



U.S. & Global Enforcement of Immigration and Employment Laws

Best Practices for Indian Companies

By Angelo A. Paparelli

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About Angelo

- **Partner in prominent 750-lawyer firm, Seyfarth Shaw LLP (www.seyfarth.com), practicing all aspects of U.S. immigration law in Southern California and New York.**
- **Over 15 years experience representing major Indian and U.S. IT consulting companies in immigration matters.**
- **Named the world's leading corporate immigration lawyer (2009, 2006 & 2005, *International Who's Who of Business Lawyers*), and a "Star Individual" in immigration law (2011, *Chambers USA's* highest rating)**
- **Co-author of the *New York Law Journal's* "Immigration" column, co-editor of *The Immigration Compliance Book* (ILW, 2009), public policy blogger: (www.nationofimmigrants.com), and litigation expert witness.**





Today's Global Mobility Environment

- Persistent economic downturn
- Protection of local labor market
- Xenophobia on the rise
- Fears that good jobs are offshored





Today's Global Mobility Environment

- More restrictive laws and regulations
- Higher filing fees unrelated to visa benefits
- Closer scrutiny of visa applications
- Difficulties at ports of entry





Today's Global Mobility Environment

- Eligibility criteria are arbitrary/not transparent for visa renewals & work permit extensions
- More whistle-blowing by local workers
- Increased government audits, investigations & prosecutions & civil suits
- Significant negative media coverage, resulting damage to brand and market share & loss of “business express” privileges





Today's Global Mobility Environment

- International employment laws create added confusion
- Uncertainty over which country's laws apply to the employment relationship and deputation agreement
- Uncertainty of penalties, including back pay, reinstatement, and punitive damages
- Conflicts between compliance obligations under employment laws and immigration requirements





U.S. Immigration Challenges

- Lack of E-1, E-2 or E-3 or FTA treaty-based eligibility for Indian firms and citizens
- Adverse administrative case law involving Indian IT companies and citizens
- More demanding *de facto* work-visa eligibility standards required of Indian firms and individuals, especially in the IT and consulting industry





U.S. Immigration Challenges

- Intense interrogation by U.S. consular officers and border inspectors
- Attack on consulting industry business model, e.g., challenge to employer-employee relationship and duty to present long-term consulting contracts with customers
- Fundamental misunderstanding by immigration agencies of how global businesses operate today (but USCIS just announced Entrepreneurs in Residence program)





U.S. Immigration Challenges

- Journalists and bloggers do not understand immigration law and thus tend to sensationalize their reporting or spread misinformation
- Politicians pander to public fears and insecurities concerning the rising power of India and China
- Ethnic and racial bias, overt or subliminal, regrettably persists





U.S. Immigration Challenges

B-1 Visa

- Catch-all business category allowing for business activities and rendition of business services
- Permitted activities: Business meetings, business-entity formation, contract negotiations, research into customer requirements, investment, training, conference attendance, professional services (B-1 in lieu of H-1 [“BILOH”])





U.S. Immigration Challenges

B-1 in lieu of H-1 (“BILOH”) Requirements

Professional services allowed under if Indian citizen is **under control from India** and:

1. Receives no pay from a U.S. source;
2. *Bona fide* nonimmigrant (coming to U.S. for short time with a home and job in India);
3. Qualifies for H-1B status (holds a bachelor’s or higher degree with a major field of study related to work to be performed; and
4. Services are “necessary to the integrated international production, marketing, and service system of the [Indian] corporation . . . and [does] not involve the reassignment” of the worker to an employer in the United States.





U.S. Immigration Challenges

Prohibited Activities on a B-1 Visa

- No “stealth” business visitors who perform skilled or unskilled labor that would take away work from a U.S. citizen
- No “jumpstarting” by beginning a U.S. job before the work visa petition is approved and employment authorization is granted
- No receipt of salary or other remuneration from a U.S. entity, and no “volunteering” in return for some future quid pro quo, although reasonable expense reimbursement is allowed





U.S. Immigration Challenges

H-1B Visa for Specialty Occupation Workers

- Heavily regulated by Departments of State, Homeland Security, Labor and Justice
- Requires extraordinary compliance practices and paperwork
- Willful or reckless violations may trigger the “death penalty” – debarment from use of all employment-based practices – and back wages, a \$35,000 per employee “super-penalty” and other significant penalties and fines.





