

## New immigration laws affect US biotechnology

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**A host of new agencies, increased processing times and stricter enforcement of current regulations may hamper the hiring of foreign workers.**

What if the perfect candidate for your US biotechnology company's open research position is a foreign national? She may be graduating from a university in the United States, be employed by another company, or perhaps be living abroad and working in a field of interest. Under any of these scenarios, you must interact with the newly established US Bureau of Citizenship & Immigration Services (BCIS), and you must understand the different ways a foreign national can legally work in the United States on a temporary basis (pursuant to a nonimmigrant visa) or on a long-term basis (as an immigrant or permanent resident).

In March 2003, the Immigration and Naturalization Service (INS) was dissolved, and three new agencies were created under the auspices of the Homeland Security Department: BCIS, which provides most of the adjudication benefits previously provided by INS; the Bureau of Immigration & Customs Enforcement, which handles deportation and investigations; and the Bureau of Customs & Border Protection, which operates the Border Patrol. It is too early to tell how efficiently these agencies will work together, but it is very important that your foreign national staff be prepared to encounter substantial delays in visa processing overseas due to increased security concerns, and probably more border difficulties with respect to entry as well. In addition, any of your foreign national staff who were born in or are nationals of a number of Muslim countries have significant registration requirements with which they must comply. Since new regulations are appearing on a frequent basis, it is extremely important to make sure every member of your foreign staff stays in correct immigration status, and under-

stands completely about potential overseas delays in visa processing.

Since biotechnology is an international industry, the United States will continue to need significant foreign talent and expertise in almost all fields of research. While biotech employers can certainly obtain foreign talent under current visa regulations, it is increasingly critical to keep abreast of changes in immigration rules and regulations, and to be sure that your congressional representatives are well aware of the positive benefits of employment-related immigration.

### Temporary working visas

There are a number of nonimmigrant working visa categories that biotech employers can use when hiring foreign nationals. In choosing the appropriate visa category, you must consider the employer's circumstances and the foreign national's background, nationality and long-term plans.

**H-1B visas.** The H-1B visa category is available for work in positions that typically require at least a bachelor's degree (or its equivalent) in the occupational specialty. H-1B visas are issued initially for up to three years, with a three-year extension possible, for a maximum allowable six years. These visa applications are filed in regional service centers throughout the United States. Currently it takes three to four months to get an H-1B visa approved; however an additional 'premium processing' fee of \$1,000 can be paid to BCIS to obtain an adjudication within two business weeks. These visas are employer-specific, so if the prospective hire is currently working for another US company pursuant to H-1B authorization, you still must file an H-1B application for your company before she can start working for you. Those foreign nationals who are currently in valid H-1B status are allowed to 'port' to a new employer, which allows the H-1B worker to commence employment for the new employer at the time BCIS receives the new employer's

H-1B application—the new employer does not have to wait for visa approval before the H-1B worker can begin working. While this is an extremely useful category in the biotech world, be aware that the current allotment of 195,000 new H-1B visas per year will drop to 65,000 upon the start of the new 'visa year' in October 2003. Unless Congress acts to raise this cap, it is likely that H-1B visas will only be available for a portion of this coming visa year.

Any employer wishing to sponsor an H-1B nonimmigrant must file a labor condition application with the US Department of Labor for the H-1B position, certifying that the wage to be paid is the greater of the actual wage for the occupation at the place of employment or the 'prevailing wage.' The federal Office of Employment Security salary survey information is a 'safe harbor' for the employer in terms of an acceptable prevailing wage calculation. The company must also post notice at its place of business that it is filing for an H-1B visa. The representations of your company can be challenged by any interested party, and if it is found to have willfully misrepresented any factual aspect of the filing, the company faces civil fines, liability for back wages and other penalties including prohibitions against hiring new H-1B workers for up to one year.

**TN visas.** Certain Canadian and Mexican nationals can enter the United States to work on a year-by-year basis under the Treaty North American Free Trade Agreement (NAFTA; TN) category. For Canadians, this is somewhat simpler than using the H-1B category, as the application is presented to the BCIS at a port of entry and is adjudicated the same day. Mexican nationals must file through the appropriate BCIS service center. The TN visa category can only be used for specific positions identified in a schedule found in Appendix 1603.D.1 of NAFTA. Of specific interest to the biotech industry are the following professional areas: scientist (including biochemist, biologist, chemist, geneticist, pharmacologist), medical

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laboratory technologist, scientific technician, pharmacist and physician (research). Similar to the H-1B visa category, this category is employer-specific, in that the Canadian or Mexican national may work only for the sponsoring employer and must obtain new TN authorization before transferring to a new employer. The application for TN status typically includes documents proving the necessary degree background, a written offer of employment from the US employer, documentation of Canadian or Mexican citizenship and a filing fee. TN status can be renewed indefinitely on a year-by-year basis by submitting new petitions at the border or through a BCIS service center. Nonetheless, since the applicant must have 'nonimmigrant intent' to qualify under this category, it is often difficult to renew TN authorization for longer than four or five years, and BCIS service centers have started to deny TN extensions filed in the United States if an immigrant visa petition has also been filed on behalf of the applicant.

