

# Corporate Immigration Policy: Why, What and How?

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## Rajiv S. Khanna

**FOREIGN TALENT** is widely employed in our workplace today. The rules that govern their employment are complicated, counterintuitive, and continually changing. I hope to demonstrate to you that a well-considered corporate immigration policy can save much wasted time and expense.

This article will provide you an overview of the most commonly encountered problem areas and a thought map to start a policy. There is no possible way to provide a template for a comprehensive policy that could be applicable to all employers. Too many elements are highly individual to the type of business, size of the employer, workflows within the organization and the desired goals of the policy. At best, I can point out the contours of the problem areas.

Further, there are two areas, Form I-9 and H-1B compliance, that each require their own lengthy explanation and are too large to be covered here. Accordingly, please be mindful that this article contains insufficient details on those two topics, but the pointers provided here will furnish enough information to arm you with defensive measures against the most common problems.

## Do We Need a Formal Policy?

The answer is almost always, yes. You may not need a corporate immigration policy if your company employs in-house immigration counsel, who are responsible for end-to-end case and immigration management. In my ex-

perience, even such companies have an immigration policy in place. The policy may be informal or stated in a series of intra-office communications, but it exists. To all of us who practice immigration law, the risks of inconsistent office procedures are too obvious not to be contained and managed ahead of possible crises.

### **What Are the Risks of Not Having a Policy?**

Not having a consistent and considered approach in dealing with immigration law exposes the employer and its management to criminal prosecution, civil litigation, corporate dissolution, loss of revenue streams, millions of dollars in fines<sup>1</sup>, hundreds of hours in lost man hours spent in defending governmental investigations and actions, loss of hired talent and loss of goodwill.

Each one of the above items of harm can be expanded to several page of information, but, briefly, consider the following points that should illustrate how the immigration laws operate.

1. Criminal prosecutions. In the last ten corporate prosecution where I have provided counseling to the corporate defendants and their criminal defense teams, I have noticed some common elements.
  - a. Matters that we would normally have considered merely regulatory violations have somehow morphed into indictable offenses. For instance, there is nothing in the law that directly mandates that hiring a foreign worker on H-1B visa (the most common work visa) without having a specific project in mind is a violation (as long as the stated salary is being paid). It stands to reason that if the employer wishes to pay the wages even while an employee is not actively deployed, that should be the employer's concern, not the government's. In fact, that is not so. Almost every indictment that I have reviewed has contained a count regarding this issue - hiring workers without a specific project in hand. A good immigration policy should prevent such and other similar issues mentioned here from arising.
  - b. Prosecutors are highly motivated to seek results. Most underlying investigations take years to complete and cost the taxpayer substantial sums. It is not likely that the government would walk away from a prosecution easily.
  - c. Prosecutions can turn into convictions based upon just one filing; multiple violations are not necessary.
  - d. Many immigration forms contain a sworn declaration that the signer has read. And understood the contents.<sup>2</sup>
2. Civil consequences.
  - a. Improperly worded documents can lead to lawsuits from employees based upon implied contracts or equitable rights.

<sup>1</sup> In 2013, Infosys Limited paid \$35 Million in settlement in lieu of fines. *See*: <https://www.ice.gov/news/releases/indian-corporation-pays-record-34-million-fine-settle-allegations-systemic-visa-fraud>

<sup>2</sup> *See, e.g.*, Form ETA 9089: "I declare under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge the information contained herein is true and accurate. I understand that to knowingly furnish false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a federal offense punishable by a fine or imprisonment up to five years or both under 18 U.S.C. §§ 2 and 1001. Other penalties apply as well to fraud or misuse of ETA immigration documents and to perjury with respect to such documents under 18 U.S.C. §§ 1546 and 1621."

- b. Government audits and investigations can take years to complete and are expensive in work hours lost, attorney fees and monetary sanctions imposed.
- c. Immigration violations can bar you from federal contracting under FAR.<sup>3</sup>
- d. At the very least, improper procedures can lead to denial of work visas and even to revocation of the ones that have already been approved.

### **Are There any Risks in Having an Immigration Policy?**

Just like any policy document that is articulated without thorough consideration or drafted without precision, a slipshod immigration policy is probably worse than not having one at all. In writing down defective policies, we will exacerbate any of the risks described above. But, a good immigration policy serves not just to avoid risks. It also creates benefits that far outweigh the effort it takes to create and maintain the policy.

### **The Benefit of Consistency**

A policy insulates you from known liability exposure and creates a consistent set of processes, which is good for both internal governance as well as first line of defense against government audits and investigations. A good policy will have sufficient details to guide the managers as well as the HR in how to proceed in routine immigration matters and how to deal with non-routine issue. Externally, that consistency can serve as both affirmative evidence under Federal Rules of Evidence of compliance as well defensive assertions against claims of noncompliance by government agencies. A stated policy creates a good defense against the most serious allegations, all of which require a guilty mind. While we may not be able to inoculate individual malfeasors within an employer if they are guilty of deliberate wrongdoing, the organization itself can take recourse to its policy as a good faith defense.

