent residence) for the employee.

More often than not, foreign national employees are interested in negotiating, even before they are hired, the where, when and how a sponsoring employer will agree to assist them with the green card process. The conventional wisdom and advice to employers in this regard has been to establish a bright-line policy that sets specific timelines for the employer to consider sponsorship for the green card process on behalf of its foreign national employees and to apply the policy evenly across the board (*e.g.,* commencing the green card process after the foreign national has been employed in good standing for at least one full year, unless, of course, the foreign national is approaching the end of his or her authorized period of stay).

Presently, with the confluence of two recent factors, namely: 1) the significant reduction in Department of Labor processing times of the PERM application (ETA Form 9089), together with 2) the new rule extending the period of post-graduate F-1 optional practical training (OPT) to 36 months for qualifying science, technology, engineering and mathematics (STEM) graduates, it may now make sense for certain employers to turn the traditional employment-based immigration process on its head and pursue the green card process for certain foreign nationals at the outset, while they are working pursuant to post-graduate F-1 OPT. That is, start the green card process for certain foreign nationals even before applying for an H-1B visa classification, given the challenges presented to employers by the current lack of H-1B visa numbers under the antiquated H-1B quota.[4]

Of course, testing the U.S. labor market for entry-level positions presents its own set of unique challenges, so this would not be a reasonable option for all foreign national new hires. Moreover, such a strategy would not be equally effective for all foreign national employees across the board, given the extensive green card backlogs for foreign nationals from India and Mainland China. However, for foreign nationals of countries other than the significantly backlogged India and China, the total processing time for obtaining a green card through the PERM process could take as little as 14–18 months.

5. **Be proactive in tracking your foreign national employees' periods of authorized stay.** Except for U.S. citizens and green card holders, all individuals who enter the U.S. (by air or sea) are issued a Form I-94

arrival/departure record (I-94). As of May 2013, U.S. Customs and Border Protection (CBP) automated the I-94 process and abandoned the old method of issuing the I-94 in the form of a small white card stapled in the passport.[5] With the automated system a foreign national must affirmatively obtain his or her most recent I-94 by way of the following link post-entry: www.cbp.gov/I94.

Why is this important? While foreign national employees are physically present in the United States, the I-94 (not the visa nor the most recent approval notice) dictates the foreign national's nonimmigrant status and how long he or she is entitled to remain in the United States in that status. In this regard, employees must remember (and should be reminded) to check their respective I-94s upon return from travel abroad to be sure they do not make the mistake of remaining in the U.S. beyond the "admit until" date set forth in the I-94 record.

The I-94 is, by far, the most overlooked immigration document among foreign national employees in the United States. It is also the most harmful document to overlook, with the potential for grave consequences for the employee. Simply put, it should not be assumed that the I-94 will be issued for the full period of authorized stay granted by U.S. Citizenship and Immigration Services (USCIS) (as set forth in an approval notice) or by the U.S. consulate abroad (as set forth in the endorsed Form I-129S in the case of a blanket L visa). Often, an I-94 will be issued for a shorter validity period than the period of stay authorized by a previously approved visa classification. This discrepancy can occur for a multitude of reasons, including a passport expiration date or even a mistake by a CBP officer at the U.S. port of entry. If it goes undetected, and the foreign national remains in the U.S. beyond the period of stay authorized by the I-94, the foreign national employee will be deemed 'out of status,' meaning he or she would be engaging in unauthorized employment for the organization. More importantly, he or she will also accrue unlawful presence that could have very serious repercussions for the employee, including a three- or 10-year bar to re-entry into the United States.

To correct a deficiency with the I-94, a foreign national may be required to leave the U.S. abruptly or file an extension of stay, before the admit until date indicated on the Form I-94. Either of these options are a burden monetarily and logistically for the employer. If detected early, however, there are broader avenues for relief with a much greater chance of having these issues rectified without needing to send the employee abroad and/or filing an extension of stay with the USCIS.

Be proactive and try to get foreign national workers into a habit of providing the human resources designee with a copy of their most recent I-94 records by circulating a recurring email reminder or posting a physical reminder in a conspicuous location at the place of employment. Additionally, the employer should follow through with those reminders by having foreign national employees follow these steps to avoid any nightmarish situations:

1. Go online and check the admit until date on the I-94 of the principal beneficiary and each accompanying dependent;
2. If the admit until date is earlier than that expected because of a passport expiration, apply for and obtain a new passport, travel abroad before the admit until date, re-enter the U.S. with the new passport (together with the old passport if the visa stamp is in it, and the current approval notice) and re-check the I-94 to make sure it is now corrected.
3. If the admit until date is earlier than that expected due to an error by the CBP, contact, by phone or email, the CBP Deferred Inspection Office at the airport in where the employee entered and request a correction.

