
Hiring to Firing Podcast — Employing Foreign Talent: Visa Challenges and Compliance Insights, Featuring *The Proposal*

Hosts: Tracey Diamond and Evan Gibbs

Guests: Robert Lee

Tracey Diamond:

Our episode today is about employing workers from foreign countries. Evan, have you ever had any experience with, family members or anyone that you know that's come in on a foreign visa?

Evan Gibbs:

Yeah, a little bit. My sister-in-law is actually from China. She immigrated here a few years ago, married my brother and she's now a US citizen and her parents actually just came over. They got green cards on a, you know, family type visa and they just came here and it was a really long process.

I mean, it's taken years for folks to come over. So it's unlike a lot of the stuff we deal with, it's a very emotionally charged and very personal process, going through the immigration process to get to the US. So, that's a good segue to talk about today's topic, which is going to be business immigration, with our partner, Robert Lee.

Tracey Diamond:

Okay. Take a listen.

[INTRO]

Tracey Diamond:

Welcome to *Hiring to Firing*, the podcast. I'm Tracey Diamond, Labor and Employment Attorney at Troutman Pepper, and I'm here with my cohost, Evan Gibbs. Together, we tackle all employment and HR issues from *Hiring to Firing*.

Today, we've invited, as a special guest, Robert Lee, who's our partner at Troutman Pepper and leads up Troutman's immigration practice. Nice to see you, Robert.

Robert Lee:

Hey, thanks for having me. Good to see you all.

Tracey Diamond:

So, Robert, why don't you tell us a bit about the practice of immigration at Troutman Pepper and how you came to be an immigration lawyer?

Robert Lee:

The immigration practice here at Troutman is really focused on business immigration. So, US companies who need high-level managers and executives or specialized technicians and engineers, that's the bulk of what our practices and we have a very small part that's dedicated of family immigration. Spouses or children or parents seeking to bring their relatives into the US. But the vast majority is for business immigration.

Tracey Diamond:

I know our practices have a lot of synergies in that we come to you and your associate, Yane McKenzie, often with questions about immigration, both in the context of corporate deal work, and also just sort of general immigration questions that our HR clients often have. I thought it would be great to have you on today because we really haven't done a segment until now about employing workers from other countries.

So, that's our topic for today, the legal compliance issues associated with foreign workers, and to kick off this discussion, we're going to play a few clips from the 2009 movie. We're reaching kind of far back tonight, and it's called *The Proposal* starring Sandra Bullock and Ryan Reynolds. Bullock plays Margaret Tate, a Canadian who works in the New York City, a book publishing company as its Editor in Chief. In this first clip, Margaret learns from her boss that her visa renewal application has been denied. Let's take a listen.

[BEGIN CLIP]

Chairman Bergen:

Margaret, do you remember when we agreed that you wouldn't go to the Frankfurt Book Fair because you weren't allowed out of the country while your visa application was being processed?

Margaret:

Yes, I do.

Chairman Bergen:

And you went to Frankfurt.

Margaret:

Yes, I did. We were going to lose DeLillo to a Viking, so I really didn't have a choice, did I?

Chairman Bergen:

Well, it seems that the United States government doesn't care much who publishes Don DeLillo.

Malloy:

We, uh, just spoke to your immigration attorney.

Margaret:

Great. So, so we're all good? Everything good?

Chairman Bergen:

Margaret, your visa application has been denied.

Margaret:

That, that...

Chairman Bergen:

And you are being deported.

Margaret:

Deported?

Chairman Bergen:

And apparently there was also some paperwork that you didn't fill out in time.

Margaret:

Come on. Come on. It's not like I'm even an immigrant. I'm from Canada, for Christ's sake. There's gotta be, there's gotta be something we can do.

Malloy:

We can reapply, but unfortunately you have to leave the country for at least a year.

Margaret:

Okay. Okay, well that's, that's not ideal. But, uh, uh, I can, uh, I can manage everything from Toronto with videoconferencing and internet. I can, I can...

Malloy:

Unfortunately, Margaret, if you're deported, you can't work for an American company.

Chairman Bergen:

Until this is resolved, I'm going to turn operations over to Bob Spalding.

Margaret:

Bob Spalding? The guy I just fired?

Chairman Bergen:

We need an editor in chief. He's the only person in the building who has enough experience.

Margaret:

You cannot be serious. I beg of you....

Chairman Bergen:

Margaret, we are desperate to have you stay. If there was any way, any way at all, that we could make this thing work, we'd be doing it.

[KNOCKING]

Margaret:

There is no way. I am, I am begging you.

Chairman Bergen:

No, Margaret, excuse me, we're in a meeting.

