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GEARING UP FOR FY2011 H-1B FILINGS: USCIS STOPS ALLOWING FILINGS WITH UNCERTIFIED LCAS AND AILA PROTESTS NEUFELD MEMO

Posted on March 21, 2010 by Cyrus Mehta

In continuation of our previous article, *H-1b Update: Filing Date Approaches; Scrutiny At POEs Increases; USCIS Issues H-1B Guidance Under Economic Stimulus*, dated February 19, 2010, http://tinylink.com/?7h4K85wN87, USCIS has announced on March 10, 2010, that it will not extend the period in which it temporarily accepted H-1B petitions filed with uncertified labor condition applications (LCAs). Earlier, USCIS explained that due to processing delays associated with the Department of Labor's (DOL) "iCERT" online filing system, USCIS had responded to requests from the public by temporarily allowing H-1B petitions to be filed with uncertified LCAs. This temporary measure went into effect on November 5, 2009, and expired on March 9, 2010.

USCIS said that as of March 10, 2010, it is rejecting any H-1B petition filed without an LCA certified by the DOL. The announcement is available at http://tinylink.com/?C0bv7HtE1C.

On a separate note, the USCIS refused AILA's request on March 5, 2010, to extend the "temporary acceptance" for submitting H-1B petitions without certified LCAs due to reports of ongoing delays in the new iCERT system of the DOL. Moreover, the new national prevailing wage determination process system of the DOL is also experiencing delays.

AILA has reminded its members that under the DOL regulations at 20 CFR § 655.731(a)(2), an employer is not required to obtain a prevailing wage determination for an H-1B and may rely on an independent authoritative wage source or other legitimate sources of wage data when filing an LCA. The independent authoritative source must meet all the criteria set forth in

paragraph 20 CFR § 655.731(b)(3). H-1B petitioners may rely on DOL's own prevailing wage data system at http://www.flcdatacenter.com/.

Please note that if an H-1B petition is filed with an uncertified LCA, the USCIS Service Center will reject it outright or issue a Request for Evidence asking for proof of an LCA that was certified prior to submission of the H-1b petition. Such a request will be impossible to comply with and the H-1B petition will likely be denied.

The general feeling is that there is not a big surge in H-1B cap cases to be filed from April 1, 2010, onwards. Note that there continues to exist a five-day filing window from April 1, 2010 – 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 Master's 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. If petitioners are unable to file H-1B petitions by April 1, 2010, they should not get worried so long as the petition reaches the USCIS by April 7, 2010. If by chance, USCIS receives more that the amount of H-1Bs mandated by the 65,000 and 20,000 Master's H-1B cap, all H-1Bs received between April 1 and 7 will be all considered under the randomized lottery.

In another significant development, AILA on March 19, 2010 sent a Memo to USCIS Director Alejandro Mayorkas and Chief Counsel Roxana Bacon, expressing serious concerns over the Neufeld Memo of January 8, 2010, which re-defines the employer-employee relationship in H-1B petitions, http://tiny.cc/z3ZU8, pertaining to third party placements by emphasizing on the need of the petitioner to demonstrate a right of control of the H-1B at a third party site. The AILA Memo reminds that there already exists a definition of "employer" in 8 CFR § 214.2(h)(4)(ii), which provides as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

> *(1) Engages a person to work within the United States;*
> *(2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and*
> *(3) Has an Internal Revenue Service Tax identification number.*

Based on the definition of an employer in the regulation, the AILA Memo points out that the Neufeld Memo adds additional requirements for determining the employer-employee relationship that are not found in the regulatory definition, which encompasses “hire, pay, fire, supervise, or otherwise control the work of any such employee.” Also, both the DOL in the context of H-1B dependent employers, 20 CFR 655.738, and Congress have recognized third-party placement, particularly when Congress restricted third party L-1B placements in 2004, it was the intent of Congress that such placements were more appropriate for the H-1B visa. The AILA Memo also highlights the unintended consequences of the Neufeld Memo, which affects industries other than IT consulting, most notably hospitals and physicians, who by law are not allowed to work for hospitals with non-physician ownership, and are petitioned for H-1B visas by separate subsidiaries of hospitals, whose sole purpose is to employ the physicians who work at the particular medical facility where the day-to-day duties are performed. These arrangements too, according to the AILA Memo, will not pass the test set forth in the Neufeld Memo. The AILA Memo also focuses on the economic harm that the Neufeld Memo would cause by pointedly stating: “The Memo comes at a moment when government agencies should be implementing policies that encourage investment and innovation in the U.S., and creating conditions in which such businesses can flourish and increase employment here. Yet the Neufeld Memo creates serious roadblocks to such economic growth, in particular by increasing the burdens of small businesses and technology companies.” The AILA Memo correctly observes that IT staffing and consulting companies constitute a legitimate industry in the U.S., and “the way in which the Neufeld Memo addresses this industry betrays a lack of understanding of its business model, and as well as a total disregard for the realities of the employer-employee relationships within the business model.” The AILA Memo adds that U.S. businesses large and small, as well as government agencies, rely on IT firms for system development work as well as for staff augmentation. It is hoped that the USCIS will withdraw the Neufeld Memo. Finally, the AILA Memo cites examples of how the misguided "right of control" standard has adversely impacted adjudications in the L visa and EB-1-3 I-140 context where a President of a multinational corporation received a denial on the ground that the beneficiary owned the majority of the shares of a corporation and that no one supervised the beneficiary's work. The full AILA Memo can be found here,
http://www.aila.org/content/default.aspx?docid=31592

In the meantime, though, petitioners gearing up for filing H-1Bs on April 1, 2010 onwards, especially if their business model is based on third party placements, should continue to pay heed to the Neufeld Memo's criteria establishing the employer-employee relationship, *See From Problem To Springboard: Tips on Using the Neufeld Memorandum in Support of H-1B Petitions*, http://tinylink.com/?zCbaXGsvHb