February 25, 2013

Don't Get Shut Out - File Your H-1B Cap Petitions Early

As you may know, each year, the U.S. government makes available a limited amount of visas in the H-1B Specialty Occupation temporary work visa classification. For its Fiscal Year 2014, U.S. Citizenship and Immigration Services ("USCIS") will begin to accept H-1B cap petitions for filing starting on April 1, 2013, six months before the start of Fiscal Year 2014.

What Is the H-1B Annual Quota?

The annual cap or quota on H-1B visas is 85,000. Of that number, 20,000 are reserved for foreign nationals who have received a master's or more advanced degree *from a United States university*. However, not all employers are subject to the cap. For example, employers filing H-1B petition extensions or amendments on behalf of foreign nationals already working in H-1B visa status for the existing employer are exempt from the quota. In addition, employers filing new petitions to change H-1B employers on behalf of a foreign national working in H-1B visa status for a different employer are also exempt from the quota (except where the foreign national is currently employed by a cap-exempt employer such as a U.S. institution of higher education and now is switching to a cap-subject private employer).

When Can an Employer File?

USCIS will start accepting cap petitions on Monday, April 1, 2013. An employer may send a petition for filing no earlier than Friday, March 29, 2013, to arrive by overnight courier service at USCIS the following Monday. The date received at the appropriate USCIS Service Center having jurisdiction over the place of intended employment is the date that counts for "filing" purposes. *A petition received earlier than April 1st will automatically be rejected.* Petitions received starting Monday, April 1 through Friday, April 5 will be treated the same for cap-counting purposes, as USCIS will wait for those five business days before processing. If USCIS should receive more than the sufficient number of petitions in the five days to use up the annual quota, as it has in the past, it then will hold a lottery to randomly select by computer generation those petitions it will process. Petitions not selected will be returned to the employers. If the H-1B cap is not reached during the initial five-day period, then USCIS will continue to accept petitions until the quota is reached.

We Recommend Employers Start to Prepare Now

No one knows how early the H-1B cap will be reached this year. Last year, it was reached on June 11, 2012. Early preparation of an employer's petition is therefore critical. Preparing and processing H-1B cap petitions is a lengthy procedure that first requires obtaining an approved Labor Condition Application ("LCA") from the U.S. Department of Labor (the "DOL") before the petition may even be filed with USCIS. The DOL has seven days in which to approve or certify the LCA; however, for employers filing an LCA for the first time, it will take longer for the DOL to verify the employer's FEIN, therefore delaying the certification. If the foreign national's degree is not from a U.S. institution of higher education, it must first be independently evaluated in terms of its equivalency to a U.S. degree, a bachelor's being the minimum requirement (or equivalent work experience using a designated formula of 3 years of work experience for every academic year of college missing). All of these actions take time. Demand for H-1B cap petitions may well be greater this fiscal year than in the past several years due to increased hiring in many economic sectors. Accordingly, we recommend that employers start to gather documentation promptly and plan to submit their petitions on April 1, 2013, in order to increase the likelihood of getting one of the coveted H-1B visas.