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GLOBAL IMMIGRATION LAW

NEGOTIATING THE H-1B CAP, NONIMMIGRANT CATOGORIES, AND NEW DEVELOPMENTS IN PERMANENT RESIDENCE APPLICATIONS

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I. INTRODUCTION

It is almost universally accepted that our country's immigration system is broken and needs a radical overhaul. Issues regarding border security, illegal immigration, and processing delays are widely reported in the media and are debated by candidates for public office. Yet, Immigration reform is still years away.

The problems and complications facing companies who want to hire foreign professional/knowledge workers are rarely part of the immigration debate. The reduced number of available business immigration visas and delays in obtaining visa stamps at U.S. embassies abroad create restrictions on the freedom of companies to hire the best qualified applicants. The restrictions also result in many highly qualified professional workers seeking employment in other countries with more favorable immigration laws.

II. NEGOTIATING THE H-1B CAP

A. Background

The H-1B program was created in 1952 to provide employers with access to highly educated foreign professionals who have unique knowledge in specialized areas. H-1B professionals include primary and secondary teachers, doctors, engineers, professors, lawyers, physical therapists, and computer professionals. During the economic boom, when the issuance of H-1Bs was at its highest, H-1B professional workers constituted less than one-tenth of one percent of the U.S. workforce. In the late 1990s, based upon an increasing demand for highly skilled foreign professional workers, the H-1B cap was increased to 195,000 per year. Beginning in 1998, employers were required to pay a $1,000 fee for each H-1B application in order to raise money to train American workers to fill professional positions. The H-1B program has built-in safeguards to ensure that highly educated foreign professionals do not undercut the wages or working conditions of U.S. workers.

In October of 2003, the H-1B cap was lowered to 65,000 visas, some of which were reserved for citizens of Singapore and Chile, reducing the effective quota to approximately 58,000 visas. Certain employers such as institutions of higher education and nonprofit and governmental research organizations are exempted from the cap.

Foreign students represent approximately half of all U.S. graduate enrollments in engineering, math and computer science. Accordingly, reports indicate that there are not enough U.S. students graduating with advanced degrees to fill highly specialized positions which, according to the Bureau of Labor Statistics, will increase dramatically over the next ten years. In recognition of the need to protect U.S. employers' access to advance degree graduates of U.S. universities, 20,000 H-1B visas were created for foreign graduates in exchange for higher filing fees and specific attestations that will protect U.S. workers.

The H-1B cap for 2004 was reached five months into the fiscal year, and the H-1B cap for 2005 was reached on the first day of the new fiscal year, thereby creating a situation where there were no H-1B visas available for the entire fiscal year. This situation continued through 2008. In 2009, the recession radically changed this scenario. Amazingly, Fiscal Year 2010 H-1B numbers were still available until December 2009 and 2012 numbers are still available but may soon run out.

B. Exemptions from the H-1B Cap

In October of 2000, regulations were promulgated which exempted certain H-1B applications from the H-1B cap. Specifically, the numerical limitations imposed by law on H-1B visas do not apply to individuals who are employed **at:** institutions of higher education, nonprofit entities "related or affiliated" with institutions of higher education, nonprofit research companies, and governmental research organizations.

A number of articles have been written regarding the significance of the use of the phrase "employed at" as opposed to "employed for." For example, there may be individuals employed by a private consulting or staffing company who are employed "**at**" a university or a nonprofit research institution but are employed "**by**" the private company.

While there is a definition of "nonprofit entity" with respect to exemptions from the H-1B training fee, there is no definition in connection with the exemption from the H-1B cap. With respect to the H-1B fee, the regulation relies on the definition of nonprofit organization under various sections of the Internal Revenue Code.

The issue of whether an organization is "affiliated" or "related" to an institution of higher education is not fleshed out in the regulations. A recent case somewhat limited the application of these terms to non-academic employers.

The regulations do provide some specifics regarding what type of entity can qualify as a "nonprofit research organization." The regulations state that the organization must be primarily engaged in basic research and/or applied research.

The Immigration Act of 1990 expanded the definition of "on-campus employment" for F-1 students to include off-campus locations that were affiliated, educationally, with established curriculum. An analogy could be made that such employment is "affiliated" or "related" to an institution of higher education for H-1B cap purposes if the work is conducted at a nonprofit entity, and the person is getting some type of credit.

