H-1B FILING SEASON (FOR THE 2016 DEADLINE ON APRIL 1ST) GETS INTO FULL-SWING FOR H-1B EMPLOYERS AND PROSPECTIVE H-1B EMPLOYEES

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Based on the current predictions, the U.S. economy will rebound after 2015's growth rate of 2.1%. What does this mean for the immigration practitioners, professionals, and prospective H-1B employers and employees? Assuming that the economy performs as projected, it is highly likely that we will once again, as we did in 2015, witness the H-1B lottery (technically referred to as "Random Selection Process") during April 2016. To better prepare for the H-1B cap, this article endeavors to summarize a few practice pointers which every prospective H-1B employer and employee should know.

Limited Numbers: *Not* 65,000; There Are Only 58,200 Regular H-1B Visas.

The current annual cap on the H-1B category is 65,000. However, all H-1B nonimmigrant visas are not subject to this annual cap. Up to 6,800 visas are set aside from the cap of 65,000 during each fiscal year for the H-1B1 program designed specifically for the Nationals of Chile and Singapore. Unused numbers in the H-1B1 pool are made available for H-1B use for the next fiscal year. Thus, in effect, only 58,200 H-1B visas are granted each year except the 20,000 additional H-1B visas which are reserved for individuals who have received master's degrees or higher from a U.S. college or university. In another upcoming article, we will discuss, in detail, whether or not every master's degree from a U.S. academic institution would qualify an individual for the H-1B master's cap.

Because of the limited number of H-1B visas, employers should immediately begin to identify individuals who would need H-1B sponsorship. This will allow sufficient time for petition preparation, including the time required to file and receive certification of the prerequisite Labor Condition Application (LCA). Thus, strategizing the submission of H-1B Petition is a key to hiring an H-1B employee for the new United States and Citizenship Services (USCIS) fiscal year beginning on October 1, 2016.

How Long Will USCIS Accept H-1B Petitions?

It is preferable, not mandatory, to submit H-1B Petitions on April 1, 2016. The answer to the question "how long USCIS will accept H-1B Petitions" depends on how many H-1B Petitions USCIS will receive during the first five (5) business days (i.e. from Friday, April 1, 2015 until Thursday, April 7, 2015) beginning, April 1, 2016. If USCIS receives a sufficient number of H-1B petitions during the first five (5) business days, an announcement will follow about the Random Selection process. If, however, USCIS does not receive a sufficient number of H-1B petitions to reach the statutory cap for fiscal year (FY) 2017, during the first five (5) business days, it will keep accepting H-1B Petitions until it announces a "final receipt date" for new H-1B petitions. It is beyond the scope of this article to discuss how USCIS conducts the Random Selection process. We will address this topic, in detail, in another article.

Refrain From Filing Multiple H-1B Petitions For the Same Employee.

An employer may not file more than one H-1B petition for each prospective employee during the fiscal year. Therefore, a prospective employee who qualifies for the "Master's Cap" of 20,000 cannot file two (2) petitions to encompass the regular H-1B and the Master's H-1B. The limitation also precludes an employer from filing multiple petitions for different jobs for the same employee but does not preclude related employers (e.g., parent and subsidiary companies or affiliates) from filing petitions for the same

beneficiary. However, the employer must demonstrate a legitimate business need to do so and if it fails to meet that burden, all petitions on behalf of the beneficiary will be denied or revoked.

Both the Proffered Position And the Prospective H-1B Employee Should Qualify.

Not only the prospective employee but *both* the proffered position and prospective employee should qualify for the H-1B visa. For a proffered position to qualify for an H-1B visa, it must be a "specialty occupation". "Specialty occupation" is an occupation that requires: (1) a theoretical and practical application of a body of highly specialized knowledge; and (2) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The H-1B regulations further require that a position also meet one of the following criteria, in order to qualify as a specialty occupation: 1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position; 2) The degree requirement is common to the industry in parallel positions among similar organizations, or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree; 3) The employer normally requires a degree or its equivalent for the position; or 4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Therefore, in order to qualify as a "specialty occupation," a proffered position must: (1) require a theoretical and practical application of a body of highly-specialized knowledge; (2) require a bachelor's degree or higher in the *specific* specialty (or its equivalent) as a minimum for entry into the occupation; and (3) meet one of the four alternative criteria listed above.

For a prospective employee to qualify for the proffered H-1B position, regulations specify that s/he should have either one of the following: (1) Full state licensure to practice in the occupation (if required); (2) Completion of the degree required for the occupation; or (3) Progressively responsible work experience in the specialty equivalent to the completion of such degree. Thus, a general degree absent specialized experience may be insufficient because there must be a showing of a degree in a specialized field.

The Filing Fee Depends Upon the Type And Size of H-1B Employer.

Besides legal fee, the employer will need to pay the USCIS filing fees. Note that there is no flat fee that every employer is required to pay. The amount of H-1B filing fee depends on the size and type of employer. All employers are required to pay the base filing fee of $325.00 for the H-1B petition. Additionally, pursuant to the American Competitiveness and Workforce Improvement Act (ACWIA), employers are required to pay an additional fee (commonly referred as ACWIA fee) of $750 or $1500 unless exempt under Part B of the H-1B Data Collection and Filing Fee Exemption Supplement.

