

The 2011 H-1B Cap to Open on April 1st

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 years prior to 2009, more H-1B applications were received in the first several days of April than the number available – as a result filed applications were selected on a lottery basis and only a limited number of applicants were able to obtain H-1B visas. In 2009, with the global recession, the H-1B cap was not ultimately reached until December of

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2009. While we expect that in 2010 the H-1B cap will not be reached for several months after April 1st, we cannot of course be certain.

As a result, we are advising all employers who expect to sponsor an employee for an H-1B visa to plan to file no later than April 1, 2010.

Employees 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 employed in H-1B status but only with “exempt” institutions or organizations, such as universities, related or affiliated non-profit entities, nonprofit research organizations, and governmental research organizations and who are now switching employment to a non-exempt employer.

Note that the H-1B cap does not apply to a foreign national who is cur-

rently 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 important points to note:

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 a U.S. earned Master’s (or higher) 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. In years prior to 2009, when more applications were received by CIS within the first few days of April, CIS announced that it would accept all H-1B petitions received in both tranches during the first 7 days of April. In other words, it would keep

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both tranches open for the first week of the month. The CIS then held multi-tier lotteries, first for cases in the Master's degree tranche and then a second lottery for the general tranche plus all those in the Master's degree tranche who had not been selected. If enough cases are received this year to exceed the cap, we assume that the CIS will follow this same procedure this year.

3. 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. Persons falling under this scenario would either have to file for an H-1B in the 58,200 visa general tranche based on a foreign or U.S. Bachelor's degree or wait until they receive their Master's degree to file in the U.S. Master's degree tranche. While we don't expect that the H-1B tranches will be closed within the first several weeks of April, we cannot guarantee it and so a discussion would have to be had with you and with the specific employee as to the best way to proceed.

4. 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. F-1 student employees who are on OPT will commonly have an OPT that will expire in May or June of 2010. If the H-1B visa petition filed for such an F-1 student is accepted for filing before their OPT grant expires, then the F-1 student employee's OPT employment authorization is automatically extended until

October 1st, when their H-1B status is activated.

5. 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.

Although the odds of the H-1B caps being reached early in April this year are not high, there can be no guarantee that they won't. It is thus critical that employers determine which of their foreign employees or prospective employees to whom they have made offers will require an H-1B this year. The rules (as outlined briefly above) are complex and virtually every case is different and requires a different analysis. Collecting the necessary data and beginning a discussion with your immigration legal counsel as early as possible will increase to the greatest extent possible your ability to maintain the legal status and work authorization of your foreign employees.

Managing the Unavoidable - H-1B Filing Delays

With the new H-1B filing season fast approaching employers seeking to hire H-1B workers should plan for delays and factor these into their H-1B filing practices. One item that causes the most significant and unexpected H-1B filing delay is the Labor Condition Application (LCA).

The LCA is a Department of Labor

(DOL) document. All H-1B petitions must be supported by a properly filed and certified LCA covering the period of intended H-1B employment. The LCA is electronically filed on a Form ETA 9035E through a special DOL web portal called iCert. The LCA contains the employer's attestation that it will comply with the DOL's rules pertaining to the employment of H-1B workers. The main provisions of the LCA are that: (1) the employer agrees to pay the higher of the actual wage paid to other workers in the same position with similar qualifications or the prevailing wage (as determined by industry or DOL surveys covering the area of intended employment); (2) the employer will provide the same working conditions to its H-1B workers as it does to other workers similarly employed; (3) the employer is not hiring the H-1B worker when there is a strike, lockout or work stoppage in that occupation at the workplace; and (4) the employer has notified the bargaining representative (if unionized) or posted written notice within the workplace of its hiring/placement of an H-1B worker.

Until recently, LCAs were certified instantaneously upon electronic submission. In the fall of 2009, the DOL revisited the LCA process and now requires that each submitted LCA be reviewed by a person. As a result standard processing of LCAs through iCert now takes 7-14 days on average. Exacerbating the delays in processing LCAs, has been the fact that the iCert portal does not have up-to-date information of employer's federal employer identification numbers (EINs) and LCAs have erroneously from time to time been denied for not listing a valid EIN. This problem continues to hamper the iCert system and smaller companies are at higher risk of expe-

riencing a denial in error due to an allegedly incorrect EIN.

As a measure of interim relief the U.S. Citizenship and Immigration Services (USCIS) temporarily allowed employers who had not received certified LCAs from DOL within 7 days of the submission to file the H-1B petition with an uncertified copy of LCA. This temporary measure expired on March 9th and the USCIS announced on its website that effective March 10th employers' H-1B petitions must be supported by certified LCAs.

What steps or actions can be taken to soften the blow of possible delays? Employers who envision the need to sponsor one or more H-1B workers within a short time frame might consider securing certified LCAs in advance. A single LCA can be certified to cover multiple workers in the same occupation, provided the employment will be in one of the designated locations listed on the LCA and the salary is covered within the salary range of similarly employed workers within that occupation. Another step that employers should take to mitigate delays is to have ready proof of their employer tax identification number (EIN) in the event the LCA is erroneously rejected. Employers that receive LCA denials due to an EIN mismatch are required to send information to the DOL regarding proof of their EIN to a special email address so that the DOL can verify and or correct its database. Employers might also consider filing an LCA preemptively where an H-1B hire is anticipated but not yet finalized. A preemptive LCA filing would alert the employer in advance of an EIN mismatch issue and provide sufficient time to correct the DOL database to ensure that future LCA submissions

are not erroneously denied.

