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EXTENDING STAYS FOR FOREIGN WORKERS

New rule grants 17-month extension for those with science, math degrees

By ANDREW WIZNER

Every year, as the H-1B cap looms, the immigration bar braces itself for change, and this year U.S. Citizenship and Immigration Services (USCIS) did not disappoint. The agency rolled out two new rules within two weeks that create new filing procedures and, more importantly, new ways around the problems the H-1B cap poses for foreign students.

THE NEW RULE NOT ONLY GRANTS A BLANKET EXTENSION OF STAY FOR THOSE WHOSE PETITIONS HAVE BEEN SELECTED FOR PROCESSING, BUT ALSO AUTHORIZES WORK DURING THE 'GAP PERIOD'

Employers who recruit graduating seniors find that foreign students are authorized to work for a 12-month period following graduation. For students graduating in the spring semester, their work authorization (known as Optional Practical Training or OPT) usually terminates the following spring or summer.

Most employers facing the time limitation file a petition with USCIS to change the nonimmigrant status of their employee from F-1 student to H-1B specialty occupation worker and request an extension of stay. The H-1B classification permits the employee to work in the U.S. for up to six years. During that time, the employer may separately commence, and possibly complete, the process for the employee to become a lawful permanent resident and obtain a "green card."

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The H-1B Program

The H-1B program permits employers to recruit or retain foreign professional workers for jobs that require at least a baccalaureate degree in a field related to the beneficiary's course of study. The employer need not prove a qualified U.S. worker is not available.

The Immigration and Nationality Act allocates 65,000 standard H-1B numbers each fiscal year. The H-1B Visa Reform Act of 2004 added an additional 20,000 H-1B numbers for beneficiaries who earned an advanced degree from a U.S. college or university. Certain petitioners, such as institutions of higher education and their non-profit affiliates, are exempt from the H-1B cap. Petitions requesting an extension of stay or change of employer on behalf of H-1B employees who have already been counted against the cap are also exempt.

Employers may file petitions no more than six months in advance of the first day of the fiscal year. Thus, employers begin to file petitions on April 1. In fiscal year 2008, which began on Oct. 1, 2007, the cap was reached on the first business day for filing, and the advanced degree cap was reached approximately three weeks later.

New Lottery Regulation

USCIS established a lottery system in fiscal year 2005 to decide which of the H-1B petitions received during the first two business days would be processed; others were returned. On March 24, 2008, just prior to this year's filing deadline, USCIS issued an interim final rule stating that it would expand the lottery to include fiscal year 2009 petitions received during the first five business days.

This year USCIS received 163,000 petitions, more than enough to exhaust the FY 2009 H-1B cap for both the standard and advanced degree categories. USCIS and U.S. Immigration and Customs Enforcement (ICE) promulgated another interim final rule, dated April 8, 2008, that provides relief for employers who petitioned on behalf of F-1 students whose Optional Practical Training would otherwise expire prior to the start of the federal fiscal year

on Oct. 1.

The rule addressed the problem of petitions filed on behalf of F-1 students who ran out of time to remain in the U.S. even though an H-1B petition was pending on their behalf. The new rule not only grants a blanket extension of stay for those whose petitions have been selected for processing, but also authorizes work during the "gap period" between the date that F-1 nonimmigrant status expires and the start of H-1B status on Oct. 1 of the new fiscal year.

The new rule issued April 8th also provides a 17-month extension of the existing 12-month Optional Practical Training for employees who earned a degree in science, technology, engineering or math and whose employers enroll in the Department of Homeland Security's E-Verify program before the OPT worker applies for the extension. This 29-month period will afford employers two additional chances to apply for H-1B classification. Some employers may also use the 29-month period to avoid the H-1B cap altogether if the foreign worker attains lawful permanent resident status.

E-Verify System

Employers will have little time to decide whether to sign up for E-Verify. The system provides an electronic means for employers to comply with the Immigration and Reform Control Act of 1986, which prohibits the hiring or continued employment of persons who do not have authorization to work in the U.S. The 1986 act requires employers to complete a Form I-9 for all new hires to verify identity and employment eligibility.

Employers may register for E-Verify at www.vis-dhs.com/EmployerRegistration, where they must agree to the terms of a memorandum of understanding with Homeland Security and the Social Security Administration. Several provisions of the memorandum should concern employers. For example, the memorandum grants Homeland Security and Social Security permission to conduct periodic site visits and requires the employer to make employment and E-Verify-related records available to the government agencies.

Participating employers obtain a rebuttable presumption of not knowingly hiring unauthorized aliens. This presumption may aid in avoiding criminal liability, but it nonetheless leaves open the possibility of ICE worksite enforcement. As recently as April 13, ICE conducted raids and took into custody a total of approximately 400 hourly workers at Pilgrim's Pride Corp. chicken processing facilities in four states. Pilgrim's Pride participates in the voluntary E-Verify program. ICE has not charged Pilgrims Pride with any violations of the immigration laws.

In response to each e-verification request, both Social Security and Homeland Security will issue either a confirmation or tentative non-confirmation of employment eligibility. In the case of a tentative non-confirmation, the employee may contest the finding by obtaining a referral letter from the employer and providing additional information to the respective agency. During the resolution process, employers may not take adverse action against employees. Final non-confirmation by either government agency indicates that the employee is not eligible for employment and therefore should be terminated.

Registration for E-Verify may seem like a high price to pay to obtain employment eligibility for foreign workers during the 17-months following the standard OPT period. However, some employers will find that it is a fair bargain to retain key employees until Congress enacts legislation to expand or scrap the H-1B cap. ■