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Hospitality Law

Key Interviewing Tips in Hiring Foreign Workers in Your Hotel

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Mr. Wildes

It takes a lot of work to keep a hotel staffed with good employees and, as in any service industry, nothing is more pivotal in ensuring your guests' positive experience. From the culinary and catering staff to the housekeepers and the concierge, courteous and well-trained personnel can leave a lasting, favorable impression on your guests that will pay dividends in return business and word-of-mouth referrals. Yet therein lies the challenge: finding, hiring and retaining those employees is no easy task. What's more is that this undertaking becomes more complex as the U.S. workforce grows increasingly diverse. There are certain guidelines regarding foreign-born labor that employers should keep in mind in order to protect their businesses from legal action while simultaneously fostering a friendly and tolerant atmosphere for all employees.

American students who were once the traditional mainstay of summer hotel staffing are now increasingly likely to choose internships, classes or vacations abroad over work in the hospitality field, leaving many hoteliers struggling to find other Americans willing to work entry-level positions. As a result, it has become increasingly common to hire foreign-born labor, especially through the H-2B non-agricultural worker visa and the J-1 Work and Travel USA visa. For those unfamiliar with these programs, the H-2B visa is an employment-based visa initially granted for a period of up to one year to workers needed on a temporary, intermittent, or seasonal basis. Although this visa is available to citizens of certain countries only, it can be extended up to three times and provides an attractive option to hoteliers seeking extra workers during peak season. The J-1 Work and Travel USA visa, on the other hand, is an exchange visa managed by the U.S. Department of State as a means for young adults outside the U.S. to visit America for a period not longer than four months and to work while doing so. Visa applicants must be full time students and are required to demonstrate a proficiency in English; these criteria coupled with their relatively short period of work authorization also render them ideal candidates for work during the busy season. In both cases, there is little concern that your employee will quit mid-season, as he or she is legally authorized to work for the sponsoring employer alone.

While H-2B and J-1 visa holders are generally placed with an employer via a sponsor agency and therefore seldom interviewed by the hotel manager prior to placement, interviewing and hiring other foreign-born candidates can be a tricky endeavor. The Department of Justice maintains the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) to protect U.S. citizens and work-authorized immigrants from employment discrimination based on citizenship or immigration status during the hiring, firing and recruitment process. As established by the Immigration and Nationality Act (INA), employers may not treat individuals differently because of their place of birth, country of origin, ancestry, native language, accent, or because they are perceived as looking or sounding "foreign." For example, in order to avoid charges of national origin and citizenship discrimination, one should exercise caution with the wording of certain questions pertaining to visa status and eligibility to work.

One way to ensure compliance with the INA is to treat all job candidates the same throughout the hiring process, regardless of national origin. This can be done by avoiding "citizens only" hiring policies unless required by law, and by not limiting applicants to certain immigration statuses. For example, if the business were to limit a position to U.S. citizens and lawful permanent residents only, it would exclude certain temporary residents, asylees and refugees and this would likely constitute the basis of a national origin discrimination lawsuit. By asking applicants if they are "legally authorized to work in the United States" and not requesting to see employment eligibility documents until the offer of hire, the business can be confident that it is complying with federal regulations. Moreover, all job applicants should be given the same information about the position and that they fill out the same application form.

Once an applicant has been granted the position, he or she must fill out an I-9 Employment Eligibility Verification Form within three days of the day of hire, regardless of that person's citizenship or immigration status. The new employee must present documents to the employer that establish identity and work authorization. These documents are clearly specified on the back of the form itself and the employer must not request additional or different documents than those proffered, unless they appear on their face to be altered or inauthentic. For example, a permanent resident may rightly present a driver's license and a social security card to prove employment eligibility; the employer may not request to see that person's "green card" in addition to or instead of the documents provided. If the new employee cannot provide the necessary documents within three days of hire, he or she must be denied the position. Again, this must apply to all new hires and not just those who are foreign-born or suspected to be.

Employees with temporary work authorization, for example, those with H, J, and L visas, will need their I-9 forms reverified before the expiration of their employment authorization. The M-274 Handbook for Employers, the booklet published by U.S. Citizenship and Immigration Services about Form I-9, specifies that employees must present a document that shows either an extension of their initial employment authorization or new employment authorization. For new employment authorization, an employee may provide any approved document he or she wishes. If the employee is unable to offer these documents, the employer cannot continue to employ that person. Further complicating things, certain nonimmigrants, having filed for an extension of status in a timely manner, may continue working for up to 240 days from the expiration of the authorized period by providing a receipt and other additional documents. The M-274 handbook describes these scenarios in greater detail and is a useful reference source should you need additional guidance.**(1)** Though reverification may be somewhat daunting, you may not refuse to hire someone based upon the future expiration date of his or her employment authorization; that, too, would constitute a discriminatory practice. Lawful permanent residents and U.S. citizens should never be reverified as their employment authorization never expires.

Employers using E-Verify, the Department of Homeland Security's internet-based employment verification system, to confirm work authorization should take care not to dismiss any workers issued a "tentative non-confirmation", or TNC. A TNC may be returned for reasons as innocuous as failing to register a name change and reflects only the fact that there was a discrepancy noted by the E-Verify system. If the employee decides to contest the TNC, the employer is expressly forbidden from taking any action against him or her, as long as the employee in question contacts the appropriate federal agency within eight days of the initial notification. Employers using E-Verify must also post a notice informing employees of their participation in the program and information about anti-discrimination policies. If your hotel decides to use E-Verify, it should be used universally for all new hires regardless of national origin, and never for the purpose of reverifying employees hired before the policy was put in place. Of significant importance, it should never be used to screen job applicants in the pre-hire stage.

When terminating employees, ensure that no decisions are made on the basis of citizenship or immigration status; do not grant U.S. citizens or any other group preferential status when making layoffs. Let behavior, performance or seniority act as determining factors and apply them universally. Do not make decisions regarding firing based on language, appearance or name.

Learning how to avoid national origin and citizenship discrimination can spare your hotel thousands of dollars in fines and legal defense fees. Typically, employers found to have wrongfully terminated an employee on discriminatory grounds are required to reinstate him or her to the same position with back pay. The Winter 2010 edition of the OSC Newsletter details a lawful permanent resident who had been terminated because his I-9 form was reverified and his green card was found to have expired. His immigration status as a lawful permanent resident does not expire, however, and his I-9 should not have been reverified in the first place. He filed a charge of document abuse and was ultimately reinstated, with $8,640 in back pay. His employer agreed to use OSC resources to retrain personnel and a letter of resolution was issued to the charging party. Though complicated and sometimes frustrating, national origin discrimination laws serve an important purpose ensuring fair treatment for all employees. When employees feel valued and respected in the workplace, it translates into their conscientious care of your guests. It's a smart business strategy that costs you nothing, but may earn you lots.

Michael Wildes is the Mayor of Englewood, NJ, an immigration lawyer and a former federal prosecutor. As partner of preeminent immigration law firm Wildes & Weinberg, Wildes has become internationally renowned for having represented the United States Government in immigration proceedings, for the successful representation of several defectors who have provided hard-to-obtain national security information to the United States and, most recently, for obtaining an injunction to prevent Libyan leader Muammar Gaddafi from residing in New Jersey during the 2009 UN Summit. Mr. Wildes can be contacted at 212-753-3468 or mwildes@wildesweinberg.com

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