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POLICY PUZZLE

EMPLOYERS SEEK SOLUTIONS TO IMMIGRATION IMPASSE P 42

PERFECT STORM

Defense bar fears flood of false claims suits p 18

PROGRAM PIRATES

Unlicensed software leads to big penalties p 40

POL



ICY PUZZLE

EMPLOYERS SEEK SOLUTIONS TO IMMIGRATION IMPASSE.

By Mary Swanton



PHOTOGRAPHY BY CHRISTOPHER DANZIG



IT HAS BECOME AN ANNUAL RITE OF SPRING:

Thronged immigrants march through city streets across the U.S. on May 1, draped in flags and toting placards pleading for reform of the nation's immigration laws. They demand solutions for the estimated 12 million undocumented aliens already here and for those whose attempts to enter the country legally are frustrated by visa restraints.

More quietly but with equal urgency, business leaders seek similar changes. Some employers contend the U.S. is losing ground in scientific, engineering and technical fields because caps on H-1B visas keep them from hiring the best and the brightest from around the world. Others are alarmed by a recently announced government policy focusing immigration law enforcement on employers who hire illegal workers, concerned it will unfairly punish those whose violations are unwitting. And many worry about the fate of valued workers—some here for decades—who could be deported at any time.

President Obama has promised to push for immigration reform, but hasn't yet revealed what pieces of the puzzle he will try to put in place. And with the economy and health care reform taking priority, prospects for Congressional action remain uncertain.

"Most employers are trying to follow the laws, but the laws are confusing and there are gaps," says Elena Park, who heads the immigration practice at Cozen O'Connor. "We don't really know what is going to happen in Congress, so employers have to stay tuned, stay alert and try to stay in compliance."

HELP WANTED

Kurt Strack's Houston-based business, which develops advanced technologies for the oil industry, is growing—but not in the U.S. Due largely to difficulties obtaining visas for the highly specialized workforce he needs, Strack, president of KMS Technologies, established a subsidiary in Germany.

"I can't have a contract from an oil company and say, 'We can't do the work because I can't get the visas we need,'" he says. "They will just look at me and say, 'We'll get somebody else.' That's why we have a subsidiary in Germany—for the sole purpose of not having to deal with U.S. visa laws."

While the issue of immigration

reform often conjures up images of uneducated farm workers, a critical element of the debate for many companies centers on whether the U.S. should allow in more economists, computer programmers, physicians, engineers and mathematicians.

Strack searches universities around the world for top students in geophysics (see "Science Shortfall," p. 47). For example, he brought recent college graduates from South Africa and India into his company's facility in Germany. "We started in October, and they were both at work on the 4th of January," he says. "That would not have been possible in the United States." But he would have preferred to train the new recruits in Houston, where most of his training staff is based.

"It's a very difficult situation—most of our activities are in Houston, and we will not move our headquarters out of Houston," he says. "But we are moving more and more of our people outside the United States."

Homeward Bound

Strack is not alone in seeking foreign professionals for highly skilled positions. For the two years prior to 2009, the annual allotment of H-1B visas, restricted to applicants with at least a bachelor's degree, was exhausted within a few days of April 1, the first date on which they were available. When the number of applicants exceeds the quota of 85,000 H-1B visas, including 20,000 designated for foreign students who have completed advanced degrees at a U.S. university, U.S. Citizenship and Immigration Services (USCIS) holds a lottery. In 2008, companies applied for 163,000 H-1B visas. People whose educational or work visas were expiring who weren't picked in the lottery had to leave

the country.

"The stars of our universities in science, engineering and math are foreign students," says Judy Lee, a partner at Foster Quan. "We have an incredible talent pool, and employers need them." This is particularly true in fast-growing

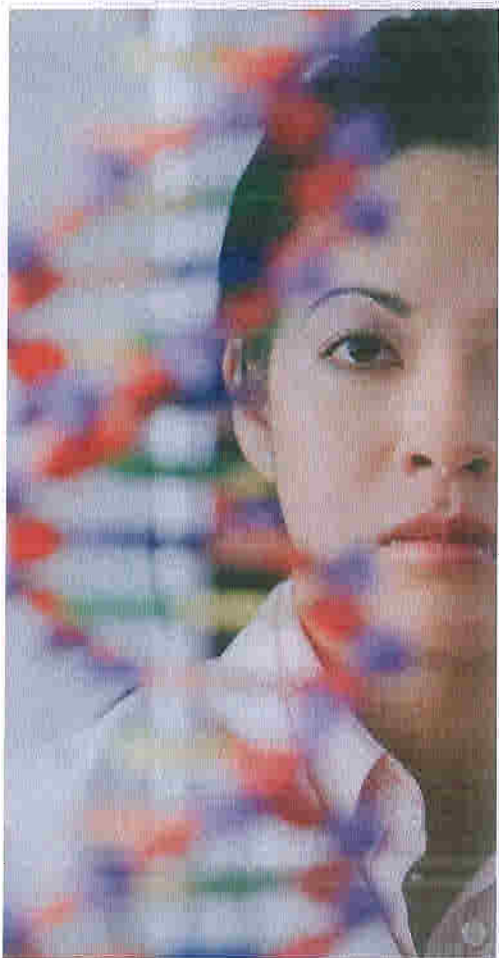
*U.S. COMPANIES
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niche fields such as nanotechnology, biomedical engineering and green energy, she adds.

