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THE H-1B VISA PROGRAM

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by
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On April 1, 2009, the U.S. Citizenship and Immigration Services (USCIS) will begin accepting H-1B petitions in advance of October 1, 2009, which is the date when H-1B visas under Fiscal Year 2010 become available. Since it is anticipated notwithstanding the economic downturn that there may be more petitions filed than the number of H-1B visas allocated under the regular H-1B cap of 65,000 and the 20,000 Master's cap, it is important for employers to start preparing H-1B visa cases as soon as possible so that they can be filed during the 5-day filing period from Wednesday, April 1, 2009 till Tuesday, April 7, 2009. Also, the procedures relating to obtaining the underlying Labor Condition Application, Form ETA 9035, will change in January 2009. The LCA will no longer be electronically certified in a pro forma manner. Processing times will take several days due to DOL review of entry of all information in the LCA. Thus, filing last minute H-1B petitions during the April 1-7, 2009 filing period will be a thing of the past. Moreover, the new ETA 9035 needs more extensive information, and will take longer to prepare.

If the USCIS receives more than the allotted number, it will conduct a randomized selection of H-1B petitions that were received from April 1 and 7, 2009. Below is a general overview of the H-1B visa, which will assist readers in understanding the process prior to filing for the April 1st date.

A. WHAT IS THE H-1B PROGRAM?
B. AMELIORATIVE MEASURES FOR STUDENTS IN F-1 STATUS.
C. THE H-1B PROCESS: HOW AN EMPLOYER BRINGS A TEMPORARY

PROFESSIONAL TO THE U.S.

A. WHAT IS THE H-1B PROGRAM?

The H-1B program is a prompt, lawful way for U.S. corporations to employ foreign-born professionals on a temporary basis. A U.S. employer using this program must guarantee that (1) the foreign-born professional will be paid at or above the rate paid for a similar position at the employer's own worksite or at the prevailing wage in the area of employment; (2) the foreign worker will not "adversely affect" the working conditions of his or her U.S. colleagues; (3) the employer's employees will be given notice of the foreign worker's presence among them at the worksite; and (4) there is no strike or lockout at the worksite.

The employer also must demonstrate that the position is one requiring a professional in a specialty occupation and that the intended employee has the required qualifications. The foreign employee must demonstrate that he or she possesses a baccaularate degree or foreign equivalent. The employer must also demonstrate that the occupation normally requires a baccalaureate degree. Progressively responsible work experience may substitute for any deficiency in education.

Usually, three years of work experience equates to one year of university education.

There is a detailed enforcement system in place to identify and sanction those employers who do not comply with these requirements; the punishments include repaying salaries to the foreign workers if found that they have been underpaid, fines as well as debarment from immigration programs for a year.

What is the H-1B cap? Before 1990, there was no cap on the number of H-1B professionals allowed to enter the U.S. The 65,000 cap enacted by the Immigration Act of 1990 was set without any data about how many professionals were actually needed or what the economy might require in the future. The growth of jobs which require specialized expertise in new or innovative technologies has fueled the need for H-1B professionals, and the cap was reached for the first time in Fiscal Year (FY) 1997, even before the end of that fiscal year. Current projections strongly suggest that U.S. companies will have a steadily increasing need for H-1B professionals in coming years.

In FY 1998 the cap was reached on May 11, 1998, a full five months before the end of FY 1998.

On October 21, 1998, the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA") was enacted to increase the cap on H-1B visas from current 65,000 to 115,000 for the FY 1999; 115,000 in FY 2000; and 107,500 in FY 2001. The quota of 65,000 would return to 65,000 for FY 2002 and thereafter.

Despite the increased numbers, the cap was reached in April 1999, six months before the end of FY 1999 (September 30, 1999). In Fiscal Year 2000, the cap was reached in March 2000. The increase from 65,000 to 115,000 for FY 1999 was again not based on any data confirming the actual need of foreign professionals in a booming economy.

In October 2001, the American Competitiveness in the Twenty-first Century Act (2000) (AC21) increased the cap to 195,000 for the next three years, with the cap dropping to 65,000 in October 2003. Due to the economic downturn, the cap was not reached in FY 2001. The cap was also not reached at the end of FY 2002 or FY 2003. From October 1, 2003, FY 2004, the H-1B cap has again dropped to 65,000.

As anticipated, the 65,000 cap was reached on February 25, 2004. Congress did not take any action to alleviate the crisis. The new quota for FY 2005 with only 65,000 H-1B visas commenced October 1, 2005. However, employers could file H-1B petitions six months ahead of time on April 1, 2005. On October 1, 2005, the first day of FY 2005, the United States Citizenship and Immigration Services (USCIS) announced that the 65,000 quota had been filled up.

