The Future of H-1B Visas May Be Scrooged

12.20.2017

The H-1B visa program allows companies in the United States to temporarily employ foreign workers in "specialty occupations." In recent months, several changes to the program have either been announced or proposed, with additional changes expected during this presidential administration. For example, more than twice as many H-1B petitions were denied in November 2017 when compared to November 2016. Specifically, 17.6 percent of the 30,445 H-1B petitions reviewed by U.S. Citizenship and Immigration Services ("USCIS") were denied in November 2017, whereas only 7.7 percent of the 30,161 H-1B petitions reviewed by USCIS were denied in November 2016.

Moreover, the issuance of Requests for Evidence ("RFE") are at an all-time high. An RFE is generally issued (i) when an application or petition is either lacking documentation/evidence or (ii) when an officer needs additional evidence to determine an applicant's eligibility for the benefit sought. Specifically, the number of RFEs received by H-1B employer sponsors are up 44 percent compared to last year. This has been reported as the highest number of RFEs issued in any year for which USCIS has provided statistics. Many of the RFEs in 2017 either stated that the salary paid to the H-1B worker should be higher because the job is too complex or that the position does not qualify as a "specialty occupation."

Another recent development involves updated policy guidance now instructing USCIS officers to apply the same level of scrutiny to initial immigration petitions and extension requests in certain nonimmigrant visa categories. These categories include H-1B "specialty occupation" petitions, L-1 Intracompany Transfer petitions, TN (NAFTA) petitions for Canadian and Mexican citizens, and O-1 petitions for those with "extraordinary ability." The previous policy instructed officers to give deference to the findings of a previously approved petition, as long as key elements were unchanged and there was no evidence of material error or fraud related to the prior determination. The updated policy guidance rescinds the previous policy.

With respect to upcoming changes, the Department of Homeland Security ("DHS") is proposing to make several key changes to the H-1B visa program. One change involves a revision of the definition of "specialty occupation." DHS says the definition would be revised to focus on the "best and brightest foreign nationals," as well as to adjust the definition of "employment" and "employer/employee relationship" to "better protect U.S. workers and wages." Another key change includes a proposed electronic registration program for H-1B petitions subject to numerical restrictions, which would significantly alter the current H-1B cap lottery process. Finally, DHS also plans to propose regulations to remove employment authorization for H-4 spouses. Currently, H-4 spouses of H-1B nonimmigrants are permitted to obtain employment authorization in very specific circumstances. DHS proposes to eliminate this benefit altogether.

Despite the current challenges to H-1B visa petitions, many of these petitions are still being approved by USCIS after submission of comprehensive responses to RFEs. As such, employers should not forgo use of the H-1B program solely based on the current environment; however, they should prepare themselves for receiving an RFE and be ready to respond to the heightened scrutiny. Employers who wish to sponsor candidates for new H-1B visas should begin preparing now so that new petitions can be filed when the H-1B cap/lottery filing season begins on April 2, 2018.

For questions, please feel free to contact Hadeel Abouhasira at habouhasira@williamsmullen.com or (804) 420-6452; D. Earl Baggett at ebaggett@williamsmullen.com or (804) 420-6478; or Reba Mendoza at rmendoza@williamsmullen.com or (804) 420-6614.

This email alert contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel.

Related People

- Hadeel Abouhasira – 804.420.6452 – habouhasira@williamsmullen.com
- D. Earl Baggett – 804.420.6478 – ebaggett@williamsmullen.com

Related Services

- Immigration
- Labor, Employment & Immigration