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EMPLOYERS MUST ACT QUICKLY FOR H-1B VISAS

Short supply may prohibit new hires until October 2010

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This spring, employers of foreign professional workers will face a potential crisis. Although the economy is expected to contract this year, the demand for foreign workers remains strong, and the allocation of H-1B visas for professionals for the upcoming fiscal year is expected to run out very quickly.

New H-1B petitions must be filed on or within the first few days of April 1, which is six months prior to October 1, the start of the new fiscal year. Most likely, employers will file more than 100,000 petitions on April 1, and as a result U.S. Citizenship and Immigration Services (USCIS) will need to conduct a lottery to determine those it can accept for processing.

In anticipation of the shortage, many employers are reviewing their expected staffing needs and preparing new H-1B petitions now, well in advance of the filing date. Among these proactive employers are many high-tech companies based in Connecticut that need new foreign professional workers to support operations throughout the United States.

The H-1B shortage is the result of a statutory cap of 65,000 visas per year. Two years ago, in response to protests from corporations nationally, Congress exempted an additional 20,000 visas from the cap for graduates of U.S. master's or advanced-degree programs. However, this past year employers quickly exhausted both allocations by filing approximately 163,000 petitions in the first week of April 2008. During the weeks that followed, USCIS conducted a lottery of all petitions it had received during the first five business days of the month, and accepted only a fraction of the total for

processing.

This year, following the completion of a new lottery, USCIS will likely take several months to process and approve the new crop of H-1B petitions. Once approved, the petitions will authorize the beneficiaries to obtain new H-1B status or visas and begin work on or after the start of the new fiscal year. If an employer does not file a petition or obtain a receipt number in the H-1B lottery, it will not be able to employ a new H-1B worker until the start of the next fiscal year which begins on October 1, 2010.

Broad Impact

In many industries, despite the recent economic downturn, employers are expected to feel the effect of the H-1B shortage. In particular, the cap will hamper hiring by companies that need new employees from abroad. It will also impact growing companies with employees already in the United States, such as F-1 students or J-1 trainees who are already authorized to work for one year to 18 months, but who will need to change status to H-1B in order to continue to live and work here.

Fortunately, under current law many foreign professionals are exempt from the annual H-1B limit. The cap does not affect foreign workers currently holding H-1B

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status, as they were counted against a prior year's cap. Petitions for employees of universities, non-profit research organizations, the government and Defense Department projects are also exempt.

Employers who foresee they will need to hire H-1B workers should prepare to file petitions now, more than six months in advance of the employment start date. Petitions filed and accepted into processing before the cap is depleted will be reserved a visa number, whether or not the employers request USCIS Premium Processing Service, by which the agency warrants it will adjudicate a case within 15 business days.

To prepare for the rush for H-1B visas, employers should assess both their current and anticipated staffing requirements. Foreign students, both those already on the payroll and those expected to join in the near future, should be considered as beneficiaries of new

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H-1B filings. Employers should check to see if these individuals have work authorization, known as Optional Practical Training, which expires during the coming fiscal year.

Foreign workers currently employed in the U.S., such as TN professionals, L-1 intracompany transferees and J-1 trainees, who may need to stay in the U.S. beyond the expiration of their current status, might also benefit from new H-1B filings. Finally, if an employer has plans for starting substantial new projects which would require hiring new foreign workers, it should identify candidates now, and immediately file for H-1B visas for them.

Alternative Classifications

Another way to handle the H-1B shortage is to use one of several alternative non-immigrant (temporary) visa classifications for which there is no numerical limit. For example, O-1 visas are available for individuals who have extraordinary ability in a particular field.

The TN treaty visa category allows professionals from Canada and Mexico to qualify for work authorization pursuant to

Free Trade Agreements. Citizens of Chile and Singapore can obtain H-1B1 treaty visas; while there is an annual limit for this category, it far exceeds expected demand. Similarly, Australian professionals can take advantage of the E-3 treaty visa category.

New employees and managers of companies can obtain E-1 or E-2 visas based on international treaties if the companies are majority owned by foreign citizens, and have either substantial trade with or investment in the United States. Companies with foreign affiliates can use the L-1 category to obtain visas for transferees from abroad who have spent at least one of the last three years outside the U.S. working for the foreign parent company or for one of its international branches or affiliates.

On April 8, 2008, USCIS and Immigration and Customs Enforcement (ICE) promulgated a new rule to authorize interim work authorization for F-1 students in the U.S. waiting for approval of H-1B cap petitions. Any student whose Optional Practical Training would otherwise expire prior to the start of the new fiscal year—for whom an H-1B petition is filed and selected in the lottery—is now automatically grant-

ed an extension of stay and authorized to work during the “gap period” between the date their F-1 status expires and October 1 of the new fiscal year, when their new H-1B status begins.

Under the new rule, students can also apply for a 17-month extension of their initial one year Optional Practical Training if they have a degree in science, technology, engineering or math (the “STEM” fields). To obtain the benefit, a student must file an application showing that the employer has enrolled in the Department of Homeland Security’s E-Verify program. Once granted, the additional 17 months of work authorization can give their employers two additional chances to file petitions for their benefit in upcoming annual lotteries for H-1B classification.

With recent changes in both the economic and political environments, it’s hard to predict whether Congress will take any action to increase the allotment of H-1B cap numbers during the coming few months. Employers should plan for a continuing visa shortage, and prepare to act now to minimize the impact of the H-1B cap on their staffing plans over the coming year. ■