International Recruitment – Managing H-1B and OPT Workforce

As most HR professionals who hire internationally know, the H-1B visa category is one of the most useful nonimmigrant options for individuals who will be employed temporarily in the US. HR professionals are also aware of the annual cap placed on the H-1B visa, and how this cap can close doors to some potential employees. The annual cap of 65,000 Bachelor's Degree-holding nonimmigrants and 20,000 Master's Degree-holding nonimmigrants applies to each fiscal year (October 1st to September 30th). This article provides a brief overview of the ever increasing popularity of H-1B visas, how to identify possible H-1B applicants in your workforce, H-1B alternatives, and how to address gaps in authorized employment and mitigate the risks and liabilities to your organization.

The United States has long been the favored destination of immigrants. Effective immigration policies formulated by the U. S. Citizenship and Immigration Service ("USCIS"), formally the INS, has attracted and retained talent of the highest ilk from all over the world. Due to effective immigration policies formulated and implemented by the U.S. government the, United States is still considered to be a land of opportunity and the only country that has all the necessary ingredients to lead the world in times of both financial stability and instability.

The International Organization for Migration ("IOM") rates the United States and Canada as the countries facing a growing demand for skilled temporary workers, and it also ranks them as major receivers of permanent migrants from throughout the world.

All of the above factors taken together have greatly driven the demand for H-1B visas in the United States. The H-1B is the highest demanded work visa due to its flexibility (referred to as "portability"). Its popularity also arises from the fact that it is the only other "dual-intent" visa allowing an employee to apply for a Green Card.

The H-1B cap has been reached earlier and earlier each year. In 2008, USCIS received approximately 163,000 petitions on the first five days of the eligible filing period for FY 2009 (April 1-7, 2008). All 163,000 petitions were then subject to a computer-generated random selection process to determine which H-1B petitions would continue to receive full adjudication and be eligible to receive an H-1B visa number. The USCIS conducted two random selections. The first random selection was made on petitions qualifying for

the 20,000 "Master's or higher degree" (advanced degree) exemption. The second random selection was performed on the remaining advance degree petitions together with the general H-1B pool of petitions for the 65,000 cap.

With the demand and popularity of H-1B visas increasing every year, it is recommended that H-1B petitioning organizations start identifying potential H-1B candidates [employees who are presently on Optional Practical Training ("OPT") or other nonimmigrant visas or whose OPT's or visas are likely to expire later on in the year], and plan workforce needs early in the year to prepare to submit H-1B petitions. The sooner the petitioner starts the H-1B process, the better the chance that appropriate time can be spent preparing and analyzing a case.

Of course there are additional visa categories which may serve as alternatives to the H-1B and permit foreign workers to come into the US to work for a period of time. First, there are L-1 visas, which are issued to foreign employees of an international corporation. Second, there are TN visas, which are allowed pursuant to North Atlantic Free Trade Agreement and which are issued to Canadian and Mexican citizens. Thirdly, there are E-3 visas, which are issued to Citizens of Australia under the Australian Free-Trade Treaty. Moreover, there are other nonimmigrant visas, such as B-1 visas, that can bridge the gap while the employee waits for an approval of their H-1B petition. Employers can also utilize the services of an F-1 student with OPT, or H-3 visas for training programs within the company. If an organization has offices abroad, an employee can be sent to the office abroad and be carried on the payroll of the overseas office.

UNDERSTANDING CAP GAP ISSUES, PITFALLS, AND MITIGATING RISKS:

Cap gap occurs when an F-1 student or OPT status employee's work authorization expires in the current fiscal year - before they can start employment pursuant to their approved H-1B in the next fiscal year (beginning on October 1st). An employee in OPT status in a cap-gap situation would have to leave the United States and return just prior to the time their H-1B status becomes effective, at the beginning of the next fiscal year. Many employers file H-1B petitions on behalf of F-1 students after their post-completion OPT expires since the employer cannot file, and USCIS will not approve, an H-1B petition submitted earlier than six months in advance of the date of actual need for the beneficiary's services or training. As a result, the earliest date an employer can file an H-1B petition for consideration under the next fiscal year cap is April 1st for an October 1st employment start date. If that H-1B petition and the accompanying change of status request are approved, the earliest date that the student may start approved H-1B employment is October 1st. Consequently, OPT employees who are the beneficiaries of approved H-1B petitions, but whose periods of authorized stay (including authorized periods of post-completion OPT and the subsequent 60-day departure preparation period) expire before October 1, must leave the United States, apply for an H-1B visa at a US Consular post abroad, and then seek readmission to the United States in H-1B status.

Prior to the implementation the rule allowing for the extension of OTP for science, technology, engineering and mathematics ("STEM") qualified Students, regulations were passed as stopgap measures to addressed the cap gap by authorizing an extension of the authorized stay, however they did not extend the student's employment authorization.

