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Attys Brace For More Scrutiny Of H-1B Visa Applications

By **Nicole Narea**

Law360 (February 7, 2018, 9:51 PM EST) -- H-1B visas, which have always been in short supply, may be even harder to get this year as attorneys and employers prepare for tough scrutiny of applications that could leave many immigrants out in the cold.

The H-1B visa program, which allows American companies to hire skilled foreign workers in industries ranging from technology to medicine, is meant to be what Hector Chichoni, chair of Duane Morris LLP's Florida immigration practice, described as the "queen of all visas for professionals." But increased demand for the visa over recent years, resulting in part from a low U.S. unemployment rate, coupled with increased screening under the current administration has made it an unreliable avenue of immigration, attorneys said.

H-1B visas are subject to a 65,000 statutory cap that numerous companies have petitioned Congress to raise. Republican Sens. Orrin Hatch and Jeff Flake introduced legislation last month to increase the cap to 85,000, but it's unlikely that any such measure would pass before the end of the current filing season.

U.S. Citizenship and Immigration Services received 199,000 H-1B applications in 2017 and 236,000 in 2016. If the last two years serve as precedent, that cap will likely be reached within five days of the filing deadline, after which applications enter into a lottery.

Here, attorneys explain what to expect this H-1B visa season.

Tell a Clear Story of the Job Opening

In previous years, attorneys understood what kind of educational and occupational backgrounds would suffice to meet USCIS' standards for H-1B applications, but such adjudications are no longer predictable, they said. Attorneys anticipate that the agency will increasingly reject applications to fill positions that do not, in its estimation, qualify as "specialty occupations" required by the H-1B program.

They are therefore urging their corporate clients to be specific about the scope and educational requirements for each position, particularly if it is in the technology field, to avoid outright rejections of their visa applications or additional requests for information that could delay visa approvals.

"With the appropriate attentiveness, the portrayal [of a position] can be made clear to avoid getting a denial where the agency doesn't believe it," Elizabeth Espín Stern, the head of Mayer Brown LLP's global

mobility and migration practice, told Law360. “This is not the year for companies to push the envelope; it’s a good year to be selective about which candidates you put through. For the ones you put through, tell the story well.”

Expect LCA Delays

This year’s H-1B visa filing deadline is April 2, but the application process must begin long before that, attorneys said. Most immigration firms began reaching out to clients in late 2017 to early 2018, pressing them to make swift hiring decisions and begin preliminary filings known as Labor Condition Applications.

Before sending in an H-1B application, the U.S. Department of Labor must approve an LCA, which is required to show that an employer would pay the prospective visa recipient the same wage as others in the company and the broader industry, among other conditions. The department has typically taken about a week to process those applications, but José Olivieri, the co-chair of Michael Best & Friedrich LLP’s immigration law practice, said he anticipates that the department will experience delays in the processing of LCAs, particularly if the government again shuts down.

Moreover, the department may issue additional “requests for evidence” to applicants before approving them. Olivieri said that he has noticed his clients have been getting requests for evidence in cases that the department would have previously waved on without issue, particularly as they relate to an employer’s pledge to pay visa recipients the prevailing industry wage.

“Dealing with requests for evidence takes time and injects additional uncertainty into the process,” he said.

Prepare for a Surge in Evidence Requests

Once an LCA is approved, attorneys can then send in their clients’ H-1B applications — which Olivieri said can be as long as 50 pages including information about the finances of a company, letters of supports, credentials and other components — by the deadline and enter the lottery.

But even after applicants are selected in the lottery, Chichoni estimates that USCIS will serve about half of them with requests for evidence and even deny some applicants. At that rate, he said companies should consider themselves lucky if they are able to employ 30 to 40 percent of their original visa applicants by Oct. 1 of this year.

Andrew Greenfield, the managing partner of Fragomen, Del Rey, Bernsen & Loewy LLP’s Washington, D.C., office, said he has seen “an enormous hike” in H-1B requests for evidence in which USCIS questions whether the job offered to a visa applicant constitutes a specialty occupation, particularly in the technology field. He explained that employers can prove that a job is a specialty occupation by showing that it requires at least a bachelor’s degree or that the duties of the occupation itself are sufficiently complex.

While Greenfield said his firm has been able to overcome such requests for evidence, USCIS has made it increasingly difficult to prove that a job is a specialty occupation, especially after the agency issued a memo last year challenging the longstanding precedent that computer programmers, among other information technology occupations are, by definition specialty occupations. The memo also called into question whether entry-level jobs carrying entry-level wages could be considered specialty occupations, which “caused a lot of angst among employers,” he said.

Mayer Brown's Stern said that the solution for employers lies in requiring a very specific educational background, as opposed to a swath of different degrees, for a given position and showing that an applicant has that "specialty training in a precise field." If employers don't explain a position clearly and why their prospective employee fits the bill, a field officer will flag their application, she said.

Consider Alternative Visas

Aside from taking those extra precautions, attorneys are also examining immigration alternatives to H-1Bs.

There is increased competition in the labor market for existing H-1B holders, who don't have to reapply in the lottery system when switching employers, Greenfield said. But their continued special status may be uncertain, as President Donald Trump had reportedly considered a plan to create new rules that would curb H-1B visa extensions last month.

Greenfield said he also examines whether employers can benefit from free trade agreements with various countries that supply visas that do not have a quota or a quota that is never reached. Moreover, he considers L visas, which allow companies to transfer an executive or manager from one of its affiliated foreign offices to one of its U.S. offices, and O visas for particularly high-paid or seasoned workers that may qualify as possessing extraordinary ability.

But for many visa applicants, H-1Bs remain their only option. And the Trump administration has placed a number of roadblocks in their way, Olivieri said.

"I don't want to understate the challenge that the administration has posed under this H-1B filing season," he said.

--Editing by Breda Lund.

Update: This story has been updated with additional information from Greenfield.
