Hiring Individuals Not Authorized to Work in U.S.: Immigration Petitions

NMSU’s job postings always state: “Offer of employment is contingent upon verification of individual’s eligibility for employment in the United States.” While it is illegal to discriminate against individuals who are not citizens but do have proper work authorization, there is nothing illegal – in fact, employers are required to treat non-eligible applicants differently. When the applicant selected to receive an offer for a position is determined to not have work eligibility in hand, the hiring unit has two options. One is to withdraw the offer of employment. The other is to sponsor the applicant by petitioning to obtain appropriate immigration documentation that allows the individual to work in the U.S. The latter option can be attractive, particularly when the applicant has skills and qualifications that are difficult to come by, but it can also be time consuming and expensive.

To ensure that NMSU can properly meet its immigration-related legal and compliance responsibilities, we have retained the Maney Gordon law firm to represent NMSU in all immigration matters. (Maney Gordon was the only immigration firm that responded to a 2013 request for proposals.) In addition, we are presently working with Andrew Pena and our HRS Department to determine how to best allocate the internal responsibilities for this process. To the extent that some beneficiaries were advised in the past that they could utilize their own legal counsel, and have already incurred expense in doing so, we will make special arrangements to have our attorneys work with their counsel (at additional expense to NMSU). For all other immigration matters, the beneficiaries must be advised that NMSU will only sponsor immigration petitions drafted by Maney Gordon, NMSU’s legal counsel.

Immigration petitions are a legal action by the university on behalf of an employee or prospective employee (the “beneficiary”). The petition for work visas and other necessary legal documents are signed by NMSU and include a variety of certifications and attestations by NMSU administrators. The liability and other consequences for inaccuracies, inconsistencies, improper filing and failure to comply with various immigration laws falls upon NMSU. We cannot rely on independent counsel selected by the prospective employee to protect NMSU’s interests.

There has been some confusion on this point because NMSU’s hiring departments typically require the beneficiary (the employees or prospective employee who is seeking work authorization) to pay for all or a significant part of the attorney fees for the visa petition process. (NMSU as the employer is required by law to pay the government filing fees, which can be significant, and this cost cannot be passed through to the beneficiary.) While the individual beneficiaries may be required (by their hiring department) to pay NMSU’s attorneys fees as a condition of employment and for our agreement to petition for the visa or permanent residency card, this is simply a cost sharing mechanism used by NMSU. That being said, in all such cases, Maney Gordon is pleased to consult directly with the beneficiary, or jointly with the hiring department head and beneficiary to obtain necessary information and to respond to inquiries and
concerns. Beneficiaries can, of course, consult their own legal counsel at their own expense, but that will not change the necessity of hiring Maney Gordon to conduct any necessary work related to the preparation of the visa petitions and other documents, nor will it relieve the beneficiary of the obligation to pay the attorney fees to Maney Gordon that the hiring department is unable or unwilling to pay. At this time, there is no central fund at NMSU to absorb either the attorney fees or the governmental filing fees, so each hiring Department/College must evaluate their willingness to expend the funds necessary to sponsor a prospective employee in acquiring a visa for legal work status. In doing so, keep in mind that an H1B visa is valid only for 6 years and can only be extended if a petition for permanent residency has been filed before its expiration. This involves considerably more expense than the initial visa application. Departments may, instead, elect to hire the next best qualified individual.

We are presently working with Maney Gordon to develop some informational hand-outs and templates that we can use to inform our departments, and current and prospective employees, and I will keep you informed as these are developed. In the meantime, here is the contact information for Maney Gordon:

**Allison Kranz**  
**Maney & Gordon, P.A.**  
**2305 Renard Place SE Suite 110 Albuquerque, New Mexico 87106**  
**Phone: (505) 266-8739  Fax: (505)265-3396  website at [www.maneygordon.com](http://www.maneygordon.com)**

Please notify all of the staff with hiring authority in your unit of the requirement to retain Maney Gordon in the event that any applicant who is selected for a job is not already authorized to work at NMSU. Also, be aware that H1B visas are NOT portable – so the fact that a prospective employee has an H1B visa or some other visa at their current place of employment does NOT mean they are eligible to work at NMSU. If you have any questions or concern about a specific situation, please feel free to contact NMSU HRS Services or Allison Kranz, the managing partner at the Albuquerque office of Maney Gordon. Ms. Kranz will be happy to have someone on her staff provide you with a no cost telephone consultation on the matter. The staff at Maney Gordon is preparing a fee schedule that will show the various legal expenses and government filing fees required for each type of immigration matter, and they will be happy to disclose the specific costs to you once you have the initial consultation and they are fully apprised of your needs.

As a final related matter, if your unit is visited by anyone asking to see documentation relating to any of our employees who are working under visas or green cards, including any request to see the “public access file” that should have been created at the time of the petition process, please contact our immigration counsel IMMEDIATELY and do not provide access to the file or any documents until approved to do so by NMSU’s attorneys. These requests are typically made in an investigation by the Department of Homeland Security or U.S. Citizenship and Immigration Services. Our counsel has advised us that by law we have 24 hours to respond to such a request, and to the extent that we may have files that are incomplete and could result in penalties, fines or other action against NMSU, they may be able to help us get our file in order within that 24 hour window. In such an event, you should call Maney Gordon directly, and also please notify my office. The probability of such an inquiry is fairly low, but all it takes is a complaint from one disgruntled individual to trigger an investigation, so we need to be prepared.
PRESENTATION SUMMARY:

1) Immigration Petitions are a legal actions by the University.

2) Maney Gordon law firm is the exclusive immigration counsel for NMSU at this time.
   (formerly John Lawitt and Associates)

   RATIONALE: The University has a variety of legal and compliance responsibilities associated with the Petitions; University is at risk if we don’t use our own legal counsel.

3) Employees and potential employees (“beneficiaries”) can consult any legal counsel they want, but all immigration related documents must be prepared by Maney Gordon.

4) The hiring department and/or the beneficiary will be responsible for paying the Maney Gordon fees. The hiring department will be responsible for paying all the government fees and costs (and cannot seek reimbursement from the beneficiary).

5) Each hiring department determines the portion of the attorney fees it expects the beneficiary to pay, and this should be explicit in the offer letter (state that the department will pay x and the beneficiary is expected to pay all additional fees).

6) Employees hired under an H1B visa cannot work elsewhere – but the visa is only effective for 6 years and cannot be renewed without filing a permanent residency petition (“green card”) which is substantially more expensive. This petition process should be initiated in the employee’s 4th year. Once the beneficiary has the green card, he/she is free to work for any employer.