

It's H-1B Visa Lottery Time

April 1 marks the start of the incredibly short filing window for new H-1B visas. The H-1B visa is the standard working visa used by foreign nationals to work in the United States with a U.S. employer. The H-1B “specialty worker” visa is available only to foreign nationals who have obtained a job offer in a position that customarily requires someone with a Bachelor’s degree. A foreign degree that is deemed the equivalent of a U.S. Bachelor’s degree will satisfy this requirement as will a combination of work experience and education that is deemed to be equivalent to a Bachelor’s degree. H-1B work authorized status may be requested for an initial period of up to 3 years and may be extended thereafter for an additional period of up to 3 years. With a few exceptions, once a foreign national has completed 6 years of time in the United States in H-1B status, she will be required to return to her home country.

H-1B visas are available in a limited number (the “H-1B cap”) on October 1st of each year, the beginning of the fiscal year of the U.S. Citizenship & Immigration Services (“CIS”). Applications for the current fiscal year tranches of H-1B visas can be made starting April 1st. In the past

Workers who are subject to the H-1B cap are those who have not previously held H-1B status and who have not been counted against the H-1B cap within the past six years.

several years, more applications have been received in the first several days of April for H-1B visas than the number available – as a result and as described in detail below, it is now critical that employers seeking to sponsor foreign nationals that will require a new H-1B visa begin to prepare now for filings at the end of March.

Workers who are subject to the H-1B cap are those who have not previously held H-1B status and who have not been counted against the H-1B cap within the past six years. Within this group typically are:

- Individuals who hold F-1 student status and are graduating this spring or summer;
- individuals in J-1 scholar or researcher status who are completing their programs this spring or summer; and
- individuals who have been em-

ployed in H-1B status but only with “exempt” institutions or organizations, such as universities, related or affiliated non-profit entities, non-profit research organizations, and governmental research organizations.

Note that the H-1B cap does to apply to a foreign national who is currently in the U.S. in H-1B status and who seeks to extend his H-1B status with his original sponsoring employer or to switch the sponsorship of his H-1B visa to a new employer.

A few background points:

1. As noted above, a limited number of H-1Bs are given out each year in two primary tranches - 20,000 visas for foreign nationals with at least a U.S. earned Master’s degree and an



additional 58,200 visas for foreign nationals who qualify generally for the H-1B (by having a U.S. or foreign Bachelor's degree or a combination of education and experience that is equivalent to a Bachelor's degree or higher). Note that there are additional H-1Bs (6,800 in total) that are specifically allocated to nationals of Singapore and Chile that are available throughout the year.

2. Last year, approximately 131,800 H-1B visa petitions were filed for the general tranche of 58,200 visas and approximately 31,200 H-1B visa petitions were filed for the U.S. Master's degree tranche within the first several days that filings could be made. As a result, the CIS first held a lottery in the U.S. Master's degree tranche and randomly picked 20,000 petitions which were then processed and approved. The CIS then held a second lottery for the 58,200 general tranche composed of those applicants that had not been selected in the U.S. Master's degree lottery and the remaining applicants. The CIS randomly picked 58,200 petitions from this second group which were then processed and approved. The cases that "lost" the lottery were simply returned to the filers with their filing fees. While we expect that the overall number of cases filed this year will be lower than last year because of the turn-down in the economy, we do expect that the CIS will receive a sufficient number of cases in both tranches within the first several days to require a lottery selection process.

3. Last year, the CIS announced that it would accept all H-1B

It is critical that cases that need to be filed be identified and be ready to be filed no later than March 31st.

petitions received in both primary tranches during the first 5 business days of April. In other words, it would keep both tranches open for the first business week of the month and hold the various lotteries with respect to the cases that had been received during this period. Any cases received by the CIS on the 8th day or later of April would be rejected and returned to the applicants. The CIS will follow the same procedure this year. It is critical that cases that need to be filed be identified and be ready to be filed no later than March 31st.