This year, because of the economic downturn, H-1B visas were still available in June for the first time since the current cap was set in 2004. As of May 29, USCIS reported that employers had filed petitions for approximately 45,800 H-1B petitions, plus 20,000 for students with U.S.-earned advanced degrees.

Opponents say the H-1B visa program suppresses wages and denies jobs to qualified Americans. But proponents say not enough American students are pursuing scientific and engineering careers to meet the needs of U.S. companies. For example, a study by the National Center for Education Statistics found that in the computer and information sciences, foreign students earned 39 percent of all master's degrees and 61 percent of Ph.D.s granted by U.S. universities in 2005 and 2006.

"If the best and the brightest from around the world come to our universities, aren't these the people we want to



PHOTOGRAPHY BY JOSE LUIS PELAEZ INC./GETTY

keep here?" asks Mark Koestler, co-chair of the business immigration practice at Kramer, Levin, Naftalis and Frankel. "Otherwise you are sending them home after you have trained them."

Burdensome Requirements

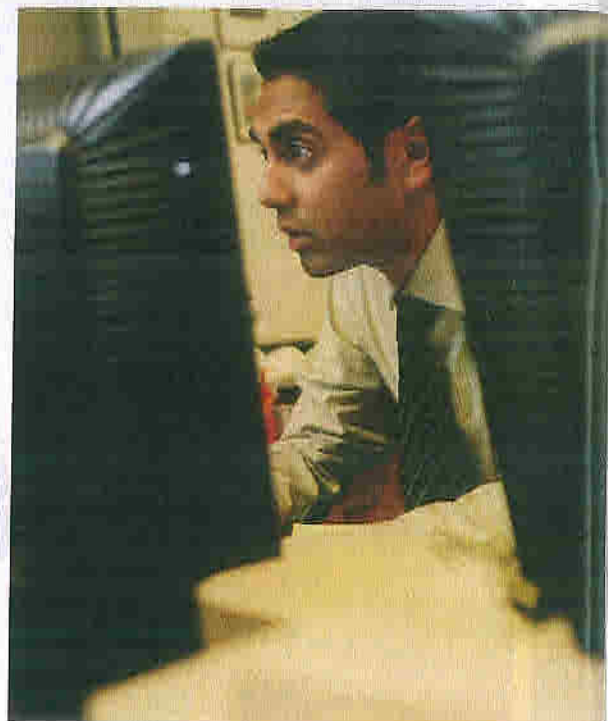
And if U.S. companies can't hire those foreign students when they graduate, or bring in specialists with the skill they need, they will, like Strack, move the jobs out of the country. For example, Microsoft (which declined a request for an interview for this story) opened a new software development center in the Vancouver, British Columbia, area in 2007 to attract leading software developers from around the world.

Microsoft General Counsel Brad Smith advocated in an April blog post for more H-1B visas. Despite the economic downturn, in order to remain globally competitive, "Microsoft and other U.S.

companies must be able to hire top talent wherever it is located," he wrote.

Some in Congress take the opposite view, pointing to the escalating U.S. unemployment rate as evidence that rather than expanding opportunities for foreign workers, the U.S. should be further restricting them. When Congress passed the TARP bailout plan for the financial services industry in February, it precluded firms receiving the government money from obtaining H-1B visas unless they can prove they tried to recruit American workers and that the foreigners aren't taking the jobs of U.S. citizens.

A bill pending in the Senate would extend similar H-1B restrictions to all companies. It would require employers seeking H-1Bs to first make a "good faith attempt" to recruit qualified U.S. workers and would prohibit them from replacing U.S. citizens with H-1B visa holders. Co-sponsors Sens. Chuck Grassley,



R-Iowa, and Dick Durbin, D-Ill., said in a statement that the bill is needed because current law allows companies to "legally discriminate against qualified Americans by firing them without cause and recruiting only H-1B guest-workers to replace them."

