

Corporate Counsel's International Adviser

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Letter from the Editor

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Dear Subscribers:

As we mentioned in the September Letter from the Editor, on August 12, 1992, Canada, Mexico, and the United States concluded an agreement to form a North American Free Trade Area. President Bush has notified the agreement to Congress, thus starting the ninety-day period in which the administration, with the help of Congress, will work to draft implementing legislation. Congress is likely to receive the legislation in early 1993. At that point, Congress will have ninety congressional working days in which to approve the agreement. The Commerce Department estimates that this part of the process may take until June 1993 to complete. Of course, full implementation of the agreement requires legislative approval in all three countries. The Commerce Department did not offer information on the time frames for approval in Mexico and Canada. [*USA Trade World*, insert (Oct./Nov. 1992, Dept. of Comm.).]

Speaking of the government, effective September 28, 1992, anyone calling Commerce Department numbers starting with "377" will get a recording telling them to use the new exchange of "482" instead of "377." Also, the last four digits in the Commerce Department telephone and facsimile numbers will remain the same for numbers up to "6500." Numbers ending with "6500" and higher have been reassigned. The change basically affects all telephone, facsimile, and data phone lines in the Herbert C. Hoover building.

The U.S. section of the U.S./Canada Binational Secretariat has already announced its new telephone and facsimile numbers. For future reference, the telephone number is (202) 482-5438, and the facsimile number is (202) 482-0148.

Very truly yours,



Laura Carlson Chen
Associate Editor

EMPLOYMENT PROTECTION FOR FOREIGN PROFESSIONALS*

*Rajiv S. Khanna***

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I. Introduction

Foreign professionals working in the United States are almost always in a precarious position. They are usually in the United States on a temporary visa (typically H-1B) and hold temporary positions with the U.S. employer. In most cases, the employer petitions for the employee's permanent residence (immigrant visa) based on an offer of permanent employment. During processing of the petition and the subsequent waiting period, which is anywhere from eighteen months to sixteen years, the employee is totally at the employer's mercy. If the employer refuses to complete the process, the employee's visa status and career can be severely prejudiced. Usually, the employee has no recourse because the employer is under no legal obligation to complete the processing.

II. What the Employee Can Do

The employee, however, does not have to remain completely unprotected. It is possible to provide substantial protection for the alien employee while the visa petition is pending. Frequently, the alien employee's services are important enough to the employer to give the employee some bargaining strength. Given a

reasonable proposal, the employer may be willing to guarantee at the outset that it will not prematurely terminate the immigration processing.

A. Initial Steps

The first step in protecting the employee is to identify whether there is a possibility that the employer will agree to provide contractual protection against premature termination of the visa processing. This is likely to involve a certain amount of bargaining by the employee. The employer will also have to be reassured about the reasonableness of the proposed arrangement.

The next step is to plan the type of contract that would offer the maximum possible protection to the employee. One apparent choice is a contract of employment for a fixed term. The term could be approximately the time it should take the employee to obtain permanent residence. Such a contract, due to its unusual nature as explained below, requires circumspect legal planning. As an example, a sample contract guaranteeing employment is provided with this article.

B. Contract Aims

Substantively, the sample contract is built around three protective provisions:

* *Copyright 1992, Rajiv S. Khanna. This article was first published in the March 1992 issue of The Practical Lawyer, published by the ALI-ABA Committee on Continuing Legal Education. Reprinted with permission. All rights reserved.*
 ** *Mr. Khanna practices law in Washington, D.C., and has extensive employment law experience.*

- a provision guaranteeing employment for the time required to complete the immigrant visa processing;
- a provision requiring the employer's cooperation in that process; and
- a liquidated damages provision to deter the employer from breaching the contract.

Strategically, the sample contract is drafted with one central idea; if the employer prematurely interrupts the visa processing, the employee should be able to bring an action against the employer and prevail on a motion for summary judgment. At the same time, the sample contract must be reasonable, not only because the employer may refuse to execute it, but also because such a contract may be held unenforceable as being against public policy and as an unreasonable restraint on the employer.

C. Contract Provisions

The following provisions of the sample contract that appear in the Appendix are the most crucial. Your skill in crafting appropriate language for your client's circumstances will dictate how much real protection your client can get from the agreement.

1. Recitals

Detailed recitals assure that all facts relating to the contract are laid out in the four corners of the document. They also make the contract a useful tool for educating a court about immigration law (thus dispensing with the need for an expert witness) and defining the reasons that led the parties to reach their agreement. The statement of reasons also lends credence to some of the unusual provisions of the contract, for instance, the liquidated damages clause.

Consistent with the summary judgment goal, the recitals can give you a set of uncontroverted facts for the motion. Make sure that the recitals tell the right story:

- the employee was uniquely qualified to provide services to the employer or its clients;
- to retain the employee's services, the employer freely chose to guarantee employment to the employee;
- in reliance on that offer, the employee declined

- another similar offer of employment from a prospective employer; and
- employment protection for a specified number of years is reasonable and necessary, because that is approximately the time it would take to process an immigrant visa petition for the employee.

