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IN THIS ISSUE:

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We welcome the submission of articles and recent developments for publication in the *TTLQ*. Authors may wish to check with the Editor about preemption of their topic. Articles should be approximately three to ten double-spaced pages inclusive of endnotes. Generally, citations should conform to the Bluebook form of citations. All articles should be submitted by email to Andrew.Melsheimer@tklaw.com.

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Making the H1-B Visa Quota: USCIS Will Begin Accepting H1-B Visa Applications on April 1, 2008

By Karen-Lee Pollak

On April 1, 2008, the United States Citizenship and Immigration Service (USCIS) will begin accepting "H1-B" visa applications for the 2009 fiscal year. Last year, the USCIS reached its H1-B visa quota in one day. By late afternoon on April 2, 2007, the USCIS received approximately 150,000 H1-B applications and had to resort to a random selection process to select applications which fell within the quota. All applications which were not selected or applications filed after April 3, 2007 were returned.

It is likely that the USCIS will also reach its H1-B cap for the 2009 fiscal year soon after April 1, 2008. The H1-B visa program enables U.S. employers to hire highly educated foreign professional workers for "specialty occupations" – jobs that require at least a bachelor's degree or the equivalent in the field of specialty. These foreign workers provide needed specialized or unique skills, fill a temporary labor shortage and/or supply global expertise. Holders of these visas can stay in the United States for up to six years.

Prudent employers should start considering and planning their H1-B visa needs for the upcoming fiscal year. It is also advisable for employers to start making contingency plans for bringing temporary professional workers to the United States if the H1-B cap is reached.

Why Is There an Early Cut-off for H1-B Visas?

H1-B visas are limited to 65,000 per year. However, certain cases are exempt from the cap. This numerical limit is further reduced by free trade agreements that specifically allocate 6,800 H1-B visas for nationals of Singapore and Chile – making only 58,200 visas available in the standard H1-B pool.

Who Is Exempt from the H1-B Cap?

The following cases are exempt from the H1-B cap:

1) extensions for current H1-B workers, whether for a new or existing employer in sequential employment situations;

2) concurrent employment in a second H1-B position;

3) amended petitions;

4) H1-B employment for nationals of Chile or Singapore;

5) petitions for new employment at an exempt organization such as a nonprofit research organization, an institution of higher education or an affiliated non-profit entity; and

6) 20,000 H1-B visas for graduates of U.S. universities who have earned a master's-level or higher degree.

What Is the Impact of the Early Cut-off for H1-B Visas?

After the H1-B cap is reached, private employers cannot hire new temporary professional workers in H1-B status for the 2009 fiscal year. Last year, the USCIS advised that it would return all H1-B petitions for first-time employment filed after April 2, 2007. For those employers in need of hiring temporary professional foreign workers after the H1-B cap is reached, there may be alternative options available.

What Other Visa Options Are Available?

The L-1 Intra-company Transferee Visa

The "L-1" or "intra-company transfer" visa facilitates the transfer of key employees from a foreign corporation to a U.S. branch, parent, subsidiary or affiliated entity. This visa allows a U.S. company to bring in top-level managerial, executive or specialized knowledge employees for a temporary period. The employee must have worked for the foreign company for at least one of the past three years, or six months for a blanket “L” scenario, and must work for the U.S. company in a similar position. The position must be in one of the three classes: manager, executive, or specialized knowledge. However, the position need not be classified under the same status as it would be overseas (for instance, what is considered a “specialized knowledge” position overseas could be classified as “manager” position in the United States. The foreign entity may pay the employee’s salary but the U.S. company must control the employee’s performance of work. Authority to engage and terminate the employee is strong evidence of control. There are no numerical limits on the L visa and the spouse of an L visa holder may apply for work authorization. The L visa is initially valid for up to three years in the case of an existing business and up to one year where a new business is established in the United States. There is a five-year limit on L-1B employees with specialized knowledge staying in the United States and a seven-year limit for L-1A managers and executives.

