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The Annual H-1B Cap Season Is Under Way

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Law360, New York (March 24, 2010) -- On April 1, 2010, the United States Citizenship and Immigration Service ("USCIS") will begin accepting H-1B Specialty Occupation visa petitions.

The H-1B is the work visa most commonly used by employers to hire new highly skilled foreign workers. Since the H-1B filing season is historically brief, employers and their counsel are now preparing to file H-1B petitions on behalf of employees to ensure that work authorization is secured.

The H-1B program is used to employ foreign workers in professional positions, e.g., architects, engineers, scientists and computer programmers, which require at least a bachelor's degree education or its equivalent.

There are 65,000 H-1B visas available each fiscal year. An additional 20,000 H-1B visas are available to foreign workers who possess a master's degree or higher from a U.S. university.

The term H-1B "cap" refers to this numerical limitation set by Congress on the number of H-1B visas that can be approved each fiscal year. H-1B petitions are valid on Oct. 1, the start of the fiscal year, and USCIS will begin accepting petitions six months prior to that date on April 1, 2010.

For the first time in many years, H-1B visas were available from April 1, 2009, through Dec. 21, 2009. In the strong economy of years past, the coveted H-1B visas were in such high demand by

U.S. employers that they were exhausted on or immediately after April 1. The USCIS then engaged in a lottery process to select the H-1B petitions to be adjudicated.

With a limited availability of H-1Bs and uncertainty as to how quickly they will be exhausted in this turbulent economic environment, employers and their counsel are strategically planning for the coming weeks. The following practice points are worth noting:

Employer Sponsorship and Duration of Validity

Most employers are subject to the H-1B cap. Institutions of higher education or related nonprofit entities, nonprofit research organizations or governmental research organizations, however, are exempt from the annual H-1B cap.

For these institutions, H-1Bs can be obtained throughout the fiscal year from USCIS. The H-1B education, licensing and LCA requirements discussed below apply to the filing of exempt H-1B petitions.

Employers can sponsor an H-1B worker for up to 6 years. Initially, an H-1B visa can be issued with a validity of up to 3 years and an extension application can then be filed for the remaining 3 years.

If an employer terminates an H-1B worker prior to the expiration of the H-1B validity date, the employer is statutorily obligated to pay the H-1B worker's return cost of transportation home.

Job Requirements

The H-1B requires that the duties of the job offered require skills and a body of knowledge acquired through a university education, or its equivalent, in a field of study related to the position.

If the foreign national possesses a foreign degree or is relying upon a combination of education and work experience, it is necessary for the degree and/or work experience to be evaluated by a professional evaluation service.

Also, if the foreign national's degree is not obviously related to the position, the employer is encouraged to provide an explanation of how the specific course of study relates to the execution of the job duties.

It is important to note that when the H-1B petition is filed with USCIS, the foreign national must meet all of the position's requirements. For example, the foreign national must have earned his Bachelor's at the time the H-1B petition is received by the USCIS.

Since most graduates do not meet their degree requirements until the end of the academic year in May or June, it is important to confirm that the foreign national in fact meets the bachelor's degree requirement by April 1, 2010.

The same holds true for licensing requirements. If the offered position requires a license, the foreign national must possess the license at the time the H-1B is filed on April 1, 2010 — not by the time the H-1B is valid on Oct. 1, 2010.

The Labor Condition Application

Employers are required to obtain an approved Labor Condition Application (LCA) from the United States Department of Labor (DOL) to be filed with the H-1B petition on April 1, 2010. The LCA is an attestation made by the employer to the DOL concerning wages and working conditions.

With regard to wages, the employer is required to pay the "required salary" which is defined as being the higher of the prevailing wage or the offered wage i.e. actual wage offered to the foreign national. It is important to note that the salary may not include a bonus or fringe benefits.

LCAs are electronically filed with the DOL's iCert system and are currently taking up to seven calendar days to be approved. Upon approval, the DOL emails confirmation of the LCA approval or "certification" which can then be printed and included with the H-1B petition.

With that said, upon beginning the preparation of an H-1B, the LCA should be prepared first and submitted to the DOL as quickly as possible so that the adjudication of the LCA does not delay the filing of the H-1B petition on April 1.

USCIS Fees

The USCIS fees for each H-1B petition include:

- a base filing fee of \$320;
- an Education and Training fee of \$1,500 (or \$750 for employers with less than 25 full-time employees);
- a Fraud Prevention and Detection fee of \$500; and,
- if the employer deems necessary, a \$1,000 “premium processing” fee to ensure the petition’s adjudication in 15 calendar days.

Please note that cap exempt H-1B employers are not required to pay the Education and Training fee. Each fee should be paid with a separate check annotated with the employer’s and foreign national’s name.

Conclusion

The H-1B is the employment visa of choice because it provides flexibility to hire skilled professionals who have not previously worked for the employer.

While the compilation and preparation of H-1B petitions can be complex, lengthy and costly, the H-1B visa classification provides U.S. employers with the ability to meet critical, short-term business needs. Employers and their legal advisers are encouraged to seek competent immigration counsel to prepare these applications.

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