

Legal - H-1B Filings and New Challenges!

By: Neelofer Syed, Esq.

I have written in detail about the H-1B visa previously in CityMasala April 2009 issue. In the previous article I covered topics like, criteria, quota, procedures, type of employment etc. In this article I will only focus on some new challenges which the H-1B petitioners are now facing because it is the same time of the year again.

First of all, just like last year it does not appear that the H-1B quota will run out any sooner. A couple of years ago, on the very first day of filing i.e. April 1, there were more petitions filed than the visa numbers available. The over filing was also resulting in H-1B lottery. Unlike that, last year and apparently this year it will take months for the quota to reach the limit.

As of April 8, 2010, United States Citizenship and Immigration Service (USCIS) reported to have received only 13,500 petitions counting towards the 65,000 quota cap. In addition the agency reported to have received approximately 5,600 petitions for individuals with advanced degree i.e. towards the additional 20,000 cap for advanced degrees.

Based on the above numbers, it appears that the H-1B quota will remain available for few months to come. Those who could not file for H-1B because of difficulties finding a suitable job can now relax. They can certainly spare some more time in job hunt and find a suitable job with a suitable employer who is willing to Petition for them.

It is true that the ongoing reduction in H-1B filing owes a lot to the over all economic situation and decrease in employment. This year, however, there are some additional factors that have contributed to this decline. Among these additional factors the recent USCIS memo providing guidance on the employee-employer relationship remains on top.

The way this memo is drafted has defined the relationship in a manner which puts a big question mark to the relationship of workers hired by IT or other Consultancies for placement with third parties/end clients.

In other words the reasoning behind this year's decline in petitions can be easily linked with some new requirements for H-1B petitioners entailed in the January guidance memorandum by Donald Neufeld, which places new emphasis on employee-employer relationships.

According to the document, the Neufeld Memo, dated Jan. 8, 2010, provides guidance "on the requirement that a petitioner establish than an employee-employer relationship existing and will continue to exist with the beneficiary throughout the duration of the requested H-1B validity period". That means that the employers that are sponsoring H-1B applicants need to demonstrate that they have a degree of control over the potential employee in terms of geography, pay, supervision and more. These requirements tie the hands of many consultant firms hiring foreign nationals on H-1B for assignment at third-party organizations/business clients.

A number of industries will be impacted by this additional requirement including IT consulting, government contracting and even healthcare. It is obvious that when a consulting company places an H-1B worker on a client site, there will be a lot of questions around who exactly is controlling the employee.

The above requirement adds to the difficulty of obtaining the H-1B which in itself remains a complex process. Indeed the need for more accurate and comprehensive filing has become more important than ever. Attention must now be given to file the Petition with appropriate documents overcoming the concerns of the USCIS. While becoming more complex, obtaining the H-1B still remains possible.

This year, various businesses, specifically IT consultancy firms are reluctant to file H-1B petitions for their foreign workers. Their reluctance is primarily because of the above mentioned issues raised in USCIS memo. These consultancies/employers should still consider going ahead with the filings but at the same time they may have to make some changes in how they are structured to work. For example, they might have to change the way their agreements with their business

clients are laid out, thus clearly defining the degree of control over the H-1B holder/employee. Nonetheless it is also very crucial that the organizations/employers get the help of an experienced immigration attorney who can provide apt guidance in this regard.

Another reason which has resulted in decrease of the H-1B filing is an unannounced change within USCIS about how they review the petitions filed for certain occupations. USCIS is denying the cases for certain occupations observing that these are not specialty occupations. Not to mention that same job titles/occupations have all along been considered as H-1B specialty occupation.

One major example of this is the position of market research analyst. USCIS, specifically, California Service Center has denied majority of cases filed for this position last year. This has remained to be a great point of concern. Vermont Service Center has also become extremely difficult to issue an H-1B for market research analysts. Nevertheless, the cases filed for such occupations remain arguable and one should be prepared to receive extensive Requests for Additional Evidence from USCIS in connection with such filings.

This trend of treating previously approvable positions differently will also be a great point of concern for those filing for the extensions of previously approved H-1B petitions. So beware!

One more point of concern is for a number of foreign students in the U.S. who are pursuing their degrees in Business Administration. Word of caution for these students they must have an area of concentration in the BBA or MBA degrees if they are planning to get an H-1B visa in future. H-1B is for specialty occupations, general BBA or MBA degrees do not qualify as a specialty degree and will tremendously increase the level of difficulty in getting the H-1B.

In the past a great number of students with a simple BBA or MBA Degree in the U.S. or equivalent have been able to get H-1B visas in various business related specialty occupations. This may become increasingly difficult if the degree does not have any area of concentration like marketing, finance & accounting, international business, trade etc.

It will be increasingly hard to satisfy USCIS that beneficiaries with general business degrees will qualify unless they have past experience in the specialty occupation they are filing for or any other supporting credentials. While the requirement of having the degree related to field of specialty occupation has always been there, previously however, USCIS did not enforcing it with as much zeal as it does now.

Those who are currently enrolled in schools to get general business degrees may want to rethink their course of studies and choice of subjects if they are planning to get a H-1B in future.

Due to the space limitations, I just wanted to touch upon some major points while leaving other details aside. I am receiving a large number of H-1B related questions and due to their specific nature I am responding to the senders directly.

Ms. Syed is a practicing attorney with Perez and Associates, specializing in immigration law. Please send your questions concerning immigration issues to legal@citymasala.com