CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

H-1B UPDATE: FILING DATE APPROACHES; SCRUTINY AT POES INCREASES; USCIS ISSUES H-1B GUIDANCE UNDER ECONOMIC STIMULUS

Posted on February 19, 2010 by Cyrus Mehta

H-1B filing date approaches. Employers will be able to submit cap-subject H-1B petitions on April 1, 2010, for the Fiscal Year (FY) 2011 H-1B program. The numerical limitation, or cap, for FY 2010 was reached on December 21, 2009. Beneficiaries of cap-subject petitions may begin employment in H-1B status no earlier than October 1, 2010. Employers recruiting abroad or who have hired individuals for F-1 "Optional Practical Training" should prepare to have their petitions delivered to U.S. Citizenship and Immigration Services (USCIS) during the five-day filing window from April 1, 2010 P April 7, 2010 (which does not include April 4 & 5 as they fall on the weekend). If the USCIS receives more than 65,000 H-B petitions or more than 20,000 MasterXs H-1Bs during the five-day filing period, they will be subject to a randomized lottery. If the USCIS receives less than 65,000 or 20,000 H-1B petitions during this five-day window, then the USCIS will continue to accept H-1B petitions until the H-1B caps are reached.

Demand for H-1Bs is expected to increase somewhat this year, so early filing is recommended. Contact us for assistance with H-1B petitions.

Petitions are only subject to the FY 2011 cap if the beneficiary of that petition has not been counted against a cap previously. Thus, "new" H-1B petitions are cap-subject but most petitions for extension, change of employer, or concurrent employment are not affected by the H-1B cap. Further, petitions on behalf of foreign nationals to be employed by institutions of higher education (or related or affiliated nonprofit entities), nonprofit research organizations, or

governmental research organizations are not subject to the cap, but if an employer wishes to hire an H-1B employee currently employed at such an organization, the new petition would be cap-subject.

Scrutiny at POEs. Recent reports suggest that scrutiny at ports of entry is increasing for H-1Bs and other employment-based visas, especially those working for information technology consulting firms and those posted at third party worksites. We recommend that entering nonimmigrants be familiar with the petition filed on their behalf, and that they carry a complete copy of the filing and supporting documents along with up-to-date documentation confirming their employment, such as recent paystubs. Entering H-1Bs should be prepared for the possibility of secondary inspection at the port of entry.

Economic stimulus guidance. Meanwhile, USCIS has issued guidance on the Employ American Workers Act (EAWA) to employers seeking to file H-1B petitions. EAWA was enacted to ensure that companies that receive funding under the Troubled Asset Relief Program (TARP) or the Federal Reserve Act do not displace U.S. workers. Under the legislation, any company that has received covered funding and seeks to hire new H-1B workers is considered an "H-1B dependent employer." An H-1B dependent employer must make additional statements to the Department of Labor (DOL) regarding the recruitment and non-displacement of U.S. workers when filing a labor condition application (LCA).

Subsequent to the enactment of EAWA, USCIS revised its Form I-129, Petition for a Nonimmigrant Worker, to include a question asking whether the employer received covered funding.

USCIS said it understands that some businesses who received covered funding may have repaid their obligations and may not know how to respond to the question (A.1.d on the first page of the H-1B Data Collection and Filing Fee Exemption Supplement). Companies that have repaid their obligations under the law should answer "No" to question A.1.d. Those that wish to provide further information with the petition to assist USCIS in determining that their status for purposes of EAWA is correct may do so.

USCIS noted that a valid LCA must be on file with DOL when the H-1B petition

(with a copy of the LCA) is filed with USCIS. Processing delays or a denial of the H-1B petition may result if the LCA does not correspond with question A.1.d of the H-1B petition, unless any inconsistency is explained to the satisfaction of USCIS. For example, if the LCA includes the additional statements, but question A.1.d is answered "no," the employer can explain that it had received covered funding at the time of filing the LCA but repaid the obligation before filing the I-129. However, if the employer indicates on the petition that it is subject to the EAWA, but the LCA does not contain the proper declarations relating to H-1B dependent employers, USCIS will deny the H-1B petition.

USCIS additionally reminds employers that EAWA applies only to new hires and not to H-1B petitions seeking to change the status of a beneficiary working for the petitioning employer in another work-authorized category. It also does not apply to H-1B petitions seeking an extension of H-1B status for a current employee to continue working for the same employer.

The EAWA guidance is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=aeda00143ea96210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD. For more on H-1B admissions and scrutiny at ports of entry, see http://cyrusmehta.blogspot.com/2010/02/more-on-h-1b-admissions-at-newark.html.