[END CLIP]

Evan Gibbs:

In real life companies often hire workers who aren't US citizens, particularly in specialized roles, such as management and tech. I think you were talking a little bit about that, Robert. So, tell us what types of visas are necessary to bring a worker from outside the country to work in the US?

Robert Lee:

Sure. Well, there's the basis, or the baseline for this part of the discussion is that an individual, a foreign national, can't just get their own work visa to come in and find a job later. Some countries offer that, but the US does not. The US requires, basically, requires a US employer to sponsor an individual for a particular type of visa, a work-authorized visa. The more common ones, there's an alphabet soup of visas, of course. So, the more common ones are the H-1B, which is for professionals with bachelor's degrees in a particular field. The L1, which is for intercompany transfer use. So, multinational companies who needed, as I mentioned earlier, a manager to oversee a certain part of their US operations. Or if someone has a rare technical background, and they need them in the US to do work here.

There's also the O-1, which is for extraordinary-ability workers. So, in science or business or the arts, for individuals who have reached the very top of their field. Then there's also treaty-based visas for the E-1 and the E-2 for nationals of a particular country, who are coming in to work for companies that have either invested in the US, or do a requisite level of trade with the US. Then, there's other treaty-based visas, such as the TN which is only for Canadian and Mexican nationals, and this was part of NAFTA, which is now the USMCA.

These are all very – they each have their own specific rules or requirements. So, the trick certainly is finding – for our clients, they'll have a particular need, and so we have to figure out how that need can be met through the existing rules for one of these visa classifications.

Tracey Diamond:

I have to say, I already have a whole bunch of questions that are swimming in my head. But first, I wanted to just ask for a point of clarification. The L1 visa, when you talked about sort of intra-company transfers, and I'm not sure if I got that language correct.

Robert Lee:

That's right. Yes.

Tracey Diamond:

Does that apply when it's a parent and a subsidiary? Or does it have to be the same company that happens to have offices in a foreign country and then also has offices here in the US?

Robert Lee:

No. The regulations are fairly broad with respect to the type of corporate relationship. It could be the qualifying relationships as listed in the regulations are parent's subsidiary, affiliates with a common parent in a branch office. So, if you have – so a parent-subsubsidiary, either the foreign company or the US company can be the parent, either can be the subsidiary. When you're calculating or when you're evaluating those qualifying relationships, then the key question is ownership and control.

Obviously, with large companies that have a complicated ownership structure, you could have a subsidiary, a US company that has a joint venture or subsidiary in Germany, but they only own say, 3% of the German company. Unless there's some other agreement that gives the US entity control over that 3% subsidiary, then they're not going to qualify under these rules. So, there has to be that common ownership and control component.

Tracey Diamond:

Interesting, because for other reasons, I could see where the companies would want to keep themselves separate, so they avoid some of the joint employment rules, whereas for visa purposes, it looks like they want to keep themselves together as possible.

Robert Lee:

Yes. That's definitely true. So then, they're competing interests, on one side of the table versus the other. Definitely.

Evan Gibbs:

I'm really curious about the, what was it? The extraordinary ability visa? I'm wondering, how does somebody qualify for that? I mean, do they have to, I don't know, be some kind of, I don't know, savant or something like that? I'm just curious what the qualifications are for that?

Tracey Diamond:

The superstar visa.

Robert Lee:

I mean, that's a very apt way to put it. What we've seen is in the regulations list, like 10 types of evidence, and the foreign national has to satisfy at least three of them. Or in the alternative, I have not had any of these types of cases yet. But if they have a Nobel Prize, then that's pretty much, I would think that it's automatic.

Evan Gibbs:

I would hope so.

Tracey Diamond:

Yes, seriously. The Einstein visa.

Evan Gibbs:

"I was a low rate. I didn't win. Sorry."

Robert Lee:

"Sorry we don't want you here. Use your genius elsewhere, because we don't want that." If they don't have a Nobel Prize, or some other internationally recognized award, then you look at these 10 criteria. It can be, if they've been, they have a track record of publications in the research context. If there is press, in general press, or in the industry press about them and their contributions to the field. If they've had a leading role in an organization, a respected organization in the field. If they've commanded a high salary is one of the criteria as well.

So, we've done numerous O-1 visas where it's in the research field. So, they're folks who are researching particular material applications. They have a lengthy publication history. Then, they have colleagues or other laureates, if you will, in the industry, recognizing or telling the story, if you will, about their contributions to the field. It can be very straightforward for individuals who checked all those boxes, and those can be proved very quickly. You have other folks who are less so, where it's the equivalent of my mom said I was really smart. I got my 10th grade paper, got an A plus. It's like, "No."