On December 8, 2004, Congress exempted 20,000 H-1B visas with master's or higher degrees from the 65,000 quota, and made them available during FY 2005. For FY 2006, 65,000 visas became available on October 1, 2005, along with 20,000 H-1B exempt visas for master's or higher degree holders. H-1B filings for FY 2006 started on April 1, 2005, and the 65,000 cap was reached on August 10, 2005. The 20,000 master's cap was reached on January 17, 2006. H-1B filings for FY 2007 started on April 1, 2006 and the 65,000 cap was reached on May 26, 2006. The 20,000 master's cap was reached on July 26, 2006.

Regarding FY 2008, the USCIS reported that it received 133,000 petitions on April 2 and April 3. In 2007, April 1 fell on a Sunday. For the very first time, the

law required USCIS to conduct a computer-generated random selection of petitions filed on the first and second day of the filing period to select only a limited number of cases allocated under the H-1B cap. The USCIS also announced that the Master's cap was reached on April 30, 2007. Petitions that were received on April 30, 2007 under the Master's cap were also subject to a random selection process.

For FY 2009, the USCIS announced that it had received more than the number of H-1B petitions for both the 65,000 and 20,000 cap during the 5-day filing period. In addition to promulgating the 5-day filing period rule for the first time, USCIS also prohibited the filing of more than one H-1B petition on behalf of the same alien.

The numerical limitation of 65,000 will not apply to a nonimmigrant who has been sponsored for an H-1B visa by an institution of higher education and non-profit entity related to or affiliated with any such institution. Nor would it apply to an H-1B visa petition that has been filed by a non-profit research organization or a governmental research organization. It will also not apply to J-1 physicians who have been sponsored for a J-1 waiver by a federal or state agency. The numerical limitation will also not apply to H-1B extension requests. Finally, free trade agreements between the US and Chile and Singapore have resulted in the carve-out of H-1B visas from the 65,000 cap. Nationals of Singapore and Chile enjoy a special quota, carved out the 65,000 cap, and continue to be eligible for the special H-1B1 visa. The quota for Singapore and Chile have never been reached to date.

B. AMELIORATIVE MEASURES FOR STUDENTS IN F-1 STATUS.

The USCIS also promulgated a rule that would assist foreign students in F-1 status whose H-1B petitions are not selected under the cap.

The Department of Homeland Security (DHS), on April 8, 2008, promulgated an interim final rule in the Federal Register (Vol. 73, No. 68; 18944-18956), increasing the Optional Practical Training (OPT) period by 17 months for F-1 nonimmigrant students who are already in their 12-month OPT period. This benefit will only be limited to students who have completed a science, technology, engineering or mathematics (STEM) degree and accept employment with employers enrolled in USCIS' E-Verify employment verification program. The rule also requires F-1 students with an approved OPT

extension to report changes to the DSO within 10 days of any change in the name, residential or mailing addresses, e-mail address, legal name, residential and mailing address, e-mail address, employer name, employer address, job title or position, supervisor name and contact information, employment start-date and employment end-date. The student must also report to his or her DSO every six months, confirming the information listed above; even if there have been no changes. The requirement to report continues if the student's 17-month STEM extension is extended further by the automatic cap-gap extension.

The rule further requires an employer of the STEM student, with the extended OPT, to report to the DSO within 48 hours after he or she has been terminated from, or otherwise leaves, his or her employment with that employer prior to end of the authorized period of OPT.

The USCIS has also released a Q&A on this topic. Students who have obtained degrees in the following fields will qualify for this benefit:

- Actuarial Science
- Computer Science: (except Data Entry/Microcomputer Applications)
- Engineering
- Engineering Technologies
- Biological and Biomedical Sciences
- Mathematics and Statistics
- Military Technologies
- Physical Sciences
- Science Technologies
- Medical Scientist (MS, PhD)

The student must file the latest version of Form I-765 with USCIS, Form I-20 endorsed by the DSO, a copy of the STEM degree and the application fee.

This rule also ameliorates the "cap gap" problem by extending the authorized period for all F-1 students who have properly filed an H-1B petition under the next fiscal year cap and a change of status request. If the H-1B petition is approved, the student will have an extension that enables him or her to remain in the US until the requested start date indicated on the H-1B petition, which is October 1, 2008. At present, if a student's practical training expires on June 30, 2008, and his or her employer's H-1B petition has been accepted under one of

the H-1B caps, this student is unable to start working until October 1, 2008, which is the effective date of the H-1B petition under fiscal year 2009. He or she may also need to leave the US at the completion of the 60-day grace period, August 30, 2008. Under the new rule, a student would be able to continue to remain in OPT status and work until October 1, 2008. This automatic extension terminates when the USCIS rejects, denies or revokes the H-1B petition.

