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### Practice Areas

Immigration

## Good Company

### “Tickets, Please:” What Employers Should Know Before Hiring a Foreign Worker in the Coming Year

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For employers thinking about hiring a foreign worker in the coming year, now is the time to evaluate the visa alternatives and put a plan in place. The filing date for H-1B visa, a popular vehicle for hiring foreign workers, is fast approaching, and employers should begin planning for that event early in the New Year. Employers should also consider alternatives to the H-1B visa in order to best effectuate their employment goals in 2009.

For employers thinking about hiring a foreign worker in the coming year, now is the time to evaluate the visa alternatives and put a plan in place. Planning ahead is key when an employer decides to obtain an employment-based visa on behalf of an employee, because many visas have strict timing requirements that the employer must take into account. Knowing the time constraints can help the employer reach its goals as efficiently as possible.

With this in mind, employers should begin evaluating visa strategies for employment set to begin in 2009. This recommendation stems mainly from the timing considerations of the H-1B visa, which many employers often find to be the only viable visa option for their circumstances. Generally speaking, the H-1B visa is a non-immigrant visa designed for foreign workers in “specialty occupations.” Specialty occupations can cover a wide range of jobs, but at a minimum must require theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor’s or higher degree in the specialty or its equivalent. The initial H-1B visa is valid for three years, and an H-1B worker is entitled to a total of six years in H-1B status. Once the limit has been reached, the worker must reside abroad for a period of one full year before re-applying for H-1B status.

#### Cap-subject H-1B visas

Congress has capped the issuance of new H-1B visas at 65,000 per year, with an additional 20,000 set aside for foreign nationals who have earned a U.S. Master’s degree. In recent years the United States Citizenship and Immigration Services (USCIS), has received significantly more petitions than there are visas available by April 1, the first day of filing. Last year, in an effort to improve fairness, the USCIS accepted all filings received between April 1 and April 7, 2008. USCIS then conducted a computer-generated random selection process for all cap-subject petitions received, and rejected and returned the filing fees for all cap-subject petitions not selected. Because the government’s fiscal year runs from October 1, through September 30, the earliest possible start date for FY 2010 petitions (filed on April 1, 2009) is October 1, 2009.

As a result of the cap and the large number of cases filed each year, the H-1B visa has become increasingly difficult to obtain. The 2010 supply is expected to be exhausted within the first few days of filing again this year. If an employer chooses to pursue the H-1B visa on behalf of a new employee, it is a good idea to begin preparing the petition several months in advance, to ensure it is ready to be filed on April 1.

### **Cap-exempt H-1B visas**

Keep in mind that not all H-1B workers are subject to the annual cap. For example, workers who have been counted against the cap in the past six years, and who are perhaps seeking an extension of stay, need not file according to this timeline. In addition, amended H-1B petitions, H-1B portability petitions (for a change in employer), and petitions filed by institutions of higher education, nonprofit organizations or entities related to or affiliated with institutions of higher education, nonprofit research organizations, and governmental research organizations, are not subject to the cap. These H-1B visa petitions may be filed regardless of whether the cap has been reached. However, not all nonprofit organizations qualify for the cap exemption. It is best to speak to an immigration attorney if you have questions as to whether your organization fits into one of the exempt categories.

### **Foreign worker lay-offs**

For many employers who already have one or more H-1B workers on the payroll, a serious issue has arisen in light of the current financial climate. The economy has forced many employers to lay off portions of their workforce, including their workers in H-1B status. Employers should know that if an H-1B worker's employment is terminated prior to the expiration of his or her authorized stay, the foreign national is immediately deemed to be "out of status" and is subject to removal. This is true even if the employee receives any type of compensation or severance for some period after termination. This puts the foreign national in a difficult situation for immigration purposes. Also note that if a lay-off does occur, the employer has certain obligations with respect to notifying the USCIS and providing return transportation for the employee. If you are encountering a situation like this, it is advisable to contact an immigration attorney to discuss the various issues associated with a lay-off.

### **Alternatives to the H-1B visa**

For some employers, the H-1B visa is not the only alternative, or even the best alternative, for hiring a foreign worker. Depending on the circumstances, the following visa alternatives may better suit an employer's needs: the L-1 visa (for Intracompany Transferees who are executives or managers of related companies, or who possess specialized knowledge); the J-1 visa (designed to allow a foreign national to receive workplace training; however, this category requires sponsorship by a government-designated exchange program); the E-1 or E-2 visa (for an employee who is engaged in trade or investment between the United States and a foreign nation); or the O-1 visa (reserved for those with extraordinary ability who have achieved sustained national or international acclaim and recognition in their field). In addition, in some cases employers may hire foreign students who are authorized to work pursuant to a one-year period of Optional Practical Training (available to F-1 visa holders who are studying at a United States educational institution). Finally, a B-1 visa may be appropriate if the employer does not wish to hire the foreign national, but rather invite him or her to the United States for a business visit on behalf of a foreign company (so long as the individual remains on the foreign company's payroll) to engage in activities such as attending business conferences and seminars, consulting, soliciting clients, and conducting market or product research. There are certain benefits, drawbacks, and restrictions associated with each one of these alternatives, which are too extensive for purposes of this article but with which the employer should become familiar before making a hiring decision.

### **New rule for those with TN status**

A separate alternative to all of the visas described above is for the employee to obtain "TN status" pursuant to the North American Free Trade Agreement (NAFTA). TN status is only available to Canadian and Mexican citizens, and permits certain professional workers from these countries to live and work in the United States for three-year periods. The three-year validity period is the result of a new rule (effective October 16, 2008), which extends the period from the previous limit of one year. Employers should be aware of this change in the law, as it significantly reduces the burden of renewing TN status for its Canadian or Mexican professional employees.

The TN is renewable indefinitely, so long as the foreign national maintains nonimmigrant intent and satisfies one of the professions specifically enumerated by NAFTA. Admissible workers under the TN include, for example, architects, accountants, engineers, attorneys, systems analysts, management consultants, scientists, and graphic artists.

### **I-9 Compliance**

Finally, employers should be aware that USCIS has recently revised its Form I-9, Employment Eligibility Verification. As of April 3, 2009, employers must use the revised Form for all new hires and to re-verify any employee with expiring employment authorization. This applies to all employees, including visa holders. The new Form I-9 contains an updated List of Acceptable Documents, which removes some acceptable documents and adds several new ones. Importantly, the Form also requires employers to accept only unexpired documents. This change is intended to improve the security of the employment authorization verification process and reduce the occurrence of fraud. The new rule also creates some technical updates to the process. The revised Form can be found by visiting the USCIS website at: <http://www.uscis.gov/>

USCIS is also in the process of updating the *Handbook for Employers, Instructions for Completing the Form I-9 (M-274)*. The revised Handbook is expected to be available on the USCIS website in the near future. For further information about the revised Form and Handbook, review the USCIS publication on this topic at: [http://www.uscis.gov/files/article/I9\\_qa\\_12dec08.pdf](http://www.uscis.gov/files/article/I9_qa_12dec08.pdf).

### **Conclusion**

There are many factors to weigh when considering employment of a non-U.S. worker. The foregoing summarizes some key points with respect to visa options and timing. If you are considering hiring a foreign worker, it is best to contact an immigration attorney who can provide advice tailored to the specific objectives of you and your potential employee.

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