H-1B Season is Upon Us . . . Will This Year's Economy Bring a Lottery?

It is that time of year again! We always hear the accountants moan and groan about the approaching April 15th deadline each year but, you have to listen a bit more closely and you will hear (and see) the U.S. business immigration lawyers and attorneys manifesting their distaste for the April 1st filing date for "cap" subject H-1B professional and specialty occupations workers. Well, here we go again . . .

April 1st, 2011 marks the first day when prospective H-1B petitioning employers and prospective H-1B employees will be able to apply to the U.S. Department of Labor ("DOL") for and Labor Condition Application ("LCA") and Petition to the U.S. Citizenship and Immigration Services ("CIS") for H-1B visa petitions for employment in the fiscal 2011-2012 year ("FY 2012"). Our advice to our H-1B employer clients continues to be that they need to think about filing H-1B petitions on (or very close to) April 1st for new and existing employees who will be eligible for a first-time H-1B visa to begin their employment on or after October 1st, 2011.

Each Fiscal Year, Congress has mandated an annual cap of 65,000 H-1B visas for "professional and specialty occupation workers" who possess the equivalence of a U.S. Bachelor's Degree. There are also an additional 20,000 H-1B visas available for individuals who possess the equivalence of a U.S. Master's Degree or other advanced degrees from U.S. Colleges or Universities. It continues to be the case that H-1B visa petitions filed on behalf of current workers who have been counted previously against the H-1B visa cap are not included in the annual cap established by Congress. Additionally, pursuant to the Chile and Singapore Free Trade Agreement, 6,800 H-1B visas are available exclusively to Chile and Singapore Nationals. This reduces the total allotment of H-1B visas available each fiscal year to 58,200.

For many years, our office assisted students who had to deal with the "cap-gap" issue. However, in 2008, there was some relief. In 2008, a regulation was promulgated that provided "cap-gap" relief for F-1 students with pending H-1B petitions. For example, F-1 student visa holders who received work authorization in Optional Practical Training (OPT) were permitted to extend the authorized period of stay and work authorization as long as they have received approved H-1B visas prior to the expiration of the OPT. Also, many Science, Technology, Engineering and Mathematics ("STEM") students continue to use the 19 month extension as a way to have the time they need to petition in the appropriate H-1B cycle. However, to get the STEM extensions, the employer needs to be enrolled in E-Verify.

For the last two (2) fiscal years, the H-1B allotment actually lasted for almost eight to nine months. This past year, the H-1B allocation lasted until late January, 2011. However, in previous years, the H-1B allotment was actually exhausted

within three (3) days of the H-1B visas becoming available. This required the CIS to conduct a "lottery" and only one of three visas submitted was accepted for processing by the CIS. The demand for H-1B visas this fiscal year may be greater than it was for last year. We keep hearing that "economic recovery" is on the way. For this reason, we continue to advise our H-1B employers to consider filing on April 1st, or as soon thereafter as possible.

Employers Will Soon Feel the VIBE . . . Look Out For A New Validation Instrument for Business Enterprises ("VIBE").

CIS recently announced that it will start to implement the application of a new web-based tool called the Validation Instrument for Business Enterprises ("VIBE"). The VIBE program is purportedly designed to enhance the speed and accuracy for the adjudication of certain employment-based immigrant and nonimmigrant petitions. The VIBE Program uses public information and previously accumulated data by third party provides to validate data about the organizations that file petitions for the temporary and permanent employment of foreign national workers in the U.S.

The VIBE Program allows CIS to electronically "ping" databases. One such database is Dun & Bradstreet ("D&B"). The D&B database contains information about the petitioner organization including, but not limited to:

1. Business activities, such as type of business (North American Industry Classification System code), trade payment information and status (active or inactive);
2. Financial standing including sales volume and credit standing;
Number of employees including onsite and globally;
Relationships with other entities including foreign affiliates;
3. Status, for example, whether it is a single entity, branch, subsidiary or headquarters;
4. Ownership and legal status, such as LLC, partnership or corporation;
5. Company executives;
6. Date of establishment as a business entity; and
7. Current physical address.

The idea is that a CIS adjudicator will consider the information submitted by the H-1B petitioner and also compare that information to the information that they glean from VIBE. Since the VIBE database is not fully populated it is likely that H-1B petitions will continue to be met with requests for evidence ("RFEs"), when the H-1B petitions are submitted to the CIS. The receipt by an employer of an RFE is likely to cause delays in processing of the H-1B (even when the cases are submitted with premium processing requests.

As an aside, the CIS recently also announced that they are working on an electronic registration for H-1B employers to attempt to more streamline the

process and to avoid the “run on cap-subject H-1Bs” that has occurred in prior years. The CIS recently announced a proposed rule that would establish a system which will allow an H-1B employer to submit an electronic registration prior to the submission of the H-1B. The idea is behind the registration is that before April 1st, the CIS will be able to predict how many visas are being demanded by cap subject H-1B employers/employees. The implementation of this system is still in its genesis and it is not anticipated to be available for employers until 2010.

Other recent changes in the H-1B arena include: (1) that CIS announced a review of its policy on H-1B cap exemptions for nonprofit entities that are related to or affiliated with an institution of higher education (examples include teaching hospitals that are affiliated with medical schools or organizations affiliated with nonprofit colleges or universities; and (2) that U.S. employers seeking to sponsor foreign nationals on H-1B, H-1B1 (Chile/Singapore), L-1 and O-1A visas must certify to compliance with Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR). For any additional information about the 2011-2012 “H-1B season”, please feel free to contact our offices at info@visaserve.com.