



Mid-Market Management Trends . . .

Clearing Paths for Critical Foreign Talent to Work in the United States

by Howard Muson

The future growth of many smaller businesses may depend upon recruiting highly skilled foreign workers for key jobs. That means becoming better acquainted with the complexities of the immigration code.

Whatever the woes of recession, the war for talent continues, and it is a sad truth that U.S. firms often cannot find qualified Americans for key positions. The country is not producing nearly enough scientists, engineers, systems analysts, doctors, nurses, health care technicians, even top-flight managers to satisfy the need in different industries and parts of the country. Bringing in professionals from abroad may not be popular now, when millions of Americans are unemployed. But experts agree that demand for these workers will explode again once a robust recovery begins.

Big companies such as Microsoft, Google, and Oracle have been in the forefront of the fight to lift the cap on the controversial business visa—H-1B—that enables American organizations to hire foreign professionals for a range of unfilled positions.

Critics of the program say it brings “cheap labor” into the country that displaces Americans.¹ Supporters argue that enterprising foreign workers have historically spurred badly needed innovations and generate more jobs than they threaten.²

¹ Among the critics is the Programmers Guild (www.programmersguild.org). One of the more prominent academic critics is Ron Hira, an associate professor at the Rochester Institute of Technology. See Ron Hira, “It’s Time to Overhaul H-1B Visas,” *BusinessWeek*, April 2, 2009 (www.businessweek.com).

² Coalitions that support reform of the restrictions on H-1B visas include CompeteAmerica (www.competeamerica.org) and the American Council on International Personnel (www.acip.com). Also see Jacob Funk Kirkegaard, “The Accelerating Decline in America’s High-Skilled Workforce: Implications for Immigration,” Peterson Institute for International Economics, December 2007 (www.piie.com).



Unless Congress provides some relief for businesses under comprehensive immigration reform, U.S. companies will have to cope for some time with an archaic system weighed down by myriad rules and frustrating delays. For small and midsize companies that will need experienced foreign talent to drive growth, this means becoming more adept at managing visa and green-card applications successfully. It means developing an immigration function within HR that many companies now lack.

Follow the Bouncing Ball

Smaller companies getting acquainted with the immigration code confront a dizzying array of visa categories: H-1B, H-2B, L-1, H-1C, O, P—the list goes on. The most popular business visa is the H-1B, which enables a non-immigrant foreign national to work in the United States legally for three years, with the option of applying for renewal for another three years. Candidates have to demonstrate theoretical or technical expertise in “specialized fields” and have a bachelor’s degree or its equivalent. H-1B visas are awarded by U.S. Citizenship & Immigration Services (USCIS), a unit of the Department of Homeland Security, with assistance from the Department of Labor (DOL).

Launched in its present form in 1990, the business visa program set a cap of 65,000 on H-1B visas issued annually.³ Legislation passed in 2004 set aside an additional 20,000 H-1B visas for highly skilled foreign applicants with a master’s degree or higher from an American university. With the tremendous growth of the hi-tech economy, however, the popularity of H-1B visas surged along with the profile of the organizations seeking them (see “Winners in the H-1B Derby,” p. 7).

Robert A. Meltzer, founder of VISANOW, an online global immigration and visa service provider, says Congress’s original intent was “to help companies hire foreign nationals to staff small IT departments in manufacturing, health care, food processing, or other non-technology industries, enabling them to increase their competitiveness or address specific concerns, such as Y2K. However, when IT technologies became a core competency for many businesses, rather than an ancillary or temporary need, demand for the visas soared.”

³ Included in the 65,000 are 6,800 H-1B visas available to applicants from Chile and Singapore under free trade agreements with the United States.

H-1B Application Requirements

- Companies sponsoring a foreign applicant must file a “labor-condition” statement with DOL showing that the applicant will be paid the prevailing wage for the occupation and geographic region where he or she will work and will be treated the same as Americans in the same job.
- The sponsoring business does not have to certify that it has made a concerted effort to find a qualified American for the position but was unable to do so. (Employer-based green cards, as well as other types of visas, do require such certification.)
- The business is obliged to inform its workforce about any H-1B hires and their pay level. The DOL has the power to investigate complaints from employees, but not to initiate investigations of suspected violations on its own.

