

Employers, employees should beware visa abuses

By Rajiv S. Khanna

A recent report by The Guardian has brought into focus corrupt labor brokers in the United States who have been abusing the visa system to take advantage of high-tech workers from across the globe. These brokers have "creat[ed] an underground system of financial bondage by stealing wages and benefits, even suing workers who quit," the report notes. Many of these workers cannot afford to fight back, and simply return home when faced with a lawsuit.

Leaving aside the few who deliberately exploit their workforce, in my experience, most employers do wish to obey the laws, but often that is easier said than done. The immigration laws of the United States are neither easily comprehensible nor coherent.

This conversation should alert both the scrupulous employers and the victimized employees about the nature of the problem for the employer and the remedies available to the victims of labor broker abuses — especially if contracts include a liquidated damages clause, the device used to create servitude. U.S. immigration law places special restrictions on liquidated damages clauses in the employment contracts of the most commonly encountered visa (H-1 or H-1B visa) held by foreign professionals in the workplace. The consequences of ignorance of the law are grave for employers and their counsel alike.

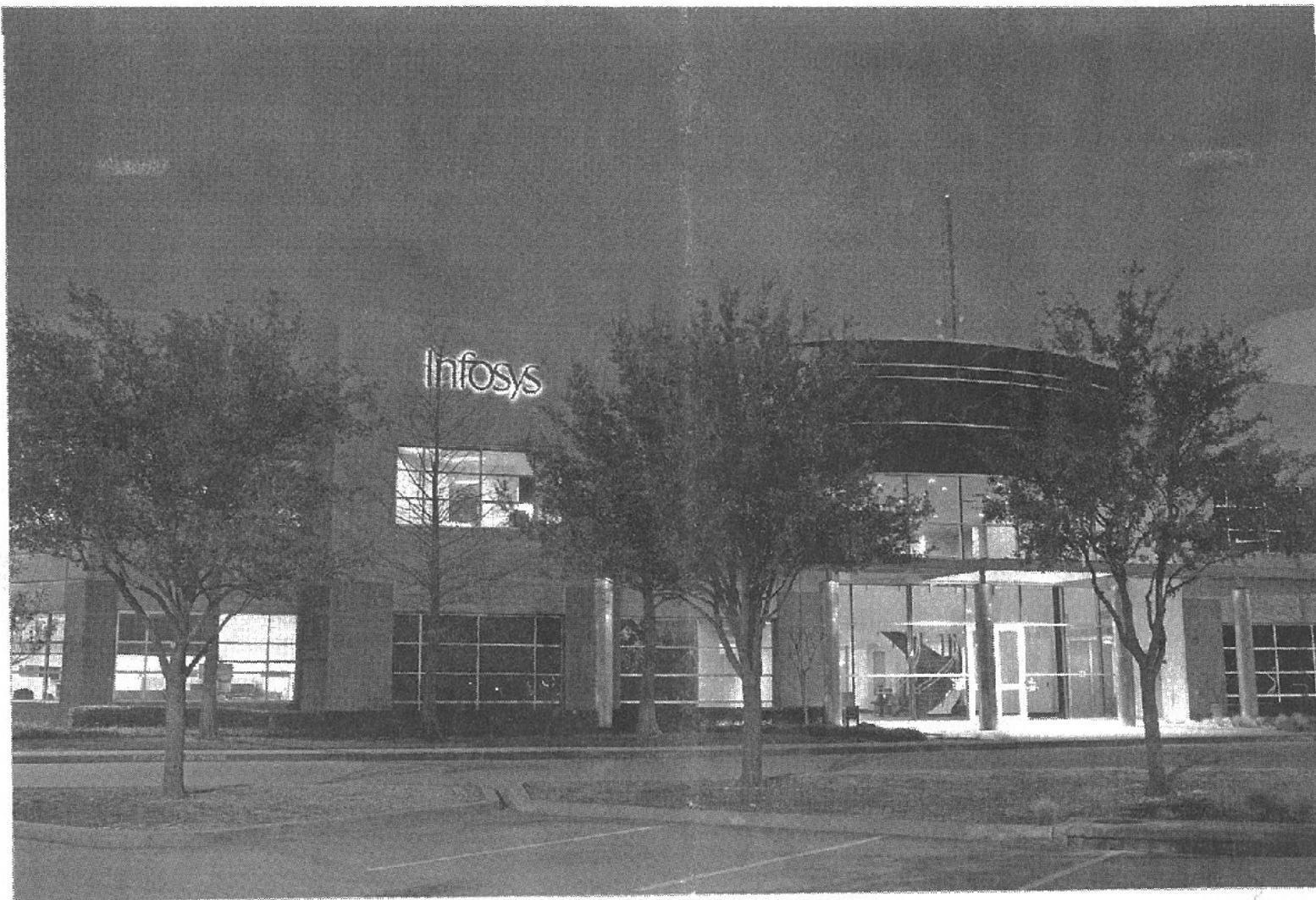
Liquidated Damages and Immigration

Liquidated damages clauses are inserted in employment contracts where an employer perceives the need to protect itself from anticipated damages for breach of contract, but the damages cannot reasonably be foreseen. The basic elements for a standard liquidated damages clause are stated in some variation of:

"In case of breach, Employee agrees to deduction from wages owed, or if no wages are owed, agrees to repay an amount of X thousand dollars, which the Parties consider liquidated damages and not a penalty."

As a matter of practice, however, the enforceability of these clauses, even when properly drafted, in employment contracts remains uncertain.