4. As noted above, any H-1B visa petition subject to the H-1B cap will have to be filed within the first week of April. The CIS takes the position that the foreign national's eligibility for H-1B status must be established at the time of filing. Thus, if the foreign national is hoping to apply in the U.S. Master's degree tranche but has not received her U.S. Master's degree on or before April 1st, then she is not qualified for the H-1B based on the U.S. Master's degree. This person would either have to file for an H-1B in the 58,200 visa general tranche based on foreign or U.S. Bachelor's degree or wait until the following fiscal year to apply in the U.S. Master's degree tranche. The

CIS has indicated that in lieu of an actual diploma, it will accept a letter from a school Registrar or Dean stating that the foreign national has completed all of the requirements for the degree but even this letter can be difficult for a foreign student to obtain as early as April 1st.

5. Most commonly, F-1 students have a period of Optional Practical Training ("OPT") granted as part of their F-1 student status that runs from their date of graduation (May or June) for 1 year. So, your current F-1 student employees who are on OPT will commonly have their OPT expire in May or June of 2009. If the H-1B visa petition filed for such an F-1 student is selected in one of the H-1B lotteries, then their OPT employment authorization is automatically extended until October 1st, when their H-1B status is activated.

6. F-1 students who are graduating in a program that is designated to be within the Sciences, Technology, Engineering or Mathematics (a "STEM") Program are eligible for a 17 month extension of their OPT after the initial 12 month period has run. Thus, F-1 students in STEM Programs will be able to take advantage of up to 29 months of employment authorization after graduation in OPT status and thus will have several opportunities to apply for an H-1B visa.

Immigration Alert is intended as an information source for clients and friends of MBBP. It should not be construed as legal advice, and readers should not act upon information in this article without professional counsel.

© 2009 Morse, Barnes-Brown & Pendleton, P.C.

With this as background, we can make a few estimates of what is going to happen this Spring with respect to H-1Bs and recommendations for steps to take.

First, it is imperative to get all H-1B change of status cases ready for filing on March 31st. Accordingly, we recommend that you start now to compile a list of affected employees so that we can start the data collection and materials preparation process by the end of February/early March.

Second, if you have made an offer to a foreign student who will be graduating this Spring, you need to think about the following:

- Will the foreign student have completed his degree by April 1st. If not, then unless they have another degree (U.S. or foreign) in the appropriate field on which you can base the H-1B visa petition, you will not be able to file an H-1B visa petition for them this year. Instead, they will have to obtain their 1 year of OPT with the expectation that you will file the H-1B visa petition for them next year.
- If the foreign student will have completed her degree by April 1st, then you can and should file the H-1B petition for them this year. If they are not selected in the lottery this year, then assuming that they have 1 year of OPT available, you will be able to file an H-1B visa petition on their behalf next year – thus getting two chances at the H-1B lottery.
- If the foreign student is in a STEM Program, they will be eligible

for a full 29 months of OPT which will allow you to file an H-1B visa petition on their behalf, possibly this year, next year and the following year – giving them potentially three chances at winning the H-1B lottery.

Third, if you have an employee in F-1 OPT status who has a U.S. Master's degree, then the odds of getting the H-1B are significantly better than if they have a Bachelor's degree. But note: they must have the Master's degree (or evidence that they have completed all of the requirements for the degree) by March 31st.

Fourth, if you have an employee in F-1 OPT status with a Master's degree, who is not from India or China, you may want to explore pursuing a Green Card for them now as a way to keeping them in the US in status and hedging against the possibility that they will not get their H-1B visa because they "lose" the lottery. In very brief terms, a foreign national (other than one from China or India) who has a Master's degree (US or otherwise), qualifies in the EB-2 Green Card category for which visa numbers are currently available. So long as they are in a job that requires a Master's degree, then it is possible to get them to the stage of the Green Card process at which they can stay in the US and continue to work for your company within approximately 6 to 8 months, obviating the immediate need for an H-1B visa. There are, however, risks with this approach. First, there is no guarantee that the Green Card will be approved - and if it is denied at any stage, then the foreign national does not have an H-1B status to fall back on and has to immediately

leave the U.S. Second, the process can be delayed, by for instance an audit by the U.S. Department of Labor of the first stage in the Green Card process, beyond the point at which the foreign national can legally stay in the US thus putting their immigration status at risk.