Senators Richard Durbin (D-IL) and Charles Grassley (R-IA) have proposed legislation to curb abuses of the H-1B program. The Durbin-Grassley bill would force sponsors to show, before hiring a foreign worker, that they had made a “good-faith” effort to find a qualified American. One practice that would be banned is advertising jobs “for H-1B’s only.” Some firms apparently run such ads to recruit foreigners willing to work for less compensation than Americans.

The cap set on H-1B visas has bounced up and down with the changing needs of business and the economy—and the changing mood in Congress.

- In 1999, the cap was raised from 65,000 to 195,000 in response to shortages of software engineers, systems analysts, and programmers in hi-tech industries. Under a sunset provision, the 65,000 cap was restored three years later in the wake of the tech bust when demand for the visas declined.
- Soon applications were surging again as the economy recovered. Normally, USCIS reviews petitions in the order they are received. But in 2007, a total of 123,400 were submitted on first day for filing (April 1). To select 65,000 from the pile, the agency introduced a computerized lottery system.
- Again in 2008, the number of petitions far exceeded the cap on the first two days for filing; the 65,000 lucky “winners” were again selected by lottery.
- This year, applications for FY 2010 slipped below the cap for the first time since 2003, as businesses cut back on staff and ceased hiring; as of early December, however, the number of H-1B petitions filed was nearing 60,000.

How One Mid-Cap Company Manages Visas

Do small and midsize companies have a dog in this fight? Emphatically, yes. Jeff Lande is executive vice president of TechAmerica, a trade association with a membership and network of over 15,000 technology companies that see reform of laws restricting business visas as a top priority. Lande says the membership includes firms of all sizes—pre-revenue startups, small and mid-cap firms, and major multinationals. They range from business services and software firms that apply for lots of visas to small Silicon Valley shops that may need only two or three a year.

Midsize companies that are global in scope continue to need H-1B and other types of visas. One example is Boston-based Sapient Inc., a NASDAQ-listed company with sales of almost \$630 million in 2008 that provides consulting on IT and business processes to companies around the world. Its interactive marketing system was rated by Forrester Wave™ as one of the strongest performers in the field. According to Alyssa Funk, immigration manager in People Success (i.e., HR department):

- This year, Sapient applied for more than 150 H-1B visas for foreign nationals coming to work in the United States (including H-1B transfers from other corporations).
- The great majority were foreign nationals with skills in multiple specialized technologies—JavaScript, Visual Basic, Oracle Development Tools, J2EE, CGI, and many others.
- The other 5 to 10 percent were for experienced program managers.
- Of the foreign nationals employed in United States, about 80 percent are from India, 10 percent from Canada, and 10 percent from Europe.
- The largest number of applications was for the visa category known as L-1, which enables foreign nationals employed by a company abroad to transfer to its U.S. offices. L-1 visas carry the same privileges as an H-1B, with one big advantage: They are not included under the H-1B cap.
- Sapient also applied for 75 employment-based green cards to obtain permanent residency for foreign employees already in the United States.

Funk oversees visa applications for American employees going abroad on short- and long-term assignments, as well as for foreign nationals coming here. That means she must be familiar with immigration requirements in other countries, not just the United States; she also has to keep track of payroll requirements, benefits, and taxes in all of the countries

where Sapient has consultants. The biggest challenge in her job, she says, is “just knowing who’s going where, and who’s going when” and educating people to let her know in advance so visa applications can be approved in time to avoid project holdups. She admits there are moments of panic when visa approvals are held up.

Although consulting firms are among the biggest visa users, the regulations sometimes make it difficult to justify short-term project work. Technically, Funk says, Sapient consultants are employed by the client, not Sapient, and may work for a succession of clients during the three-year H-1B visa term. For example, Funk points out that after a six-week project for one client, consultants may be given a week off, then move on to a project for another client. Sponsors of an H-1B temporary visa have to submit a “statement of work” spelling out the employee’s responsibilities, commitment to the client, and locations where he will be working. Because Funk doesn’t always know in advance the details of a consultant’s next assignment, however, she has to convince USCIS to approve the visa for the full three years, since the person will still be a Sapient employee receiving a full salary and benefits as outlined in his H-1B petition and labor-condition application.