Immigration laws permit liquidated damages clauses, but not penalties. Congress wanted to ensure that foreign professional workers are not subjected to the type of servitude and coercion that



The offices of Infosys in Plano, Texas, Feb. 8, 2012. In October 2013, Infosys, settled a dispute with the government over immigration violations for \$34 million.

some high tech workers are experiencing at the hands of dishonest labor brokers.

While the liquidated damages/penalty distinction is the norm for all employees, immigration law imposes a set of restrictions, some of which can be gleaned from reading law, regulations and policy — others, only from experience.

Immigration law expressly prohibits recovery of certain filing fees and recovery of employer's normal "business expenses."

Nonrecoverable filing fees are defined, but what constitutes normal "business expenses" is not. So, even the most meticulously drafted liquidated damages clause could be potentially considered objectionable by the agency charged with enforcement, the U.S. Department of Labor, and hence an unnecessary risk.

By its letter, immigration law imposes no blanket prohibition against liquidated damages clauses. The DOL directs that "the employer may not require a worker to pay a penalty for leaving employment prior to any agreed date. However, this restriction does not preclude the employer from seeking 'liquidated damages' pursuant to relevant state law." Prudence, however, counsels against routine use of these clauses.

The biggest problem with liquidated damages clauses is that their legality must be judged by the DOL. Once the DOL steps in the door, they can widen the investigation to other matters and to other employees. The attorney fees alone can run high because voluminous amounts of documents may be examined and statements obtained from employees. In addition, the investigations interrupt work and impede normal business operations.

The DOL considers it a statutory obligation to determine whether a required payment is a penalty (and not liquidated damages) under relevant state law. Hence, any complaint is certain to result in an investigation. Further, even a complaint regarding an alleged attempt to enforce a penalty provision will be processed and investigated in the same way as any other violation. This provision conceivably could be triggered by as little as a discussion or an email.

Finally, the DOL will apply principles of administrative collateral estoppel (the legal principle limiting consideration of a dispute to only one court action), when appropriate, just as it would for any other employment law violation. One adverse ruling against an employer could open a Pandora's box

for liability.

As a matter of established practice, the DOL does not investigate employers for immigration violations until there is a complaint from an interested party. But once the complaint is made, little restraint is mandated on the width or the depth of the investigation. To top that, the investigators carry out the functions of investigation as well as deciding on the penalty; the proverbial judge, jury and executioner.

There is a right to appeal, but the appeals involve going against counsel representing the DOL, who typically open the appeal with discovery requests requiring additional hours of time, expense and potential for further liability exposure. As a practical matter, even the insinuation of a lawsuit against an employee has serious implications for any of our colleagues involved in drafting, reviewing, or litigating such clauses. The penalties and sanctions apply even where there is an "attempted" enforcement.

Not only are employers prohibited from recovering as liquidated damages certain types of expenses, they are forbidden also to make deductions in the wages of an H-1B employee beyond what are normal tax, social security and Medicare deductions. Any other reduction in the paycheck must meet the very

stringent requirements under 20 C.F.R. Section 655.731(c)(9), which permits only those deductions made for the convenience of an H-1 employee based upon a "voluntary, written authorization" of the employee. Hence, if an employer attempts to dock liquidated damages from a paycheck, that constitutes a violation separate from the enforcement of an impermissible contract clause.

Consequences of Violations

Violations of immigration law carry grave consequences ranging from civil money penalties through criminal prosecution.

Civil money penalties imposed by government under immigration law target both the merits of the clause and the method used for its recoupment. With a company-wide investigation, an unenforceable and impermissible liquidated damages clause can lead to penalties of up to \$1,000 for each violation. The Secretary of the DOL has the authority to impose this fine and order the employer to return any unauthorized amounts received from the H-1B employee. As an example of the amounts involved, note, that in October 2013, Infosys, a large multinational company, settled its dispute with the govern-

ment over immigration violations for \$34 million.

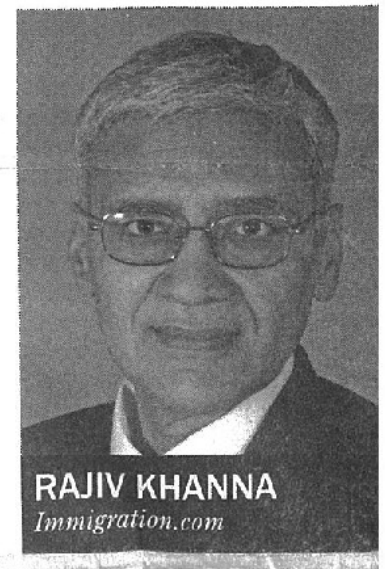
Debarment from participating in immigration related visas and green card applications can be imposed and frequently is. The debarment can be from one to three years. During the debarment period, employers may not file immigration related applications or extensions for existing employees.

If immigration violations are found, debarment from federal contracting follows. If your client is a government contractor, it stands to lose its business if it is found to have committed immigration violations. Under Federal Acquisition Regulations, immigration violations are listed as one of the causes of debarment.

Most seriously, the current fashion in the corporate immigration world is *criminal prosecution*. The government is almost too quick to allege fraud, conspiracy and RICO violations in situations traditionally treated as civil or regulatory violations. This is by far our most serious concern if DOL finds a pattern of immigration violations.

It is much safer to not rely upon liquidated damages clauses for H-1B employees. Note that recovery of compensatory (damages sufficient in amount to indemnify the injured person for the loss suffered), consequential (losses that do not flow directly and immediately from an injurious act but that result indirectly from the act) or any other damages permitted by law is not prohibited by immigration law; and recovery or lawsuits for damages other than liquidated damages are not a cause for DOL investigation.

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