

Insights, News & Events

WEB EXCLUSIVE - ALTERNATE REALITY: “EXTREME VETTING” OF H-1B WORK VISAS

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To boost innovation and remain competitive, employers often have no option but to sponsor foreign nationals for H-1B work visas to meet their labor needs, especially when it comes to workers in science, technology, engineering, and math fields. While employment in STEM occupations has grown 79 percent since 1990 and outpaced overall U.S. job growth, the number of U.S. students enrolling in STEM studies has not kept up.

But securing such visas is no longer an easy task. Remember when you could just file an H-1B work visa and the government would approve it as long as you complied with the H-1B regulations? Those days have disappeared.

THE BASICS: THE H-1B PROCESS

For those unfamiliar with the process, U.S. employers may sponsor foreign nationals for H-1B visas to work in “specialty occupations”—those that require the theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor’s degree or higher in the specialty, or its equivalent as a minimum for entry into the occupation. Before filing an H-1B petition with U.S. Citizenship and Immigration Services (USCIS), the employer must file and receive a certified Labor Condition Application (LCA) from the U.S. Department of Labor.

The LCA establishes that the H-1B employee will be paid the prevailing wage or the actual wage paid by the employer to workers with similar skills and qualifications, whichever is

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higher. The employer must also attest that employing the H-1B worker will not adversely affect the wages and working conditions of similarly situated U.S. workers.

THE EXASPERATING CURRENT STATE OF H-1B ADJUDICATIONS

The new standard for immigration adjudications, however, is now “extreme vetting.” [USCIS has rescinded its long-standing policy memorandum](#) directing USCIS adjudicators to give deference to a prior approval of an H-1B petition when adjudicating an extension involving the same employer and the same position. The new guidance instructs USCIS adjudicators to apply the same scrutiny to both initial H-1B petitions and all subsequent extension petitions. Moreover, the guidance states that USCIS adjudicators “should not feel constrained” in issuing requests for evidence.

Backdoor legislating has appeared where deference has vanished. The specified purpose of the “Hire American” section in President Trump’s Executive Order 13788—“[Buy American, Hire American](#)”—is to create higher wages and employment rates for U.S. workers and to protect their economic interests by rigorously enforcing and administering the laws governing the entry of foreign workers. In addition, the executive order directs the government to suggest reforms to help ensure that H-1B visas are awarded to the most-skilled and highest-paid beneficiaries.

Following the Executive Order, USCIS struck employers with the following new realities:

- Requests for additional evidence (RFEs) on H-1B petitions have increased by more than 44 percent.
- Although RFE rates increased greatly, approval rates are down only slightly from prior years. Thus, a well-crafted RFE response with the assistance of immigration counsel and with robust supporting evidence can still result in an approval. Evidence to prove the position is a specialty occupation should include, but not be limited to, a detailed job description, organizational chart, a spreadsheet showing the names of other employees in the same position, their rates of pay, their education levels, copies of their degrees, and any prior recruitment the employer conducted for the H-1B position listing at least a

bachelor's degree as a minimum requirement. By arguing that the duties associated with the position are complex and require at least a bachelor's degree, such RFEs can be successfully addressed.

- USCIS is scrutinizing entry-level wages, even for recent college graduates with no work experience. Paying an entry-level wage does not mean the position cannot qualify as an H-1B specialty occupation. It does mean you have to work closely with immigration counsel to educate the adjudicating officer on why an entry-level wage is appropriate for the H-1B position.
- Employers with many H-1B employees, as well as those who are "H-1B dependent," may receive more denials than they have in the past.
- A [Department of Homeland Security memo](#), dated February 22, 2018, places additional restrictions on employers that place H-1B workers at third-party client sites, including requiring evidence of actual work assignments, proof of which entity controls the H-1B worker, detailed itineraries to cover assignments for a three-year period, contracts, and SOWs. On May 1, 2018, a group of IT staffing companies filed a complaint to block the enforcement of the DHS memo.
- USCIS and DOL have also [increased the number of site visits and employer audits](#). Employers who have filed bona fide petitions where the employee is working pursuant to the terms described in the petition and LCA should not panic. However, both employers and employees should be prepared for such a visit with the guidance of immigration counsel to avoid surprise.

USCIS Director L. Francis Cissna further fortified the Trump Administration's extreme vetting policies by sending a [letter](#) to Senator Charles Grassley (R-IA) on April 4, 2018, stating that USCIS is "focusing on strengthening the integrity of the H-1B program" through measures such as a "dedicated e-mail address to make it easier for the public to report suspected fraud and abuse" in the H-1B program, narrowing the eligibility for H-1Bs, establishing an electronic registration program for petitions subject to the H-1B cap, and contorting "the definition of employment and employer-employee relationship to better protect U.S. workers and wages."

U.S. WORKERS REVOLT

In addition to combating “extreme vetting” policies of the Trump Administration, H-1B employers also must now combat discrimination lawsuits from U.S. workers. For example, three white U.S. citizen employees of Cognizant Technology Solutions Corporation filed suit claiming that they were given low performance ratings, denied promotions, and ultimately replaced by less-qualified Indian H-1B workers. Cognizant Technology Solutions Corporation has consistently held the position as one of the top 10 users of the H-1B program.

Other IT outsourcing companies that rely heavily on the H-1B program, such as Tata Consultancy Services Ltd. and Infosys Ltd., also face similar class actions. Indian technology companies are often targeted for these types of lawsuits because they tend to use the H-1B program more than U.S.-based companies. In fact, in FY2015, the top seven Indian technology companies received 14,792 H-1B visas. But times are changing, and these numbers have dropped the past two years: in FY2016, the top seven Indian technology companies were given a total of 9,356 H-1B visas, while that number saw a 9.5 percent decline in FY2017 to 8,468.

In addition to the claims of race and national origin discrimination under the Civil Rights Act, U.S. citizen employees can assert actions for citizenship status discrimination under the anti-discrimination provisions of the Immigration and Nationality Act (INA). The H-1B program was certainly not intended to be used to displace U.S. workers. Thus, to avoid discrimination claims, you should work closely with your employment and immigration counsel when determining which positions to sponsor for H-1B work visas to ensure no adverse effect on the wages and working conditions of similarly situated U.S. workers.

CONCLUSION

To prevent lawsuits from disgruntled U.S. workers and to counter government’s “extreme vetting” of H-1B work visas, you should work closely with immigration and employment counsel to exercise extreme vigilance. Then we can wait for the portal to re-open and bring us back to a reality where simply complying with the H-1B regulations is enough to secure much-needed visas.

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