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IMMIGRATION UPDATE

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Mobility | Investment | Compliance

Spring Cleaning and the H-1B Visa Cap

With comprehensive immigration reform on the horizon and the economy rebounding, the number of H-1B visa filings for foreign temporary professional workers is likely to significantly increase this year. American businesses recognize that to compete in the global economy, smart, competitively trained, and diverse talent is critical. In many industries, foreign workers, including H-1B degreed professionals, are an integral part of such a workforce. There are only a limited number of new H-1B visas issued each fiscal year, and how quickly they are utilized is tied to the economy and market demand. For the 2013 fiscal year, the H-1B cap was reached on June 11th 2012, five months earlier than in FY 2012 when it was not reached until November 23, 2011.

Employers hoping to apply for one of these coveted FY2014 H-1B visas that will allow for an October 1, 2013 start date should immediately consider initiating a petition to ensure a visa number. Filings for H-1B applications subject to the yearly cap begin on April 1, 2013 -- six months prior to the start date of the 2014 fiscal year. It should be noted that filing on April 1st or as close to that date maximizes an employer's ability to secure one of the limited number of H-1B visas available. While considering whether or not your company will be sponsoring any individuals for H-1B visas, the time is right to review compliance in all aspects of immigration related matters including Department of Labor and U.S. Citizenship and Immigration Services filings. For those charged with immigration responsibilities now is the time to dust off the Form I-9 binders, PERM Audit files and Public Access Folders to ensure they are being maintained properly and discarded at the appropriate time.

What is an H-1B Employee?

Companies use the H-1B program to employ foreign workers in "specialty occupations," that is, positions that require the minimum of a Bachelor's degree or its equivalent and specialized knowledge or skills, such as scientists, engineers, teachers, architects, and computer programmers among many others. There are only 65,000 H-1B visas allotted annually for cap-subject workers. An additional 20,000 H-1B visas are available for workers with advanced degrees earned in the United States, including Master's and Ph.D. degrees.

The Numbers

The current annual cap for the H-1B category is 65,000. However, the cap only applies to new H-1Bs. With a few exceptions as discussed below, including those working with non-profit and education institutions, individuals currently in H-1B status are not subject to this annual cap. In

addition, up to 6,800 visas are set aside from the cap of 65,000 during each fiscal year for the H-1B1 program under the terms of the legislation implementing the U.S.-Chile and U.S.-Singapore Free Trade Agreements. Unused numbers in this pool are made available for H-1B use for the next fiscal year.

When can new H-1B visas be filed?

Cap-subject H-1B petitions can be filed for receipt by USCIS on April 1, 2013, for an employment start date of October 1, 2013. The increase in H-1B filings will reopen the debate on the demand for H-1B professional workers and a re-examination of the advantages and disadvantages in employing an artificial cap of skilled professional workers at a time when it is crucial that the U.S. be able to compete globally.

How is the Department of Labor involved?

Prior to filing the H-1B petition with the USCIS, an employer must prepare a Labor Condition Application (LCA) certifying to the Department of Labor (DOL) that the company will pay the H-1B worker the **higher** of the actual or prevailing wage, and will include such wage on the I-129 form. A DOL certified LCA must accompany each H-1B petition. In an effort to protect U.S. workers, employers must post a notice at the worksite stating that it has filed an LCA in accordance with DOL regulation. The DOL Wage and Hour Division is charged with ensuring certain standards are met in order to protect similarly employed U.S. workers from being adversely affected by the employment of the nonimmigrant workers, as well as to protect the H-1B workers.

Who is subject to the Cap and Who is not?

The determination of whether the filing will or will not be cap-exempt will turn on a variety of facts. Fortunately, the cap does not apply to individuals who are already in the U.S. in H-1B status and working for another company that was not cap-exempt. Furthermore, institutions of higher education, nonprofit research organizations, and government research organizations continue to be exempt from the H-1B cap.

H-1B Compliance

With USCIS' increased focus on compliance, the start of cap season is a good time to review your company's Public Access Files (PAFs) as well as the H-1B compliance policies and procedures. Public Access files must be available for public inspection and should contain all of the relevant LCA information including wages, benefits, proof of notification (postings). The Office of Fraud Detection and National Security (FDNS) is charged with detecting, deterring and combating immigration benefit fraud and strengthen efforts in ensuring benefits are not granted to those who threaten national security or public safety. FDNS, through the "fraud fee," conducts random and unannounced site visits to H-1B employers of all sizes across all industries. As part of the program, FDNS officers collect information during site visits to verify information pertaining to petitions that are pending and already approved. The $500 H-1B Fraud Prevention and Detection Fee, paid by all employers seeking an H-1B for initial employment or a change of employer funds these efforts.

In light of these ongoing H-1B site visits, HR managers should ensure that all existing H-1B employees:

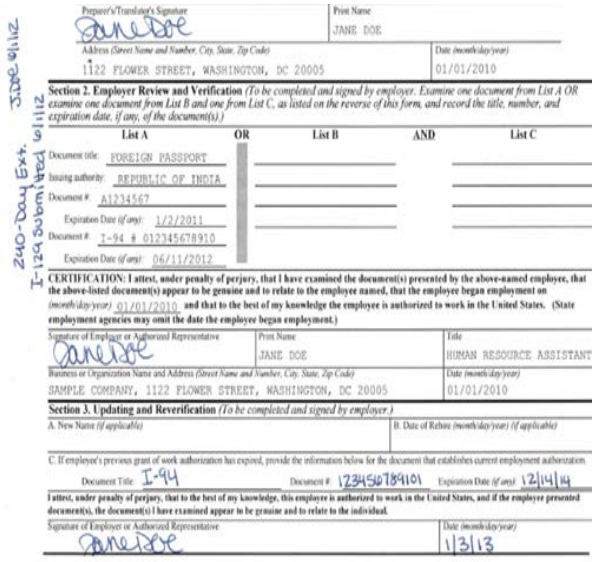
- have a complete and updated PAF in place that is readily available for public inspection;
- have the correct LCA in place;
- have evidence that the LCA was posted at the job location where the employee is working;
- are working in the job that is noted on the H-1B petition;
- are being paid the ***higher*** of the actual or prevailing wage;
- are working at the salary noted in the H-1B petition; and
- have not experienced any material changes to the job description noted in the H-1B petition.

