

Changes make it easier to hire foreign workers

During this sluggish economy there has been much talk about layoffs and terminations. However, it's only a matter of time before businesses embark on the upward business cycle and begin hiring employees again. Some changes in U.S. immigration law during the past year help U.S. businesses employ foreign workers in professional occupations.

While there are several methods to employ foreign workers in the United States, the H-1b visa category is by far the most widely used in the professional context. The H-1b is designed for "specialty occupations" that include computer professionals, engineers and other positions where the minimum requirement for the job is at least a bachelor's degree.

A company that wants to hire a foreign national in the H-1b category must go through a two-step process involving a certification from the U.S. Department of Labor and a petition with the Immigration and Naturalization Service. Historically, the H-1b process took anywhere from four to 12 weeks, and the foreign national could not begin working until the petition was approved. However, last fall the American Competitiveness in the 21st Century Act was passed, thereby providing four positive changes to help U.S. businesses hire foreign workers.

Increase in H-1b numbers:

Congress increased the number of H-1b visas to 195,000 per year for fiscal years 2001 through 2003. During most of the 1990s the number of H-1b visas was limit-

ed to 65,000 visas per fiscal year. Once the cap was reached for a fiscal year, employers were prevented from hiring new H-1b workers until the beginning of the new fiscal year. This marks the first year in the past three years that the cap has not been reached, and the INS attributes this to the increase in the numbers rather than a drop in the overall U.S. economy.

Portability of H-1b workers:

Under the prior law, an employee could not begin working for a new employer until the INS approved the H-1b petition. Under the current law, an employee who has

already been in H-1b status through another employer can now begin working for a new employer as soon as the H-1b petition is filed with the INS. Of course, if the petition is ultimately denied the employee has to cease working for the company.

Increased job flexibility for long-delayed applications:

Historically, any worker who petitioned for a green card on the basis of his employment had to remain in the same position with the employer until the green card was approved or risk having the green card denied. Because of backlogs at the Department of Labor and INS, it was common for a foreign worker to wait two to five years for the green card approval. Undeniably this was a problem for the employee. However, it also hindered the ability of companies to promote foreign employees in its work force and to attract new employees because employees were



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reluctant to make any changes that would jeopardize their chance of getting a green card. Now employees who reach the final stage of the green card process can change positions or employers as long as the final application has been pending for at least 180 days and the new position is in a "same or similar occupation."

Extension of H-1b worker status:

The H-1b visa is "temporary," meaning a foreign worker must leave the United States after six years if he has not reached the final stage of his green card. Bureaucratic delays and limits on the number of green cards allotted per year often created situations where the employee exceeded his six-year limit and had to leave. Under the current law, a foreign national can extend his H-1b status beyond the six-year limit in some circumstances.

For companies that need to recruit and hire foreign workers to fill jobs in a short time frame, the INS has implemented a fast-track method for employment-based petitions. On Dec. 21, 2000 the president signed the District of Columbia Appropriations Act of 2001, which authorized the INS to collect a \$1,000 "premium-processing fee" in addition to the regular filing fee.

By paying the additional fee, a company can have the INS process the case within 15 days. If the INS fails to process the case within 15 days, it must refund the fee to the employer.

The premium-processing program is a benefit to employers who are hiring foreign workers who are not already in H-1b status and therefore don't have the option of the portability provisions.

Of course, whenever a company hires any worker — whether it is a U.S. worker or a foreign national — it must be cognizant of the requirements in verifying employment authorization. Through the Immigration Reform and Control Act of 1986 Congress added an "employer sanctions" section to the Immigration and Nationality Act to ensure that employers hire only those who may legal-

ly work in the United States. To document that employers abide by the provisions, the INS created Form I-9, Employment Verification Form. Companies must complete an I-9 form on behalf of each employee within the first three days that the employee starts working. If a company employs an illegal worker, it can face penalties ranging from \$250 to \$2,000 for each person. Similarly, if the employer fails to complete the I-9, or does so incorrect-

ly, it may face penalties from \$100 to \$1,000 for each violation.

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