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Immigration News
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H-1B and L-1 Application Filing Fees Increase and Other Rules

Reinstated H-1B Filing Fee

Congress was quite busy as year 2004 came to an end working on the *FY05 Omnibus Appropriations Act*, the *L–1 Visa and H–1B Visa Reform Acts* and other laws having immigration implications.

A provision in the *Fiscal Year 2005 Omnibus Appropriations Act* reinstated the H-1B supplemental filing fee as enacted under the *American Competitiveness and Workforce Improvement Act of 1998*. Under the *American Competitiveness and Workforce Improvement Act of 1998*, a supplemental $1,000.00 filing fee for new or extended H-1B petitions (with some exceptions) was imposed until October 1, 2003. The fee was in addition to the H-1B petition filing fee, currently $185.00, and any request for Premium Processing which requires a $1,000.00 filing fee.

The reinstated supplemental filing fee now in effect for H-1B petitions is as follows:

- For H-1B employers/petitioners who employ 25 or more Full Time Equivalent employees[1] the filing fee is $1,500.00.

- For H-1B employers/petitioners who employ less than 25 Full Time Equivalent employees[2] the filing fee is $750.00.

- The supplemental H-1B filing fee does not apply to:
  i) Primary or Secondary education institutions.
  ii) Institutions of Higher Education (as defined by §101(a) of the Higher Education Act of 1965, 20 U.S.C. 1001(a))
  iii) A non-profit entity related to or affiliated with any such institution of Higher Education.
  iv) A non-profit entity which engages in established curriculum-related clinical training of students who are registered at an institution of Higher Education.
  v) A non-profit research institution.
  vi) A government research institution.
  vii) A second time-same employer/petitioner H-1B extension request.
  viii) A same employer/petitioner amended H-1B petition not requesting an extension of status.

The supplemental fee is deposited in an "H-1B Nonimmigrant Petitioner Account" allocated for scholarship and training programs and to fund immigration enforcement activities. The employer may not pass this expense to the foreign national; if the employer violates this provision, it is subject to penalties. It is

[1] When determining the number of Full Time Equivalent employees, the employer must include the employees of any and all affiliates and/or subsidiaries of the petitioning employer.

[2] When determining the number of Full Time Equivalent employees, the employer must include the employees of any and all affiliates and/or subsidiaries of the petitioning employer.

recommended that the employer pay this fee directly to U.S. Citizenship & Immigration Services (USCIS) when the petition is filed by providing a separate check to evidence its compliance with this provision.

Anti-Fraud Filing Fee Effective March 8, 2005

For all initial or change of employer H-1B petitions, L-1 petitions and Blanket L petitions, (Forms I-129 and Forms I-129S for Blanket L petitions) filed with (received by) USCIS or a Consular Post (for Blanket L petitions) on or after March 8, 2005, the petitioner must pay a new "Fraud Prevention and Detection Fee" of $500.00. This additional amount will be allocated to an "H-1B and L Fraud Prevention and Detection Account" with the funds being available for use by the Department of State, the Department of Homeland Security and the Department of Labor.

The "Fraud Prevention and Detection Fee" does not apply to requests by the same petitioner/employer to amend or extend the H-1B or L-1 immigration status of the foreign national/beneficiary. Thus from March 8, 2005 the filing fee for an initial H-1B or L-1 petition will be $685.00. If Premium Processing is desired, the $1,000.00 filing fee is also needed. This anti-fraud fee is timely for USCIS as the 65,000 Fiscal Year 2006 H-1B petition approvals become available for filing April 1, 2005 (with an October 1, 2005 start date).

Extra H-1B Petition Approvals Available

As part of the *H–1B Visa Reform Act of 2004* on or after March 8, 2005, 20,000 H-1B petitions approvals, in addition to the standard 65,000, will be allocated to foreign nationals who have graduated with an advanced or higher degree (Master's or Ph.D.) from a U.S. college or university. As this provision of law is effective March 8, 2005, USCIS must provide instructions for the processing of such H-1B petitions and any applicability for Fiscal Year 2005[3]. The earliest H-1B petitions for Fiscal Year 2006 will be accepted by USCIS is April 1, 2005 (with start dates of employment on or after October 1, 2005).