Remember – timing is critical and requires that you take the time now to determine which of your foreign employees or foreign students to whom you have made offers are eligible for the H-1B visa program. In addition, the rules (as outlined briefly above) are complex and virtually every case is different and requires a different analysis. It is thus critical that you collect the necessary data and begin a discussion with your immigration legal counsel as early as possible so that the appropriate plans can be made to increase to the greatest extent possible your ability to maintain the legal status and work authorization of your foreign employees.

Anticipating & Avoiding H-1B Filing Delays: New Labor Condition Application on the Horizon

On April 15, 2009, the Department of Labor ("DOL") will begin requiring employers to use its new portal for the filing of Labor Condition Applications (Forms ETA 9035E) which are used in the H-1B visa petition process, and PERM labor certification applications (Forms ETA 9089), which is the first step in the process of sponsoring an employee for U.S. permanent resident

status. The new portal will replace the separate systems now used by the DOL. While the new portal will offer some clear improvements in the completion and filing of PERM applications, it will adversely impact H-1B employers. The reason: The new portal will no longer allow for instantaneous certification of the Labor Condition Application (LCA). This is significant because an H-1B employer must first file and obtain DOL certification of a Labor Condition Application before the employer can file its H-1B petition with the U.S. Citizenship and Immigration Services. Under the new system, LCA certification will take at least 7 days and possibly up to two weeks. For employers who anticipate hiring multiple H-1B workers for the same position it may be wise to obtain in advance certification of an LCA that supports multiple H-1B worker so that these delays can be avoided.

Premium Processing Immigrant Petitions Extended to Former H-1B Workers Affected by 6 Year Limit on Stay

The USCIS has expanded its Premium Processing of designated Forms I-140 (Immigrant Petition for Alien Worker) to include former H-1B workers who are beneficiaries of a Form I-140 Petition and have already reached their 6 year limit of H-1B stay. Thus, under the expanded policy, current or former H-1B workers are eligible to seek Premium Processing of an I-140 Petition. To qualify for Premium Processing under this program, the foreign worker must:

1. Be the beneficiary of a Form I-140 Immigrant Petition for Alien Worker;
2. Have reached the 6 year limit of H-1B stay or be within 60 days of reaching the 6 year limit of H-1B stay;
3. Be eligible for a 3 year extension of H-1B stay under the per country limitations provisions of section 104(c) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21) due to the lack of an immigrant visa; and
4. Not be eligible for a 1 year extension of H-1B status under section 106(a) of AC21 which allows for extensions of H-1B stay in 1 year increments where a Labor Certification or I-140 Immigrant Petition was filed at least 365 days ago and has not been invalidated or denied.

This benefit is available only to foreign workers who are the beneficiaries of Forms I-140 in the following employment-based preference categories:

- EB-1 Aliens with Extraordinary Ability and EB-1, Outstanding Professors and Researchers;
- EB-2, Members of Professions with Advanced degrees or Exceptional ability (*not seeking a National Interest Waiver*), and;
- EB-3 Professionals, EB-3 Skilled Workers and EB-3, Other workers.

Prior to the adoption of this provision, Premium Processing of a Form I-140 was available only where the

foreign worker was in the United States in valid H-1B status that was due to expire. This new provision expands the benefits of the Premium processing program to foreign workers whose 6 years of permissible time in H-1B status have already expired and who are thus outside of the United States or who have switched to another visa status in the United States.

The Morse, Barnes-Brown & Pendleton, PC, **Immigration Practice Group** provides sophisticated legal services and practical advice to businesses of all sizes, ranging from technology start-ups to Fortune 500s.

Donald W. Parker – dparker@mbbp.com
John J. Gallini – jgallini@mbbp.com
Scott J. Connolly – sconolly@mbbp.com
Katelyn Giovino – kgiovino@mbbp.com
Courtney A. Mosher – cmosher@mbbp.com

Morse, Barnes-Brown & Pendleton, PC
Reservoir Place, 1601 Trapelo Road
Waltham, MA 02451

781-622-5930

© 2009 Morse, Barnes-Brown & Pendleton, PC