PUBLICATION

Immigration Update: Targeted Site Visits and Restrictions on Computer Programmers in the H-1B Program; Plan B Options If You Don't Win the H-1B Lottery

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This month: Targeted Site Visits and Restrictions on Computer Programmers in the H-1B Program; Plan B options if you don't win the H-1B lottery.

H-1B Employers – Time to Take Stock and Prepare for FY18

In the midst of the mad flurry of H-1B cap filings, United States Citizenship and Immigration Services (USCIS) issued a policy memorandum that rescinds guidance on H-1B adjudication for certain computer-related positions from December 2000 and announced implementation of increased measures to deter and detect H-1B visa fraud.

Computer Programmers Beware

On March 31, the day most H-1B applicants were filing their H-1B cap petitions for FY18, USCIS released a policy memorandum that supersedes and rescinds a December 22, 2000 memorandum entitled "Guidance memo on H1B computer related positions" issued to Nebraska Service Center (NSC) employees by Terry Way, former director of the NSC. This March 2017 Memorandum essentially states that any entry-level Computer Programmer positions (relying on a Level 1 Wage from the Foreign Labor Certification Data Center Online Wage Library) will NOT qualify as a specialty occupation for H-1B purposes. Employers should be prepared to support an H-1B petition for any other type of Computer Programmer position with evidence from reliable and authoritative sources that the duties of the position require an educational minimum of a bachelor's degree in a computer science field related to the occupation.

The December 2000 policy memo was rescinded to prevent inconsistencies in the H-1B (and H-1B1) adjudications now that three service centers (Vermont, California, NSC) are charged with adjudicating these petitions. This December 2000 memorandum relied on now outdated data related to computer programmer occupations and did not properly articulate the criteria for H-1B specialty occupations. Reviewing the most current versions of the Occupational Outlook Handbook and industry standards for computer programmer occupations, the March 2017 memorandum concludes "individuals with only an 'associate's degree' may still enter these occupations. As such, it is improper to conclude based on this information that USCIS would 'generally consider the position of programmer to qualify as a specialty occupation.'" While the memorandum goes on to explain that the handbook is not definitive on whether a position qualifies as a "specialty occupation" and does not disqualify all positions in computer programming occupations, it includes a reminder that it is the Petitioner's burden of providing other evidence that a particular programmer position qualifies as a specialty occupation.

Employers should pay special care to the job duties described in supporting letters and articulating the degree requirement for all H-1B petitions, but can plan on an increased level of scrutiny, likely Requests for Evidence from USCIS, and a greater number of denials of H-1B petitions for entry level Computer Programmers.

Employers Get Ready for Targeted Site Visits

USCIS has been conducting random site visits to ensure employer and employee compliance with H-1B requirements (specialized position, prevailing wage, worksite, etc.) since 2009. In cases where fraud or abuse of the H-1B program has been suspected, USCIS alerts U.S. Immigration and Customs Enforcement (ICE) for further investigation and action. In its April 3, 2017 announcement, USCIS confirms it is adopting a more targeted approach in these site visits to better focus its resources in situations where fraud and abuse are likely to occur. In selecting cases for a site visit, USCIS will focus its efforts on:

- Cases where USCIS cannot validate the employer's basic business information through commercially available data [USCIS uses Validation Instrument for Business Enterprises (VIBE) to pull data from Dun and Bradstreet to validate information about companies /organizations. *See* https://www.uscis.gov/working-united-states/information-employers-employees/employer-information/vibe/validation-instrument-business-enterprises-vibe-program]

- **H-1B-dependent employers** (defined by regulation at 20 CFR § 655.736) – those who have a high ratio of H-1B workers as compared to full-time U.S. workers [> 7 H-1B workers in a company with 1 – 25 total full-time employees; >12 H-1B employees in a company with 26 – 50 employees; or 15 percent or more H-1B workers in a company with 50 employees. *See DOL Fact Sheet* https://www.dol.gov/whd/regs/compliance/FactSheet62/whdfs62C.pdf]

- Employers petitioning for H-1B workers who work off-site at another company or organization's location.

Employers who are "end user clients" of staffing companies that use H-1B visas (including many of the biggest companies in the United States) can expect more inquiries and visits from USCIS seeking to verify whether staffing companies' H-1B employees are working under the conditions represented to USCIS in their respective H-1B filings. Employers as "end users" of these H-1B employees need to stay vigilant in their arrangements with staffing agencies to make sure they are in compliance with necessary posting and other H-1B and Department of Labor requirements. The Department of Labor issued a separate alert on April 4, announcing its plans to rigorously use authority to investigate allegations of H-1B Program violators and considering changes to the Labor Condition Application (part of the H-1B application process) to provide greater transparency to agency personnel, U.S. workers and the public.