**L-1 visas.** For those biotech companies who have parent or subsidiary operations in other countries, the L-1 visa category allows certain personnel (executives, managers and employees with specialized knowledge) to be transferred temporarily to work for the US parent, branch, subsidiary or affiliate of the foreign organization. To qualify, the employee must have worked for the foreign company for at least one of the immediately preceding three years in an executive, managerial or 'specialized knowledge' capacity. Basic scientific staff can typically be transferred for up to five years as L-1B employees with specialized knowledge, although the BCIS is becoming extremely strict in its interpretation of this category. Managerial and executive staff can remain in L-1A status for up to seven years and receive an additional benefit of precertifying for permanent residency at a later time. Finally, spouses of L-1 visa holders may now apply for working authorization in the US, which is a significant benefit to working couples.

#### Long-term hiring

Bringing biotech staff into the US under any of the above options can typically be accomplished within a three- to four-month period; however, these categories only allow employment for a limited period of time. For long-term employment, your foreign national staff must be sponsored for immigrant visas, and must file for permanent residence, or 'green cards.' In total, this process can take well over three years to complete. Given current economic issues with corporate layoffs, mergers and the ebb and flow of funding in biotech, it is all too frequent that an employee cannot stay with a single employer

for this period of time. It is now possible for an employee to transfer his or her permanent residency application to a new employer after it has been pending with the BCIS for at least six months if the employee is working in the same or a similar occupational classification. The following immigrant categories are of special interest to the biotech community.

**Employment Category One.** This category allows certain managers and executives of multinational companies (including many personnel transferred to the US in the L-1A visa category) and foreign nationals of extraordinary ability to file for permanent residency without going through the labor certification process. In addition, if your company employs at least three individuals in full-time research positions and has achieved documented accomplishments in an academic field, you are entitled to file for immigrant visas under this category for your 'outstanding researcher' staff. An outstanding researcher must have at least three years of teaching or research experience (this can include teaching/research done while working on an advanced degree), and must demonstrate that he or she is recognized internationally by demonstrating two of six factors listed in the regulations. Simply possessing a minimum of two factors, however, may not be sufficient, as the BCIS is looking for quality over quantity in assessing the caliber of evidence submitted. Currently the BCIS is scrutinizing these types of petitions in great detail, requiring substantial documentation to satisfy these criteria.

**Employment Category Two.** This category can be used for professionals with advanced degrees and foreign nationals with 'exceptional abilities.' A bachelor's degree and five years of progressively sophisticated post-baccalaureate experience may be substituted for the advanced degree. A labor certification must generally be conducted for applicants in this category; however, if you can demonstrate that the scientific research work is in 'the national interest,' a labor certification will not be necessary. While national-interest waivers have traditionally been subject to a high percentage of denials by the BCIS, significant delays in labor certification processing have made this a necessary category to consider, particularly for those individuals conducting research in areas with a nationwide impact, such as cancer research and disease control.

**Employment Category Three.** Category Three filings for skilled staff in employment positions are used for those individuals that cannot qualify as 'outstanding researchers' or individuals of 'extraordinary ability.' You must obtain a labor certification from the US Department of Labor (DOL) prior to immi-

grant visa approval. You would typically use this category when sponsoring research staff who possess significant specialized skills that cannot easily be found in the US labor market.

#### The labor certification process

A labor certification application is conducted through the relevant state and federal departments of labor to demonstrate a lack of qualified US applicants for a particular job position. If your employee cannot precertify under Category One or through a national interest waiver, you must establish to the satisfaction of the DOL: (i) that you will pay the prevailing wage for the position; (ii) that there are insufficient US workers who are able, willing and qualified for the job; (iii) and that your job requirements are not unduly restrictive.

In most states, all recruitment is conducted by the employer before filing with the DOL, using those recruitment methods typically used in the employer's industry group. This is known as a 'reduction in recruitment' filing. Processing time varies dramatically by location, but generally takes well over two years to accomplish at a state level, and then goes to the federal DOL for review. DOL has further complicated matters with new memoranda that require the employer to demonstrate that there are no qualified US workers at the time of the DOL adjudication. This is often two years after the recruitment data was initially filed. In a poor economic climate, the DOL may require employers to re-advertise the job position, or to explain employer layoffs that have occurred since the initial filing. This is often an insurmountable task. With tremendous business dissatisfaction over the length and perceived unfairness of this process, the DOL has announced plans to implement a quicker form of certification in the fall of 2003, but proposed regulations have not yet been released.

#### Conclusions

Your company wants the best scientific talent available, and sometimes you must look outside the borders of the US to find that talent. This requires successful navigation of the US immigration system—a system continually affected by new regulations and dramatic changes in procedures. Delays in both nonimmigrant and immigrant visa adjudication are mounting; regulations are being changed and even current regulations are being interpreted more narrowly by the new BCIS; and new, more stringent security checks continue to be implemented. Current information is critical to your ability to hire foreign staff, as success often depends on selecting the most appropriate and advantageous visa category for both your short-term and long-term needs. ■