C. THE H-1B PROCESS: HOW AN EMPLOYER BRINGS A TEMPORARY PROFESSIONAL TO THE U.S.

An employer who temporarily needs the services of a foreign professional must demonstrate that both the job requirements and the foreigner's credentials or experience are "professional." The employer must also meet Department of Labor (DOL) requirements (noted below) and petition the USCIS for permission to employ a foreign national. If the employee is out of the country, he or she must also apply for the visa at a U.S. consulate abroad.

1. "Labor Condition Application" Process – Department of Labor (DOL)

- Employer must certify to the DOL:
  - It is paying the higher of what it pays its own similar workers or what similar workers in the area are paid (whichever is higher);
  - The working conditions of its U.S. workers are not adversely affected;
  - There is no strike/lockout at the worksite nor in the occupation for which a foreign professional is sought;
  - It has given notice to current employees that it is seeking to hire an H-1B professional.
- DOL certifies receipt and acceptance of the attestation in order to create a public record.
- Employer must post the labor condition application for 10 days and maintain a wage file that is open to the public.
- ACWIA created a new category of employers known as "dependent" H-1B employers. U.S. employers of 51 or more whose workforce comprises 15% or more H-1B workers are considered dependent employers. Smaller

employers are allowed a slightly higher ratio of H-1Bs to their total workforce. These employers must additionally attest that they will not displace a U.S. worker 90 days before and after filing the visa petition for a foreign worker. Further, they must attest that they have taken good-faith steps to recruit in the U.S. using industry-wide standards and that they have offered the position to any U.S. worker who applies and is equally or better qualified than the H-1B worker. Dependent employers who pay H-1B workers a salary of $60,000 or who employ a person with a master's degree are exempt from these additional attestations.

- Violations of the attestations:
    - Employers must follow through on attestations or they are in violation of law and could be required to pay wages, incur civil penalties and be debarred from the program;
    - DOL will begin an investigation of employer practices through both a formal complaint and its own investigation mechanisms.

2. Immigration Petition – USCIS

- The employer must submit a request to USCIS, proving that it has completed the Labor Condition Application process and demonstrating that both the employer and the foreign professional qualify for the visa category. The employer must submit a fee of $320. As of March 8, 2005, all employers applying for H-1B and L-1 visa petitions must pay the new $500 "fraud prevention" fee for each petition seeking an initial grant of H-1B or L nonimmigrant classification or those petitions seeking to change an employer within those classifications. The $500 fee will not apply to petitions filed to amend or extend the stay of an existing employee. The new $500 fee is in addition to the $320 filing fee for an H-1 or L-1 visa petition. If the employer wishes to expedite the petition through premium processing, an additional $1,000 filing fee is required. As of December 8, 2004, employers must also pay a supplementary fee of $1,500, or $750 if the employer has 25 or fewer full-time employees including any affiliates or subsidiaries. Some employers may be exempt from the training fee. Employers will also be exempt from the training fee if they are filing a second H-1B extension on behalf of the foreign national employee.

- The employer must demonstrate:

    - The need for someone who is a professional (job requires a worker with at least a bachelor's degree);
    - That the candidate it seeks to hire has the required degree (including an equivalency of a foreign degree) and any other qualifications required.

- USCIS has the final say on the professional and the position.
- Under a Premium Processing Program, the USCIS will adjudicate the case within 15 days upon payment of an additional $1,000 fee.

3. Visa Application – Department of State (DOS)

- If the professional is outside the U.S., he or she must apply to a U.S. consulate for an H-1B visa. If already in the U.S. in another status, the professional can petition the USCIS for a change of status to H-1B.
- U.S. consulate officer adjudicates the application to determine the alien's admissibility.

4. Portability

Under § 105 of the AC21, a nonimmigrant who was previously issued an H-1B visa or provided H-1B visa status is authorized to accept new employment upon the filing of a petition by the prospective employer. Prior to the enactment of this provision, an H-1B worker switching from one employer to another would have to wait for the H-1B visa petition to get approved before joining the new employer.

In order to be eligible under § 105, the nonimmigrant should have been lawfully admitted into the United States and the petition must have been filed "before the date of expiration of the period of stay authorized by the Attorney General." Furthermore, this nonimmigrant subsequent to such lawful admission must also have not been employed without authorization in the U.S. before the filing of the petition.

- Extension Of H-1B Status Beyond Six Years

§ 106 of AC21 also liberalized the rule allowing for a 7th year H-1B extension. The law now allows for extensions of H-1B status in one-year increments beyond the six-year limitation in the case of nonimmigrants who had previously

been issued an H-1B visa or had H-1B status if 365 days have elapsed since the filing of either a labor certification application or an employment-based immigrant petition.

§ 104(c) of AC21 also provides a one-time protection for an H-1B visa holder by allowing him or her to extend the 6th-year period if he or she is the beneficiary of a first, second or third preference employment-based approved petition, but due to backlogs in the employment preferences, is unable to file for adjustment of status. Such H-1B extensions will be granted in three year increments.

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