This meant the student could remain in the United States until October 1st, when the approved H-1B employment was set to begin, but the student could not work.

In an effort to address this, the USCIS, under a rule addressing cap gap issues**,** stated that F-1 academic students on post-completion OPT could maintain valid F-1 status until the expiration of their OPT. Once that OPT ends, they are authorized to remain in the United States for up to 60 days to prepare for departure.

Below are 2 different scenarios on how this Cap Gap extension rule automatically becomes effective when the H-1B cap has been reached and the OPT employee (or F-1 student) has an H-1B petition filed on his/her behalf during the acceptance period:

Scenario 1: If the H-1B petition filed on behalf of the student is not selected during the acceptance period, the automatic extension terminates when USCIS announces completion of the random selection of the H-1B selection process on its public web site.

Scenario 2: If the H-1B petition filed on behalf of the student is selected during the acceptance period, the student may remain in the United States and continue working until the October 1st start date indicated on the approved H-1B petition. The OPT employee may benefit from this provision only if they has not violated their status.

Under the rule, F-1 students may apply for post-completion OPT 90 days before and no later than 60 days after their academic programs end. This allows F-1 students seeking post-completion OPT to apply during their 60-day departure preparation periods in the same way that they are allowed to apply for H-1B status during their departure preparation periods. This allows students to ensure that they meet graduation requirements before applying for OPT.

STEM DEGREES AND OPT EXTENSIONS:

Realizing the need for retaining highly skilled foreign national workers to meet the United States' growing demand for skilled temporary workforce, the USCIS now allows F-1 academic students who receive degrees in **STEM,** and who receive an initial grant of OPT, to apply for a 17-month extension for a maximum of 29 months of post-completion OPT. The STEM Designated Degree Program List is based on the "Classification of Instructional Programs" developed by the US Department of Education's National Center for Education Statistics.

Eligible STEM degrees include Computer Science Applications, Life Sciences, Actuarial Science, Mathematics, Engineering, Military Technologies, Engineering Technologies, and Physical Sciences. In order to be eligible for the 17-month extension of post-completion OPTs, the OPT employee or student must meet the following criteria:

1. The student must have a Bachelor's, Master's or Doctoral degree in a STEM field; and
2. The employer must be enrolled in E-Verify; and

3. The student must apply on time (at least 90 days before the current post-completion OPT expires).

Employees in OPT status who timely file STEM extension applications with USCIS may continue working while their applications are pending for 180 days or the date of the decision, whichever date is earlier.

An employee who has received a 17-month STEM extension must report the extension to their International Student Officer ("ISO") or Designated Student Officer ("DSO) within 10 days, indicating changes in any of the following:

- Legal name;
- Residential and mailing address;
- E-mail address;
- Employer name;
- Employer address;
- Job title or position;
- Supervisor name and contact information;
- Employment start-date; and
- Employment end-date

Some may question the benefits of hiring a foreign worker that requires extra care and a longer hiring process than a US worker. However, there are clear benefits to international recruitment, such as the creation of new jobs that lead to a larger market, and transfer of skills and knowledge from diverse cultural perspectives. In fact, international transfers and assignments provide great career prospects for both employers and employees because they allow for an exchange of specialized knowledge and managerial perspectives. Foreign workers also increase specialization in the economy, enhance the nation's productive capacity, and help innovation in the US. The international transfer and mobility of talent is a result of globalization of economies and is both a cause of and consequence of globalization.

In an ongoing attempt to keep HR professionals up-to-date with business immigration law rules and regulations, our office continues to forge strategic alliances with various professional organizations that are able to obtain and provide important information to their members.

When traditional immigration approaches do not work, our knowledgeable and skilled legal team offers many visa options to meet immigration goals. Please feel free to contact us at any of our several office locations, and speak to a member of our staff in one of the 15 languages spoken, English, Spanish, French, Japanese, Korean, Slovak, Czech, Polish, Tagalog, Hindi, Tamil, Italian, Russian, Chinese, and German.

To meet a growing demand for Canadian Immigration Law Services, Nachman & Associates formed a Canadian Division in 2005. Managed by licensed Canadian legal staff and with offices in Montreal and Toronto, as well as New York and New Jersey, our Canadian Division attorneys are in the unique position to assist with cross-border issues.

Nachman & Associates, P.C. is also proud to announce the 2007 formation of a Global Immigration Division to assist clients with immigration services to countries such as the UK, China, New Zealand, Australia, and more. Our Global Division staff is fully equipped to assist with international transfers to and from the United States. If you, or any member of your staff, are interested in receiving more information about various immigration options, or subscribing to one of our firm's monthly newsletters, please contact our offices at 201-670-0006 x107 or e-mail us at info@visaserve.com.