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Publications

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USCIS will start to accept H-1B cap petitions on April 1, 2016

On April 1, 2016, USCIS will begin to accept FY2017 H-1B petitions. If employers have not yet finalized their decisions on whether to sponsor current employees or potential new hires, they should do so quickly in order to ensure an H-1B petition can be prepared and filed on time.

The H-1B cap remains at 65,000, and the first 20,000 petitions filed by foreign nationals with at least a U.S. master's degree will continue to be exempt from the cap. As has been the case since 2013, it is extremely likely the H-1B cap will be exceeded during the first five business days starting April 1, requiring USCIS to resort to a lottery. Under last year's FY2016 cap, USCIS received approximately 233,000 cap-subject petitions during the first five business days beginning April 1, 2015. (When a lottery is triggered, USCIS will include all petitions received during the first five business days.)

USCIS recently updated its annual H-1B cap page for the current cap season (FY2017), which employers want to review for guidance and tips.

Delays in USCIS processing of H-1B extensions

The Vermont Service Center (VSC) and California Service Center (CSC) are experiencing significant delays in the adjudication of H-1B extensions. Currently, VSC is processing cases filed on July 6, 2015 and CSC is processing cases filed on August 28, 2015. As a result, beneficiaries of these pending petitions may encounter difficulties in renewing driver's licenses, making international travel plans, or renewing EADs for eligible spouses. In addition, with such severe delays, foreign nationals may be near the end of the automatic 240-day extension of work authorization. As a result, employers and beneficiaries may be forced into upgrading cases to premium

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processing at a cost of $1,225 to secure a decision within 15 calendar days.

BALCA issued four decisions concerning job orders

The most common pathway to a green card is to prepare and then file a PERM labor certification application ("PERM") with the Department of Labor ("DOL"). As part of the PERM process, an employer must test the U.S. labor market by performing certain advertising steps and providing notice of the filing of the application.

As part of the advertising process, an employer, regardless of the employment-based classification, must post a 30-day job order with the state workforce. Historically, the DOL would require that the job order contain the same items that must be listed in the newspaper and professional journals advertising steps. However, in 2013, in *Matter of Chabad Lubavitch Center*, BALCA held that the content requirements for newspapers do not apply to job orders placed with the applicable State Workforce Agency.

In February, BALCA issued three decisions that reinforced the decision in *Matter of Chabad Lubavitch Center*. In these cases, the Certifying Officer denied the PERM applications based on perceived flaws in the job orders (the first misstated that a high school diploma was required; the second included a drug screen and background check requirement not listed on the PERM application; and the third only listed an annual salary of $1). BALCA reversed all three. The three BALCA cases are *Matter of Xceltech Inc.*, *Matter of Abundant Life Evangelical Community*, and *Matter of Bahwan Cybertek Inc.*

However, on March 3, 2016, BALCA issued a decision that may give the DOL a new basis for denying cases where the job order includes "substantial" job requirements not listed on the PERM application. In *Matter of Akbar & Associates, Inc.DBA Deli Plus*, the employer included a licensing requirement on the job order but did not list it as a minimum requirement on the PERM application. BALCA found that this could have had a chilling effect on applicants. BALCA cited

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to the PERM attestations regulations, specifically the one that requires an employer to attest that the "the job opportunity has been and is clearly open to any U.S. worker."

Therefore, while BALCA has made it clear that the content requirements for newspapers do not apply to job orders, inconsistencies between the job order and PERM application could still be fatal under the attestations regulations.

Department of State creates the EB-5 Assistance Desk

On February 19, 2016, the Department of State (DOS) announced the creation of the EB-5 Investor Assistance Desk, which was launched on February 22, 2016. Created in 1990, the EB-5 Program permits entrepreneurs to apply for permanent residence if they have made the necessary investment in a commercial enterprise in the United States and plan to create or preserve 10 permanent, full-time jobs for qualified U.S. workers. Over the years, the program has proved popular. Due to the unique nature of the program and its pathway to permanent residence, the DOS created the EB-5 Investor Assistance Desk. Now, EB-5 investors with approved I-526 petitions may email NVCeb5@state.gov with their questions. This Desk will also oversee the addition of potential derivative applicants and the creation of fee bills. As DOS states, "[t]he goal of NVC's Investor Assistance Desk is to provide more transparent and effective customer service through a team specially trained in the I-526 petition." For more information, please visit this link.

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