

Immigration law meets Facebook: Decoding the discrimination lawsuit against the social media giant

Synopsis

Are the Indian workers better trained for these jobs than their American counterparts? Are they better workers? Are they more diligent? Are they more collegial and more amenable to supervisory instructions? Why would an employer prefer to hire a culturally heterogeneous foreign worker over a culturally homogenous American worker for a high paying job?



The US government has filed a complaint against **Facebook** for discriminatory hiring practices. Interestingly, the hiring discrimination is alleged to be directed not against foreign workers; it is alleged to be directed against the US workers.

The premise of the complaint and its content create both a sociological question and an object lesson in appropriate immigration compliance practices for all companies doing business in the United States.

The complaint alleges that Facebook does not recruit amongst the US workforce with the degree of diligence for job openings that are the basis for green cards, as it does for its routine positions. In other words, Facebook tries to tilt the hiring ground in favour of its foreign employees so that they can obtain their green cards.

US immigration laws require that foreign employees can get their green cards under the implicated category (PERM) only if there are no US workers qualified for the offered positions. Thus, employers like Facebook must perform a test of the US labour market.

The labour market test is subject to excruciatingly detailed regulations. The employers must define their job requirements to clearly identify the minimum qualifications required to perform the green card job. Several types of advertisements must be placed in various media. The employers must carefully examine all resumes received to justify under the penalty of perjury that there are no US applicants ready, willing, and able to take the job that is being offered to the foreign worker. All US workers who appear to be qualified or could qualify for the job with reasonable on-the-job training must be considered. If a qualified US worker is found, the market test fails and so does the green card process.

The law does permit the labour market to be tested an unlimited number of times. There is no restriction in that respect.

In its complaint, the government claims that Facebook has a recruitment process for its normal jobs (other than those used for green cards) that gets them hundreds of resumes for each open position, whereas their labour market test barely ever nets a resume. This paucity of resumes is blamed upon a labour test that is conducted to reduce the number of resumes received. While Facebook's market test does not directly violate any regulations, the complaint alleges, it violates the duty of the employers to conduct all recruitment in good faith.

To further elaborate the job context, most of the foreign employees seeking green cards are likely holding H-1B visas while their green cards are being processed. It is also likely that Indian nationals form the bulk of the green card beneficiaries. The US government statistics show that Indians have routinely received over 40% of H-1B visas allocated globally.

In the complaint, there are some allusions against inappropriate H-1B hiring practices, which I think are without merit. H-1B hiring practices are restricted and scrutinized only for those employers who are heavily dependent upon H-1B visas and accordingly have a substantial number of foreign workers (exceeding 15% of their workforce).

Note that the complaint alleges that most of the green card jobs are highly remunerated (on an average \$150,000 per annum).

If the government's allegations are true, one must wonder, why does Facebook prefer to hire and retain foreign workers, a majority of whom are likely to be Indian citizens? Obviously, such a hiring bias could not be motivated by monetary gain or convenience. Hiring on and maintaining H-1B visas while the green card process is going on is expensive and highly inconvenient in several ways. For instance, US employers cannot freely change the geographical placement of H-1B workers, their job duties, or the terms of their employment.

I do not have any clear answers, but I do have several clear questions. Are the Indian workers better trained for these jobs than their American counterparts? Are they better workers? Are they more diligent? Are they more collegial and more amenable to supervisory instructions? Why would an employer prefer to hire a culturally heterogeneous foreign worker over a culturally homogenous American worker for a high paying job?

Reflexive anti-immigration sentiment presents a picture of highly qualified US workers unable to find employment. But then how may we understand the alleged preference of Facebook for foreign workers hired despite serious inconvenience and at considerable expense?

Maybe Occam's razor can cut through all these questions to help us arrive at a simple answer: qualified US workers are already employed; they are not seeking employment. If true, that leaves employers like Facebook in the unenviable position of having to justify their immigration practices, including recruitment, to an administration that is endemically suspicious of their motives and forever imposing innovative barriers in their path. This is a serious competitive disadvantage for US businesses.

All companies doing business in the US and involved with immigration compliance must glean caution from the Facebook complaint. The government can infer and/or selectively enforce regulatory requirements on the fly, a practice that is both legally questionable and practically toxic. Nevertheless, caveat emptor.

The author is Managing Attorney at Immigration.Com

(Disclaimer: The opinions expressed in this column are that of the writer. The facts and opinions expressed here do not reflect the views of www.economictimes.com.)

ith

C
E
A