Published on *The National Law Review* https://www.natlawreview.com

Immigration Alert for Employers: Time to File H-1B Visa Petitions

Article By:

Sara B. DeBlaze

On April 1, 2016, the U.S. Citizenship and Immigration Services ("USCIS") will begin accepting new H-1B visa petitions for employment that will begin on October 1, 2016. The H 1B visa is a popular choice for companies that plan to hire a foreign national to fill a "professional" or "specialty occupation" position requiring a minimum of a bachelor's degree in a specific field. Candidates for H-1B status include current employees in student status (F-1 or J-1), potential new hires, or employees in a different immigration status (for example, E, L or TN status).

Congress has placed a numerical "cap" on H-1B visas. For Fiscal Year 2017 (which begins October 1, 2016), the limit is 65,000 cap-subject H-1B visas, with an additional 20,000 visas available for individuals who have earned a master's degree or higher from an accredited U.S. educational institution. Although some exemptions from the cap may be available (principally for institutions of higher education or for persons already holding H-1B status), most employers are subject to the cap. As with last year, we expect the H-1B cap to be reached the first week of April. Once the H-1B cap has been reached, employers will be unable to file new cap-subject H-1B petitions until April 1, 2017.

Consequently, we advise employers to make H-1B sponsorship decisions as soon as possible. It is important to finalize preparation for H-1B petitions well before April 1 so that a complete petition can be submitted to USCIS on the first day it is permitted.

We strongly advise clients to finalize their H-1B petition decisions by February 14, 2016. Each petition requires a certification by the Department of Labor of a Labor Condition Application, which currently takes approximately seven days for issuance. As we draw closer to April 1, we anticipate that these certifications will take longer to obtain. It is therefore important to begin work on new H-1B petitions as soon as possible.

Unfortunately, we anticipate that yet again the demand for H-1B visas will far exceed the numbers available. For the past several years, USCIS has conducted a random lottery of all cap-subject H-1B petitions filed the first few days of April. Therefore, even if an employer files a complete H-1B petition for an employee on April 1, 2016, it is possible that the petition will not be selected in the lottery. If not selected, the entire petition (including uncashed checks) will be returned to the employer or its legal counsel.

Employers with Student Employees—Extension of Time for Stem Opt Status

The court decision affecting students in F-1 standing pursuant to STEM OPT is still not settled. On January 23, 2016, the District Court for the District of Columbia granted the U.S. Department of Homeland Security's ("DHS") motion to extend the current status of the STEM OPT rule until May 10, 2016. Over 34,000 persons and their employers would suffer severe consequences if the STEM OPT extensions are not allowed.

Since 2008, certain F-1 foreign students with science, technology, engineering or mathematics ("STEM") degrees have been permitted to apply for a 17-month work authorization extension of their Optional Practical Training ("OPT") after graduation from a U.S. college or university. A court case in August 2015 found that the DHS did not follow proper procedural requirements when it issued this Rule. The Court found all STEM extensions held by F-1 students to be invalid, but the Court gave DHS until February 12, 2016 (now May 10, 2016) to remedy the Rule's defects. Unfortunately, if this is not resolved by May 10, 2016, students currently on STEM OPT extensions may no longer have valid work authorization. Additional benefits are also affected, including cap gap protection and timing for students to file for work authorization. We will keep you updated on developments relating to this crucial issue.

Changes to the E-3 and H-1B1 Classifications

As of February 16, 2016, new regulations go into effect that will affect highly skilled workers in the nonimmigrant classifications for specialty occupations from Chile, Singapore (H 1B1) and Australia (E-3), among other nonimmigrant and immigrant categories.

The change most relevant to employers relates to extension of H-1B1 and E-3 status. Employees in H-1B1 and E-3 status previously had to have their extensions approved prior to the expiration date of their status. Now, they may file petitions in the United States and retain work authorization for up to 240 days while their petitions are pending.

Important to Track Job Site Changes for H-1B Employees (Simeio)

USCIS final guidance relating to changes in job sites for H-1B employees (the "Simeio memo") is now in full effect. Employers who plan to move H-1B employees to a site outside the "area of intended employment" listed in their most recent H-1B petition **must** file an amended or new petition **before** the employee begins working at the new place of employment. "Area of intended employment" is the area within normal commuting distance of the work site where the H-1B worker is normally employed. Please note that these amended or new petitions cannot be filed prior to certification of a new Labor Conditions Application ("LCA") unless an appropriate LCA is in place.

Changes to the ESTA/Visa Waiver Program

Non-U.S. citizens who currently travel visa-free to the United States pursuant to the Visa Waiver Program ("VWP") by registering through the Electronic System Travel Authorization ("ESTA") may need to obtain visas if they have certain connections to Iran, Iraq, Sudan or Syria. This may affect employees on visas who travel widely or who have dual nationality. The new Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015 provides that travelers in the following categories are no longer eligible to travel or be admitted to the United States under the VWP:

- Nationals of VWP countries who have traveled to or been present in Iran, Iraq, Sudan, or Syria on or after March 1, 2011 (with limited exceptions for travel for diplomatic or military purposes in the service of a VWP country).

- Nationals of VWP countries who are also nationals of Iran, Iraq, Sudan, or Syria.

These individuals will still be able to apply for a visa using the regular immigration process at our embassies or consulates. For those who need a U.S. visa for urgent business, medical or humanitarian travel to the United States, U.S. embassies and consulates can process applications on an expedited basis.

Exemptions are available for certain individuals who traveled to these countries for certain business-related purposes, persons representing international organizations and humanitarian non-governmental organizations and journalists.

Reminder for Travelers to Canada (U.S. Nationals Exempt)

As of March 15, 2016, all visa-exempt foreign nationals flying to or through Canada will need an Electronic Travel Authorization ("ETA") prior to arriving in Canada. This process is similar to the ESTA program already in effect for travelers to the United States. U.S. citizens and nationals are exempt from this requirement, but lawful permanent residents of the United States must comply. Non-U.S. employees traveling to Canada should plan to obtain an ETA prior to business travel.

In order to obtain an ETA, the applicant will be required to complete a simple online application and pay a small processing fee of CAD $7.00. Most applicants will receive a decision within minutes of submitting their online application. Upon approval, the ETA will be valid for five (5) years or for the remaining validity of the applicant's passport (whichever period is shorter).

National Law Review, Volumess VI, Number 34