A sponsoring employer is required to pay a fee of $750.00 if it employs 25 or fewer full-time equivalent employees. In all other cases, the employers need to pay $1500.00. Employers such as institutions of higher education; nonprofit organizations or entities related to, or affiliated with an institution of higher education; nonprofit research organization or governmental research organization, etc. are exempt from paying the ACWIA fee. Additionally, employers seeking initial approval of H-1B must pay a $500 Fraud Prevention and Detection fee as mandated by the H-1B Visa Reform Act of 2004.

Additionally, as a result of the FY2016 Omnibus Appropriations Bill passed on December 18, 2015, the supplemental fee for H-1B petitions are increasing for companies that employ 50 or more employees in the United States and have more than 50 percent of their U.S. workforce in H-1B, L-1A, or L-1B nonimmigrant status. Specifically, the previously expired fees H-1B petitions will increase from $2,000 to $4,000. These supplemental fees must be paid on initial and extension petitions. Further, either the employer or employee can pay an optional premium processing fee of $1,225.00 to expedite the adjudication of a petition.

Be Aware of Salary and Benching Costs.

A prospective employer must obtain a certification from Department of Labor (DOL) that it has filed an LCA in the occupational specialty. The employer attests on the LCA that H-1B nonimmigrant worker will be paid wages which are at least the *higher* of the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question OR the prevailing wage level for occupational classification in the area of intended employment. Thus, not to undercut wages paid to the comparable U.S. workers, Congress has included a safeguard in the H-1B program. Additionally, employers are required to pay the costs for the petition process.

Regulations require that employers must begin paying LCA-stated wages when the employee "makes him/herself available for work" but not later than 30 days after employee's entry into the United States or 60 days from the date that USCIS grants a Change of Status. Liability begins to accrue when the person "enters into employment" with the employer. Thus, even if the worker has not yet "entered into employment," when the H-1B worker is present in the U.S. on the date of the approval of the H-1B petition, the employer shall pay to the worker the required wage beginning 60 days after the date the H-1B worker becomes eligible to work for the sponsoring employer. The H-1B worker becomes "eligible to work" for the employer on the date set forth in the approved H-1B petition filed by the employer.

An employer must continue to pay an H-1B employee who is not working due to a nonproductive status at the direction of the employer (e.g., benching because of lack of work, lack of a permit or license). This regulation applies even if the H-1B employee is receiving training either provided by the employer or through some other external arrangement at the direction of the employer. Thus, the employer is liable for both nonproductive time as well as productive time once employee becomes eligible for work. Employers who do not pay non-terminated H-1B employees may face civil penalties. Employers are, therefore, advised to pay an H- I B employee his or her salary as listed on the LCA until that employee has been terminated and the USCIS has been notified of the request to withdraw the H- IB Petition. Furthermore, if the H-1B employee is terminated prior to the end of the period of admission, the employer is liable for "the reasonable costs of return transportation of the alien abroad.

Compliance Issues: Posting Notice of the LCA & Maintaining Public Access Files.

Notice of the LCA must be posted, or where there is a union it must be given to the union, before filing the LCA. The notice may be the LCA itself or a document of sufficient size and visibility that indicates: (1) that H-1Bs are sought; (2) the number of H-1Bs; (3) the occupational classification; (4) the wages offered; (5) the period of employment; (6) the location(s) at which the H-1Bs will be employed; and (7) that the LCA is available for public inspection. The notice should state where complaints may be filed. Notice must be posted "in a least two (2) conspicuous locations at each place of employment where any H-1B nonimmigrant will be employed" and the notice shall be posted *on or* within 30 days *before* the date the labor condition application is filed and shall remain posted for a total of 10 days.

Notice may be posted in areas where wage and hour and OSHA notices are posted. An employer may also provide electronic notice to employees in the "occupational classification" for which H-1Bs are sought, through any means it normally uses to communicate with employees including a home page, electronic bulletin board or e-mail. If accomplished through e-mail it needs only to be sent once; other electronic forms (e.g., home page) should be "posted" for 10 days. Notices must be posted at each worksite including ones not originally contemplated at the time of filing but which are within the area of intended employment listed on the LCA.

Additionally, an employer must maintain a group of documents referred to as a Public Access File (PAF). The PAF must be accessible to interested and aggrieved parties. The PAF must be available at either the employer's principal place of business or at the worksite. An interested party is one that has "notified the DOL of his or her/its interest or concern in the administrator's determination."

The PAF must be available within one day after the LCA is filed with all supporting documentation including: a copy of the completed LCA; documentation which provides the wage rate to be paid; a full, clear explanation of the system used to set the "actual wage"; a copy of the documentation used to establish the prevailing wage; copy of the notice given to the union/employees; and a summary of the benefits offered to U.S. workers in the same occupational classification, and if there are differences, a statement as to how differentiation in benefits is made (without divulging proprietary information).

Demonstrate Sufficient Level of "Control" Over Prospective H-1B Employee(s).

In order for the H-1B petition to be approved by USCIS, a petitioning employer must establish that an employer-employee relationship exists and will continue to exist throughout the duration of the requested H-1B validity period. Hiring a person to work in the United States requires more than merely paying the wage or placing that person on the payroll of the H-1B petitioning organization. In considering whether or not there is a valid "employer-employee relationship" for the purposes of H-1B petition adjudication, USCIS must determine if the employer exercises a sufficient level of "control" over the prospective H-1B employee.

Thus, the prospective H-1B petitioner organization must be able to establish that it has the "right to control" as to when, where, and how the prospective H-1B nonimmigrant beneficiary will perform the professional and specialty occupation job. USCIS considers various factors in making such a determination (with no one particular factor being decisive).