Prior to joining Sapient two years ago, Funk was employed in smaller, private hi-tech consulting firms. “The other firms I’ve worked for did immigration in-house. We did our own preparation and application filings. We needed an immigration attorney mainly for green-card filings.” In contrast, Sapient relies on VISANOW for most of the work of securing visas. Almost all of the application process involves paperwork that can be done online, says CEO Meltzer, a former immigration attorney in a large Chicago law firm. The online system allows users to fill out all the forms and attach required documentation. It alerts users to deadlines, communications from the government, and visa expiration dates. “A missed deadline can take a lot of time and effort to straighten out,” explains Meltzer.

Many immigration law firms have websites that facilitate online visa applications, but very few appear to match the dimensions of VISANOW’s system for handling visa transactions worldwide. VISANOW charges a flat fee for use of the web system along with access to its staff of six attorneys. Under a partnership with Sapient, VISANOW also supports HR in managing its immigration function. Sapient visa applicants can log into their accounts on the VISANOW website.

“They can see any updates or other communications from the attorney or me,” Funk says. In other firms she’s worked for, all communications with attorneys were channeled through HR because the lawyers were generally paid by the hour. “We didn’t want any surprises,” Funk recalls. “Basically, companies and attorneys should have nothing to hide.”

Defining “Extraordinary Ability”

If your medical laboratory or R&D operation wants to hire the world’s best brains worldwide, you have to be able to prove they’re the best.

At the Scripps Research Institute (TSRI), 1,800 scientists are investigating the fundamental processes of life and their application to curing diseases. The faculty includes three Nobel Laureates and a galaxy of other top medical investigators, along with scores of doctoral candidates and post-doctorates who work with them in the lab. In this complex of stellar scientific talent, *about 75 percent are foreign nationals* in the United States on different types of visas.

Thomas M. Barnett, director of the TSRI international office, estimates that his department handles in excess of 2,000 visa “transactions” a year for employees on its main campus in La Jolla, California, and a newer one in Jupiter, Florida, along with their spouses and children. Many H-1B petitions are for faculty appointees or lab researchers who do not intend permanent residency. (H-1B visas for non-profit institutions do not fall under the cap, but must be obtained for foreign personnel nonetheless.) Generally, the only category of foreign nationals that TSRI sponsors for a green card is those who qualify for the so-called EB-1 “preference,” who are superstars accepting faculty appointments. Though candidates for the preference must first obtain a temporary visa to get into the country, they don’t have to wait in line for a green card if granted EB status.

The employer-based EB-1 green-card, as used by TSRI, is strictly for “outstanding researchers” who are proven to be “extraordinary”—giants in their field—as documented by prizes, publications, and other recognition. If a sponsoring

university or research institute can do that, it doesn’t have to advertise the position or show that no American of equal stature wanted the job.⁴

Because an EB-1 can lead to the biggest prize the government can grant—permanent residency—USCIS may continue to press sponsors for further evidence of reputation (RFEs, or requests for evidence) before approving it. If an EB-1 applicant cites articles written for a respected scientific journal, for example, USCIS may ask, “Well, how many readers does this journal have?” Barnett points out that repeated requests of this sort can disrupt critical research if they delay approvals or renewals. TSRI receives nearly \$400 million a year in income from government, industry, and private sources. A high-level immunologist whose visa is about to expire may be working on a \$150 million National Institutes of Health (NIH) grant. “If that person has to be taken out of the lab because his work authorization runs out due to visa delays,” Barnett says, “science comes to a screeching halt. Taxpayer dollars are not being used efficiently.”

Documenting the reputations of foreign scientists may be easier than finding lower-level lab technicians qualified to work with them. Research done in TSRI labs is often broken up into slivers calling for experience in highly specialized tasks. Despite the many biotech labs in TSRI’s La Jolla neighborhood (Salk Institute, Burnham Institute, and the University of California, San Diego), Barnett says principal investigators still have a difficult time finding post-docs with the right experience. “Many of our faculty members would gladly take an American post-doc because then they don’t have to worry about all the visa stuff,” he says. “However, the Americans who can qualify are getting jobs with huge corporations. That’s fine, but America has to produce many more of them.” Often, Barnett says, a TSRI lab has a choice between only two applicants with the right credentials—say, one from Germany, the other from the United Kingdom.