C. Current H-1B Visa Holders Not Subject to the Cap

The regulations state that once an individual receives an H-1B visa for a position that is subject to the cap, he or she may change employers or obtain an extension without being affected by the H-1B cap. In other words, once a cap number has been used for an individual, he or she may extend H-1B status or change employers without any regard to the cap unless he or she leaves the United States for a period of one year so that the individual would be eligible for a new six-year period of H-1B eligibility.

It is important to note that if a person obtains an H-1B visa through a cap-exempt entity, he or she will be still be counted against the cap if he or she moves to a cap-subject position. Therefore, people working for a university or nonprofit research institution on an H-1B visa, will still have to qualify for the H-1B cap if the person transfers H-1B status to a private company.

D. Counting H-1B Time

An individual is allowed to remain in the United States on an H-1B visa for a total of six years. The six years can be spent with multiple H-1B employers and time spent in L-1A orL-1B status will count against the six year cap. Time spent in H-4 status will not count against the 6 year cap. It is clear that time spent outside the United States will not count against the H-1B cap. If a person is outside of the United States for more than six months in any given year, any time spent in the United States on an H-1B visa during that calendar year will not count against the H-1B cap. If an H-1B visa holder leaves the U.S. for an entire year, he or she will receive a new period of six years but will have to obtain a new H-1B cap number..

It is possible to extend H-1B status for a seventh year if the individual files an application for permanent resident status before the end of the fifth year of H-1B eligibility.. The required application could be an application for labor certification or an I-140 petition that does not require labor certification as a prerequisite, such as an application for permanent residence based upon national interest, outstanding researcher, extraordinary ability, multi-national manager or executive, etc.

An H-1B will be extended for three years beyond the six-year cap if a person has an approved I-140 and cannot file for adjustment due to the visa number backlog.

E. H-1B Portability

Under the doctrine of H-1B portability, an individual who is already on an H-1B visa may change jobs upon the filing of an H-1B application by the new employer. Employment can commence once the petitioner is notified that the application has been filed. The more conservative approach is to wait until the receipt notice is issued by the Service Center. Some companies use the more aggressive approach of commencing employment as soon as the overnight carrier has confirmed delivery. The aggressive approach presents the risk that if the application is rejected for any reason, the person will have engaged in unauthorized employment and thereafter is ineligible for H-1B portability or even an extension of status in the United States, requiring the person to leave the U.S. country to obtain the extension.

An issue has been raised as to whether H-1B portability "trumps" the H-1B cap. In other words, if an H-1B visa holder is switching from a cap-exempt to a cap-subject employer, and there are no H-1B numbers available, can the individual start working under portability and continue in that status until the H-1B cap numbers are available. This issue has appeared to have been resolved by USCIS indicating that portability does apply to this situation.

F. Cap-Gap Relief for all F-1 Students with pending Applications

A student who is a beneficiary of a **properly filed H-1B petition** will have his or her OPT extended to the following October 1st unless the application is denied or withdrawn.

A student whose H-1B petition is withdrawn or denied will have his or her OPT extension terminate 10 days after the date of the withdrawal or denial, and their F-1 status extension will end 60 days after the withdrawal or denial.

For students whose post-completion OPT expired prior to the filing date of the H-1B petition, the cap gap extension starts at the end of their grace period and ends on September 30. However, these students do not have work authorization.

G. H-1B issues for Entrepreneurs and Start-up Companies

Entrepreneurs and start-up companies face special challenges in the H-1B arena. The current Administration is creating new approaches to ameliorate these issues. A start-up company should be prepared to demonstrate it has sufficient substance to support the H-1B beneficiary. Such a showing could include money in the bank, existing or prospective contacts or business, venture capital commitments, etc. In addition every H-1B beneficiary must be subject to proper "control." If the beneficiary is the owner than some vehicle should be in place to show the beneficiary could be removed from his/her position if to do so is in the best interest of the company.

