Eight Questions to Ask After Filing an H-1B

Eight Questions to Ask After Filing an H-1B

Insight — April 1, 2013

On April 1, 2013, U.S. Citizenship and Immigration Services (USCIS) began accepting petitions for H-1B visas subject to the cap for next year's allotment of visas for foreign national professionals. Only 65,000 H-1B visas are issued for the coming year which begins on October 1, 2013, with an additional 20,000 visas available for foreign nationals who graduated from a U.S. college or university with a master's degree or higher. Employers seeking to obtain work authorization for key foreign national employees in specialty positions such as engineering, computer science, accounting, medicine, teaching and other high tech or professional fields need to file their petitions on or shortly after April 1 as the cap on H-1B visas is expected to be reached quickly.

8 Questions that Help Minimize H-1B Liabilities

If you filed an H-1B petition, here are eight questions you need to ask to reduce your potential liability:

1. **Are you properly maintaining a Public Disclosure File?**
   When filing an H-1B petition, the sponsoring employer must attest that it will comply with the terms and conditions of the labor condition application (LCA). Employers must keep a public disclosure file related to each H-1B worker to demonstrate compliance with the LCA terms. The public disclosure file should be kept for at least one year beyond the LCA expiration date and must include:
   - A copy of the LCA with employer's signature
   - Documentation of the wage to be paid to the H-1B employee
   - Explanation of wage system
   - Prevailing wage source
   - 10 business day posting
   - Summary of benefits offered to the H-1B employee
   - Evidence of recruitment and additional non-displacement attestations (for employers who are deemed willful violators)
2. **Have you filed an H-1B amendment when a change of employment occurs?**
   Under applicable regulations, an H-1B amendment must be filed if there has been a material change in the employment terms from that listed on the original H-1B petition. Material changes may include a significant change in the job duties, a reduction in hours

or compensation, or a change in work location.

3. **Are you ensuring maintenance of immigration status for H-1B transfer workers?**
   Under the portability provisions of the American Competitiveness in the 21st Century Act, an H-1B worker employed by another company may transfer to a new employer. The new employer, however, must file an H-1B visa transfer petition with USCIS before the worker begins work for the new employer. The H-1B extension will also require HR to re-verify the employees work authorization in Section 3 of the I-9 before the current H-1B expires.
4. **Are more than 15% of your workers in H-1B status?**
   An employer with more than 50 full-time employees of which 15% or more are H-1B employees may be considered to be an H-1B dependent employer. An H-1B dependent employer has additional attestation obligations related to its recruitment efforts and the displacement of U.S. workers. For example, each time the employer files an LCA to support an H-1B petition, the employer is required to indicate its H-1B dependency status. Large employers with more than half of all workers in H or L immigration status are subject to an additional $2,000 filing fee.
5. **Do you have independent high tech contractors who are really your employees?**
   Misclassifying workers as independent contractors rather than employees opens the door to a whole host of potential liabilities related to pay practices, tax withholding, etc. It also raises potential issues related to immigration requirements, including whether you are effectively the employer of the contractor. If you effectively control the work, you are the employer and may have an obligation to file the H-1B petition.
6. **Have any salary cuts reduced H-1B workers below prevailing wage?**
   Employers must pay H-1B workers the higher of (1) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for that employment; or (2) the prevailing wage for the occupation in the area of employment. Employers who decrease pay levels for H-1B workers need to re-evaluate the new pay rate to ensure that they still meet the required salary.
7. **When you terminate an H-1B worker, do you notify the USCIS and DOL and offer to pay for return travel?**
   Employers who terminate the employment of an H-1B worker prior to the end of the H-1B status immediately end the lawful immigration status for the H-1B worker. The employer should notify USCIS and DOL of the termination as failure to do so may result in the accrual of back-wages to the H-1B employee. The employer also must offer to pay the H-1B worker the reasonable costs of return transportation to the foreign worker's country.
8. **Have you informed your H-1B workers when (and when not) to travel?**
   H-1B workers need to take appropriate steps when they travel

abroad, including obtaining a valid H visa stamp and maintaining an unexpired passport. H-1B workers generally should avoid travel outside the U.S. during a pending change of status or extension of status because Customs and Border Protection may issue a visa stamp which may not incorporate the extension. Recent international student graduates whose OPT status expires before October 1, 2013 and are in the U.S. under the cap gap regulation may not travel. Married H-1B workers need to extend the H-4 status of their spouse through consular stamping or filing an I-539 with USCIS.

Additional Information on Hiring Foreign Workers

Hiring foreign nationals for short-term employment in the U.S. involves a complex set of immigration laws and regulations. USCIS provides numerous resources for employers, including a guide called "How Do I Hire a Foreign National for Short-Term Employment in the United States?" Please do not hesitate to contact Roger Tsai or another member of Holland & Hart's Labor and Employment practice group if you have specific questions or need help with filing H-1B petitions.
