Hiring Highly Skilled Workers: Preparing for the 2010 H-1B Cap Season

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There has been considerable news coverage lately debating the H-1B visa issue and the Obama administration's review of the program. While the debate continues, preparation for the annual H-1B cap season is well underway as U.S. Citizenship and Immigration Services (USCIS) begins to accept H-1B petitions on April 1, 2010. The H-1B is the work visa most commonly used by companies to employ highly skilled foreign workers. Notwithstanding the economic downturn, employers are compiling H-1B petitions to ensure that talented foreign workers will not be left without work authorization.

Since the H-1B filing season is historically brief, it is critical that employers approach the process proactively and strategically. In years past, the coveted H-1B visas were in such high demand by employers that they were exhausted on or immediately after April 1. The USCIS then engaged in a lottery process to select the H-1B petitions to be adjudicated.

For the first time since 2003, H-1B visas were available from April 1, 2009, through Dec. 21, 2009. Since it is difficult to predict how quickly H-1B petitions will be used this fiscal year, it is prudent to file H-1Bs on the first day they are accepted.

This article will explain the background of the H-1B filing season and provide an overview of what employers need to know to prepare for April 1, 2010. The article will also identify other visa classifications that may be an alternative to the H-1B.

Why Filing on April 1 Is Strategic

In 2009, the use of H-1B visas—the specialty occupation visa that is most commonly used to hire foreign workers and, in particular, foreign graduates—was unusually anemic.

However, during November and December 2009, the demand for H-1Bs accelerated dramatically, suggesting an uptick in hiring.
The current law limits or "caps" the number of foreign nationals who may be issued H-1Bs each fiscal year to 65,000. Hence, the frequently used references to the H-1B cap.

The numerical limitation of H-1Bs was temporarily raised to 195,000 in fiscal years 2001, 2002 and 2003 due to the high demand that coincided with the boom of the dot com industry. Since the number of H-1Bs is determined by statute, Congress returned the availability of H-1Bs to 65,000 in 2004.

Included in the numerical limitation of 65,000 H-1Bs each fiscal year are 6,800 H-1Bs designated exclusively for nationals of Chile and Singapore according to Free Trade agreements with these countries. The immigration law also provides for an additional 20,000 H-1Bs (above the already statutorily available 65,000) for foreign nationals holding master's degrees or higher degrees from U.S. universities.

In strategically planning for the H-1B cap season, it is important to note that the USCIS' fiscal year begins on Oct. 1 and ends on Sept. 30. The USCIS permits the filing of visa petitions up to six months before the employment start date cited in the petition.

Therefore, H-1B petitions citing an Oct. 1 start date may be filed on April 1.

In past years, demand was so strong that H-1Bs were exhausted on April 1 or shortly thereafter. Employers and foreign national workers were in the unenviable position of anxiously awaiting the results of a lottery in which the USCIS randomly chose the H-1B petitions that would be adjudicated. To avoid the uncertainty of whether an employer can hire or retain a valued employee, filing H-1Bs on April 1 is advised.

Requirements of the H-1B Classification

H-1Bs are "temporary" work visas by which employers may hire and retain highly skilled foreign workers. Since these are temporary visas, the H-1B employee may remain in the United States for a maximum of six years. If the H-1B employee is sponsored for a green card, his/her stay may be extended beyond six years under certain circumstances. The USCIS will initially approve an H-1B for up to three years and then the employer may extend the H-1B status for another three years.

1. The Employer and the Foreign National Beneficiary

The H-1B program is used to employ foreign workers in "specialty occupations" (e.g. positions such as architects, engineers, scientists and computer programmers), which require at least a bachelor's degree education or its equivalent. In the H-1B petition, the sponsoring employer must provide a detailed job description that illustrates a need for the skills and body of knowledge acquired through a university education in a field related to the position. In turn, the foreign national must possess a bachelor's degree or its equivalent in a field of study related to the job offered. It is important to note that on the day the H-1B petition is received by the USCIS, the foreign national applicant must meet the H-1B degree requirements and any applicable state licensure requirements.

Practice Tips: The foreign national must possess a U.S. bachelor's degree or its equivalent in a field related to the offered job. If the foreign national's degree is not obviously related to the job, the employer should explain how the bachelor's degree course of studies relates to the work to be performed.
The equivalent of a U.S. bachelor's degree is deemed to be four years of university education as determined by a professional education evaluation service. Alternatively, a combination of education and work experience may be deemed to be equivalent to a U.S. bachelor's degree based on a professional education evaluation service. The USCIS considers three years of work experience to be equivalent to one year of university education.

2. The Labor Condition Application: The Basics

Employers are required to obtain an approved Labor Condition Application (LCA) from the U.S. Department of Labor (DOL) which must be filed with the H-1B petition on April 1. The LCA is an attestation made by the employer to the DOL concerning wages and working conditions of its workers.

