

Employers: apply for H-1B work visas while they last

By Eli M. Kantor

Employers and their counsel should start preparing for H-1B Visa season. The United States Citizenship and Immigration Service, or Immigration, will begin accepting new H-1B applications April 1 for a start date of Oct. 1. This is the earliest date an employer may file a petition for an H-1B visa.

During the last two years, the annual H-1B visa quota of 65,000 visas was reached during the *first week*. If Immigration receives more petitions than it can accept by April 5, it will use a lottery system to randomly select the numbers of petitions eligible for H-1B status.

H-1B visas are nonimmigrant visas initially valid for up to three years that can be extended for up to six years for college-degreed professionals, such as systems analysts, information systems managers, software developers, computer programmers, engineers, scientists, teachers, architects, graphic designers, financial analysts and others. An additional 20,000 H-1B visas are allocated for applicants with Masters degrees or Ph.D.s.

To make H-1B visas more attractive for married individuals, the Obama administration has changed the rules so the married spouse of an H-1B holder — an H-4 — can obtain work authorization co-extensive with the length of their spouse's H-1B. Additionally, Sen. Orin Hatch recently proposed a bill in Congress to raise the annual cap from 65,000 to 115,000, with a potential to go up to 195,000 if the need arises. The bipartisan bill is touted by several lawmakers who believe that it will help American companies attract the best and the brightest workers from around the world to spur American economic development. There have

been several similar measures introduced into Congress over the last few years, without success.

In the meantime, employers should evaluate their needs for either a possible new hire or to keep a current foreign national employee authorized to work on a post-graduate work permit employed. Indeed, offering a job to a foreign national means navigating the Kafkaesque requirements of Immigration's rules.

For starters, it's important to determine if the employee will even be eligible. Then, consider whether you can afford to pay the potential employee the prevailing wage for the position in your geographical location, as determined by the Department of Labor. Importantly, will the potential employee in lawful immigration status now continue to be in status come October, when their H-1B visa will go into effect?

And a few more considerations: Does the proposed position require a bachelor's degree or equivalent? Is it common in the industry for that position to be filed by someone with a bachelor's degree? Does the potential employee have the required academic credentials? Are the potential employee's foreign academic credentials equivalent to a four-year bachelor's degree from an accredited U.S. university?

Clearly, these issues are complex.

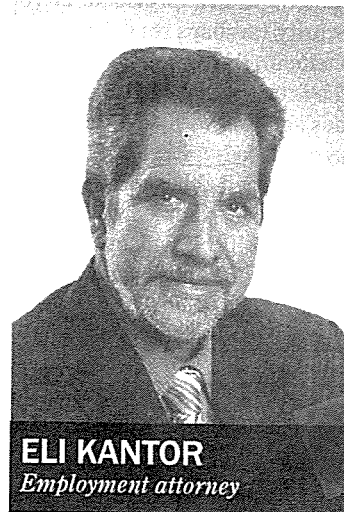
The timing of the process is also important to remember. Before an H-1B application can be filed with Immigration (on Form I-129), the employer must first obtain a labor condition attestation (LCA) from the DOJ attesting, among other things, that the employer is offering to pay the potential employee the prevailing wage. It normally takes around seven days, and that's assuming there are no issues with the application. For instance,

sometimes the DOL does not have a record of the employer's federal employment identification number, a problem which can take up to a week to resolve.

Finally, potential employees must have certified copies of their academic credentials. If they are foreign, they must be translated into English and evaluated by an accredited credentials evaluation service to verify that they are equivalent to a four-year bachelor's degree from an accredited U.S. university.

The completed application along with all of the required supporting documents, including the approved LCA from the DOL, the applicant's academic transcripts and diplomas — translated into English and evaluated — must be filed no later than six weeks from now to have a chance of being selected in the lottery. If an employer wishes to apply for an H-1B visa for an employee, they better act now.

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