2. Guaranteed Employment and Processing Protection

In paragraph 2 of the sample contract, employment is guaranteed for three years. This guarantee must *not* be made absolute. A court is likely to strike down any absolute guarantee as an unreasonable restraint of trade. For this reason, the sample contract provides that the employer has the right to take appropriate action for *proved* employee misbehavior.

Before drafting this part of the contract, carefully review the employer's employee handbooks, memorandums, and policies. Many employee handbooks provide that all employees hold at-will employment. Hence, you should include an override mechanism with specific reference to the handbook. This mechanism should be effective in convincing a court that opting out of the applicable provisions of the handbook was bargained for and that the parties expressly intended to override the handbook. Again, you strengthen your position on summary judgment if the intent of the parties is clear from the contract itself.

Invariably, employee handbooks set out "causes" for termination of employment, such as those stated in paragraph 4 of the sample contract. It may be desirable to negotiate with the employer to exclude all but the most serious forms of misbehavior from the definition of "cause" for your client. Additionally, you should be sure to include language that puts the burden of proving misbehavior on the employer.

Under paragraph 3 of the sample, the employer is obligated to cooperate with the employee in processing the immigrant visa. Draft this clause in as much detail as seems appropriate under the circumstances of a particular case. Despite this clause's brevity in the sample contract, it is one of the fundamental protective provisions inuring to the benefit of the employee.

3. Liquidated Damages

The liquidated damages clause, paragraph 5, has to

be drafted very carefully. If the clause, in the total context of the contract, appears to be a penalty, it will not be enforceable. Nevertheless, the clause has a good chance of holding up when

- the liquidated damages bear a reasonable relationship to the damages actually sustained;
- calculating actual damages is difficult and uncertain; and
- the parties, who have negotiated at arm's length, expressly state that the clause is not meant to be a penalty.

Under the terms of the sample contract, the employee is being paid a salary of approximately \$360,000 per year; thus, liquidated damages of between \$200,000 and \$360,000 are not unreasonable. Obviously, if the employer interrupts the visa processing, the employee may have to leave the United States or suffer some severe disruption of career or future plans. The recitals should also set out how interruption of immigrant visa processing can severely prejudice the employee. Since it is impossible to assign dollar figures to all damages that may be suffered by the employee, these considerations, in conjunction with possible lost wages, should render the stated amount of liquidated damages reasonable.

4. Dispute Resolution

Once again, scrutinize employee handbooks carefully. Most handbooks refer to dispute resolution mechanisms, including arbitration and some type of intra-organizational scheme for refereeing disputes between the employer and the employee. These seemingly harmless mechanisms could be dangerous. They can defeat the summary judgment goal embodied in the sample contract because the legal niceties in the sample contract might get cavalier treatment in alternative dispute resolution procedures. Therefore, a provision opting out of handbook procedures, such as paragraph 12 of the sample, is an absolute must to ensure that the contract is enforced in a court of law only.

5. Choice of Law

Choice of law in deciding contractual disputes is a very complicated and confusing area of law. Although it may not be an issue in many cases, by way of abundant caution, it may be best to provide in the

contract a mechanism to assure that there is predictability in the choice of law. For instance, the sample contract would require Virginia law to be applied to any dispute relating to the contract. The same result would be obtained whether a forum court applied the traditional *lex loci contractus* rules or the more modern interest analysis for choice of law questions. One possible addition to the sample contract could be a recital stating the place where the job is to be performed. The sample contract identifies the place of execution of the contract and defines the parties' own choice of law in paragraph 11.

III. Conclusion

Overall, the efficacy of a contract guaranteeing employment depends on your thorough understanding of the employee's circumstances. It is beyond the scope of this article to describe all the considerations that went into the brief sample contract, but the most important ones have been discussed. From a practical perspective, the sample contract should serve as a good starting point in drafting a contract guaranteeing employment to alien employees. Numerous options are available in preparing the contract, but the basic approach has to be eclectic, drawing upon knowledge of contract law, immigration law, and litigation.

Appendix

Employment Guaranty Agreement

This Agreement (Agreement) is made this _____ day of _____, _____, by and between XYZ, Inc., a corporation duly constituted under the laws of the Commonwealth of Virginia (Employer) and John Doe (Employee), an individual now holding temporary, full-time employment with the Employer.

Whereas, the Employee is uniquely qualified to provide technical services to the clients of the Employer;

Whereas, the Employer, acknowledging the valuable contributions made by the Employee to the business of the Employer, wishes to continue to retain the services of the Employee;

Whereas, the Employee was offered full-time, permanent employment by an organization known as ABC, Inc., at the rate of \$180 per hour and was also offered processing of his lawful permanent residence (green card) by that organization, and the Employee is forgoing that offer relying on the terms contained in this Agreement; and

Whereas, the parties hereto understand that the processing of the Employee's permanent residence may take approximately three years, that the Employee would be severely prejudiced if any interruption in this processing occurs, and that the severity of such prejudice increases with the passage of time;

Now, therefore, for good and valuable consideration, receipt and sufficiency of which is hereby acknowledged, the Employer and the Employee hereby agree and covenant as hereunder.

