Special Immigration Alert:

The 2018 H-1B Cap Has Been Reached

Trump Administration Issues New Announcements Regarding IT Workers

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I. The 2018 H-1B Cap Has Been Reached

On April 7, 2017, the U.S. Citizenship and Immigration Services ("USCIS") announced that it had reached the congressionally mandated H-1B cap for fiscal year 2018 ("FY18"). This announcement applies to both the general cap of 65,000 and the additional cap of 20,000 for those with advanced degrees from U.S. universities. The USCIS announced further that it will reject and return filing fees for all unselected cap-subject petitions that are not duplicate filings. The agency will continue to accept and process H-1B cap exempt petitions. However, employers should remember that, as of April 3, 2017, premium processing was suspended for up to six months for all H-1B petitions, including cap-exempt petitions.

Once the USCIS completes its intake of all FY18 H-1B petitions received by last Friday, the agency will conduct computer-generated lotteries to determine which H-1B petitions have been selected for processing. The USCIS will first hold the advanced degree lottery for the 20,000 visas in that cap category. Once that lottery is completed, the unselected petitions will be added to the lottery for the 65,000 general category. Petitions that are not selected in either lottery will be formally rejected and returned with their filing fees.

Due to the enormous volume of H-1B petitions filed for FY18, the USCIS is presently unable to predict when it will be able to conduct these lotteries. Stay tuned!

II. Trump Administration Issues New Announcements Regarding IT Workers

There has been significant adverse press recently regarding how IT consulting firms are taking jobs from American workers and even asking these workers to train their foreign replacements to secure severance payments. Two weekends ago, *60 Minutes* featured an expose on the outsourcing of IT positions at the University of California, San Francisco. Against this backdrop, the Trump administration, which made implementing tough immigration enforcement and putting "American workers first" two of its major campaign themes, has issued the following three announcements, all of which appear to address the situation concerning IT consultants within existing legal constraints:

A. March 31, 2017, Policy Memorandum on H-1B Computer Programmers

This March 31 policy memo essentially advises USCIS examiners that basic computer programmers may not be eligible for H-1B classification if their positions do not require a specialized bachelor's degree as a minimum entry-level requirement. The memo rescinds an earlier memo, dated December 22, 2000, in which the USCIS indicated that it would consider programmers as H-1B eligible if they were engaged in providing clients with programming analysis, custom designs, modification, and/or the problem solving of software. However, the 2000 memo also indicated that programmers who simply entered or reviewed code for employers not in the IT industry may require added scrutiny because these positions normally do not require a specialized bachelor's degree. Since the 2000 memo was issued, it has been a challenge securing H-1B classification for lower-level computer programmers because the USCIS questions whether their positions require a specialized degree. Examined in this context, the March 31 policy memo really did not break any new ground. The last paragraph of the March 31 policy memo concludes that "[T]he fact that a person may be employed as a computer programmer and may use information technology skills and knowledge to help an enterprise achieve its goals . . . is not, [by itself], sufficient to establish the position as [H-1B eligible]. . . . Instead, a petitioner must provide other evidence to establish that the particular position [meets the H-1B requirements]."

B. April 3, 2017, USCIS Announcement on H-1B Fraud and Abuse

The USCIS announced that it will now focus H-1B site visits in three areas: (i) cases where the government cannot validate an employer's basic business information through commercially available data, (ii) H-1B dependent employers that have a high ratio of H-1B workers compared to U.S. workers, and (iii) employers petitioning to allow H-1B workers to work off-site. Again, the focus of this appears to be on the IT consultants involved in the displacement of U.S. workers.

C. April 3, 2017, DOJ Press Release on H-1B Discrimination Issues

This press release was issued by the Department of Justice ("DOJ") to remind employers that the immigration laws contain a provision that prohibits employers from using the H-1B process to discriminate against U.S. workers. This provision has been on the books since 1986 but has proved of little utility in addressing the outsourcing issue because of its limited scope. To violate the statute, an employer must have a hiring preference that favors H-1B workers over U.S. workers. The fact that an employer has a significant number of H-1B employees is not, by itself, sufficient to demonstrate a violation. There must be a conscious decision to prefer H-1B workers to the expense of U.S. workers. This is a hard claim to prove and is why this particular provision has been used sparingly in these cases.

If you have any questions about the H-1B cap or any other aspect of the immigration process, please contact any member of Epstein Becker Green's national Immigration Law Group.

Robert S. Groban, Jr.

New York
212/351-4689
rgroban@ebglaw.com

Pierre Georges Bonnefil

New York
212/351-4687
pgbonnefil@ebglaw.com

Patrick G. Brady

Newark
973/639-8261
pbrady@ebglaw.com

Jungmin Choi

Newark
973/639-5226
jchoi@ebglaw.com

Jang Hyuk Im

San Francisco
415/399-6067
jim@ebglaw.com