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Top 7 Tips For H-1B Sponsorship Season

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U.S. employers with international workforces, including both students and open-market candidates from abroad, need to prepare for what can be a hectic season: the days and weeks leading up to April 1, which is the first day to file H-1B visa petitions for the upcoming federal fiscal year commencing Oct. 1, 2015. This article provides our "Top 7" tips for employers during this H-1B sponsorship process.

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Tip 1: Make Sure the Proposed H-1B Position Qualifies

Employers should be prepared to demonstrate that the proposed H-1B position is sufficiently sophisticated and complex to warrant specialized training through a university program or the equivalent. The job must require a four-year degree or its equivalent in a specialty field; a general degree, absent specialized work experience, will not satisfy the statutory criteria for H-1B status. For example, a software developer position would ordinarily require a degree in computer science, engineering or an equivalent technical degree. Specialty occupations in the business field include accounting, marketing and finance. Positions that may be staffed by employees possessing any of a variety of liberal arts degrees are generally not considered specialty occupations.

The precise test for the employer is to gauge whether the position is specialized and the candidate has that specialized ability. A financial risk analyst position requiring a degree in statistics would clearly qualify for a position in banking, while a position for a quality analyst that does not require a degree or experience specifically in a quantitative field might not. A computer software engineer position to develop integrated solutions would likely qualify; a general research assistant position likely would not. Some fields are more vulnerable to a finding that the occupation is too broad to merit specialty occupation classification. A marketing or sales representative opening, for example, should have sufficiently targeted focus in the industry or business line to mandate a degreed professional with a specific background in the area of marketing or sales required.

Tip 2: Make Sure the Proposed H-1B Employee Has the Right Qualifications

The candidate who is sponsored for an H-1B visa must have completed the specialty four-year degree

required for the occupation, or an equivalent combination of education and experience. If the beneficiary has some formal college-level training but not a full four years, the rule of thumb the government follows is to require a demonstration of three years of experience or training — in the field — for every university year that is missing. Experience without some college-level education is not normally sufficient unless the experience is extensive and involved increasingly progressive responsibility in the specialty area.

Employers sponsoring H-1B workers need to confirm the precise education and experience of their candidates for the annual quota filing, and ensure they obtain appropriate credentials evaluations now, so as to have these in time for the filing period which opens up on April 1.

Tip 3: Determine the Required Wage for the Position Well in Advance

Federal regulations require employers to file an affirmative certification, known as a labor condition application ("LCA"), electronically with the U.S. Department of Labor in advance of filing the H-1B visa petition. The LCA is a representation by the employer that hiring the H-1B worker will not adversely impact wages or working conditions of U.S. workers.

A critical element of the LCA is the employer's attestation that the wage offered the H-1B worker will be competitive with the internal company wage — the "actual wage rate" — and the market wage — the "prevailing wage rate" — for the position.

The "prevailing wage rate" is an average wage of workers similarly employed in the area of intended employment, based upon the nature of the job offer, the area of intended employment, and the job duties for workers similarly situated. The "actual wage rate" is the wage paid by the employer to all other individuals in similar positions in the same location who possess substantially similar experience and qualifications.

In determining the prevailing wage for the position, it is important that the employer identify the appropriate DOL-defined wage level consistent with the education, training and experience requirements for the job. An employer that pays a low-rate "level-1" wage for a position that requires a bachelor's degree and three years of experience, for example, risks being denied an H-1B because the position seems insufficiently complex at that entry level, or, in more serious instances, penalties that can include back pay awards if the employer is later found to have understated the required wage.

Tip 4: Don't Forget Your Labor Condition Application Notification Requirements

The certified LCA must accompany the H-1B petition and processing by DOL can take seven days. Thus, it is important to leave enough time for the LCA to be certified prior to March 30, 2015. Employers need to confirm all aspects of the LCA affirmation in advance of submitting the LCA. These include four attestations:

- the employer will pay the required wage;

- the employer will provide working conditions for H-1B workers that do not adversely affect other workers similarly employed;

- there is no strike or lockout in the occupational classification at the place of employment; and

- the employer has provided appropriate notification of the H-1B hiring on or within 30 days before the date the employer files that LCA.

The employer's notification must include precise details about the job (including the wage, location and period of employment), and express instructions addressing the filing of complaints alleging misrepresentation in or failure to comply with the terms of the LCA.

If the position is covered by a collective bargaining agreement, the notice must be provided to the collective bargaining representative. If there is no collective bargaining agreement, the notice must be posted in hard copy or, alternatively, circulated to all employees in electronic format for at least 10 days at the place of employment. If the job site is a customer's premises, the employer must post the notice on the customer premises. In that instance, discussion with the customer to ensure understanding of the legal requirement for posting is important.