Consular posts generally see an increase in L-1 applications after the H1-B cap is reached. However, there is no legal reason why aliens eligible for H1-B status cannot legitimately seek out other type of visas, including L visas.

The Treaty-Trader/Treaty-Investor Visa (E-1/E-2)

“E” or “treaty” visas are available to persons or entities engaging in trade between the United States and their home country or persons and entities coming to the United States to develop and direct enterprises in the United States in which they are investing substantial amounts of capital. The E-2 category includes individual investors as well as managers, executives, and “essential skills” employees of business entities that make the investment. As a threshold issue, in order for a foreign national to qualify for this visa there must be a trader or investor treaty between the United States and the applicant’s home country. For treaty traders, the company set up in the United States must be at least 50% owned by a treaty country national, but the applicant does not have to be an owner of the business. There must be a “substantial” flow of trade (either goods or services) between the U.S. business and the treaty national’s home country. The USCIS determines whether the trade is substantial on a case-by-case basis. Factors that may be considered include the nature of the business, the number of transactions, the quantity of trade and the outlay of capital.

With respect to an investment visa, again the business must be at least 50% owned by treaty nationals and there must be a substantial investment, which like the treaty-trader visa is determined on a case-by-case basis. The investor must have experience in the business and must be actively involved. The investor cannot simply invest in a company run by someone else. An E visa holder is normally admitted to the United States for a two-year period with unlimited two-year renewals. Spouses of E visa holders may apply for work authorization.

The TN Status Visa

Employers may continue to sponsor Canadian and Mexican nationals in “TN” status under the North American Free Trade Agreement (NAFTA). This visa is available to Mexican and Canadian nationals who have been offered a temporary position in one of the professions described in schedule 2 of NAFTA. The applicant must have the degree or credentials required for that profession. The TN visa is valid for one year and may be renewed indefinitely. A spouse of an employee in TN status is not eligible for work authorization.

The O Visa

Foreign nationals with extraordinary ability in the arts, sciences, athletics, education or business, may apply for an “O” visa. Beneficiaries in the sciences, athletics, education or business field must show that they have risen to the top of their field, as evidenced by national or international recognition. Beneficiaries in the arts must show prominence and a record of extraordinary achievement. Beneficiaries in the motion picture or television industry need to show a high-level of accomplishment, above that ordinarily encountered in the field. The O visa is usually granted for three years and is renewed in one-year increments. The O visa may be renewed indefinitely. A spouse of an O visa holder cannot apply for work authorization.

The J-1 Exchange Visitor Visa

The "J-1" or "exchange visitor" visa is available to foreign nationals to enter the United States as exchange visitors to participate in government-approved exchange programs. First, the prospective employer must establish an approved exchange program. Such program may be sponsored by government agencies, private businesses or educational agencies. The foreign national may then enter the United States for the purpose of doing research, gaining training or studying. Depending on the foreign national's qualifications and the type of exchange program, the J-1 visa is available anywhere from 18 months for most trainees to 42 months for professors and research scholars. Certain foreign nationals may be subject to a two-year home residency requirement at the end of their stay.

Making the H1-B Visa Cut-off for Fiscal Year 2009

In order to timely receive H1-B visas, applications should be filed on April 1, 2008. Prudent employers will be well served in starting to consider their employment needs for the upcoming fiscal year. The FY 2007 numerical cap was reached on April 2, 2007. It is likely that the FY 2008 H1-B cap may also be reached within a day unless Congress acts to raise the cap. Because the USCIS generally works on petitions in the order they were received, it may be worthwhile to pay the extra $1,000 premium processing fee to have an H1-B visa application adjudicated in 15 days – assuming the USCIS again makes premium processing for H1-B applications an option.

Unless Congress raises the annual H1-B visa cap, employers will have to file their H1-B petitions as early as possible and make use of other visas available to bring temporary workers to the United States for FY 2009. Readers are encouraged to contact their senators and representatives to push for an increase in the H-1B cap.

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