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Every Lawyer's Survival Guide to U.S. Immigration Law in 2007

It's not just for immigration lawyers any more

This is the fourth of a multi-series on how the reach of U.S. immigration law increasingly impacts other legal areas, sometimes creating opportunities, and, more often, traps for the unwary.

Today's installment focuses on the H-1B specialty worker program.

Critical shortage of H-1B Worker Visas persists

By Stephen M. Brent

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Everyone agrees brain power is the fuel that powers cutting edge businesses. To compete successfully in today's global marketplace, American employers need the ability to hire the best and the brightest.

It's clear that the need of U.S. employers for highly educated professionals exceeds the number of U.S. citizens and lawful permanent residents seeking such work. Employers need foreign workers to fill the gap.

To meet that need, Congress created the H-1B specialty worker program, which allows employers to hire foreign professional workers temporarily (for up to six years, in certain circumstances, more) in qualifying occupations.

The program covers occupations that require the theoretical and practical application of a body of knowledge, and at least a bachelor's degree or equivalent, to qualify. (Oddly, the category also includes top fashion models). Typical H-1B workers are computer professionals, scientists and engineers.

Employers seeking to hire H-1B workers do not need to prove that they can't find qualified U.S. workers for the job, a usual requirement for employers seeking permanent employees.

The category is among the most controversial aspects of the perennially volatile world of U.S. immigration policy. In recent years, the annual allotment of H-1B numbers has been exhausted long before the year began.

In fiscal 2008, which doesn't begin until October 1st, most observers expect that pent up demand will exhaust the allocation almost as soon as the U.S. Immigration and Naturalization Service begins to process new petitions. That will be next week. The service accepts petitions for processing six months in advance of the start of the fiscal year.

The concept of H-1 professional workers dates back to the enactment of the Immigration and Nationality Act in 1952. Its antecedents, however, extend back to the Immigration Act of 1917, which, while barring many kinds of alien laborers, made an exception for certain kinds of professionals and artists.

No knowledgeable person doubts H-1B workers are important to the economy, far in excess of their numbers as a percentage of the 127 million-person U.S. workforce, less than one-tenth of one percent, according to the American Immigration Lawyers Association.

Although there is general agreement our economy needs some number of H-1B workers, there is also a countervailing argument, principally advanced by the labor lobby and its allies, that foreign professional workers need to be limited in number because they take jobs from Americans and tend to undercut wages.

In fact that rationale is doubtful. The law requires employers to pay the prevailing community wage to H-1B workers, and also to pay a certain fee, \$750 to \$1,500 in most cases, to fund training programs for U.S. workers (theoretically to reduce the need for foreign ones).

Moreover, there is a view that H-1B workers, by their contributions, actually stimulate overall job growth.

In the 1952 act, Congress imposed a numerical cap of 65,000 on new H-1B hires. For many years the cap was a nonfactor. It was never approached until the 1997 fiscal year, when it was reached in September, one month before the year ended. In 1998 it was reached in May, five months before the year ended.

Beginning in 1999, Congress struggled to find a cap number that satisfied both employers and restrictionists. The basic cap number jumped from 65,000 in fiscal 1999 to 115,000 in 2000, 195,000 in 2001 through 2003, then back down to 65,000 since.

In fiscal 2004, however, Congress sought to alleviate the shortfall to a point by creating another 20,000 slots for workers with U.S. master's degrees or higher. It didn't help much.

On August 10, 2005, the fiscal 2006 cap was hit nearly two months before the year even began. Then things got worse. In the current fiscal year, the cap was hit last May 15, fully four-and-a-half months prior to the start of the fiscal year.

Once the cap is hit, the immigration service stops processing H-1B petitions. Sometimes the employer can find an alternative category, for instance O-1, for the small number of workers who can qualify as outstanding in their field. Usually, though, the employer is simply prevented from filling the job. (Some kinds of jobs are exempted from the cap count. H-1B renewals are not counted either.)

The congressional debate is always lively as legislators split in unusual ways. The cleavage is not along party lines. A significant number of Republicans, who tend to be tough on immigration, support wide expansion of the program. A significant number of Democrats, who tend to be open to immigration, oppose it.

President Bush lines up squarely with the expanders. Speaking to a group of DuPont employees in Delaware in January, he urged Congress to expand the number of H-1B visas.

He explained: ““I want you to know I understand we need to make sure that when a smart person from overseas wants to come and work in DuPont, it’s in our interest to allow him or her to do so. We’ve got to expand what’s called H-1B visas.””

The president added: ““It makes no sense to say to a young scientist from India, you can’t come to America to help this company develop technologies to help us deal with our problem.””

Next week, when employers will be authorized to file petitions for fiscal 2008 slots, will be interesting. Most observers expect the fiscal 2008 cap limit to be reached imminently. Some think it will be in only a day or two.

Indeed, U.S. Immigration and Citizenship Services, anticipating a filing deluge, issued a press release anticipating the possibility of instant exhaustion. It stated that it will reject petitions received through Friday (March 30th), and, if they receive a sufficient number of petitions to exhaust the quota on the first day, they intend to process all received on the first and second day by selection in a ““random selection”” lottery.

Obviously employers hoping to hire H-1B workers should file right away.

For those that don’t file in time, the only hope is a legislative fix.

Stephen M. Brent, of the Rochester immigration law firm Brent & Roberts, has practiced immigration law for nearly 25 years. He served twice as chairperson of the Upstate New York Chapter of the American Immigration Lawyers Association and has spoken and published widely on the subject.