H-1B Prevailing Wages

For all H-1B petitions, the employer is required to pay the greater of the wage offered or 100% of the prevailing wage as determined by the State Workforce Agency or in limited instances a qualifying survey. Previously an H-1B employer was able to offer the greater the wage offered or 95% of the prevailing wage. The Department of Labor is working to modify its prevailing wage system which currently operates on two levels – Level I for entry level positions requiring full-time supervision of the work to be done, and Level II for anything above Level I. Most wages for H-1B petitions were classified at a Level II wage which often was very unrealistic for the industry as well as for the employer. The future prevailing wage system will offer four levels of wages based on experience, education and the level of supervision. The use of the prevailing wage system and payment of 100% of the prevailing wage will also be applied to the Labor Certification stage for employment-based Green Card/Permanent Resident status processing.

Penalties for H-1B Dependent Employers

On or after March 8, 2005 the provisions for H-1B Dependent Employers[4] and prior LCA Violators[5] as provided in the *American Competitiveness and Workforce Improvement Act of 1998* are reinstated. Such provisions require attestations by the H-1B employer that:

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[3] The 65,000 H-1B petition approvals for Fiscal Year 2005 (October 1, 2005 to September 30, 2006) have already been awarded.

[4] An H-1B Dependent Employer can be (i) one employing up to 25 full-time employees in the United States of which more than 7 are H-1B nonimmigrants, (ii) one employing 26-50 full time employees in the United States of which more than 12 are H-1B nonimmigrants, or (iii) one employing more than 50 full-time employees in the United States of which more than 15% are H-1B nonimmigrants.

[5] Willful violators of the LCA attestations in the preceding five-year period.

a. The H-1B petitioner/employer has not "displaced"[6] U.S. worker(s) during the 90-day period before and the 90-day period after filing the H-1B petition.

b. The employer has taken good-faith steps to recruit U.S. workers.[7] The employer must also disclose whether or not it has offered the job to any U.S. workers who applied and were equally or better qualified than the intended H-1B Specialty Occupation Worker. *Exception:* If the H-1B Specialty Occupation Worker would qualify for an employment-based immigrant visa (Green Card) as an Alien of Extraordinary Ability, an Outstanding Researcher or Professor, or as a Multinational Executive/Manager, then the recruitment attestation is not required. This exception will be applied in only very limited situations.

c. The H-1B petitioner/employer will not place the H-1B Specialty Occupation Worker with another employer (not a related corporate entity) that will control the activities of the H-1B Specialty Occupation Worker (an indicia of employment) unless the H-1B petitioner/employer has inquired whether or not the other employer has or intends to displace U.S. worker(s) within the 90-day period before or the 90-day period after the placement/assignment of the H-1B Specialty Occupation Worker. This provision will typically apply to job contractors placing employees at various work sites. If such job contracting is anticipated, the H-1B petitioner/employer should obtain a written statement from the other employer regarding the absence of displacement of that employer's employees. However, the attainment of such statement may not in and of itself relieve the H-1B petitioner/employer from liability.

Such attestations do not apply to an H-1B petition for a foreign national (H-1B Specialty Occupation Worker) receiving an annual salary of at least $60,000 or for a foreign national holding an advanced (Master's) degree working in a specialty occupation position requiring such advanced degree.

Other Immigration Changes

As part of the *L–1 Visa (Intracompany Transferee) Reform Act of 2004*, for L-1B initial petitions, extension petitions and amended petitions filed on or after June 6, 2005, the L-1B Specialized Knowledge Intracompany Transferee may no longer be subcontracted to a third party business where the foreign national would work under the control and supervision of a third party as the "primary" place of employment. Congress became cognizant of "L-1 abuse" when an overseas consulting company established offices in the United States as a means to continue transfer foreign nationals to the United States when the number of H-1B petition approvals was returned to the 65,000 level from the 195,000 level during Fiscal Year 2003. Now the L-1B nonimmigrant will only be authorized to work at the place of employment of the petitioner.

