

Immigration Update

Immigration Enforcement on the Rise, H-1B Quota Problems Persist

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Department of Labor Enforces H-1B Wage Levels

When Congress approved the Visa Reform Act of 2004 last November, it increased the H-1B surcharge to \$1,500 and added a \$500 anti-fraud fee to initial H-1B and L-1 petitions. In light of greater funding for enforcement activity, we recommend employers with H-1B workers review their compliance policies to ensure that they are effective and being followed.

Even before the new anti-fraud enforcement funds were available, compliance issues arising out of the employment of foreign national workers were again in the news. The Department of Labor (DOL) recently fined Computech, Inc., a computer staffing company, nearly \$5 million in back wages payable to 232 H-1B workers and an additional \$1,220,000 in penalties for H-1B visa program violations. Apparently, Computech did not pay the required wage rate for its H-1B computer professionals. Secretary of Labor Elaine Chao said, "The Department of Labor is committed to vigorously enforcing the law to make sure that employers gain no economic advantage by using temporary foreign workers instead of American workers."

DOL regulations governing H-1B work authorization are an important component of the employer's compliance policies. We recommend that companies regularly audit the procedures and record keeping required under the Immigration and Nationality Act for the employment of temporary H-1B workers.

H-1B Quota in Disarray

In 2004, Congress created a subcategory addition to H-1B quota numbers, with 20,000 new numbers reserved for graduates of U.S. institutions of higher education with a masters or higher degree. However, the U.S. Citizenship and Immigration Services (USCIS) has struggled with implementation of the statute, first announcing that for this year only, the 20,000 numbers would be open to all eligible H-1B beneficiaries, then putting all implementation on hold. There is speculation that this hold results from the agency's discovery that it over-counted fiscal year 2004 initial H-1B petitions by 10,000!

An USCIS official advises that USCIS does not know yet when the announcement about acceptance of H-1B petitions for fiscal 2005 will be published. The announcement, which will be in the form of a rulemaking in the Federal Register, is currently awaiting the Office of Management and Budget (OMB) clearance.

The official was not able to say whether USCIS will hold to the March 8, 2005 press release that said the fiscal 2005 number would be open to all eligible H-1Bs, or if the agency will return to declaring that only individuals holding a master's degree or higher from a U.S. university will be eligible for the numbers.

In the meantime, USCIS began accepting H-1B filings on April 1, 2005 for fiscal 2006, contrary to the rumor that it would delay acceptance of these filings.

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A HISTORY TO LEVERAGE

This odd circumstance raises a question about what to do with those who wish to take advantage of a fiscal 2005 number, but also wish to file as soon as possible for a fiscal 2006 number. USCIS was unable to address this, other than to say that “no one will be advantaged or disadvantaged for a fiscal 2005 number because they filed for a 2006 number.” The Federal Register notice should address this situation, but USCIS cannot disclose the content until it is cleared by OMB. USCIS has acknowledged it is aware of the expense and other issues involved if one is double-filing for an H-1B visa against both fiscal 2006 and 2005 allocations.

We advise employers who are planning to file new H-1B petitions to wait until April 15, 2005 to see if USCIS announces final plans for release of the 20,000 U.S. graduate degree numbers. If any of those numbers are available for beneficiaries with foreign degrees or U.S. bachelor’s degrees, those petitions can be filed with start dates prior to October 1, 2005. If, however, USCIS restricts the 20,000 to U.S. graduate degree holders as originally designated, then employers will be restricted to petitions requesting an October 1 start date to reserve a fiscal year 2006 H-1B number.

ICE Increasing Undocumented Worker Enforcement Activities

U.S. Immigration and Customs Enforcement (ICE) is increasing its enforcement activities. Earlier this month Wal-Mart agreed to pay \$11 million to settle federal charges that it knowingly allowed contractors to use undocumented workers to perform janitorial services in its stores. ICE conducted two separate investigations resulting in arrests of 352 undocumented workers employed by contract janitorial service companies to clean Wal-Mart stores. In addition to the \$11 million fine, the settlement agreement requires Wal-Mart to provide compliance training to its store managers to prevent the employment, hiring, or recruitment of undocumented workers. Wal-Mart must also assist with on-going investigations of other janitorial service companies previously used by the discount retailer. The settlement allowed Wal-Mart to avoid civil and criminal actions alleging the knowing hire of undocumented workers and failing to comply with record keeping requirements. The importance of having supervisors and managers knowledgeable regarding work authorization rules is highlighted by the settlement requirement that Wal-Mart create training programs throughout the company.

PERM Update

As we described in an earlier Fennemore Craig Immigration Update, the new labor certification process, PERM, favors employers who file on-line rather than by mail, the only two choices for filing a PERM application. The DOL requires employers to first register to use the PERM system and only employers or owners of the applying entity may register, because the employer must make the required attestations. The registration must be submitted by an individual with actual hiring authority for the employer; the employer’s attorney cannot make the initial registration. However, once the employer is registered and has received a PIN, the employer can create a sub-account for its attorney. Please review the PERM Recruitment Instructions on our web page at http://www.fclaw.com/newsletter/materials/immigration_alert_20021005.pdf, along with the accompanying PERM Recruitment Checklist.

We have high hopes for the PERM process, but are not recommending that every pending labor certification be re-filed using PERM. That switch has consequences, not all of which may be favorable. We look forward to discussing with you the changes in strategy required by the new process. We are also available to meet with your employees and answer questions about their status and about how PERM might affect them.

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