1. **Salary.** The Employee shall be employed at a rate of compensation of \$180 per hour, 40 hours every week (full time). The Employee is assured a minimum annual raise of 5 percent of the Employee's hourly salary paid in the preceding year.

2. **Guarantee of employment.** The Employer hereby guarantees full-time employment at no less than the agreed salary to the Employee for three years from the date of execution of this Agreement. It is agreed that notwithstanding employee handbooks, memorandums, or any other policies of the Employer, during the three-year term of this Agreement, the Employee may be discharged only for cause as set out in paragraph 4 of this Agreement.

3. **Cooperation in immigration processing.** The Employer shall fully cooperate with and assist the Employee and the attorneys or representatives retained therefor in all lawful requests made for the purpose of processing lawful permanent residence of the Employee.

4. **Cause for discharge.** It is agreed that, during the term of this Agreement stated in paragraph 2, the Employee may be discharged only for cause. Notwithstanding any employee handbooks, memorandums, or any other policies of the Employer, "cause" shall mean

only the following: (a) proved dishonesty or criminal conduct; (b) proved failure of the Employee to observe or perform any of his duties and obligations, not inconsistent with this Agreement, if that failure continues for a period of seven business days from the date of his receipt of written notice from the Employer specifying the acts or omissions deemed to amount to that failure; or (c) proved gross negligence in the performance of duties and obligations not inconsistent with this Agreement.

5. **Liquidated Damages**

5.1 **Adverse action within first year.** If, within the first year of the term of this Agreement stated in paragraph 2, the Employee is discharged without cause, laid off, or has his full-time employment status varied in violation of this Agreement, the Employer shall, before such discharge, lay-off, or variance, pay the Employee a fixed, agreed, and liquidated lump sum amount of \$200,000. This amount represents liquidated damages agreed upon by the parties and is not a penalty.

5.2 **Adverse action within second year.** If, within the second year of the term of this Agreement stated in paragraph 2, the Employee is discharged without cause, laid off, or has his full-time employment status varied in violation of this Agreement, the Employer shall, before such discharge, lay-off, or variance, pay the Employee a fixed, agreed, and liquidated lump sum amount of \$280,000. This amount represents liquidated damages agreed upon by the parties and is not a penalty.

5.3 **Adverse action within third year.** If, within the third year of the term of this Agreement stated in paragraph 2, the Employee is discharged without cause, laid off, or has his full-time employment status varied in violation of this Agreement, the Employer shall, before such discharge, lay-off, or variance, pay the Employee a fixed, agreed, and liquidated lump sum amount of \$360,000. This amount represents liquidated damages agreed upon by the parties and is not a penalty.

6. **Assignment.** This Agreement may be assigned only with prior written notice by either party, and subject to the mutual consent and approval of any such assignment.

7. **Binding effect.** This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, heirs, executors, administrators, successors, and permitted assigns.

8. **Integration.** This Agreement constitutes the complete understanding between the parties, unless amended by a subsequent written instrument signed by both parties.

9. **Severability.** If any item, covenant, or condition of this Agreement or the application thereof to any person or circumstances shall be invalid or unenforceable, the remainder of this Agreement, or the application of such term, covenant, or condition to persons of circumstances other than those to which it is held invalid or unenforceable shall not be affected thereby, and shall be valid and enforceable to the fullest extent permitted by law.

10. **Notices.** All notices, demands, and requests required or permitted to be given under the provisions of this Agreement shall be deemed duly delivered if in writing and if: (a) transmitted by facsimile machine; (b) delivered by hand with receipt thereof; or (c) mailed by registered or certified mail, return receipt requested and first class postage prepaid.

11. **Choice of law.** This Agreement shall be governed by and interpreted in accordance with the laws of the Commonwealth of Virginia.

12. **Dispute resolution.** Any methods of dispute resolution, such as arbitration, set out in employee handbooks, memorandums, or any other policies of the Employer shall not, solely at the election of the Employee, be binding in resolution of any disputes or claims relating to or arising from this Agreement. Such disputes and claims may instead, solely at the election of the Employee, be litigated in the appropriate court of law.

13. **Attorneys' fees and interest.** If legal action should be required to enforce any rights under this Agreement, the prevailing party in that action shall be entitled to all expenses incurred in that party's behalf, including costs and reasonable attorneys' fees, and any amounts accrued and outstanding under this Agreement will be subject to prejudgment interest at the legal rate.

14. **Headings.** The captions and headings in this Agreement are for convenience and reference only and in no way define or limit the scope or content of this Agreement or in any way affect its provisions.

H. Honcho, President of the Employer, expressly represents that he is duly authorized to act on behalf of the Employer.

XYZ, Inc.

By: _____

John Doe

H. Honcho
President ■

Corporate Counsel's Guide to BUSINESS-RELATED VISAS

Almost everyone coming into the United States must have a visa. This includes business visitors, suppliers, customers, and even employees of our foreign subsidiaries who are not U.S. citizens.

We can help you answer some common questions regarding visas. How do you get a visa? What kind of visa do you need? What can the holder of the various visas do while in this country? What happens if the holder of a visa does something not allowed by that visa?

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