Also effective June 6, 2005, for new L-1 blanket petitions, all foreign national must have worked for the qualifying organization for 365 consecutive days during the three-year period prior to the intracompany transfer. The prior qualification of only 6 months prior employment has been cancelled for new Blanket L petitions.

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[6] U.S. worker is "displaced" if he or she is laid off (other than a discharge, voluntary departure, or end of employment contract) from a position in which an H-1B Specialty Occupation Worker is sought (in other words replacing a U.S. worker, having substantially equivalent qualifications and experience, with a foreign national to perform the same job -- having essentially the same responsibilities in the same area/location of employment). An U.S. worker is not displaced if the U.S. worker is offered a similar position with the employer at equivalent or higher compensation and benefits.

[7] The recruitment for U.S. workers to fill the position offered to the H-IB Specialty Occupation Worker at the same or higher compensation level can follow industry-wide standards.

PERM

Effective March 28, 2005 the Department of Labor will finally implement the much debated and anticipated Program Electronic Review Management system (PERM). For employment-based Green Card/Permanent Resident Status processing an employer typically participates in a Labor Certification process where the employer demonstrates that for a particular position, there are no "willing, able, qualified or available" U.S. Workers. The "old" Labor Certification process involved either recruiting for the specific position under the supervision of the Department of Labor/State Workforce Agency or showing what recruitment has already been completed (Reduction-in-Recruitment or RIR Labor Certification). Under PERM, an employer will need to follow some specific rules and all recruitment must be completed prior to the filing of the Labor Certification.

Recruitment under PERM may be more than an employer would normally do when seeking to hire an employee for any position. Specifically for professional positions, the employer must:

1. Place a job order placed with the State Workforce Agency for 30 days.
2. Place an internal posting for ten (10) consecutive business days and use all normal forms of internal media (e.g. company Intranet) for posting employment opportunities for such positions.
3. Place two Sunday advertisements in the local newspaper of general circulation.
4. Complete at least three (3) of the following activities:
   - Participation in a job fair.
   - Posting the position on the employer's web site.
   - Placing an employment opportunity posting for the position on a third-party web site, e.g. www.Monster.com, www.careerbuilder.com.
   - Participation in on-campus recruiting or posting the position with the campus placement office.
   - Posting the position in the newsletters of trade or professional organizations.
   - Using private placement agencies or recruiting firms.
   - Using the employer's "employee referral programs" if such program includes identifiable incentives offered to employees who make the referral.
   - Advertisements for the position in a neighborhood or ethnic newspaper.
   - Use of radio and TV advertising.

Applicants must be interviewed or the employer must be able to provide a detailed explanation why the applicant was not interviewed or does not qualify for the position. The recruitment must be completed within 180 days prior to filing the PERM application. The employer is required to retain all documentation of its recruitment efforts, including all resumes or applications received for a period of five (5) years. The employer's recruitment report must state the specific dates of the particular recruitment activities, the number of persons hired for the position, the number of U.S. workers rejected for the position and the lawful job related reason a U.S. worker was not hired.

The possible advantage of using PERM is the Department of Labor anticipates issuing a certification quicker. Thereafter the employer can file a petition with USCIS to qualify the foreign national employee for the position, and then the foreign national employee can apply for Permanent Resident status. The PERM application can be filed electronically with the Department of Labor. The Department of Labor will randomly audit PERM applications prior to issuing a decision/certification, and subsequent to the certification the Department of Labor can invalidate or revoke the certification if a willful misrepresentation has been made or the Department of Labor finds the certification was not "justified".

Additional information on PERM will be forthcoming.