The Changing Tides of the H-1B Visa Adjudication

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Employers are experiencing changes in the H-1B adjudicative process resulting in challenges in planning supplement professional work force hiring. The specified purpose of the "Hire American" section in President Trump's Executive Order 13788—"Buy American, Hire American" ("BAHA") is to create higher wages and employment rates for U.S. workers and to protect their economic interests by rigorously enforcing and administering the laws and policy governing among other visas, the H-1B issuance to foreign workers. Here is what we are seeing in connection to the BAHA order and its impact on H-1B adjudication:

- U.S. Citizenship and Immigration Services (USCIS) has rescinded its long-standing policy memorandum directing USCIS adjudicators to give deference to a prior approval of an H-1B petition when adjudicating an extension involving the same employer and the same position. The new guidance instructs adjudicators to apply the same scrutiny to both **initial** H-1B petitions and **all subsequent** extension petitions. The guidance states that adjudicators "should not feel constrained" in issuing requests for evidence.
- The issuance of Requests for Evidence (RFEs) on H-1B petitions have increased by more than 44 percent since the previous year. Consequently, approval rates are down from prior years.
- USCIS is reviewing entry-level wages, even for recent college graduates with no work experience. Paying an entry-level wage does not mean the position cannot qualify as an H-1B specialty occupation. This may require an employer to provide additional information to educate the adjudicating officer on why an entry-level wage is appropriate for the H-1B position.
- USCIS is scrutinizing traditional professional level positions that have typically qualified as a "specialty occupations" in years past on the basis that to qualify one can earn a variety of specialty degrees to qualify the individual for the position.
- Employers with many H-1B employees, as well as those who are "H-1B dependent," may receive more denials than they have in the past.
- A Department of Homeland Security memo, dated February 22, 2018, places additional restrictions on employers that place H-1B workers at third-party client sites, including requiring evidence of actual work assignments, proof of which entity controls the H-1B worker, detailed itineraries to cover assignments for a three-year period, contracts, and SOWs.
- USCIS had updated its policies to make it more difficult to place foreign students at third-party worksites as well during their STEM Option Practical Training (OPT).
- USCIS and Department of Labor (DOL) have also increased the number of site visits and employer audits. Employers should be prepared for such a visit and ensure their public access files are in order.

The new proposed rules that may affect the H-1B process:

- May 24, 2018, the DOL released proposed changes to ETA Form-9035, Labor Condition Application for Nonimmigrant Workers (LCA) that would require more details about the end-user clients and potential worksites specific to the placement of H-1B workers. The proposal require U.S. employers to provide the legal business name of the end-user client at whose worksite the H-1B intends to work. This new requirement directly targets U.S. employers who place foreign national workers at third-party worksites. The comment period just closed, and it is unclear what the final rule will look like or go into effect.
- USCIS will propose new regulation that will establish an electronic registration system for H-1B cap-subject petitions for next fiscal year. The new rule is intended to better manage the intake and the statutory random H-1B lottery selection process. This new rule

is purportedly scheduled for publication July 2018 for a notice and comment period.

- USCIS intends to publish a rule to revise both the definition of "specialty occupation" and the definition of "employment and employer-employee relationship" "to better protect U.S. workers and wages." One goal of revising these definitions is to make it harder for consulting companies to place their employees at 3rd party work sites. This rule was initially slated for publication in the fall of 2018, but now it appears it will not be published until January 2019.

It is important to note that under the rulemaking process, a proposed rule is released and a notice and comment period, normally lasting 30 or more days, which provides employers and other immigration stakeholders, will have the opportunity to submit formal comments to the government, before a final rule is published. Therefore, regulatory changes will not take place immediately, but it is important to understand.

Today, simply complying with the H-1B regulations is not enough to secure much-needed visas for your employees. It is important to stay connected and be ready to adapt to the new changes if you have a work force that relies on H-1B visas. Employers should stay tuned to other potential changes to the H-1B program in the coming months.

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