New Guidance on Determining the Employer-Employee Relationship for H-1B Petitions

On January 8, 2010, Donald Neufeld, Associate Director, Service Center Operations for the USCIS issued detailed guidance on the question of what constitutes a valid employer-employee relationship for purposes of the H-1B visa program (the "Neufeld Memo"). The H-1B rules generally require that an employer entity (called the "petitioner") sponsor a foreign national employee (called the "beneficiary") for the H-1B visa or visa status. Thus, the applicable H-1B regulations (Title 8 C.F.R. Section 214.2(h)(4) (ii)) require that an H-1B petitioner have an "employer-employee" relationship with the foreign national beneficiary. The lack of any formal definition of what constitutes the proper employer-employee relationship in the H-1B regulations has been a source of confusion to employers, attorneys and adjudicating officers, resulting in conflicting interpretations and adjudications, particularly with regard to third party placement of beneficiaries. The Neufeld Memo is the first to clarify the obligations of employers under the H-1B program regarding an acceptable employer-employee relationship, and provides helpful guidance on how companies should prove this relationship to USCIS in order to obtain approval of an H-1B initial petition or extension of status.

The Neufeld Memo restates the common factors for establishing an employer-employee relationship under common law but emphasizes that the most important factor is the petitioner's right to control the work of the beneficiary. The petitioning

company must be able to provide evidence, discussed in greater detail below, of its right to assert control over the beneficiary's work. The USCIS makes clear that it is not sufficient that the petitioner merely employ the beneficiary and pay him or her a wage. Some of the factors outlined in the guidance that establish that the proper control exists are:

- Is the petitioner supervising the beneficiary?
- If the beneficiary is off site, is the petitioner supervising the beneficiary? Does the petitioner have the right to control the beneficiary's work?
- Does the petitioner provide the beneficiary with the "tools" to perform his duties? Does the beneficiary use proprietary information (software, applications, expertise) of the petitioner to perform his duties? Is the end-product of the beneficiary linked to the petitioner?
- Does the petitioner pay the beneficiary, and does the petitioner have the authority to review performance and work product?
- Is the petitioner providing benefits to the beneficiary, and treating the beneficiary as an employee for tax purposes?

The Neufeld Memo goes on to provide examples of employment arrangements that both meet and fail to meet the standard of a proper employer-employee arrangement. In the first category, of acceptable arrangements, are situations in which the beneficiary works primarily or exclusively onsite at a company office location and where the employee works primarily at a petitioning company location but also travels to meet with clients on location on a regular basis.

In the second category, of unacceptable arrangements, are so-called “Job Shop” arrangements where a staffing company will place an individual at an end client site to fill a position that the end client does not otherwise have. In these situations, the proper employer-employee relationship does not exist - even though the beneficiary may be on the payroll of the petitioning staffing company - because the beneficiary’s work is supervised only by the end client who also determines when and how the job is done and may also have the ability to terminate the employment of the beneficiary.

Between these two ends of the spectrum and listed as an example of a proper employer-employee relationship is what the Neufeld Memo calls a “Long Term Placement at a Third Party Site”. In this example, the petitioner is a software development company that has been engaged by a customer on a long-term project involving the development and implementation of a particular software program. In order to complete that work, the petitioner must place employees at the customer work site to do the development and implementation work. In this example, the beneficiary employees report to managers as the petitioner and are otherwise under the control of the petitioner which is contractually responsible for performing under the contract with the customer. Thus, the proper employer-employee relationship exists.

The Neufeld Memo is of particular importance for employers that fall into this last category. These employers, who routinely make use of long-term, third party placements, must be careful to provide evidence of a valid employer-employee relationship. In assessing whether the proper employer-employee relationship exists, the

USCIS will be looking at a number of factors, all of which go to the issue of control over the beneficiary employee, including:

- A signed employment agreement or offer letter between the petitioner and the beneficiary employee that outlines employment terms including duties to be performed, salary and benefits.
- A copy of the agreement between the petitioner and the end client that establishes the scope of the project and that while the petitioner’s employees are stationed at the end client work site, they remain under the control and direction of the petitioner.
- A description of the circumstances under which the employee is placed at the end client – does the petitioner expect to have other projects on which the employee will work at other end clients; is it clear to the employee that the petitioner has the authority to fire him or her and control his or her work.
- A description of the process by which the beneficiary employee received performance reviews and salary increases and bonuses.
- A copy of the petitioner’s organization chart (or the organizational chart for the project) that supports the fact that the petitioner has control over the work of the beneficiary.
- Evidence of how the employee is paid – i.e., if he or she must keep a time card, who manages that process - and how his or her benefits are managed.
- Evidence of the work product of the beneficiary employee and how it fits within a larger project that is described in the agreement

of work order between the petitioner and the end client.

The issuance of the Neufeld Memo likely signals an increase by the USCIS in challenges to the approvability of H-1B visa petitions and extensions in cases where it is either obvious or suggested that the petitioner is in the business of consulting or staffing or where the beneficiary is going to be working at an end client work site. In these cases, it will be important to provide documentation at the time that the H-1B visa petition is filed that addresses directly the existence of the proper employer-employee relationship in accordance with the terms of the Neufeld Memo. In addition, while the Neufeld Memo clearly puts additional burdens on true staffing companies, a well constructed and documented case that addresses the concerns of the USCIS still stands a reasonable chance of approval.

Please contact Donald W. Parker at dparker@mbbp.com or John J. Gallini at jgallini@mbbp.com if you would like to discuss the information in the memorandum or how the Neufeld Memo applies to your fact pattern.

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