

GENERAL ADVICE FROM GENERAL COUNSEL

Issue: Updated April 3, 2019



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 (typically permanent residency which is the so-called "green card"), there is nothing illegal about treating non-eligible applicants differently. In fact, employers are required to do so. When the applicant selected to receive an offer for a position is determined to not have work eligibility in hand, the hiring unit generally has two options. One is to withdraw the offer of employment. The other is to determine if the individual is likely to qualify for a work visa for the particular job position. If so, the department may elect to sponsor the applicant by petitioning to obtain appropriate immigration documentation (most commonly an H-1B visa) 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. Be aware that H-1B visas are NOT portable – so the fact that a prospective employee currently has an H-1B visa or some other visa at their current place of employment does NOT mean they are eligible to work at NMSU.

Mandatory Legal Counsel

To ensure that NMSU can properly meet its immigration-related legal and compliance responsibilities, we have retained the Maney Gordon Zeller (MGZ) law firm to represent NMSU in all immigration matters. Internally, our Human Resource Services Department serves as a resource to departments, and as a liaison to MGZ.

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 immigration 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. Also, as the employer, NMSU is required by law to pay all costs associated with the immigration petition, including government filing fees and attorney's fees. Contrary to prior advice, these costs cannot be passed through to the beneficiary. For these reasons, NMSU will only sponsor immigration petitions prepared by MGZ (contracted NMSU procurement process). Beneficiaries may, of course, consult their own legal counsel at their own expense, but that will not change NMSU's requirement that MGZ represent NMSU in the preparation of the visa petitions and other documents.

Costs of Visa Application Process

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 H-1B 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 who is already eligible to work in the U.S.

Steps in Visa Application Process

Once a job applicant who needs a work visa is selected, the first step is to contact NMSU HRS (Jessica Ulmer) to discuss the situation. HRS will update you on any changes in policies or practices since this guidance was issued. HRS can also give you more general information regarding the visa petition process and a general idea of the likely cost.

The second step is to consult with the MGZ law firm. Please note that this initial consultation is provided at no cost or obligation to the department. MGZ has a contracted fee schedule for NMSU matters, and upon request, they will disclose the specific costs once following the initial consultation and they are fully apprised of your needs. MGZ's attorney, Carolina Regales, and paralegal Tim Reardon, are assigned to handle NMSU work and can be reached here:

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Phone: (505) 266-8739 Fax: (505)265-3396

Email: c.regales@maneygordon.com
website at www.maneygordon.com

Once MGZ evaluates your particular job position and the applicant's credentials, and if the department decides to pursue the visa, MGZ will provide an engagement letter for the department, which should be signed by the relevant Dean or Vice-President. The letter will indicate the standard legal fees for the particular type of immigration petition, and the payment obligation associated with the work. Once the engagement letter is signed and returned to MGZ, the law firm will commence work on the petition process. Throughout the process, NMSU HRS will coordinate the process and will maintain the legally mandated public access file.

Immigration Record Inspection Requests

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 the MGZ law firm IMMEDIATELY and do not provide access to the file or any documents until approved to do so by our 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 MGZ 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.