U.S. Immigration Challenges

H-1B Problem Areas

- **H-1B dependency: Affirmative recruitment and non-displacement (primary and secondary)**
- **No benching, posting at customer sites, required wage payment and benefits, non-displacement (primary only for non-dependent H-1B employers)**
- **Liquidated damages vs. penalties, return transportation, good faith termination & employer-employee relationship (Neufeld Memo)**
- **DOL (Wage & Hour Division), USCIS (Fraud Detection & National Security) and State Department (Diplomatic Security) investigations on the rise**





U.S. Immigration Challenges

L-1 Intracompany Transferee Visa

- Blanket L-1 visa applicants often rejected, and approved individual L-1 petitions often returned to USCIS
- L-1A managers/executives may not perform functions
- L-1B specialized knowledge & blanket L-1B specialized knowledge professionals very hard to prove
- USCIS (Fraud Detection & National Security) and State Department (Diplomatic Security) investigations on the rise





Global Mobility Best Practices

- Develop and publish a robust immigration and employment law compliance practices and a culture of compliance
- Present only clearly approvable immigration and visa requests
- Prepare all visa applicants thoroughly for consular and border interviews





Global Mobility Best Practices

- Manage client relations to assure immigration law compliance by customer and consultants

- Engage outside counsel to conduct comprehensive immigration and employment law compliance audit
 - Preserves attorney-client privilege
 - Assures impartiality
 - Provides good faith compliance defense or penalty mitigation

- Follow corrective recommendations of outside counsel





Global Mobility Best Practices

- Maintain current knowledge of changing immigration and employment law compliance requirements
 - e.g., **California SB 459, signed 9 Oct. 2011, effective 1 Jan. 2012, imposes steep penalties on employers who willfully misclassify employees as independent contractors,**
- Maintain good relations with government immigration and labor agencies and legislatures, visiting regularly on your firm's behalf or as part of trade or advocacy organizations
- Engage competent legal counsel for employment law and immigration law services (strategic advice and case submission).





Global Mobility Resources

H-1B Visa

- Immigration and Nationality Act (INA) § 212(n), 8 U.S.C. § 1182(n) (INA section concerning H-1B labor condition applications)
- 20 C.F.R. § 655.700-.855 (DOL H-1B LCA regulations)
- [DOL's enforcement data 2.0 Wage and Hour Compliance Action Data](http://ogesdw.dol.gov/raw_data_summary.php) (Listing H-1B violations from 10/01/2007 to 06/30/2011 by employer, state, fines, penalties and other data fields), http://ogesdw.dol.gov/raw_data_summary.php
- [DOL Office of Administrative Law Judges H-1B LCA Decisions](http://bit.ly/q9m8Bk) (1993-2011), <http://bit.ly/q9m8Bk>
- [Kutty v. DOL](http://bit.ly/q9m8Bk), Aug. 19, 2011, E.D. Tenn., Knoxville Div., <http://bit.ly/q9m8Bk>





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- Angelo A. Paparelli & Ted Chiappari, “[New USCIS Policy Clips Entrepreneurs, Consultants and Staffing Firms](http://bit.ly/tNmt15),” <http://bit.ly/tNmt15>, *New York Law Journal* (February, 2010)





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- Angelo A. Paparelli, Mareza Estevez & Peter Schiron, "[Global Mobility Management -- A Primer for Chief Legal Officers and HR Executives](http://bit.ly/rtMrks)," <http://bit.ly/rtMrks>, *Who's Who Legal*, September 30, 2011
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- Ted Chiappari & Angelo A. Paparelli, "[Professional Employer Organizations and Uncharted Immigration Risks](http://bit.ly/u37ql4)," <http://bit.ly/u37ql4>, *New York Law Journal* (December, 2010)
- Additional Resources: <http://bit.ly/q9m8Bk>





Questions





Thank You for Your Attention

Angelo A. Paparelli

**Partner, Immigration Group
Seyfarth Shaw LLP**

Web: www.Seyfarth.com/Immigration

Blog: www.NationOfImmigrators.com

U.S. Toll-Free: 877-860-3852

Outside U.S.: 213-270-9797

Email: apaparelli@seyfarth.com

