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H-1B Cap Opens: Procedural Changes Could Catch Employers Off-Guard

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Under immigration law, the H-1B program allows U.S. employers to hire foreign nationals in "specialty occupation" positions for which they require a bachelor's degree or the equivalent. Under current law, there is a cap on the number of new H-1B petitions that will be granted during each federal fiscal year ("FY"). While current trends suggest the cap might not be hit as early this year as in some years, procedural changes related to prevailing wage requirements could catch employers off-guard and cause delays.

What Are the H-1B Cap Numbers?

During the dot.com boom, the H-1B cap was temporarily set at 195,000, but as of October 1, 2003, the cap returned to 65,000. Of those, 6,800 H-1B are allocated to citizens of Singapore and Chile under recent trade agreements with those countries, reducing the number generally available to 58,200 for the remaining countries.

In December 2004, Congress carved out an exemption of 20,000 more "bonus" numbers to the H-1B cap, but reserved them for foreign workers with U.S. Master's or higher degrees. For this Master's or advanced degree cap, the first 20,000 qualifying H-1B petitions received for employment in FY2011 will not be counted toward the regular H-1B cap.

The quota is available starting October 1, and petitions can be filed up to six months in advance, that is, on April 1, 2010. Demand outstripped supply in recent years. In 2008, the Department of Homeland Security agency that processes H-1Bs, U.S. Citizenship & Immigration Services ("USCIS"), received more than 163,000 H-1B petitions by April 7, depleting the cap in one week. USCIS resorted to randomly selecting which petitions would be accepted, and which would be refused and returned. The process is considered the "H-1B lottery."

In contrast, for FY2010, while the Master's cap was hit by June 2009, the regular cap remained unfilled until December 21, 2009. At that time, USCIS applied the random lottery selection process to the H-1B petitions received that day.

What Are the Procedural Changes This Year?

This year, there is a change in processing for the H-1B prevailing wage requirement. A preliminary step in filing an H-1B petition is to show that the employer will pay the prevailing wage by obtaining a certified Labor Condition Application ("LCA"). The Department of Labor

("DOL"), not the Department of Homeland Security, processes prevailing wage requests. Employers submit a Form 9035 online to the DOL through its web-based portal called iCERT. The Form must be submitted to USCIS, after submission to the DOL, along with the H-1B petition or the H-1B petition will be rejected.

For a time, LCA certification occurred more-or-less instantaneously. Under the current DOL system, Form 9035 LCA processing can take a week or more. Therefore, LCAs should be filed well in advance to avoid delays and a risk that the cap might be hit.

Who Is Exempt From the Cap?

New employees hired in H-1B status are subject to the cap, unless they are exempt. Many people can still obtain H-1B status through exemptions to the H-1B cap, in particular the following:

- Petitions for persons who currently hold H-1B status and seek an extension do not count towards the H-1B cap numbers;
- An H-1B worker can move to a new employer without using an H-1B cap number;
- In some cases, persons who previously held H-1B status can regain H-1B status without using an H-1B cap number;
- Institutions of higher education, nonprofit research organizations and governmental research organizations are exempt from the cap; and
- The caps carved out for citizens of Chile and Singapore are rarely hit.

What H-1B Alternatives Exist?

There are alternative immigration options other than H-1B status, including the following:

- L-1 intracompany transfers for persons who worked for a foreign entity related to a U.S. company for at least one year;
- For Canadians and Mexicans, TN status under the North American Free Trade Agreement ("NAFTA");
- J-1 training and other exchange programs;
- E-1/E-2 treaty investor and treaty trader status for numerous countries;
- E-3 visas for Australians;
- O-1 for extraordinary ability with degrees;
- Returning to school for a higher level of education and work authorization;
- Labor certification for permanent resident status under the "PERM" process as a first step toward "green cards." Note, however, there are processing backlogs for many types of permanent resident applications.

Other creative alternatives are often available as well, for a temporary or as a stopgap measure.

What Does This Mean for Employers?

An employer cannot hire a person in the United States without proper work authorization. While the person cannot work without work authorization, there are ways to tide the person over for short periods of time while waiting for adjudication. In particular, in some instances the employer can give the potential employee a "signing bonus" as some support for the person waiting for the adjudication, so long as the person does not work in the interim and has status to remain in the United States while waiting for the H-1B.

There often are solutions for companies to hire valuable candidates. The employer who is considering hiring a foreign national in H-1B status should plan to prepare and send the petition to USCIS on March 31, 2010, or as soon thereafter as possible, for the coming year's H-1B quota.

Employers need to resist any temptation to have potential employees begin or continue working, even in what might be considered volunteer positions, without the proper work authorization. Hiring employees without the proper authorization can subject the employer to penalties and subsequent scrutiny under immigration law.

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