Businesses that depend on high-level foreign researchers for R&D can learn from TSRI’s collaboration on visa questions with other non-profit institutions. Members of the non-profit

⁴ There are a total of five categories of employer-based (EB) green cards. The second level—EB-2—is for professionals who can demonstrate “exceptional ability.” Unlike sponsors of EB-1 preference candidates, companies seeking an EB-2 green card for an employee must be able to show that they “tested the market” and were unable to find an equally well-qualified American for the job. A maximum of 40,000 green cards are allotted annually for each of the two top EB categories.

research community in California keep in close touch, informing one another when the government appears to be raising entirely new issues. “We congeal very quickly when we hear about novel RFE’s,” Barnett says. The USCIS service center in the state, he says, has been very responsive to their need for clarifications. Barnett thinks businesses have been slow to form such consortiums, perhaps because so much of what they do is proprietary. “Because we’ve been able to reach out to the government as a group, we’ve been much more effective.”

Sometimes it is highly beneficial for organizations that depend on specialized skills to educate the umpires. Four years ago, TSRI, Salk, and the California Institute of Technology held a joint information forum with USCIS personnel about what qualifications are necessary to become faculty at world-class scientific research institutions. Following the dialogue, RFEs fell off dramatically, Barnett says.

Develop an Immigration Policy

Smaller companies that sponsor more than a few visas each year need to develop policies to guide HR. Among the questions that need to be addressed:

- What business and personal profile of foreign-born professionals will fit best with our culture?
- How will the rest of our staff react to hiring professionals from other countries?
- Will we cover all costs of applying for visas and green cards or ask applicants to share them?
- Are we willing to pay a top-flight immigration law firm by the hour or should we insist on a flat fee?

For the most part, H-1B candidates come to small and mid-size companies from American universities, says Donald Mooers, Jr., an immigration attorney in Bethesda, Maryland. Typically, a company interested in the foreign national will say, “We’ll hire you. Find an attorney. We’ll work with him and do everything necessary to sponsor you.” That can be a mistake. Since the business has to sponsor the candidate’s petition, Mooers suggests the company should provide its own attorney to better control the process and avoid delays and possible regulatory violations.

The biggest mistake companies make, experts agree, is to try to navigate the rocks and shoals of the system on their own. Some try to do it, but turn to an immigration lawyer when they discover how much time it can take to fill out forms, provide necessary documentation, and respond to government challenges. Mooers estimates that applying for an H-1B visa costs \$2,300 in filing fees, plus a lawyer’s charges, which can range from \$2,500 to \$6,000 (depending on whether the attorney agrees to a flat fee or is paid by the hour, the number of RFEs from the government, and other factors). For another \$1,000 fee, the government will expedite processing.

According to some legal experts, Congress designed the H-1B program to allow visa holders to seek immigrant status and remain in the country while applying for an employer-based green card. Applying for a green card is a three-step process that Mooers describes as an H-1B application “on steroids.” It can take as long as four to six years and, in addition to filing fees, costs between \$4,000 and \$15,000 in legal costs, depending on the complexity and duration of the process.

In view of these costs, a company first has to ask how badly it needs the prospective employee: “How much time and money are we willing to spend for this person to get a green card?” Second, the company may want to establish a minimum period of continuous employment before sponsoring the employee. Once the employee obtains a green card, VISANOW’s Meltzer points out, he or she is free to go to work for another employer. In other words, the initial sponsor could lose the employee to a competitor. For companies that are concerned about this, VISANOW recommends a minimum period of three years (when an H-1B visa expires) to assess the foreign employee’s potential contribution and loyalty to the company.

If you plan to seek a green card for an Indian or Chinese worker, be aware of another possible hurdle. By law, applicants from no single country can be granted more than 7 percent of all green cards available in a given year. Skilled employees from India and China usually face long waits for a card because so many apply.

