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When Applying for Work Visas, It's Not Over 'Til It's Over

BY SUZANNE B. SELTZER

Special to the Legal

Even if you are not an immigration lawyer, you may have heard that the H-1b cap was reached in a record-breaking one day. The H-1b non-immigrant visa category is perhaps the most frequently used method for U.S. employers to hire foreign nationals on a temporary basis.

An H-1b is available to foreign nationals who will be employed in the U.S. to work as a professional in a specialty occupation, generally defined as a position that normally requires at least a bachelor's, or higher, degree. It provides employers with more latitude in hiring the best candidate, and provides students who come from abroad with the opportunity to work in the U.S. before they return.

While the H-1b can be a relatively straightforward way for employers to hire educated foreign nationals, there is a cap on the number of new H-1bs that can be issued each year. Starting with fiscal year (FY) 2004, the cap was reduced from 195,000 to 65,000. Since then, it has been a race to file petitions before U.S. Citizenship and Immigration Services (USCIS) announces that it has received enough H-1b petitions to meet the congressionally mandated cap.

USCIS accepts petitions for adjudication six months before the start of the fiscal year, which begins each year on Oct. 1. Each year since the cap was reduced to 65,000, USCIS has announced that it has enough petitions to meet the cap even before the fiscal year had begun. For example, in FY 2005, the cap was reached on Oct. 1, 2004; FY 2006 it was reached in August 2005; and in FY 2007 it was reached in May 2006. This year, FY 2008, it was reached on April 2, the very first day that petitions were accepted by USCIS.

This year was unusual not only because the cap was reached the first day, but also because on this first day, USCIS received approximately 133,000 petitions for 65,000 H-1bs. (As of the writing of this article, it was believed, but not certain, that some of the 20,000 "master's cap" H-1b may remain available.)

In the past, if the petition was properly filed on the first day, it was at least certain that the petition would be adjudicated. With more than double the number of petitions than H-1bs available, approximately half the petitions received this year are expected to be rejected.

In order to determine which petitions will be adjudicated, USCIS is instituting a "random selection" process, or "lottery." The specific details regarding when USCIS will conduct this lottery, how many petitions will be selected (presuming that of the first 65,000-some will be denied), and many other logistical questions are still to be answered. At present, USCIS has only announced that it will take "a substantial amount of time" to sort through all of the H-1B petitions.

With the H-1b cap program so broken only legislation can fix it, employers need to explore more reliable, or at least less arbitrary, options. For employers such as universities, affiliated nonprofits, and nonprofit research organizations, this is not an issue, because such institutional employers are exempt from the cap. Even private employers, whose employees work at one of these exempt institutions, or concurrently for one of these exempt institutions, may be able to avoid the cap. Finally, nationals of Singapore and Chile have their own H-1b cap, which historically has not been reached. Employers petitioning for these nationals will most likely not be faced with the issue of unavailability.

However, for other employers, it's necessary to leave the confines of the H-1b and explore the alphabet soup of alternative visa options. For example, similar to the Chilean and Singapore H-1bs, there are similar types of visas specific to nationals of certain countries. This includes the E-3 for Australians, and the TN for Canadians and Mexicans. Moreover, foreign companies operating in the U.S. may be able to employ nationals of the same country with a treaty (E) visa.

In addition to country specific options, there are also occupation specific options. There is the I visa for nationals working for a foreign information media outlet; R visas for those working in a religious vocation; J visas for researchers, scholars and physicians; P visas for those in the performing arts; and A and G visas for diplomats. Multinational managers and executives, or those with "specialized knowledge" may qualify for an L transfer visa, if it can be established that they worked at least one year in the past three years for the same company outside the U.S.

And there is more. There are O-1s for individuals who can establish outstanding ability in their field, or conversely H-3s and Js for those entering a training program. There is the Q visa for those whose work shares the culture and traditions of the foreign national's home country. In addition, some foreign nationals may be authorized to work based on their spouse's status in the U.S. For example, spouses of those in J, E or L status, or far along in the permanent residency process, may qualify for employment authorization.

Even with these alternatives to the H-1b cap, there may be foreign nationals who still do not qualify for an employment-authorized status. However, these options should be explored as broadly as possible to overcome the limitations imposed by the H-1b quota. For many highly skilled professionals, it's not over 'til it's over. •

SUZANNE B. SELTZER *is a partner at Klasko Rulon Stock & Seltzer. She is a member of the National Coalition for Access to Health Care, as well as co-chairwoman of AILA's NY-NJ State Department of Labor liaison committee. Seltzer is a frequent speaker on immigration options available to international medical graduates, and is the author of "Options for J-1 Clinicians: Expanded Use of the O-1 Visa." Seltzer obtained her J.D. from Georgetown University Law Center and her B.A. from the University of Pennsylvania.*

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