Tracey Diamond:

Ribbon for participation.

Robert Lee:

Right. Exactly. That's not quite what they're looking for. Those cases are fairly, I don't know if enjoyable is the right term to work on, because you have to dig deep into their industry and what their accomplishments are. If you have someone who's a world-renowned photographer, and so we dug into who they've worked with, and their awards, and it was a fascinating case to work on. Even though it might not be obvious that this person has the extraordinary ability, when you dig into the evidence, you find that it actually does meet all the requirements. So, you give it a shot and it works out.

Evan Gibbs:

I think this question probably varies by visa type. But how long does the process typically take?

Robert Lee:

So, once the documents, once the petition is filed with immigration, then for most of these, if not all of them, you can pay an extra filing fee to have it processed anywhere from – if it is non-immigrant visas, then it's within 15 business days. That the additional filing fee is \$2,805 as of now.

Tracey Diamond:

And \$5, it's the \$5 that are going to say, have employers say, "Forget it."

Robert Lee:

Exactly. I think that they landed on that. It used to be 2,500 until recently, and then I think they did an inflation adjustment. So, that's where they got that extra \$305. In all seriousness, the filing fees can add up and it can often be a barrier to getting either that premium processing done. If you don't, if you can't come up with that 2,805, then these things can sometimes take anywhere from three, six, seven, eight, nine months. So, the clients who can afford it, it's obviously a tremendous help to them to get these individuals into the US.

Evan Gibbs:

How long do these types of visas as you discussed? I'm assuming they're all temporary, and I'm curious how long they last? How long does it grant the person the right to work in the US?

Robert Lee:

Yes. For most of these, when we're talking about that age, and now the TN and the O-1, those are all, for the most part, you have three years of initial eligibility, and then those can be

renewed depending on the classification. So, for the TNs, there's no ceiling as to how long somebody can – how many times somebody can renew that visa. But they do have to show the intent to return abroad. So, we've had clients who have held a TN for 12, 15 years, but they're still able to show that their family is still in Canada, or they maintain the residence, and own a separate business in Mexico or whatever the situation is.

For the H-1B, again, there's an initial three-year eligibility, and then they can renew it for another three years, unless if their employer or they get sponsored for a green card, for employment-based permanent residents, and if they are able to get to a certain point before the end of that six years of initial eligibility, then they can renew their H1 status indefinitely.

The times vary for the L-1. The managers, they get ultimately, seven years of additional eligibility. Three years initially, then two-year extensions. And for the specialized knowledge workers under the L-1, B classification, then they get one two-year extension or five years total.

Tracey Diamond:

I often hear about employers having employees come in on an H-1B. Actually, my initial question is, is there one visa that you tend to see more of with your typical non-Nobel Prize winner employee versus another? Or do they really run the gamut of sort of the major four, it sounds like? The big four? H-1B, L-1, O-1, and TN?

Robert Lee:

Yes. So. the H-1 is going to be the most the highest volume, I guess.

Tracey Diamond:

That's what I figured.

Robert Lee:

Yes. It's limited to the sense that the government only gives out a limited number of new H1s every year. So, once somebody has an H1, then they can transfer that to other employers. The other employer has to file the petition to transfer and all that, but they only give out a limited number of H1s every year. This year, I think, they did the lottery for it. There was something like 400,000 registrants for the H1 lottery, for a total of 85,000 available visas. Last year was upwards of I think, 700,000 or 800,000 submissions. They changed the rules a bit to combat fraud, and there were certainly some issues with respect to how the lottery was previously done. I think this year, these are definitely improvements, these changes for the better. But it's still, the odds are still incredibly slim for these folks.

Tracey Diamond:

That's crazy. I often hear about you're having a play here on an H-1B and the employer decides they want to terminate. How does that impact the employee with H-1B visa?

Robert Lee:

Yes, that's a great question. So, the employee's immigration status, their ability to lawfully remain in the US is tied to that employment for someone who's an H-1B status. So, if they are terminated, or their employment ends, and some folks quit, or resign without understanding the impact on their immigration status. So, as of the date that they are let go or as of the date their employment ends, then technically speaking, they're no longer maintaining valid H-1 stops.

There was a recent change in the regulations. I say recent, but it's gosh, six or seven years now. Where the regulations codified an eligibility for a 60-day grace period after that termination. So, for someone in H-1, if they are laid off, say, April 1st, then they have the next 60 days to either find a new sponsor who can file the H-1 transfer for them, or file another change of status to change status to tourist visa, or try and become a student. But if that paperwork if that application or that transfer petition is filed within those 60 days, then the fact that they lost their job previously, that doesn't count against them. But if it's 65 days, or any time after 60 days, they can't rely on that the being codified 60-day grace period. But depending on the circumstances, they can still ask for discretionary approval of that. But it becomes a lot harder if they get beyond that 60 days.