If you chose to extend that policy to include your existing or potential foreign workers, you will create a consistent set of expectations. Any risk of unwanted legal or equitable claims by employees can be avoided through proper disclaimers and reserving flexibility in application and in the power to change policies as you deem fit.

### **The Benefits for Stakeholders**

It has also been my experience that written policies create a high degree of assurance in dealings with external stakeholders or potential stakeholders. For instance, if you are jointly bidding for a project, it is useful for your partners to know at a glance what your processes are and how they are administered. This is especially true for federal contracts, where immigration noncompliance is big deal-breaker. The same is true for mergers and acquisitions. Immigration noncompliance or compliance that is difficult to verify creates delays and hurdles.

### **The Benefits for Business Planning**

Internally, for your organization, an immigration policy creates the framework that can remove complexity and uncertainty of immigration processes as deterrent to expansion and growth. For instance, you

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<sup>3</sup> See, FAR, Section 9.406-2 Causes for debarment. A contractor, based on a determination by the Secretary of Homeland Security or the Attorney General of the United States, that the contractor is not in compliance with Immigration and Nationality Act employment provisions (see Executive Order 12989, as amended by Executive Order 13286). Such determination is not reviewable in the debarment proceedings.

could have a policy in place that provides for interim outsourcing of work and payment to a foreign worker who is waiting abroad for the visa to be approved or is for some other reason not able to take up the job immediately. Additionally, a good policy is effective no matter how rapidly and how far you expand. With minor modifications, the same policy could be equally applicable in a 10,000 employee organization as it would be in 100.

### **What To Include in the Policy?**

An effective policy must address all stages of employment, immigration filings, cost allocation and compliance. We always tell clients to just write out a policy assuming there is no law restraining them. It is wise not to get them bogged down with the details of what cannot be done. That way, we know what the business goals are. We can then try to create avenues for meeting the goals both through policy as well as immigration options that might get overlooked if we don't know the true business goals.

#### ***1. Pre hiring policies and processes***

- a. Add a recital that you follow all requirements of law for employment and only duly authorized workers are allowed to take up and continue employment.
- b. it is advisable to create a process through which any employee of the company can report unlawful immigration practices for internal investigation.
- c. Create a requisition process through which a front line manager can send in to HR a request to recruit for a job opening. Many organizations use an electronic process that is maintained by HR. This process can be very useful in various immigration and compliance matters.
- d. If you have an in-house legal staff or an ongoing relationship with outside immigration counsel, create a process on how in special cases immigration pre hiring procedures will be reviewed by counsel. For instance, if you are unable to find qualified workers within the USA, what options do you have to recruit internationally?

#### ***2. Recruitment***

- a. Create guidelines of what sources of recruitment the company uses.
- b. Do not use any language in the ads that creates an appearance of discrimination against US workers. The government takes seriously any complaints of "reverse discrimination," where ads discriminate against or discourage US workers.<sup>4</sup>

#### ***3. Interviewing***

- a. An important question to ask every applicant either in your recruitment application or employment interview or both is substantially: "do you currently possess an unrestricted right to work in the USA." Note: if you do not ask every applicant that question or require green card or citizenship as the only means of employment in your company, you could be committing discrimination. Of course, if some jobs uniformly require US citizenship, there is no problem in making that clear.

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<sup>4</sup> See, information from the Office of Special Counsel, DOJ: <http://www.justice.gov/crt/office-special-counsel-immigration-related-unfair-employment-practices>

#### **4. Hiring**

- a. Define Forms I-9 creation, maintenance and preservation policies. At the very least, create guidelines that make it clear I-9 has to be created for all employees, domestic or foreign, within three business days of hire. Do not insist on any one form of documentation - all have equal dignity. A good source of basic information is a handbook authored by the USCIS at <https://www.uscis.gov/sites/default/files/files/form/m-274.pdf> (last visited 19 February 2016). Note: Do not download the handbook. Always look at the most recent version directly from the government web site. Information on the handbooks and guides can change. If your organization uses the electronic verification system (e-verify), the procedures will be different. The information and training available on the e-verify web site should be reviewed: <https://www.uscis.gov/e-verify> (last visited 19 February 2016) and its processes should be incorporated in the policy.
- b. Make HR personnel aware there are special rules under immigration law for how soon after approval of a visa/status an employee must be placed on the employer's payroll.

#### **5. Hired employees**

- a. Actual control and the right to control employees. Include clear guidelines that state that your organization will always have actual control (where the work is for in-house deployment), and at the very least, will have the right to control the employees (if working off site). Note that most work visas require that the employees work as employees (IRS Form W-2), not independent contractors (IRS Form 1099). The "right to control" an employee takes on great significance in immigration law.
- b. Changes in job. Counsel must be consulted before incorporating variations in jobs such as: increase or decrease in salary; promotion or demotion; lay offs or benching; and changes in job description, title or location.
- c.

#### **6. Laying off**

If an employee has to be laid off, there should be a policy in place for immediate notification to the government, in writing, requesting a revocation of the visa. Note that there may be additional legal requirements in lay offs. For instance, H-1B visa holders have to be offered a one way ticket back to their home country if they are laid off prematurely.

