

U.S. Citizenship and Immigration Services ("CIS") promulgated a Memorandum on January 8th, 2010 (the "Memo") that significantly impacts H-1B sponsors in the IT consulting arena. The Memo specifies how CIS should determine the existence of the required employer-employee relationship when adjudicating an H-1B petition. The Memo provides guidance concerning the type of evidence that confirms the existence of an employer-employee relationship between an H-1B petitioning employer and the beneficiary when the employee's work is performed off-site ("third party placement").

[To Read The Memo, Click Here . . .](#)

We believe that employers who have business models that deal with third-party placements are likely to face onerous Requests for Additional Evidence ("RFE"). These employers will need to review the factors enumerated in the Memo concerning "control", and devise a system of control over their employees to establish a direct employer-employee relationship. The impact of the Memo is likely to have ripple-effects beyond the IT consulting field. The fallout is likely to be felt by their clients which include many of the largest U.S. companies and even the U.S. federal government.

The new levels of service provided to H-1B employers are likely to include: (1) public access file preparation; and (2) site visit compliance; and (3) consular processing coaching; and (4) port-of-entry compliance. For more information about the H-1B nonimmigrant petition process or preparing for the H-1B process by April 1st 2010, please contact us at [info@visaserve.com](mailto:info@visaserve.com).

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### • **The H-1B Season is Upon Us ... Other Options For Those Unable to Secure an H-1B This Upcoming Fiscal Year!**

We are rapidly approaching the April 1st deadline for the filing for new H-1B visas for the 2010 to 2011 Fiscal Year (FY 10-11). H-1B Petitions for FY 10-11 must be received by the U.S. Department of Homeland Security ("DHS"), Citizenship and Immigration Services ("CIS") on April 1st, 2010. If you do not begin to make preparations as early as possible then you and your prospective H-1B employer may not be able to secure an H-1B (subject to the cap) for the October 1st, 2010 start date.



Unless Congress acts immediately to increase the quota of 65,000 visas (plus and additional 20,000 for those with Masters Degrees from U.S. Academic Institutions), the allotted number of H-1B visas are likely to be taken within the very first days that the petitions may be filed. This is what happened a few years ago and it may happen again.

In 2008, during the "run on H-1Bs," many people did not receive their visas because the petitions were not filed in a timely manner. Other cases were not "properly filed" (defined in the CIS regulations) and were incomplete or deficient in some way and were therefore not approved even though they were filed in a timely manner. If petitioners fail to properly meet each one of the regulatory filing

requirements, then the petition may not be considered "properly filed" and may be returned.

There are a few things that prospective H-1B employers and H-1B employees can do to improve the likelihood that the H-1B will be accepted by the CIS. First, be sure that all of the appropriate documentation is contained in the H-1B petition. Second, be sure that the H-1B is submitted to the CIS in a timely manner. Third, be sure that the H-1B is sent to the proper CIS Service Center for adjudication.

Most importantly, if there is a "run" on the H-1B petitions then petitioners should consider the possibility of utilizing filing multiple H-1B petitions. Be advised that the CIS issued guidance concerning multiple H-1Bs. Filing a master's H-1B and bachelor's H-1B is not considered a multiple H-1B filing. Many organizations have layers and layers of subsidiaries and affiliates (different organizations with different Employer Identification Numbers) and there appears to be nothing yet in the regulations to preclude the use of those organizations as vehicles for additional H-1Bs. With each H-1B submitted, there is a statistically higher chance of one of the H-1Bs being able to "win" the lottery (if a lottery happens in the upcoming FY).

What is your H-1B back-up plan? First consider trying to obtain an H-1B with a cap-exempt organization. Academic institutions of higher education can make petitions for the H-1B with no regard to the cap. Also, many may qualify for alternative visas to the H-1B. For example, in 1991, the law carved the O, P Q and R visa categories out of the H-1B nonimmigrant visa classification. You will want to look to all of your H-1B visa alternatives.

#### • **What is your H-1B Back-Up Plan? Look North to Canada.**

The most common reason for H-1B applications to be returned is that too many are received for the number of available H-1B slots. However, with the recent Memo from the CIS it is likely that many H-1Bs will be denied because of third-party relationships with clients. Most foreign nationals invest all their energies in the H-1B process without thinking of what they will do if they don't make the quota or if their H-1B is denied. It is recommended that H-1B applicants set up an "immigration back-up plan." Canada offers a viable alternative to those seeking entry in the U.S. and not accepted (for whatever reason) for an H-1B visa.



What many do not realize is that foreign nationals who are presently in the U.S. can make an application for Canadian permanent residence before, or while, they file for and await an H-1B determination. There is nothing to prevent applying for entry to both countries at the same time. Under the Canadian Immigration Regulations, there is a special provision to allow a foreign national to apply to enter Canada directly from the U.S. - without returning to their home country - as long as that person has been lawfully admitted to the U.S. for one year or more and has the visa(s) to prove it. However, it is preferable to apply to Canada (but not necessarily required) before the current visa in the U.S. expires.

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