Evan Gibbs:

This is a good segue to talk about the movie again. And in the movie, one of the reasons that Margaret's visa renewal application was denied was because she left the country to go on a business trip in Germany. In reality, Robert, are there any limitations on an individual's ability to travel outside of the country if they're here on a work visa?

Robert Lee:

Yes. In limited circumstances, I think that there's no probably a good time to talk about the distinction between visa and status. So, in the movie, when they talk about her extension, or her visa application pending, and then having been denied, then that's not really – the term was being used a little loosely. In order for – the visa is the attachment in the passport that allows someone to enter the US. Then once they are in the US, then they have that visa status.

So ordinarily, when somebody comes in on an H-1, for example, then there would be an H-1B stamp in their passport to say that they can come in an H-1 status. If they changed their status in the US, or if their extension is pending, then that's when the travel restrictions come into play. Because if you have someone, for example, if someone graduates as an F-1 student, they are selected in the H-1 lottery, and then their employer files the change of status to H-1. If they leave, all that change status is pending, then that request to change status is abandoned, essentially. So, they might be able to come back in on the F-1 visa, reenter the US in F-1. But their H-1 – their status won't change automatically when that H-1 petition gets approved.

Those are the types of restrictions, and I was trying to figure out in the context of the movie, like why her leaving the US would have that impact, especially if she was readmitted anyway. The only thing that I could think of is, she held a status like an H-1, for example. They filed to extend her H-1 status. In the meantime, her underlying H-1 status had expired. So, using that same example, let's say, if her H-1 status expired on April 1st, and they filed her extension prior to April 1st, then that's fine. It doesn't have to be approved before her status expires.

So, having that pending extension, allows her to remain in the US and continue working. But if she departs the US after her underlying status expired, even if the extension is still pending, when she leaves, then that preservation of her authorized stay and work authorization, that goes away. If she had departed the US while that extension was pending, and ordinarily, if she, as a Canadian, she's not required to actually have a visa stamp in their passport. So, in the context of the movie, again, I think she went to Frankfurt, and when she came back in, she just showed her Canadian passport, and she was admitted as a tourist or as a visitor. When that happened, then once she went back to her office, or when she started working again, then she

was violating her immigration status because she was now a visitor and not an H-1B visa holder.

Tracey Diamond:

I love Robert, that you've given that, that much thought. I really think that the reason why they said she's no longer legal in the US because of Frankfurt, was just sort of a construct so that she could have a relationship with Ryan Reynolds.

Robert Lee:

Yes. I'm pretty sure I put it in more thought than –

Tracey Diamond:

In the movie, Margaret attempts to solve her visa problem by blackmailing her assistant played by Ryan Reynolds into marrying her. That leads to this big exotic trip to Alaska where Ryan Reynolds' family lives and a potential wedding, and then she kind of comes clean in the end, and they all live happily ever after. When Ryan Reynolds says, "Yes, I will marry you because I want to date you." So, let's listen to a clip.

[BEGIN CLIP]

CIS Officer:

Let me explain to you the process that's about to unfold. Step one will be a scheduled interview. I'll put you each in a room and I'll ask you every little question that a real couple would know about each other.

Step two. I dig deeper. I look at your phone records. I talk to your neighbors. I interview your co-workers.

If your answers don't match up at every point, you will be deported indefinitely. And you, young man, will have committed a felony punishable by a fine of \$250,000 and a stay of five years in federal prison.

So, Andrew, you wanna talk to me?

[END CLIP]

Tracey Diamond:

So, in real life, what are the rules on marriage and citizenship in the US?

Robert Lee:

In real life, don't let you storm into the USCIS building and touch those officers. So, the main thing, I think, in terms of a marriage-based filing is that the marriage has to be "bona fide", and that's defined as it wasn't entered into get around the immigration regulations. I mean, the movie is absolutely right in terms of like the harsh penalties for immigration fraud. So, the process works is that they will first have to get married, and then the US citizen spouse would file an immigrant petition for, in this case, for his wife. That process, it's been taking a while now. But it's certainly not immediate. It can take upwards of a year, perhaps. When you file that petition, then you include the marriage certificate, of course, and the evidence of the bona fides of the marriage. They're like, what we include are copies of the driver's licenses to show that you live

at the same address, whether it's a lease or a mortgage, that you share bank accounts and credit cards. So, you're listing each other as the beneficiary of your life insurance, or you're all on the same insurance. You have children together. You're both listed on the birth certificates.