With regard to wages, the LCA requires the employer to attest that it will pay the foreign national worker the "required wage," which is defined as being the higher of the prevailing wage or the offered wage (i.e., actual wage). The prevailing wage is determined by referring to DOL-approved wage surveys for a similar position in the same geographical location as the job offered. The actual wage is the salary offered to the foreign national by the employer.

In addition, employers are required to attest in the LCA that they will offer foreign workers the same working conditions and terms of employment as U.S. workers. Working conditions refer to hours, vacation periods and fringe benefits. The spirit of this

requirement ensures that neither U.S. workers nor foreign workers are disadvantaged by the filing of H-1B petitions.

This year, employers must be prepared for the delays—as much as seven calendar days—for the DOL's new iCert system to process and approve LCAs. The DOL has had to resolve numerous problems with the new system, ranging from outages to verifying employer identification number (EINs).

Practice Tips: The wage offered to foreign nationals cannot include bonus or other fringe benefits. LCAs may be processed only six months in advance of their requested start date and may be valid for only up to three years. H-1B petitions can be valid only for the period covered by the valid LCA. H-1B petitions will be accepted only with certified (i.e., approved) LCAs.

3. The Cap Gap

The "cap gap" refers to the automatic extension of F-1 status through Oct. 1 granted to foreign students who are the beneficiaries of approved H-1Bs.

Foreign students in F-1 status are eligible to apply for one year of Optional Practical Training (OPT) prior to graduation from a U.S. university. Typically, OPT is authorized beginning during the summer months after graduation and valid for 365 days. The "gap" between the expiration of OPT and the start of the H-1B on Oct. 1 is referred to as the "cap gap." The immigration law provides for an automatic extension of OPT work authorization between the expiration of OPT and Oct. 1 for students who are the beneficiaries of an approved H-1B change of status application

Practice Tips: Confirm that foreign students graduating from a U.S. university timely file for OPT through their universities.

The H-1B petition must be filed as a "change of status" application to be granted "cap gap" relief. This means that upon approval of the H-1B petition, the student's status is automatically extended through Sept. 30 and on Oct. 1 his/her status is automatically changed to H-1B status. It is also important to note that a foreign national who departs the United States while a change of status application is pending automatically abandons the application. Therefore, travel outside the United States—including to Canada and Mexico—during this process is strongly discouraged.
Dependents of H-1B applicants are also eligible to receive cap gap relief and their F-2 status will automatically be extended through Sept. 30 and then changed to H-4 status on Oct. 1.

4. USCIS Fees

The USCIS filing fees for each H-1B petition is significant. The fees include:
--A base filing fee of $320.
--An education and training fee of $1,500 (or $750 for employers with less than 25 full-time employees).
--A fraud prevention and detection fee of $500.
--If the employer deems necessary, a $1,000 "premium processing" fee to ensure the petition's adjudication in 15 calendar days.

Practice Tips: Individual checks for each fee should be made out to the U.S. Department of Homeland Security. If the petition is denied, USCIS will not refund any fees. If there is a lottery and the petition is not selected, the entire H-1B application and all filing fees will be returned to the employer.

Visa Alternatives: E-3, L, O, J, TN

Employers may wish to consider alternatives to the H-1B should the cap be reached on April 1 or shortly thereafter. The following visa classifications may be viable alternatives:
E-3 Specialty Occupation Visa: The E-3 classification was established pursuant to a free trade agreement between Australia and the United States. The requirements for the E-3 classification are nearly identical to the H-1B, however, only Australian nationals are eligible to apply for E-3s.
L-1 Intracompany Transfer Visa: Foreign nationals who work for a subsidiary, affiliate or branch office of the U.S. employer outside the United States for 365 days in the past three years may be eligible for an L-1 visa. L-1 visa holders may enter the United States to work for up to five years in a specialized knowledge position or up to seven years to work in a managerial position.
TN Visa: Nationals of Canada and Mexico who are offered professional positions covered by the North American Free Trade Agreement (NAFTA) may enter the U.S. to work for U.S. employers. Examples of job categories in the TN classification include: accountant, engineer, computer systems analyst and architect.
O-1 Extraordinary Ability Visa: The O-1 visa is an option for foreign nationals who are deemed to be at the top of their field of expertise. The immigration law sets forth specific criteria that must be satisfied to meet this high burden of proof. The O-1 visa is ideally suited for high-level or experienced professionals.
J-1 Exchange Visitor Visa: Unlike the options discussed above, the J-1 visa classification is an exchange visitor program designed for foreign nationals to engage in training. Typically, training programs for foreign nationals who possess university degrees or professional work experience can be approved for up to 18 months.

Conclusion
For U.S. employers who want to hire the best and brightest talent in their industry, the H-1B is the work visa of choice. The H-1B provides the flexibility to hire professionals who have not previously worked for the employer for up to six years. The H-1B also allows employers to sponsor talented and valued employees for green cards to remain in the United States permanently.

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