

# The Evolving Definition of Workplace Diversity

*By Scott R. Malyk and Lin R. Walker*

Top-performing companies have long recognized that diversity is good for business. But the definition of workplace diversity is evolving. Typically, when one thinks of workplace diversity, characteristics such as race, ethnicity, gender, age, religion, and sexual orientation come to mind, among others. However, in today's ever-increasing global economy, and in Corporate America's race to develop the newest innovations and best solutions, the definition of workplace diversity should be expanded to include immigration or citizenship status.

Indeed, through recruitment of a diverse workforce, including immigrants (green card holders) and nonimmigrants (temporary work visa holders) (collectively referred to as "foreign nationals"), organizations are equipped to recruit from a larger pool of applicants, thereby enabling organizations to find the best and brightest applicants across all races, ethnicities, genders and citizenships. Such a diverse workforce can also provide organizations with individuals who possess the requisite language skills and cultural experiences required to expand or improve operational outcomes in global emerging markets. A diverse workforce can also assist with achieving a true diversity of values (i.e., what motivates someone to join a company, to embody the organizational spirit and drive, and to be a productive employee for the long-term).

## **Benefits of Immigration to Diversifying a Workplace**

The hiring of foreign nationals brings a wealth of knowledge, skills and diverse perspectives that enable organizations to be more competitive in today's global marketplace. The state of New Jersey has a large, well-educated foreign national population. In 2017, it was estimated that approximately 22 percent of New Jersey's population (over 1.97 million people) were foreign nationals, with more than 37 percent of those individuals possessing at least a bachelor's degree or higher.<sup>1</sup> Additionally, foreign nationals account for nearly 30 percent of all self-employed business owners in New Jersey and generated more than \$3.3 billion in business income in 2017 alone.<sup>2</sup>

Overall, foreign nationals, in particular those who work in the U.S. pursuant to an H-1B visa classification, are essential to the success of thousands of U.S. businesses, especially in the technology, healthcare, and financial industries, by filling gaps in the U.S. workforce. Indeed, the United States continues to experience a shortage of U.S. workers who possess advanced degrees in STEM fields (science, technology, engineering and mathematics). In order for U.S. companies to continue to stay ahead of the rest of the world in developing cutting-edge technologies like artificial intelligence and 5G, employers must have the capability and fortitude to hire and retain foreign-born talent when necessary.<sup>3</sup>

The Dec. 2018 Employment Situation Summary (also known as the Jobs Report), published on Jan. 4, of this year, and the Job Openings and Labor Turnover Report (Nov. 2018), published on Jan. 8, of this year by the Bureau of Labor Statistics, U.S. Department of Labor (DOL), reflects this shortage of qualified workers. According to the Sept. 2018 Jobs Report, unemployment in the United States is currently 3.9 percent and there are currently 6.3 million unemployed people.<sup>4</sup>

Despite stereotypes often portrayed by the media, foreign nationals, such as H-1B workers, do not reduce job opportunities for U.S. workers. Rather, they fill employment gaps where organizations cannot find qualified candidates. This is supported by both the Jobs Report and the Job Openings and Labor Turnover Report. The unemployment rate for occupations that require at least a bachelor's degree in a specialized field of study is extremely low as compared to the national unemployment rate. The Bureau of Labor Statistics data for Dec. 2018 shows that unemployment in "professional and related occupations," which normally require at least a bachelor's degree was just 2.1 percent,<sup>5</sup> while the national rate of unemployment is 3.9 percent. The low unemployment rate shows there are more than enough job opportunities to support U.S. workers and foreign national workers alike.

### **With Immigration Comes Regulatory Responsibility Worksite (I-9) Compliance**

Stronger immigration enforcement is the new norm under the current administration. On that basis, an employer's focus on worksite enforcement (specifically Form I-9 compliance) has never been more important. The combination of a substantial increase in the number of I-9 audits and related investigations (and arrests) by U.S. Immigration and Custom's Enforcement (ICE), coupled with the doubling of civil penalties assessed, makes this a very credible threat to employers across the United States.

Based on a press release from ICE, dated July 24,<sup>6</sup> ICE engaged in a second wave of I-9 audits over the late spring/mid-summer, which nearly doubled the number of notices of inspection (NOIs) served on employers from 2,281 in May 2018 to 5,200 in July. In an earlier May 14 press release,<sup>7</sup> ICE also noted that employer arrests (through the I-9 audit process) were up 91 percent year-over-year and administrative (foreign national) arrests were up 255 percent over the same period.