Be Alert to Possible Violations – and Fraud

Most visa frauds involve very small fringe operations that bring foreign nationals into the United States, then “body-shop” them out to other employers, according to one immigration lawyer. Nevertheless, U.S. immigration authorities have been aroused by charges that some employers abuse the system. The *Wall Street Journal* recently reported that USCIS inspectors have been paying surprise visits to companies with large numbers of visa users to determine whether the work they are doing is consistent with their applications.^a

HR departments can’t push everything off on the lawyers; they have to be alert to personnel practices that may cross the line into technical infractions. Examples can be found in a study of fraud and compliance that USCIS released in 2008. The investigators examined 246 cases of H-1B visa holders chosen at random from almost

97,000 petitions. Mainly through site visits, they found 51 examples of technical violations or “willful misrepresentations” that were possibly fraudulent.^b

A few cases cited:

- The visa holders were performing duties significantly different from those described in their petitions.
- The employer deducted certain filing fees from a visa-holder’s pay, making his or her wage lower than the prevailing rate for the occupation and region.
- The employer “benched” the employee, paying him less than full hours, during periods of slow work.
- The employee was working at a geographical location not covered in the original labor-condition statement.

^a Miriam Jordan, “Slump Sinks Visa Program,” *Wall Street Journal*, October 29, 2009.

^b “H-1B Benefit Fraud and Compliance Assessment,” U.S. Citizenship and Immigration Services, September 2008 (available at www.uscis.gov/files/nativedocuments/H-1B_BFCA_20sept08.pdf).

HR as the Prod

If your company applies for more than a few visas a year, someone in HR has to be familiar enough with the regulations to coordinate the work of key players and move applications along. Whether or not it’s a full-time job, as at Sapient and TSRI, the staff specialist must be able to:

- Prod both the immigration lawyer and the applicant, when necessary, to file forms and critical documentation to meet government deadlines. “Typically, in the other firms I’ve worked for,” says Sapient’s Alyssa Funk, “the attorneys were slow to push cases through. But the attorney can’t do anything if the applicant doesn’t submit the proper documents on time.”
- Educate providers on the rules. If you use recruiters, make sure they understand what credentials are required for various types of visas. A bachelor’s degree that requires three years of study in a candidate’s home country, for example, may not qualify in the United States, where the degree normally takes four years.
- Keep foreign applicants informed about the progress of their petitions, including communications from the government and the attorney. Companies might do this by giving them access to individual accounts on their intranet or online through web systems such as VISANOW.

- Keep the government informed of any changes in the H-1B holder’s status, including promotions, demotions, changes in pay level, and transfers to other locations. This is required by law.
- Monitor changes in immigration law. Historically, they have been frequent and can affect the status of visa holders as well as the information required on petitions.

Pressures to “Hire American” are likely to mount in the months ahead, at least until the unemployment figures drop significantly. Even if the government doesn’t require it, companies should make a substantial effort to find qualified Americans for key jobs (through advertising, job fairs, recruiters, etc.) before hiring foreign workers. The search should be fully documented so the company is prepared to provide evidence that no Americans with the qualifications were available. In short, HR has a role to play in public relations—both with your own workforce and the public.

Winners in the H-1B Derby

The list of organizations receiving the most H-1B visas reveals a few surprises. For example, six of the top 10 recipients in 2008 were giant Indian outsourcers with offices in the United States:

1. Infosys Technologies (4,559)
2. Wipro (2,678)
3. Satyam Computer Services (1,917)
4. Tata Consultancy Services (1,539)
5. Cognizant Tech Solutions (467)
6. Larsen & Toubro Infotech (403)

Though these outsourcers supply systems analysts and engineers to projects of U.S. businesses, critics question whether Congress meant the H-1B program to benefit foreign companies on this scale.

Other top recipients in 2008 (for FY 2009):

- Global consulting firms, such as Accenture (731), Ernst & Young (321), and Deloitte (218)
- Leading American tech firms, such as Microsoft (1,037), Cisco Systems (422), and Intel (351)
- Academic institutions, such as the University of Pennsylvania (186), the University of Michigan (183), and Yale (145); 25 of the top 100 users were American universities.
- Public school districts in Prince Georges County (239), Baltimore (229), and New York City (96). A lawyer familiar with these visas says they go mostly to math and science teachers from the Philippines, where the school systems were built on the American model.^a

^a Marianne Kolbasuk McGee, "Who Got H-1B Visa Petitions Approved in 2008? Look at the List," *InformationWeek*, March 3, 2009 (available at www.informationweek.com). The list was based on *InformationWeek's* analyses of data from U.S. Citizenship and Immigration Services (USCIS).

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