

Issues & Answers

IMMIGRATION LAW ALERT

H-1B "Cap" Worries Return on October 1st

By Nancy-Jo Merritt

Filling a position with a well-qualified applicant is not always easy. When the best or only applicant is a foreign national, the only available work authorization visa category is often the H-1B, which Congress has decreed will be subject to limitations. The H-1B is a type of non-immigrant work permit. Among the several restrictions on H-1B visa petitions is an annual limit on the number of first-time H-1B petitions that can be approved. Moreover, in a few weeks that limit, the "cap," will be sharply reduced when the 2004 fiscal year of the United States begins October 1, 2003.

On October 17, 2000, the American Competitiveness in the 21st Century Act, known as AC21, became effective. An important provision of AC21 was the increase in the H-1B cap

on initial employment petitions* to 195,000 for fiscal years 2001, 2002 and 2003. In fiscal year 2004, however, the H-1B cap returns to its pre-AC21 level of 65,000 new petitions. Several categories of H-1B petitions are "carved-out" from the cap: petitions filed by universities or affiliated non-profit entities and non-profit or governmental research organizations, plus petitions filed for a separate group of J-1 graduate medical students. Even so, we expect that the demand for H-1B professionals will exceed the number available in the coming year.

During the 2003 fiscal year, approximately 85,000 H-1B petitions will have been filed, a lower number than in recent years due to the downturn in the economy. If the economy trends

upwards, there will be an increase in the number of new H-1B petitions, but the word from Congress is that the cap will not be increased for fiscal year 2004.

The American Immigration Lawyers Association and various industry groups have provided Congress with suggestions of additional carve-outs from the cap. There is some sense that these are being considered with favor, but we are strongly recommending that petitions for new H-1B employees be filed as early in the fiscal year as possible to avoid the difficulties of an early cut-off in H-1B numbers in 2004.

Please call us if you have any questions about the consequences of the return of numerical restrictions for H-1B petitions. ■

* Only the first H-1B petition for an individual is counted against the cap; extensions and petitions by second employers are not counted.

New Visa Requirements for Healthcare Workers in 2004

By Steven R. Solway

Foreign national healthcare workers have been given one more year before they will be required to pass the visa screen* requirements as a pre-requisite to U.S. temporary (non-immigrant) work authorization. The Department of Homeland Security (DHS) has agreed to a one-year grace period until July 26, 2004. At that time, the visa screen regulations will apply to temporary healthcare workers (other than physicians) in all non-immigrant classifications.

Although visa screen regulations have been enforced only with respect to those healthcare workers applying for permanent residence in the United States, the DHS recently issued final regulations requiring visa screen certification for healthcare workers in the country on a temporary basis. This visa screen requirement applies to physical therapists, speech language pathologists, occupational therapists, medical technologists, medical

technicians (clinical laboratory scientists), and physician's assistants.

This means that any foreign healthcare worker admitted with non-immigrant work authorization prior to July 26, 2004, is not yet required to obtain visa screen certification. Healthcare workers already in the United States and seeking an extension of status or a change of status to a work-related category will not be required to obtain visa screen certification so long as the application or petition is approved prior to July 26, 2004. However, these workers must obtain the required certification no later than one year after the date their authorized stay was extended or status changed.

It is important to note that non-immigrant healthcare workers will be required to produce a valid visa screen certificate each time they enter the United States. U.S. permanent residents ("green card" holders) will not

be required to present the visa screen certificate upon admission into the United States.

In view of these developments, we recommend that hospitals and medical establishments require their non-immigrant healthcare workers obtain a visa screen certificate at the earliest opportunity. Alternatively, if the employer is willing to sponsor the TN (a type of non-immigrant work permit for professionals under NAFTA) or H-1B healthcare worker for permanent residence, it should initiate that process as soon as possible. If the worker enters the United States prior to July 2004, it is advisable to have him or her immediately initiate efforts to begin the visa screen process upon arrival, because the visa screen certificate may take a few months to obtain. Doing so will ensure that there will be no interruption in approved employment for foreign healthcare workers. ■

** The visa screen is governmentally mandated criteria a healthcare worker, such as a nurse, must satisfy that includes passing professional and English language competency exams.*

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Nancy-Jo Merritt focuses her practice on immigration law and has over two decades of experience representing domestic and international companies with issues concerning foreign national employees and business immigration matters. She provides strategic counseling to clients and assists employers in developing compliance programs. Ms. Merritt has successfully challenged the federal government's interpretation of immigration law in a number of matters. She won the first award of fees in the United States from an Immigration Judge under the Equal Access to Justice Act. She received her B.A. (1964), M.A. (1974) and J.D. (1978) from Arizona State University.

Steven R. Solway's practice concentrates on immigration law and developing customized immigration processes for clients, which provide support and service directly to human resources staff and employees. He has extensive experience with U.S. and Canadian immigration matters, with specific emphasis on Canadian Employment Authorizations, T/N visas, Canadian Permanent Residence, H-1B visas, L-1 visas, Alien Labor Certification, Green Cards and the I-9 process. He received his B.S. (1983) from York University and LL.B. (1986) from Osgoode Hall Law School.

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