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Wired For Success: How Recent Development in the Semiconductor Industry Can Shape Immigration Programs

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America runs on semiconductors, also known informally as chips. Chips are integral to the cars we drive, the planes we fly, the systems that defend our country, and the computers that every single industry, from manufacturing to finance, relies upon. A recent top-down approach by the Federal Government — best exemplified by the CHIPS and Science Act (2022) — provides opportunities for immigration professionals to create a pipeline for talented foreign nationals and climb above their competition within the industry.

Headlines over the past few months have highlighted the United States' renewed interest in building and expanding its semiconductor industry. This has resulted in government funding for private sector technology companies, which is being used for the construction and expansion of production facilities.

The federal government's top-down approach to the chips industry has spurred this new investment, and is expected to spark continued expansion over the coming months and years. This renewed focus on the chips industry comes from increased geopolitical tensions surrounding Taiwan, which

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accounts for an outsized proportion of global semiconductor foundry operations.

Creating and Maintaining Pipelines

The key to attracting, retaining, and relocating foreign talent to U.S. chip operations will be ensuring that two main talent pipelines remain open and unobstructed in the wake of ever-changing immigration laws, policies, and directives.

The first of these pipelines is the F-1 nonimmigrant student visa. Ensuring your organization is ready to take on F-1 students — and, more importantly, students on STEM Optional Practical Training (STEM OPT) — will increase the chances you can sponsor them on H-1Bs, TNs, E-3s, and other nonimmigrant worker visas. Companies will typically hire a talented foreign student on STEM OPT, and then change their nonimmigrant status to an H-1B, E-3, or TN visa classification, when applicable.

STEM OPT is a program that allows foreign nationals on temporary F-1 student visas that are studying in a STEM field to apply for a 24-month extension of their one-year post-graduation work authorization. This allows semiconductor companies to recruit international STEM students for up to three years, and the companies can then initiate other nonimmigrant or immigrant visa processes while the STEM OPT student is working for the company. Given the low selection rate of H-1B lotterv registrants, it is important that chip companies have multiple chances to register talented foreign nationals for the H-1B lottery, as it can take years to get selected. To recruit foreign nationals on STEM OPT, employers must be enrolled in E-Verify and must design and implement an I-983 STEM OPT training plan to augment the F-1 student's academic learning through practical experience. Accordingly, speaking to an immigration attorney to ensure your company is E-Verify ready is critical in ensuring you can recruit and retain foreign talent.

The second pipeline of note is the L-1 intracompany multinational transferee for managers, executives, or individuals of specialized knowledge. This allows companies to transfer managerial, executive, or specialized knowledge employees from their foreign offices to their U.S. offices. Chip companies should ensure their Blanket L approvals are up-to-date, as this allows for an easier process at U.S. consulates, and the turnaround time in shifting these employees to the United States can be a matter of weeks as opposed to months. Furthermore, it is important that U.S. immigration professionals understand and preempt the needs of the U.S. chip business, so that critical foreign employees can be identified and promoted into L-1 eligible roles abroad for at least one vear before their transfer to the United States. The L-1 can be used for foundry, logistics, back office, and even business development roles, and as such, is a versatile way to bring experienced employees from abroad to augment U.S. operations.

Semiconductors Are Officially in the National Interest

The CHIPS Act and the investments accompanying the act provide ample ammunition for practitioners seeking National Interest Waiver (NIW) approval for companies operating in the semiconductor industry. The NIW provides an exemption to the standard labor certification green card process if it can be proven that:

- 1. The foreign national's proposed endeavor has both substantial merit and national importance;
- 2. The foreign nation is well-positioned to advance the proposed endeavor; and
- 3. That, on balance, it would be beneficial to the United States to waive the job offer and labor certification requirements.

The CHIPS Act, as well as the media coverage surrounding the CHIPS Act, provides significant evidentiary weight for individuals in the semiconductor industry to meet the first prong of the above-mentioned test, set forth in *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016). Both the act itself and information supplied by industry stakeholders such as the *Semiconductor Industry Association* provide a strong justification for skilled individuals involved in any aspect of the semiconductor industry to obtain an NIW. The Act offers decisive language, including the need to address "the challenges the United States critical materials supply chain workforce faces, including aging and retiring personnel and faculty, and foreign competition for United States talent."

It should also be noted that Subtitle D of the CHIPS Act does impose some requirement for foreign talent recruitment programs, most notably in the semiconductor research sector, especially in federal research agencies.

Growing Pains

There has been some notable opposition to the use of immigrants and foreign nationals in America's semiconductor boom, which may have contributed to delays in the opening of facilities in the U.S. when compared to similar operations overseas. As this comparison illustrates, utilizing foreign talent may be critical to rebuilding the American semiconductor industry, and chip companies should avail themselves of the tools provided to them to attract and retain foreign talent.

Conclusion

While any meaningful overhaul of the immigration system is unlikely, the CHIPS and Science Act has provided some ammunition for employers to find long-term solutions for talent acquisition problems. Using the existing tools in the visa toolbox effectively will be key for companies operating in the semiconductor space to establish a competitive advantage. This information is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.