H. Other Important Nonimmigrant Visas

a. TN visas – TN visas are available to citizens of Canada and Mexico who are coming to work in the United States in an occupation that is included on the TN

list. Individuals working on a TN visa must maintain intent to return to their home country at the conclusion of the visa. TN visas are issued in one-year increments and can form the bridge for employment until H-1B visas are available.

b. L-1A and L-1B visas - L-1A and L-1B visas are available to individuals who have been employed abroad for a company affiliated with the petitioning company in the United States. In order to obtain an L-1A visa, an individual must be a manager or an executive. In order to qualify for an L-1B visa, the application must prove that the individual has specialized knowledge of the petitioning company's technology, products, services, etc. If the company is in its first year of existence then the petition needs to show that the company has secured a physical premise for its operations and that it has a business plan that shows the company will be of sufficient size and substance to support a full-fledged L-1A or B at the end of the new office period.

c. F-1 visas – A person may come to the United States on an F-1 visa to study in the United States. Foreign students participating in certain programs may be able to obtain curricular practical training which will allow them to work during their educational program. Students can obtain optional practical training after graduation which allows them to work for one year. If an employer hires an F-1 student on optional practical training, it is critical to examine the issue of the H-1B cap immediately and to plan an H-1B application accordingly.

d. E-1 and E-2 Visas.- The U.S. has qualifying trade treaties with some but definitely all countries. A national of a country with a qualifying treaty can apply for an E visa. E-1 visas are for companies involved in substantial international trade, at least 50% of which must be between the U.S. and the treaty country. E-2 visas are for companies that have made a "substantial" investment into a commercial enterprise in the U.S. There are a number of different formulae for determining if the investment is substantial and the investment cannot be merely to create money to live on by the investor. In the case of E-1 and E-s visas, a controlling interest in the company must be held by someone with the nationality of the treaty country and the beneficiary must hold that same nationality. E visas can be obtained by the investor or supervisory or executive employees or by highly skilled employees.

e. O-1 visas – O-1 visas are available to individuals who are considered to have extraordinary ability in their field. O-1 visa applications tend to be adjudicated more liberally than their permanent resident counterpart. O-1 visas are also available to individuals who are subject to the two-year home residency requirement pursuant to J-1 visa status.

f. J-1 visas – There are many companies who will sponsor individuals for J-1 visas to come to the United States to participate in international exchange and gain work experience. Most J-1 sponsors will ask the individual to sign a non-binding

statement that they intend to return home after the J-1 visa. There is no provision in the law which prohibits a J-1 visa holder from transferring to H-1B status unless he or she is subject to the two-year home residence requirement either by virtue of receiving government money or by working in a field listed on the "skills list" for the individual's home country. The J-1 regulations were recently changed to essentially make them unavailable for graduates of U.S. universities who do not have work experience in the field.

g. Q visas – Q visas are available to individuals coming to participate in an international cultural exchange program for the purpose of providing practical training, employment, and the sharing of the history, culture and traditions of the country of the person's nationality. This visa could be used by individuals who are coming to teach or perform in the United States, or to work for a company that promotes the culture of the home country or trade between the person's home country and the U.S.

III. OVERVIEW OF PERMANENT RESIDENCE APPLICATIONS

A. Background

Prior to October 1, 1991 (the effective date of the Immigration Act of 1990), seeking permanent resident status based on employment was a relatively straight-forward proposition in that there were only a limited number of options. The Immigration Act of 1990 created a number of new approaches to permanent residence including the national interest waiver, outstanding professor and researcher, and individuals of extraordinary ability, not to mention the diversity lottery and employment-creation visas for individuals who want to invest one million dollars in our country. In this new environment of multiple options for permanent residence, it can often be difficult and confusing to determine the best approach for a particular person. Therefore, it is important to consider a number of criteria in determining which approach makes the most sense in a given situation. It is often helpful to consider the following questions:

1. How long will it take to obtain permanent resident status?

2. What costs are involved in this particular approach?

3. What are the person's chances for success with respect to this particular option?

4. What affect will a change of employers or positions have on the permanent residence application?

5. Does the particular permanent resident category require the applicant to occupy a permanent and/or a full-time position?