On that basis, it is now more critical than ever to counsel and prepare business clients for the very real possibility that ICE will make an unannounced visit to their place of work for purposes of serving a NOI. Keys to ensuring employer compliance with Form I-9 requirements include conducting internal self-audits, human resources training, and having a proper plan in place should an audit (or raid) occur.

Early detection of I-9 compliance issues can help avoid potentially serious legal consequences for clients. These consequences can include substantial civil and even criminal penalties for company representatives who are found to have engaged in a demonstrable pattern and practice of knowingly employing foreign nationals who do not have proper work authorization documentation.

### **USCIS Fraud Detection and National Security Investigations**

In 2004, U.S. Citizenship and Immigration Services (USCIS) created the Office of Fraud Detection and National Security (FDNS), whose officers are charged with detecting visa fraud and ensuring that immigration benefits, such as temporary work visas, are not granted to individuals who pose a threat to national security or public safety. Although initially created only to vet employers who

sponsor foreign nationals for H-1B, L-1 and R-1 visa classifications, FDNS has since expanded its scope to include the investigations of employers who sponsor employees for E and O visa classifications.

FDNS will audit an employer's compliance with U.S. immigration laws by conducting unannounced site visits during which time the FDNS officer will collect information to verify the validity of a petition seeking a work visa and to identify issues that may indicate fraud. While FDNS site visits are random and unannounced, under the current administration they are occurring with such frequency that most employers who file employment-based nonimmigrant visa petitions should anticipate and prepare for such a site visit to occur.

During a site visit, the FDNS officer will seek to verify information submitted with the petition; confirm the sponsoring company exists, including reviewing public records on the company; take photographs of the interior workspace and interview personnel (company signatory or another designated official, the foreign national beneficiary, and his or her supervisor) to confirm the foreign national beneficiary's work location, physical workspace, hours, salary and duties are akin to that which was included in the petition.

In this regard, it is essential for sponsoring employers to have a uniform procedure in place to properly and effectively respond to FDNS site visits, which includes appointing a designated representative who will sit in on all interviews conducted by FDNS and maintain accurate records of all H-1B public access files (PFAs), a requirement under the H-1B regulations.

In the wake of increased FDNS site visits, there has been a spike in the issuance of notices of intent to revoke (NOIRs) H-1B petitions that were filed and approved by USCIS between 2015-2018. These NOIRs tend to be most prevalent in H-1B cases involving the placement of information technology consultants at third-party client sites. Upon reopening these cases, the NOIR threatens the employer with revocation of the targeted H-1B approval(s) if the sponsoring employer is unable to disprove the alleged misrepresentation or fraud uncovered by the investigation. The revocation of an H-1B classification would, at a minimum, result in the mandatory termination of that H-1B employee. In the most egregious of circumstances, following a written response to the NOIR, USCIS may refer the case to DOL or ICE, which may then result in additional workplace audits and/or a criminal fraud investigation of the employer. So while a client's participation with an FDNS site visit is voluntary, it is vital for sponsoring employers to cooperate should one occur.

In the wake of some seemingly harsh, anti-employer policies and practices, it behooves organizations to be mindful of the regulatory obligations placed on them as a sponsoring employer. Not only willful violations, but even careless mistakes (e.g., failing to notify USCIS of a foreign national worker's termination or a material change in job duties), can result in substantial fines to a sponsoring employer.

## **Conclusion**

While hiring foreign nationals may require additional planning and preparation on behalf of an employer, we believe such preparation is a small tradeoff given the host of benefits that foreign

nationals offer us in terms of cultural experiences, knowledge and values, all of which collectively enrich neighborhoods, schools and workplaces with diversity. In order to make this process as seamless as possible, it is important to plan ahead.

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### Endnotes

1. <https://www.americanimmigrationcouncil.org/research/immigrants-in-new-jersey>.
2. Id.
3. <https://www.aila.org/advo-media/tools/talking-points/aila-member-talking-points-on-buy-american-hire>.
4. <https://www.bls.gov/news.release/empisit.nr0.htm>.
5. <https://www.bls.gov/news.release/empisit.tl3.htm>.
6. <https://www.ice.gov/news/releases/ice-delivers-more-5200-i-9-audit-notice-businesses-across-us-2-phase-nationwide>.
7. <https://www.ice.gov/news/releases/ice-worksite-enforcement-investigations-already-double-over-last-year>.