All those things are what the government looks at when evaluating a marriage-based petition. Pictures from the weddings, knowing about things like that are included. Here's the itineraries, the five trips we took together when we traveled the world or what have you. So, there isn't an immediate benefit, just by getting married. She certainly wouldn't be able to immediately start working again. It doesn't fix all those problems. She would still need to wait for the company to be protected. Getting back to the, I know, and she couldn't just say, "Hey, I'm married to a US citizen now. Give me my job back." They would still need to go through the I-9 and all that to reverify here.

It can take quite a while. But those are the main concerns. To the movie's credit, I guess, if the officer does suspect fraud, then they can have those separate interviews and asking the same questions or ask different questions. What was the last time your parents visited? What's your brother's middle name or things like that, that they can ask about.

Tracey Diamond:

Or fly to Sitka, Alaska and make sure you there for the wedding.

Robert Lee:

I don't think that they do that.

Tracey Diamond:

That would be a little bit of a stretch of government monies.

Evan Gibbs:

What are the consequences, for an employer, for a company, if they employ someone illegally?

Robert Lee:

If it's an innocent mistake, for example, if they – it can vary, basically. From a small, relatively small 100, a few \$100 fine, up to if there's a pattern of practice of knowingly employing unauthorized workers, then that can be thousands of dollars in fines and potential criminal liability in jail for the employees of the company that are running the scheme, so to speak.

I think that the circumstances of it to be pretty egregious, which in order to lead to the jail time. But it certainly is possible. It certainly can and does happen. So, I'll leave it at that.

Tracey Diamond:

Another aspect of workplace immigration law, I know that you deal with a lot, Robert, is I-9 compliance and I know this comes up in the context of advice and counseling, and also in the context of corporate deals. Are there any particular issues that employers should be looking out for in making sure that their I-9 process is compliant?

Robert Lee:

Yes. So, the baseline concerns about the I-9. It's basically a two-page form now. But the guidebook, what the employers need to know, is in what's called the ML-274 Handbook, and

that's 150 pages long. It's not as simple as the form itself would indicate. The main concern for I-9 compliance, the first thing is the timing, because you can't fix it if it's not done timely. If the employee has to complete their section on the first day, at the time of hire, by the time they start working for pay, and then the employer has to complete their portion to review the documentation within three business days of the date the employment begins. If it happens on the fourth day, that's too bad. You kind of have to accept that. You can't really fix that. If there's a date that was missed, or an address was misspelled or something like that, then those can be corrected. But the fact that it was completed late, that can't be –

Tracey Diamond:

You can't go back in time. You can only go forward. You can't go backwards.

Robert Lee:

That's a different movie. Yes, exactly. Another concern is employers getting their arms around the remote worker circumstances. So, obviously, after we left the pandemic, we realized that people can work productively remotely, then you might have a business that hire someone 10 states away. During the pandemic, there were some accommodations made for the online verification. But now, those went away unless you're registered with the verifier, which is a separate thing. But for the purposes of this discussion, if you're a company that hires a remote worker, you still have to have those, you still have to meet those timeline requirements. So, what the guidance suggests is that only if they're working remotely from their parent's house 10 states away, then authorize one of their parents to review their documents. It doesn't have to be an employee of the company. There has to be somebody authorized, a competent adult, authorized to review the document. That's a good way. It can be a college roommate. It could be the barista where they're working at the coffee shop, whatever the case may be, as long it's a competent adult that they can physically review the hard copies of the worker's employment authorization paperwork.

Tracey Diamond:

I would just add to that, that employers should be careful not to go dig too deep, right? They should be looking to make sure it's reasonable that the documents look reasonably legitimate, but they shouldn't be doing an independent investigation, or they may wind up with a National Origin discrimination lawsuit.

Robert Lee:

Yes, that's absolutely right. There's certainly that concern when they start asking more questions. If they – employment authorization card, well, you said you're not a citizen, we need to see your green card. It's not required. It's not required to have a green card to work. So, when the employer start unnecessarily asking those questions or requiring specific forms of documentation, that's a recipe for trouble. Just stick to, here's what's required. They have this document or they don't know. If it's reasonably related to the worker, then that's all the employer really needs to do.

Tracey Diamond:

Well, I think this is a really good stopping place for us. I want to thank you so much for joining us today, Robert. This was chock-full of information. I know that it'll be very helpful to our clients out there. Thank you all for listening. Don't forget to check out our blog, [HiringToFiring.Law](#) and our

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