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EMPLOYMENT LAWSCENE ALERT: H-1B SEASON IS IN FULL SWING

As Wisconsin slowly awakes from the deep freeze of the polar vortex, employers are busy preparing applications for the H-1B filing season. Wisconsin employers seeking non-immigrant foreign workers in specialty occupations that require theoretical or technical expertise should consider contacting legal counsel to begin preparation of their visa petitions. All paperwork must be submitted during the application period, which begins on **April 1, 2019** and typically runs only until **April 5, 2019**.

What is an H-1B Visa

An H-1B visa allows U.S. employers to temporarily employ foreign workers in specialty occupations that require specialized knowledge or an advanced degree. H-1B visas are typically approved for positions in finance, engineering, mathematics, science, computer programming, or medicine. However, many positions requiring a bachelor's degree or higher will qualify.

H-1B visa holders allow the foreign worker to remain in the United States for a maximum of six years. While the application period starts on **April 1,** the visa is valid for the 2020 fiscal year, meaning that recipients of the visa may not begin working before October 1, 2019.

There is a cap on how many H-1B visas may be issued for each financial year: the government will issue 65,000 regular H-1B visas, which require specialized knowledge or a bachelor's degree, as well as another 20,000 visas for applicants with a U.S. master's degree or higher. Typically, however, the government receives two to three applications for every available quota position. Although application numbers have decreased in recent years, the 2019 H-1B fiscal year saw 190,098 H-1B applications during the first five days of the application period. Consequently, it is essential that employers are prepared to submit their petitions within the application period to avoid missing an opportunity to have the petition adjudicated.

This quota does not apply to certain institutions of higher education, related or affiliated nonprofit entities, nonprofit research organizations, or government research organizations.

Who is Eligible for an H-1B Visa?

Any foreign worker who meets the required educational requirements may have an employer petition on her behalf for an H-1B visa. Non-immigrants who are already in the United States on other valid visas may also qualify for the H-1B visa. These applications generally come from F-1 Student Visa holders who have completed their studies at an American university and are seeking to enter the workplace. Other visa-holders, such as L-1 Intracompany Transferee Visa holders and, in some cases, B-1/B-2 Visitor Visa holders, may also qualify.

Once a foreign worker has obtained an H-1B visa, she may be eligible to adjust her status to a Legal Permanent Resident through an employment based green card adjustment.[1] Additionally, H-1B visa holders are eligible to bring their spouse and children under 21 years old with them to the United States under the H-4 dependent visa.

H-1B Visa Application Process

It is important to note that the U.S. employer is charged with submitting the H-1B petition on behalf of the foreign worker. There is a two-step process to this petition:

First, the employer must apply for a Labor Certification Application (LCA) with the U.S. Department of Labor. The LCA is an attestation by the employer that it adheres to certain labor requirements regarding wages, working conditions, and, if applicable, labor unions. The LCA is filed using the Department of Labor's online iCERT system and can take between one to two weeks to receive approval.

Second, the employer will submit the approved LCA along with the USCIS form I-129 and other accompanying documents for H-1B consideration. Because the number of H-1B applications greatly outnumbers the statutory quota, USCIS uses a lottery system to randomly select applications for adjudication. Applications that have not been selected will be returned to the employer with the appropriate filing fees.

Practical Tips

Whether you are an employer looking to sponsor an employee or an employee seeking to adjust to an H-1B, there are several practical steps you can take to facilitate the burdensome H-1B application process.

- Initiate the dialog early. Because the H-1B application is driven by the employer and not the employee, it is important that both sides communicate early and often regarding the capacity and willingness of the employer to petition.
- Check the prevailing wage requirement. The LCA application requires information on the prevailing wage for the open position. This process can be extremely time consuming and complex. However, if the prevailing wage is found to be Level 1 (e.g., an

entry level wage), more information, such as an expert opinion letter may be necessary. Because any additional steps to show eligibility may delay the application, it is best to understand what needs to be done early.
- Understand what documents will be needed for the petition. These likely include degree certificates, transcripts, a job description, and other corporate documents. Remember, if any documents are in a foreign language, you must provide a copy of the original as well as a certified translation.
- Update the employer's *Validation Instrument for Business Enterprises* (VIBE) entry with USCIS. VIBE is a program that allows USCIS to retrieve commercially available information about the employer. Although not required, employers are permitted to update the VIBE entry to facilitate the H-1B adjudication process.

With the H-1B visa, early planning is essential to identify any potential issues. For example, additional time may be needed to translate documents, independently assess foreign credentials, or to determine whether the applicant may be eligible for a more efficient path to employment, such as through an O-1 visa, an L-1 visa, or other investment-based applications.

If you are interested in utilizing the H-1B process to strengthen your workforce, please contact O'Neil, Cannon, Hollman, DeJong & Laing S.C. to discuss how we are able to assist you in your immigration needs.

[1] Employment based green card adjustments require extensive documentation and may take months or years to finalize. Please contact the attorneys at O'Neil, Cannon, Hollman, DeJong & Laing S.C. to determine whether such a step is viable.