More Channels to Report Abuse/H-1B fraud

In its April 3 alert, USCIS provides a dedicated email address (REPORTH1BABUSE@USCIS.DHS.GOV) where any worker can report suspected H-1B abuse/fraud experienced or observed in the workplace. This information will be used for further investigations and will be referred to law enforcement agencies for potential prosecution. This same day, the Department of Justice warned employers not to discriminate against U.S. workers and included contact information for the Immigrant and Employee Rights Section to report discrimination (https://www.justice.gov/opa/pr/justice-department-cautions-employers-seeking-h-1b-visas-not-discriminate-against-us-workers.

Note: Workers still may continue to report allegations by submitting Form H-4 to the Department of Labor's (DOL) Wage and Hour Division (https://www.dol.gov/whd/forms/fts_wh4.htm) or completing ICE's HSI Tip Form (https://www.ice.gov/webform/hsi-tip-form).

These efforts, both the focus of the site visits and the restrictions on H-1B visas for computer programmers, may appear to be aimed squarely at the larger outsourcing companies that historically have used the greatest

numbers of the H-1B visas, but any employer could find itself the subject of a sudden investigation as a result of these heightened measures of investigation. These government alerts from multiple agencies, reminders of hotlines, dedicated email addresses and general prevalence of H-1B news this week with the new influx of cap filings should put employers on high alert to ensure compliance with H-1B requirements. If you have not already done so, now is the time to make sure your company is ready for a site visit, required documentation is maintained for H-1B workers in the designated DOL and Public Access files, and workers' terms of employment are in compliance with relevant immigration and employment laws.

Related Resources:

USCIS April 3 Alert: "Putting American Workers First: USCIS Announces Further Measures to Detect H-1B Visa Fraud and Abuse" is available at: https://www.uscis.gov/news/news-releases/putting-american-workers-first-uscis-announces-further-measures-detect-h-1b-visa-fraud-and-abuse

March 31, 2017 Policy Memorandum can be accessed at**:**
https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-6002-0142-H-1BComputerRelatedPositionsRecission.pdf

DOL Announces Plans to Protect American Workers from H-1B Program Discrimination:
https://www.dol.gov/newsroom/releases/eta/eta20170404-0

Plan B for H-1B Applicants

Although you may not yet know whether your H-1B petition has been selected for processing under the FY18 cap, it is never too early to think about alternatives and come up with a feasible Plan B. Now that premium processing has been suspended, applicants will need to wait until they receive the USCIS Receipt notice by standard mail (hopefully by the end of April) to be certain their petition has been *accepted* for processing, and under current processing times, will likely need to wait at least another four to five months until the H-1B petition is actually *adjudicated* to know they can definitely plan on remaining in the United States and work in H-1B status for their sponsoring employer. This results in a long time of wondering and waiting. We provided a summary of possible options last year at: https://www.bakerdonelson.com/Immigration-Update-May-2016. In addition to the F-1, STEM, L-1, H-4, TN, E-3, E and O options detailed in the May 2016 article, an individual may be able to obtain concurrent employment with a cap-exempt employer under a broader interpretation of cap-exempt employment or pursue parole as an entrepreneur under the International Entrepreneur rule, effective July 16, 2017.

Concurrent Cap-Exempt Employment: Some employers are not subject to the limitations of the FY Cap – these can include Colleges or Universities, nonprofit entities "affiliated or related" to a university, nonprofit research organization, governmental research institutions and workers employed "at" such entities (even if not "by" such entities) if the worker spends majority of work time performing duties that directly further the purpose/objectives of the cap-exempt organization. As long as an employee does not "cease to be employed" with the cap-exempt employer, he or she can concurrently work for an employer who would otherwise be subject to the cap. The cap-subject employer would be required to file a separate H-1B petition and provide evidence of the ongoing concurrent cap-exempt employment, but this can be a feasible option for individuals who can find cap-exempt employment. (For more discussion on the cap exempt employers, go to: http://immigration.bakerdonelson.com/uscis-new-rule-implements-old-laws-twists/)

International Entrepreneurs: Effective July 16, 2017, individuals who have a substantial ownership interest (> 15 percent) in a start-up entity that has received a qualified investment (either $250,000 from qualifying investor(s) or at least $100,000 through government award(s) or grant(s)) may be eligible for a grant of parole in the United States for up to 30 months with possible extension for up to a five-year maximum. For further

details on the entrepreneur rule, requirements and process, go to: http://immigration.bakerdonelson.com/dhs-final-international-entrepreneur-rule-take-effect-july-16-2017/ and http://immigration.bakerdonelson.com/entrepreneurs-may-new-way-start-united-states/.

If you are interested in discussing these options or other alternatives to the H-1B, please contact a member of our Immigration Group.