B. Priority Dates, Backlogs, and Retrogression

Congress has limited the number of permanent resident visas that can be awarded in any one year. Additionally, there is a per-country limit which governs how many visas can be given to individuals from any one country. Therefore, permanent resident visas are subject to "supply and demand." There is only a limited supply so that if there is a large demand caused by many people qualifying for permanent residence, State Department establishes priority dates. For many permanent resident categories, there is no waiting list so therefore that category is "current" and is reflected by the designation "C." Other categories have long waiting lists. For example, if a person has an approved labor certification, they will seek permanent residence in either the employment-based-2 or the employment-based-3 category. Specific category is determined by the person's nationality which is established by his or her place of birth. An applicant can "borrow" the nationality of his/her spouse if it is more favorable.

The EB-3 category has a considerable waiting list of many years. The EB-2 waiting list, for most countries, has no waiting list. Therefore, it is highly advantageous to pursue a labor certification application in the EB-2 category if that category applies to the specific situation.

The countries of China, India, Mexico, and the Philippines have, in many situations longer waiting lists than the rest of the countries in the world due to the high demand of people from those nationality groups. . The waiting list for different categories is an important factor in determining which type of permanent resident application to pursue and long waiting lists require an individual to be very strategic in planning his immigration future.

C. Labor Certification and Special Handling Labor Certification

Labor certification is the "tried and true" method for obtaining permanent resident status. In order to receive labor certification, an employer must demonstrate that it is paying the prevailing wage and that there is a shortage of qualified, *available* American workers for the position. In order to make this showing, an employer must engage in recruitment, which includes advertising in a paper of general circulation or a national periodical. After conducting the recruitment, the employer must demonstrate that no applicants met the minimum requirements for the position. Therefore, the creation of the job description and the minimum requirements for the position is the most important step in the labor certification process.

As of July 17, 2007, the Department of Labor's "no substitution" rule went into effect. Companies can no longer substitute beneficiaries in the labor certification process. Furthermore, I-140s must now be filed within 180 days of the date of approval of the labor certification application. Finally, employers must pay 100% of the employers' costs in the labor certification process. Essentially, this means that the employer must pay all of the costs and fees for the labor certification process. There are a number of subtleties to this rule which can be applied to certain situations.

A special handling labor certification is the fastest way to obtain permanent resident status. Special handling labor certifications are available to any individual who works at an institution of higher education who is involved in a position that "involves **some** classroom

teaching." In other words, special handling labor certifications are not limited to individuals who teach on a full time basis or even spend a majority of their time teaching. Therefore, an individual working as a research associate, a librarian, in human resources, etc. for a college or university can take advantage of the special handling procedures if he or she is assigned any teaching responsibilities.

Special handling labor certifications are advantageous in that the college or university is allowed to hire the best person rather than being required to demonstrate that none of the applicants met the minimum qualifications for the position. Furthermore, if the beneficiary has been hired pursuant to a competitive recruitment process which included at least one print ad, and if the special handling labor certification is filed within 18 months of when the individual was selected, no further recruitment is required.

Special handling labor certifications are also available to performing artists.

D. EB-5 Applications

The EB-5 visa for immigrants was created by the Immigration Act of 1990. Unfortunately, Congress has not seen fit to make the law permanent and the current expiration date is September 30, 2012 although the program has been extended continuoulsy since it was first created.

There are two ways to obtain permanent residence status through the EB-5 program. The traditional approach is for an individual to invest $1 million or $500,000 in a "targeted employment area" and create or preserve at least 10 jobs for U.S. workers, not including the investor. A "targeted employment area" is a rural area or an area which has experienced unemployment of at least 150% of the national average. Colorado has many targeted employment areas throughout the state.

The second approach to obtaining permanent residence in the EB-5 category is to invest in a "Regional Center." Regional Centers are private or private-public investments which have received the approval of USCIS based upon their capacity to create direct or indirect employment opportunities for U.S. workers. There are currently over 200 Regional Centers. A person must invest $500,000 (plus the required administrative costs) in an approved Regional Center to obtain permanent residence in the EB-5 program.

Initially, the EB-5 investor receives a two-year "conditional permanent residence" status. Prior to the expiration of the two years, the individual must apply for full permanent resident status.

In order to qualify for permanent residence in this category, the investor must demonstrate that the funds were obtained legally and that the individual is an "accredited investor."