Termination Tips

6. **When terminating an H-1B worker is necessary, follow these steps to effect a *bona fide* termination under the regulations.** Like most employees in the United States, H-1B workers are typically at-will employ-

ees. However, if an H-1B worker is terminated prior to the conclusion of his or her "authorized period of stay," the sponsoring employer has an affirmative duty under the regulations to effectuate a *bona fide* termination of the H-1B worker.

To effect a "*bona fide* termination of the employment relationship" under the Immigration and Nationality Act (INA), there must be: 1) written notice provided to the employee that the employment relationship has ended; 2) written notice provided to USCIS that the employment relationship has ended; and 3) an offer of payment for reasonable costs of transportation of the H-1B worker back to his or her last place of foreign residence.[6] If, however, the H-1B worker voluntarily resigns, transfers his or her employment to another H-1B employer, or changes his or her status to another lawful visa classification, the travel reimbursement requirement is nullified.

In the wake of some seemingly harsh, anti-employer Department of Labor wage and hour rulings, it behooves employers to be mindful of the regulatory obligations placed on them as an H-1B sponsoring employer. Not only willful violations, but even careless mistakes (*e.g.,* failing to notify USCIS of an H-1B worker's termination), can result in the award of back pay to the H-1B worker, along with substantial fines to a sponsoring employer.

During the separation/termination process of an H-1B worker, the H-1B employee should be provided a written acknowledgment of termination, effective on the date of termination. The written acknowledgment should offer to reimburse the terminated worker (but not his or her dependents, if any) for reasonable, one-way travel back to his or her home country or last country of residence. In doing so, the acknowledgment should also provide that the trip must occur within a reasonable period of time after termination (*e.g.,* 30 days). To claim reimbursement, the acknowledgment should require the foreign national to submit proof of payment for the airfare to human resources. The acknowledgment should be duly executed by the foreign national and the employer's representative, and maintained in the employee's personnel file.

Conclusion

By being proactive in establishing and following a well-defined set of guidelines regarding the hiring, retention and termination of foreign nationals, an employer, in partnership with competent immigration counsel, should be in the best position to attract and retain the best and the brightest workforce available in the marketplace, given the constraints of the current immigration system. ⚖

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ENDNOTES

1. *See* June 29, 2010, Technical Assistance Letter of Katherine A. Baldwin, deputy special counsel of U.S. Department of Justice, Civil Rights Division, wherein these questions were deemed appropriate by Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), responsible for enforcing the antidiscrimination provision of INA §274B [8 USCA § 1324b].
2. The H-1B visa classification is, by far, the most sought-after temporary work visa in the United States for foreign-born, professional workers. The H-1B category requires sponsorship by a U.S. employer and is limited to specialty occupations, which generally require the candidates hold at least a bachelor's degree or the equivalent in a relevant discipline. A major limitation of the H-1B visa classification is the aggregate six-year period of stay placed on H-1B status, which can only be extended beyond six years if a permanent resident (green card) application has been timely commenced on behalf of the H-1B employee.
3. Program electronic review management (PERM) process is the first step of the employment-based green card process applicable to most H-1B workers. In connection with the PERM process, the employer is required to test the U.S. labor market in the area of intended employment of the foreign national being offered the employment opportunity.
4. Perhaps the most critical limitation of the H-1B visa category is the annual cap, or quota, for new H-1B visas, which is arbitrarily set (without consideration of market conditions) by Congress. Indeed, every year on Oct. 1, the U.S. government makes available a quota of 85,000 new H-1B visas, with 20,000 of those set aside for advanced-degree graduates (with a master's degree or higher) of colleges and universities from within the United States. In recent years, employers filed so many H-1B petitions during the first days of the filing period that the United States Citizenship and Immigration Services (USCIS) is forced to create a "random lottery selection" system to establish some fairness among applicants. This past April, over 250,000 petitions were filed for 85,000 visas, allowing foreign national graduates and their sponsoring employers less than a 33 percent chance of having their petition selected in the H-1B lottery.
5. Those who enter the U.S. by way of land border are typically still issued a paper Form I-94 stapled in the passport.
6. *See* 8 C.F.R. § 655.731(c)(7)(ii); 8 C.F.R. §214.2(h)(4)(iii)(E).