

# Practical guidance at Lexis Practice Advisor®

Lexis Practice Advisor® offers beginning-to-end practical guidance to support attorneys' work in specific transactional practice areas. Grounded in the real-world experience of expert practitioner-authors, our guidance ranges from practice notes and legal analysis to checklists and annotated forms. In addition, Lexis Practice Advisor provides everything you need to advise clients and draft your work product in 12 different practice areas.



*Liz Stern*

## Checklist – Best Practices for Employers Undertaking Business Immigration Sponsorship (Nonimmigrant and Immigrant)

By [Liz Stern](#), Mayer Brown LLP

This checklist guides employers in properly preparing and filing nonimmigrant and immigrant petitions with the U.S. government agencies that administer immigration services. We also include guidance on how to develop an Immigration Compliance Program for employers.

For more information on business immigration sponsorship, see [Key Considerations Before Engaging in Business Immigration Sponsorship](#).

### Preliminary Considerations Before Sponsoring nonimmigrant and Immigrant Workers

Most employers choose to sponsor a foreign national requiring work authorization for a nonimmigrant visa and then progress to sponsorship of an immigrant visa after a period of employment. The temporary nature of nonimmigrant visa classifications provides the employer with time to evaluate the performance of the employee and make the determination of whether the employer seeks to continue the employment relationship on a more permanent, indefinite basis based on that performance and the employer's assessment of ongoing business needs.

- **Employer's long-term goals for the employee.** Before sponsoring an employee for a nonimmigrant or immigrant visa, an employer should objectively determine the need to retain the employee, the employee's future career path with the employer, and the employer's business need.
- **Employee's long-term goals to remain in the United States.** Before sponsoring an employee for a nonimmigrant or immigrant visa, an employer should also determine how long an employee intends to reside in the United States.
- **Allocation and distribution of costs.** Before sponsoring an employee for a nonimmigrant or immigrant visa an employer should determine which costs will be borne by the employer and which costs the employee must pay. The employer must bear some costs, such as the labor market test and H-1B fees. Either the employer or employee may bear the processing costs for other processes, such as filing [Form I-485](#).
- **Coordination with outside counsel: Will outside counsel deal directly with the business, or work through an intermediary in human resources?** The employer should develop a strategy and process for managing the sponsorship process, including when the employer will work with outside counsel. A model where outside counsel communicates primarily with the employer's human resources department to gather employee documentation and answer employee questions provides a more centralized solution. Alternatively, a model for communication where outside counsel works directly with employee visa holders may be preferable from an efficiency standpoint to avoid bottlenecks and to assist human resources departments with focused document collection and analysis of employee inquiries. In either instance, the employer should request regular, detailed reporting and tracking of matters from its counsel.

### Gather Key Information

Before you assist the employer in initiating the sponsorship of a nonimmigrant or immigrant visa, you will require certain key data points to assess the appropriate visa classification(s) and the foreign national's eligibility for a nonimmigrant or immigrant visa.

- **Obtain information on the new position from the employer.** Creating a comprehensive description of the job is critical in ensuring that a visa application will be approved. At a minimum, you should obtain the following key information from the employer:
  - o Hiring leader and business unit/division
  - o Job title
  - o Education requirement, including level of degree and field of study
  - o Skills set requirement
  - o Job description, including detailed job duties
  - o Percentage of time required to perform each job duty
  - o Supervisory responsibilities
  - o Description of performance review process
  - o Travel requirement (if any)
  - o Salary (base) and bonus, itemized
  - o Full street address of worksite location(s)
  - o Start date
  - o Business cost allocation
  - o Whether a license is required from the U.S. Department of Commerce and/or the U.S. Department of State to release technical data to the foreign employee
- **Obtain information from the prospective foreign employee.** The visa history, nationality, and background (academics/training/experience) of the candidate is essential to the development of a nonimmigrant or immigrant petition or visa application. You should have the employer obtain the following key information from the prospective foreign employee:
  - o Copy of passport biographical page
  - o Copies of any prior U.S. immigration documents, including approval notices, visa stamps, and employment authorization documents
  - o All periods of stay in the U.S. in the last six years, and the visa classification for each
  - o Educational documents, with English translations (if necessary) and credential evaluation (if any)
  - o Copy of Form I-94 (if currently in the U.S.)
  - o Last address outside of the U.S.
  - o Province of birth
  - o Resume or curriculum vitae
  - o Verification of employment letters from previous employers
  - o Whether the foreign employee has ever been arrested or charged for any offense
  - o U.S. Social Security number (if any)
  - o Alien number (if any)
  - o Consulate or Embassy where visa will be applied
  - o Information regarding spouse and minor children including:
    - Copies of passport biographical pages
    - Copy of Form I-94 (if currently in the United States)
    - Copies of prior U.S. immigration documents
    - Alien number (if any)

- Marriage certificate (if any)
- Birth certificates (for dependent children)

### Develop an Immigration Compliance Program

The risks associated with cross-border travel and mobilization of talent are substantial and complex. This fluid movement raises the specter of increased risk, with “shop floor” audits becoming commonplace, compliance ratings impacting the company’s ability to capture visas, and the potential for whistleblowers exacerbating the impact of any infraction. To succeed in this environment, major companies with globally mobile work corps require an agile global mobility program with effective controls and key compliance components.