As part of these notification requirements, the employer also must maintain records of compliance with the LCA requirements in a public access file ("PAF"). PAFs must be maintained either at the relevant job site(s) or at the company headquarters. Members of the public may request to review the PAFs, and similarly, government auditors may arrive unannounced and request the PAFs. Employers should develop a protocol for how PAFs are accessed, who within the company is notified when a private request for or an audit regarding a PAF or PAFs occurs, and provide written instructions to representatives at each job site on how to respond to a PAF request.

Tip 5: Don't Snooze on the Filing Period!

The Immigration and Nationality Act imposes an annual cap of 65,000 on new H-1B visas, of which 6,800 visas are reserved by treaty for nationals of Chile and Singapore. In addition, another 20,000 visas are made available for individuals who have earned a master's degree or higher from an accredited U.S. educational institution.

This cap is designed to be filled in the order in which petitions are filed. Because demand has grown to levels so high that the cap has been met during the first week of April, filing at the earliest point is essential. The U.S. Citizenship and Immigration Services will consider "first in time" filings to be any that are received by the agency in the first five business days of the filing period — which this year is April 1 to April 7, 2015.

If there are cap numbers remaining at the end of the first five business days, the cap remains open until filled. If there are sufficient cases to meet or exceed the cap in the first five days, the filing period closes and a lottery is conducted from the cases filed to randomly select the cases that USCIS will adjudicate. In 2014, for instance, both the regular H-1B cap of 65,000, as well as the additional 20,000 visas filed under the U.S. advanced degree exemption, were reached within the first five days.

While there is no precise way to predict when this year's H-1B quota will be exhausted, increased hiring

and an improving economy suggest that the quota will again be exceeded within the first five days, resulting in a lottery notification. Cap-subject H-1B petitions not selected for processing cannot be refiled until further visas become available the following year. An employer may not file multiple or duplicative H-1B petitions for the same employee.

Tip 6: Check if Your H-1B Petition Is Exempt from the Cap

Some applicants for H-1B visa status are exempted from the cap, such as, for instance, beneficiaries of employment offers at institutions of higher education or related or certain affiliated nonprofit entities, nonprofit research organizations, or government research organizations. In addition, H-1B extension petitions or requests to change H-1B employers (known as “portability” petitions) are generally not subject to the annual H-1B visa cap, as a person who has already been counted within the past six years is already using an H-1B slot. These applicants are not reliant on the visas available on April 1, and may file at any time.[1]

Tip 7: Don’t Forget Your Obligation to Begin Paying Wages if Your Case is Selected

An H-1B employer’s obligation to pay its H-1B workers begins with the earliest of the following applicable events:

- The H-1B worker enters into employment with the employer, which occurs when the worker first makes himself/herself available for work or otherwise comes under the control of the employer, such as reporting for orientation or studying for a licensing exam, and which for cap-subject cases would be Oct. 1, 2015, at the earliest;

- No later than 30 days after the H-1B worker is first admitted into the U.S. under the approved H-1B petition, whether or not the worker has entered into employment, if the worker is entering the country from overseas; or

- No later than 60 days after the date the H-1B worker becomes eligible to work for the employer, whether or not the worker has entered into employment if, in contrast, the worker changes visa status while already in the U.S. (such as a change from an F-1 student visa to the H-1B status).[2]

On the Horizon

The White House in November 2014 outlined proposed changes to several employment-based immigration practices aimed at helping U.S. business and foreign workers. Although neither of these changes are likely to be implemented until after April 1, employers should be on the lookout for the additional benefits that may stem from these:

- **Exemptions from H-1B Cap.** Revised regulations will allow for broader exemption from the H-1B visa cap for employers contracting with currently-exempt academic institutions. Current law requires a showing that the petitioning employer is: (i) connected or associated with an institution of higher education through shared ownership or control by the same board or

federation; (ii) operated by an institution of higher education; or (iii) attached to an institution of higher education as a member, branch, cooperative or subsidiary.

- **STEM Graduates.** Post-graduate work training ("optional practical training," or "OPT") authorization for U.S. college graduates currently is 12 months, with up to 29 months for graduates of science, technology, engineering and mathematics ("STEM") fields. This STEM period would be extended under the president's order, including for STEM graduates who are pursuing non-STEM advanced degrees, such as an MBA.

Conclusion

The H-1B visa filing period is a dynamic time for U.S. employers. During this period, U.S. employers are able to enhance their diversified, international pool of workers to which the H-1B visa provides access. As employers navigate the regulatory framework for this important visa category, the tips discussed here will help employers to avoid potential pratfalls in the period leading up to April 1.

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[1] A petition requesting a change of employer from a cap-exempt employer to a cap-subject employer will be counted against the annual quota.

[2] The Family and Medical Leave Act ("FMLA") entitles employees of covered employers to take up to 12 weeks of unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance under the same terms and conditions as if the employee had not taken leave. The provisions of the FMLA apply to H-1B workers to the same extent as U.S. workers.

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