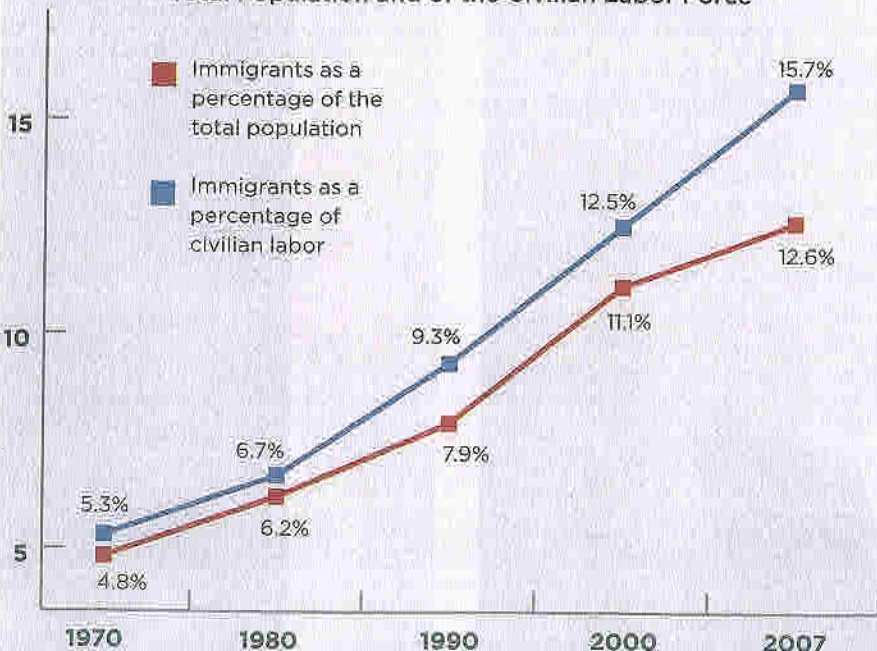
But Jackson Lewis partners Sean Hanagan and William Manning contend that most employers wouldn't invest the money and time to obtain H-1B visas if they could find the skilled workers they need at home.

"With government filing fees [\$2,320] and equal or greater legal costs, it is quite a commitment for the company," Hanagan says. "Most employers come to us for visa sponsorship help because they can't fill that professional position with a U.S. worker." As to the argument that H-1B workers lower wage levels, Manning adds that H-1B employers are required to pay the prevailing wage for that job in that location.

Manning points out that the H-1B visas are only good for three years, after which the employer can file for a three-year extension, incurring additional costs. Ensuring an indefinite stay means

PHOTOGRAPHY BY STEWART COHEN/PAM OSTROW/GETTY

Foreign-Born Immigrants as a Percentage of the Total Population and of the Civilian Labor Force



Source: Migration Policy Institute

gaining permanent residency, which can take five to six years for professional-level employees.

"It is very burdensome on the employer," Manning says. "It gums up the works."

Brain-Dead Policy

In fact, Ted Ruthizer, co-chair of the business immigration practice at Kramer Levin Naftalis & Frankel, contends that the complications of obtaining permanent residency illustrate why Grassley and Durbin's effort to require employers to show they tried to find American workers before applying for H-1Bs should be defeated.

The so-called labor certification process requires advertising both in Sunday newspapers and on the Internet, and then measuring to see if any American worker can be found who meets the minimum requirements. "The Labor Department has a tough time making these determinations," Ruthizer says. "Cases are pending there for many years." For example, the Labor Department might challenge whether a senior financial analyst needs a master's degree.

Beyond the bureaucracy and delays, "The whole notion of measuring a smart foreign national professional against the least qualified American worker is a very brain-dead type of policy," Ruthizer adds. "The H-1B was never intended to be premised on a showing that no U.S. worker was available. It was a way to have a meritocracy, where U.S. employers could hire people with the greatest skill set and the most talent."

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Tips to avoid
immigration
liability



PHOTO: JEFFREY M. COOPER/ISTOCKPHOTO.COM

SCIENCE SHORTFALL

Kurt Strack, president of KMS Technologies, travels the world seeking employees with the skills to develop new and innovative oil field technologies. This global search is necessary, he says, because the U.S. has fallen behind the rest of the world in training students in the sciences. In his quest to identify the best and the brightest geophysicists for his company, Strack, who has a Ph.D. in geophysics, teaches and advises graduate students in Thailand, Germany, China and India, as well as in Houston. In the past 15 years, he contends, the quality of the science students in the U.S. has sharply declined compared to the rest

of the world.

"I have no problem with students in India, Germany, Thailand—anywhere in the world they are better in the basic sciences [than they are in the U.S.]," he says. "This is a serious problem."

Strack sees visa limitations as a root cause of the educational decline. "We have had many years of bad visa policies, so the universities no longer have the quality of staff they used to have. So the rest of the world has better universities [that attract the best students]."

The problem is compounded by frustrations that foreign students often encounter in obtaining visas to study in

the U.S., he adds. "I sat next to a guy on the plane from China who was going to the University of Chicago for an MBA program," he says. "He was the only one out of 20 [Chinese applicants] who got a visa."

Strack, who was born in Germany and now holds dual German and U.S. citizenship, believes U.S. attitudes toward immigration in recent years have created an inflexibility that is dangerous for the country's future.

"The U.S. is a creative place because it is a melting pot," he says. "If the melting pot disappears, the creativity will disappear."