It is also a good time to ensure that older PAFs are discarded if they are past the dates required for retention and all items in the PAF are properly executed and maintained. Often attorneys will draft the core PAF and forward documents for review and execution to clients – for the company it is important to determine if all the I's were dotted and the T's were crossed. Good housekeeping of immigration records is critical for companies striving to improve overall immigration related compliance. Company policies in terms of legal fees, filing fees and other areas should also be reviewed at this time to ensure compliance with the law.

Form I-9 Compliance

H-1B cap season is also an excellent time to review the company's Form I-9 compliance and ensure that re-verifications are completed timely and correctly. Re-verifications are required for aliens authorized to work for a certain period of time in the US. During I-9 audits, we often find that employers do not timely update Section 3 with the appropriate re-verification information. Do not overlook the core compliance requirements in situations where your company is sponsoring individuals on work related visas. The law states Section 3 must still be completed *on or before* the expiration of the validity of work authorization regardless of whether you sponsor the applicant directly or not.

Specifically the 240-day extension granted to individuals whose I-129 extension application is still pending at the expiration of their original I-94 should be recorded. The M-274 Handbook for Employers notes that employers should write "240-Day Ext." and record the date the I-129 was submitted in the margin of Section 2. Then, Section 3 should be updated once a decision is received from USCIS or before the 240-day period ends, whichever comes first. USCIS also recommends retaining a copy of the new I-129, proof of payment for filing the new I-129, and evidence that the new I-129 was mailed to USCIS with the Form I-9 record.


240-Day Ext. I-129 Submitted 6/1/12

Preparer's/Translator's Signature: Jane Doe | Print Name: JANE DOE
Address (Street Name and Number, City, State, Zip Code): 1122 FLOWER STREET, WASHINGTON, DC 20005 | Date (month/day/year): 01/01/2010

Section 2. Employer Review and Verification *(To be completed and signed by employer. Examine one document from List A OR examine one document from List B and one from List C, as listed on the reverse of this form, and record the title, number, and expiration date, if any, of the document(s).)*

List A	OR	List B	AND	List C
Document title: FOREIGN PASSPORT				
Issuing authority: REPUBLIC OF INDIA				
Document #: A1234567				
Expiration Date (if any): 1/2/2011				
Document #: I-94 # 012345678910				
Expiration Date (if any): 06/11/2012				

CERTIFICATION: I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on (month/day/year) 01/01/2010 and that to the best of my knowledge the employee is authorized to work in the United States. (State employment agencies may omit the date the employee began employment.)

Signature of Employer or Authorized Representative: Jane Doe | Print Name: JANE DOE | Title: HUMAN RESOURCE ASSISTANT
Business or Organization Name and Address (Street Name and Number, City, State, Zip Code): SAMPLE COMPANY, 1122 FLOWER STREET, WASHINGTON, DC 20005 | Date (month/day/year): 01/01/2010

Section 3. Updating and Reverification *(To be completed and signed by employer.)*

A. New Name (if applicable) | B. Date of Rehire (month/day/year) (if applicable)

C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment authorization.
Document Title: I-94 | Document #: 123456789101 | Expiration Date (if any): 12/14/14

I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative: Jane Doe | Date (month/day/year): 1/3/13

It is frustrating to see employers complying with the law, filing timely non-immigrant extensions, but then failing to update Section 3 of the Form I-9 timely thereby exposing the company to fines and penalties. The law requires that reverifications are completed on or before the date a non-immigrant's work authorization expires. As a best practice, non-immigrant employees should receive update reminders 120 days prior to the expiration of their work authorization in the same manner you would notify all other employees with expiring work authorizations.

Conclusion

The need for increased visa numbers was recognized in both President Obama's immigration plan as well as the bi-partisan immigration proposal introduced last week. In fact, U.S. Senators Orrin Hatch (R-Utah), Amy Klobuchar (D-Minn.), Marco Rubio (R-Fla.) and Chris Coons (D-Del.) introduced legislation, the Immigration Innovation (I2) Act of 2013, to bring long-overdue reforms to the nation's immigration laws for high-skilled workers. The I2 Act is supported by a bipartisan group of ten senators and seeks to reform America's immigration laws for highly skilled immigrants working in science and technology fields. I2 would increase the number of temporary visas that are available to these immigrants so more could remain in the United States after attending school in the US and contribute to our economic growth and innovation. *Among other things, I2 would increase the H-1B cap from 65,000 to 115,000* and would reform fees on H-1B visas and employment-based green cards. The fees would then be diverted to fund a grant program to promote science, technology, engineering, and mathematics (STEM) education and worker retraining, which would be administered by states. Foreign students studying in the US would be allowed to have "dual intent" to possess an F-1 student visa and apply simultaneously for residency (this is currently prohibited). This proposal appears to be a workable vehicle to promote stability and allow for the best, and the brightest, to establish long-term roots in the U.S. while their contributions improve our economy.

In the interim, employers must work within the limitations imposed by the current H-1B visa cap and ensure immigration compliance within their organizations.

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