- **Determine visa sponsorship requirements for all potential new hires.** After a potential hire has been identified, as part of the onboarding process you should help the employer determine whether the new hire requires visa sponsorship. Typically those who are not U.S. Citizens, are not Legal Permanent Residents, or do not possess an USCIS Employment Authorization Document require visa sponsorship.

Employers should be cognizant of regulations prohibiting discrimination with respect to hiring, firing, or recruitment based upon an individual’s citizenship or immigration status, such as the Immigration Reform and Control Act (IRCA). While IRCA requires employers to verify the identity and employment eligibility of all employees hired after November 6, 1986, the law prohibits employers from rejecting valid documents or insisting on additional documents beyond what is legally required for employment eligibility verification. For more information on IRCA, see [Navigating the Immigration Reform and Control Act of 1986’s \(IRCA\) EEO Provisions](#); [Chart – Determining and Remediating Employer Penalties for IRCA Violations](#); and [Chart – EEOC v. OSC Enforcement of Immigrant-Related Discrimination](#).

To ensure compliance with IRCA and other non-discrimination laws, employers should limit initial questioning regarding visa sponsorship requirement for all potential new hires to the following:

- o Is the applicant currently authorized to work in the United States on a full-time basis for any employer? If the applicant answers “no,” the employer may inquire as to the applicant’s current immigration status.
- o Will the applicant require now or in the near future employment visa sponsorship (i.e., H-1B visa)?

To avoid the implication of discriminatory hiring and recruitment practices, employers should ask these questions to all potential job applicants.

- **Coordinate with human resources to ensure visa processing is executed on time and within budgetary requirements.** Once a potential hire has been identified as requiring visa sponsorship you and the hiring leader should consult with the employer’s human resources department to determine the appropriate visa(s) option(s) and obtain a list of the needed documents and information to process the case.
- **Collect documents and information required for visa processing.** The candidate should provide the employer with a document checklist/questionnaire. It is then important to help the employer collect all the requested documents and provide all of the information requested. If documents and information are not readily available or possible to obtain, the candidate should consult with the employer to discuss alternatives.
- **Receive visa approval and initiate onboarding process.** Once a visa approval is obtained the employer may begin the process of onboarding.
- **Confirm identity and work authorization verification at the onset of employment.** To comply with [Form I-9](#) and E-Verify regulations an employer must confirm the identity and work authorization in a timely manner. An employer must:
  - o Complete Section 1 of the Form I-9 no later than an employee’s first day of work for pay
  - o Complete Section 2 of the Form I-9 no later than the third business day an employee starts work for pay –and–
  - o Complete Section 3 of the Form I-9 if an employee’s work authorization expires.

If an employer volunteers or is required to participate in E-Verify then an employer must enter Form I-9 information into E-Verify for an employee no later than the third business day after the employee’s start date. For more information on employment verification, see Lexis Practice Advisor’s [Business Immigration / Employment Verification practice notes](#); and Lexis Practice Advisor’s [Business Immigration / Visas forms](#).

- **Track work authorization expiration dates, as well as “max-out” date.** An employer’s human resources department should create a methodology of tracking the date an employee’s work authorization expires and the date an employee’s eligibility for a visa category will reach its conclusion (max-out). This will help ensure Form I-9 compliance and that there are no unauthorized employees.
- **Initiate visa petition renewals as needed, well in advance of expiration dates.** USCIS will accept petitions requesting extension of nonimmigrant status up to six months in advance of visa expiration. We recommend initiating extension petitions for employees within this window, approximately four to six months in advance of expiration, with the goal of filing the extension petition no less than 45 days in advance of expiration.
- **Confirm timeline for sponsorship for permanent residency.** Ideally after the initial visa petition renewal an employer should evaluate whether an employee will be sponsored for permanent residency. Once a decision is made on immigrant visa sponsorship, the human resources department, the hiring leader, the candidate, and you should coordinate to determine the timeline. Planning ahead will ensure that there is no unauthorized employment, no lapses in employment, and enough time to file a change of status, if needed, to a status that allows an employee to adjust his or her nonimmigrant status to an immigrant, permanent residency status.

This excerpt from Lexis Practice Advisor®, a comprehensive practical guidance resource providing insight from leading practitioners, is reproduced with the permission of LexisNexis. Lexis Practice Advisor includes coverage of the topics critical to attorneys who handle transactional matters. For more information or to sign up for a free trial visit [www.lexisnexis.com/practice-advisor](http://www.lexisnexis.com/practice-advisor). Reproduction of this material, in any form, is specifically prohibited without written consent from LexisNexis.

Learn more at: [lexisnexis.com/practice-advisor](http://lexisnexis.com/practice-advisor)



LexisNexis, Lexis Practice Advisor and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license.  
© 2016 LexisNexis. All rights reserved.