There are three criteria that most commonly determine the choice of Regional Centers which are:

- Will Regional Center return the principal to the investor?
- What will be the rate of return on the investment?
- Will the investment in the Regional Center lead, ultimately, to full permanent resident status.

E. National Interest Waiver Applications

Until 1998, the national interest waiver application was, perhaps, the most effective way to obtain permanent resident status for scientists and researchers who were working in areas of national importance. Unfortunately, the laws surrounding national interest waivers were negatively impacted by the case of *In re New York State Department of Transportation*. In that case, the Administrative Appeals Office established some very restrictive requirements for national interest waiver applications. At a threshold level, the applicant must show that his or her work is in the "national interest" and that the work is national in scope. The *NYSDOT* case added the provision that an applicant must show that the prospective national benefit of his or her work is so great as to outweigh the national interest inherent in requiring the person to go through the labor certification process. This can be demonstrated by proving that the petitioner's work will serve the national interest to a substantially greater degree than available U.S. workers who have the same qualifications.

After the issuance of the *NYSDOT* decision, the approval rate for national interest waiver applicants significantly declined. In recent years, however, we have noticed a significant increase in the approval rate for these types of applications. One of the advantages of this category is that the individual is not required to have a permanent, full time job in the United States in order to obtain permanent resident status. Additionally, the application resides with the applicant, not the institution, and therefore can travel with the applicant from position to position.

Under the new proposals by the current Administration an entrepreneur/investor could qualify for a NIW if he/she is creating jobs in the U. S. Details remain forthcoming on this approach

F. Extraordinary Ability

In order to obtain permanent residence as a person of extraordinary ability, an individual must show that he or she has a level of expertise that makes him or her one of the small percentage of individuals who are at the very top of their fields of endeavor. The applicant can make this showing by satisfying three of ten enumerated criteria which includes such things are receiving internationally or nationally recognized prizes, membership in associations which require outstanding achievement, published materials about the individual in professional journals, evidence of important, original scientific and scholarly work, evidence of high salary or remuneration, etc. One of the advantages of this category is that the individual is not required to have a permanent, full time job in the United States in order to obtain permanent resident status. Additionally, like a national interest waiver case, the application resides with the applicant, and not the institution, and therefore can travel with the applicant from position to position.

G. Outstanding Researcher or Professor

In order for an individual to obtain permanent residence as an outstanding researcher or professor, a person must show that he or she has been recognized as outstanding in his or her particular field. The person does not, however, need to prove that he or she has risen to the very top of his or her field as is required for extraordinary ability. Rather, the person must show that he or she is viewed as outstanding in his or her field of endeavor.

In order to obtain permanent resident status in this category, a person must show that he or she has a "permanent" position with the petitioning institution. The definition of "permanent position" has been liberalized by USCIS memos. The institution must be the petitioner in an outstanding researcher or professor application, and the application does not travel with the applicant.

In order to obtain permanent residence as an outstanding professor or researcher, a person must meet two of the six enumerated criteria, many of which are similar to the criteria set forth in the extraordinary ability category.

H. Adjustment Portability

In AC21, a law passed in December 2000, Congress created the concept of "adjustment portability." Under this provision, an individual who has filed for adjustment of status is free to change employers or jobs once the adjustment of status application has been pending for more than six months under certain conditions. Recent changes in interpretations make it clear that the I-140 must be approved before an individual takes advantage of adjustment portability.

Adjustment portability does not help in the case of extensive visa backlogs. A person's visa number must be "current" before he or she can apply for adjustment of status and, therefore, a person waiting to file adjustment would not be eligible for adjustment portability. On the other hand, if a person has an approved labor certification and/or I-140 and changes jobs, he or she may transfer the old priority date to a new application as long as the old I-140 is not revoked. This is a way to keep one's place on the waiting list even if he or she changes jobs or companies prior to being eligible for adjustment portability.

IV. CONCLUSION

The H-1B cap situation remains very volatile. At the same time, permanent residence processing has improved except for the problem with visa backlogs. Congress needs to act soon to solve these critically important issues and to make our laws more hospitable to entrepreneurs and start-up companies.