

Immigration Document or Contract?

Companies who employ foreign nationals must be mindful of the overlap between immigration law and employment law. The company should consider whether it might be con-

In employment law, the concept of "employment at will" means an employer may terminate a person's employment at any time and for any reason except unlawful reasons such as age, sex, and race. As a

and the employee can sign an express contract stating that the employment will continue for a specific length of time. Yet even when there is not an express contract, a court may find an "implied" contract for a specific period of time based upon other evidence, including statements in a company handbook, the customs of the business, written statements from the employer, or verbal statements between the company and the employee.

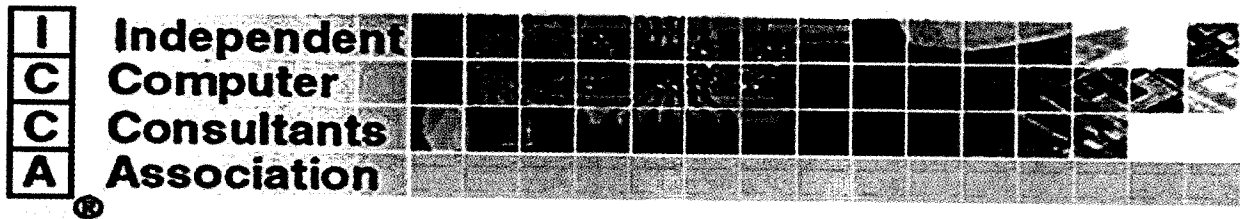
There have been several cases in which foreign nationals have sued previous employers under the claim that the foreign national had an implied contract that the employment would continue for a specific period of time. The foreign nationals base their claims upon statements the company includes in immigration petitions filed with the INS on behalf



"In some cases an employee who is discharged before the end of the three years may argue that his employment was expected to last for the entire length of the visa."

tractually obligated to employ a foreign national for a specific period of time based upon statements made in immigration documents filed on behalf of the foreign national.

general rule, each person is employed at the will of the company unless the company and the employee agree that the employment will continue for a specific period of time. Obviously, the company

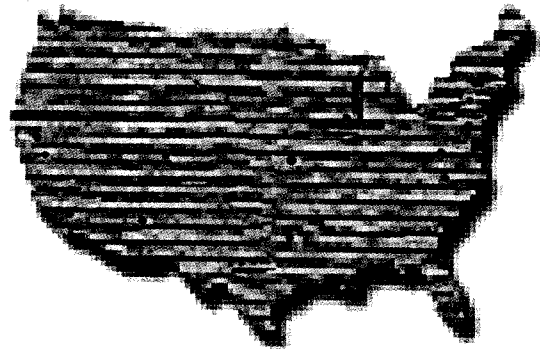


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of the foreign national. The issue arises both in the context of temporary visas and green cards.

In the immigration arena, an employment visa is granted for a limited amount of time. For example, the H-1B visa category—the most widely used visa in the professional context for computer professionals, engineers, consultants, and other persons where the minimum requirement for the job is at least a bachelor's degree—is valid for an initial period of three years. Because it is costly for companies to file for multiple extensions of employment for a single employee, most companies typically request the entire three years for the visa even when it is likely that the employment could be for a shorter time. However, in some cases an employee who is discharged before the end of the three years may argue that his employment was expected to last for the entire length of the visa. Likewise, an employee who is discharged before his green card is approved may argue that his employment was expected to last at least until his green card was approved.

Fortunately for companies, courts have refused to rule in favor of a discharged employee based solely upon statements an employer makes in immigration documents, regardless of whether those statements are made in a petition for a temporary visa or in a petition for a green card. In fact, employers are not contractually bound to employ a foreign national for a particular period of time unless there is additional evidence showing that the employer and the employee intended the employment to continue for a specified time.

While courts have refused to find an implied contract based solely upon statements in immigration filings, it is still prudent for companies to take some proactive steps to ensure the company does not create an implied contract for employment:

- Add a statement to immigration filings that the employment is "employment at will" and can be terminated by either party.
- Add a disclaimer in the company handbook stating that all employees are employed at will unless there is a signed contract signed by both the employer and the employee that explicitly states that employment is for a specific period of time.
- Obtain from the foreign national a signed acknowledgement that either party can terminate the employment at anytime with reasonable notice.

There is another contractual issue that companies need to consider when filing a green card application on behalf of a foreign national: the company needs to be careful about making any promises to an employee about the green card. For example, one foreign national filed a lawsuit against his previous employer when his green card application was denied because his employment ended before the green card application was processed. The foreign national claimed that the company's delay in filing the green card prevented him from receiving the green card approval. The company allegedly promised to start the green card for the foreign national after he completed his first 90 days of employment, yet didn't file the application until after the employee had worked for more than a year. Thus, as foreign nationals become more litigious, companies should be more mindful of employment law issues when employing foreign nationals. ■

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