#### **7. Legal advice**

- a. There must be a policy for HR or managers not to provide legal advice to employees. In many States, that is a criminal offense and arguably also creates liability for the employer. While there may be exceptions from criminal prosecution for corporate employees conducting the business of the employer, overall, it makes the most sense to approach outside counsel for ongoing advice.
- b. One of the decisions that is very important to make is whom will outside counsel represent in immigration: employer, employee or both. Many lawyers undertake joint representation of the employer and the employee. The local bar rules may deem an intended beneficiary (employee) of an immigration petition to be deemed a client. Joint representa-

tion makes representation easy, but can create problematic situations in two ways. First, if there is a parting of the ways between the employer and the employee, outside counsel cannot provide advice or representation to one against the other. Second, all documents in the file, including financial documents like tax returns, are jointly available to both clients. It is important, therefore, that a decision should be made about whether you desire representation for one side only. In such cases, waivers can be obtained from employees making it clear that outside counsel engaged by employer is not representing them.

### **8. Special considerations**

Some policies will have to be uniquely tailored to the nature, size and elements of the employer's business: not for profit, educational or research entities, government contractors, technologies export controls and individual workflows within the organization.

### **9. Visa/green card filing**

I consider this part of the policy to be optional. Many employers prefer to make these decisions on case-by-case bases. Here, the employer decides when they will file for immigration benefits for foreign employees. These benefits consist of initial visas, visa transfers (changing employers), visa extensions and applications for permanent residence ("green cards"). If you wish to include these provisions, you will have to think about the following matters:

- a. How soon after an employee joins would you file for their work visa and then their green card?
- b. Would you require a reasoned commendation from the employee's manager to HR based upon employee's performance, past and future benefit to the employer.
- c. What will the employee be required to pay? Keep in mind that the current government thinking is that, in addition to visa fees and expenses that are expressly, by law, required to be paid by the employer, all normal business expenses must also be paid by the employer. Most of the immigration related costs are likely to be deemed the employer's normal business expense. That would require the employer to pay all the amounts. To get a general sense of what the expenses involved are, you can see our firm's calculations for the most common cases here: <http://www.immigration.com/our-fees-2015-2016>
- d. Note that you may not be able to recover any of the amounts you spend in the immigration process. See, for instance, Rajiv S. Khanna, *Liquidated Damages Clauses In H-1B Visa Holders' Employment Contracts*, *The Practical Lawyer* 37 (October 2012).
- e. You may want to also include a statement or an affidavit to be provided by the employee that all information and documents the employee provides for immigration process are true and correct. I have seen situations where an employee's fraudulent documents created a host of problems for the employer, who unknowingly submitted them to the government.

### **10. Provisions for compliance**

- a. Who speaks for the company? The policy should clearly list who is authorized to sign petitions and who can speak for the company during governmental requests for information, audits and investigations. These can be different people or different sets of people. For in-

- stance, HR personnel can be responsible for signatures, while VP Operations could be designated to review and respond to other requests. It is dangerous for frontline staff to provide information to the government.
- b. Export control. If your work involves controlled technologies or substances, you will need special procedures (or permissions from the government) for foreign employees.

### **11. Disclaimers**

These disclaimers must be included:

- a. Your immigration policy is subject to all applicable laws, rulings and government policy as they exist at the time of finalization of this policy and as they change from time to time.
- b. The policy and immigration filings are not intended to, expected to, and do not create, amend or abrogate any rights or expectations in law, in equity or under any other legal theory.
- c. Subject to applicable law, the policy does not operate to in any way curtail the employer's absolute discretionary authority to proceed to file, not file, withdraw or revoke any immigration cases.
- d. Policy is subject to change without notice.

### **12. Maintenance of documents**

The policy should contain rules about how long the immigration documents and copies of petitions, etc. should be maintained. Our advice is to scan the documents and archive them. Hard drive space and even cloud space has become so cheap that there is hardly ever any need to worry about storage of digital documents. Additionally, there are processes in immigration that could be questioned decades after the fact. Some of my colleagues feel that keeping documents indefinitely invites unnecessary trouble in case of investigations. Nevertheless, my opinion is, if the documents have been carefully and competently prepared, it should not matter how long we keep them.

### **13. Maintenance of policy**

- a. Ensure the policy is circulated among and read by affected people. Note: You can have elements of policy that you chose to keep within your management team. Not everything has to be available to all team members.
- b. Reviews and updating. Annual reviews and, if necessary, revisions should be undertaken. Immigration laws and policy are continually changing. A monolithic or antiquated policy is probably worse than having no policy.
- c. Annual training of HR. Frontline managers and HR should be trained continually to keep with the changes in laws and government policy

### **14. Who must review the policy?**

Once a draft policy is prepared, it should be reviewed both in-house and outside counsel to ensure it is in accord with the desired goals, corporate processes, employee handbooks and other applicable laws.

- a. In-house counsel. Obviously, in-house counsels have the most intimate knowledge of the employer's work and the legal areas that most impact it.

- b. Management
- c. HR
- d. Technical managers
- e. Employment counsel

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