

Employers Must Plan Ahead to Mitigate H-1B Visa Processing Delays

March 31, 2018

The Trump Administration has passed no new immigration legislation or regulation. However, the administration's stated focus on protecting the American worker, as articulated in its 2017 Buy American and Hire American Executive Order, has affected H-1B visa processing times to the detriment of employers seeking to either bring their best overseas talent to the United States, or to recruit qualified foreign nationals to work here. The bureaucratic slowdown is evident at the United States Citizenship and Immigration Services (USCIS) stateside, and at U.S. consulates that review work visa stamp applications overseas. The USCIS and U.S. consular officers are issuing more requests for further evidence (RFEs) and requests for further information (RFIs) in connection with these visa petitions. In fact, USCIS statistics show that RFEs issued by the USCIS increased by 40 percent in the first three months of 2018. In some cases, the USCIS has taken to issuing two RFEs for the same petition. Specialty occupation work petitions that could once be processed under premium processing in under 15 business days, can take three times as long when an RFE is issued. The USCIS has stated that the issuance of an RFE within the premium processing timetable meets the premium processing timing requirements. Employers are given 84 to 90 days to respond to the RFE. The USCIS can take an additional 60 days to review the RFE response, and then issue a decision. Employers can take the following steps to alleviate the impact of these developments. **Plan Ahead** Review your company's staffing needs in the United States and determine the necessary skill set, education, and experience required to fill job openings at least 10 to 12 months in advance. This will allow you to gather the necessary documents from your foreign workforce. Early on, you should identify which foreign national employees working at the U.S. company pursuant to an F-1 student optional practical training (OPT) employment authorization document (EAD) card will need to have an H-1B specialty occupation visa processed to work beyond the OPT EAD card expiration date. In addition to reviewing the job description and necessary education and experience, review the hierarchy of the position within the company, or at a more granular level, the department where the position will be housed to ensure that there is a particular position to be filled and that the identified foreign national can fill it. Identify the candidate early in the hiring process and review the CV, degree

or diploma, and coursework to ensure that the candidate's education directly relates to the offered position. The USCIS has issued numerous RFEs in the past 12 months requesting a clear and full explanation of the duties to be performed and how the degree and coursework directly relate to the position. **Prepare the Documentation** We encourage employers to prepare the documentation regarding: the position; day-to-day professional duties broken down by the percentage of time needed to perform each; an in-depth description of the complexity of the professional duties to be performed; the coursework taken by the foreign national with a discussion of how it relates to the professional duties to be performed; and a full description of the required degree and how it directly relates to the professional duties to be performed. In some cases where the degree is not directly related to the position, we recommend that an expert opinion from either a university professor or employment agency head be included in the packet of supporting documents for the work visa petition. Further, in 2017, employers faced RFEs related to using a low salary level on the legally required labor condition attestation (LCA) to be submitted with any H-1B work visa petition. The LCA must be certified by the U.S. Department of Labor. In 2017, employers typically used an entry level wage ("level 1"). The RFEs argued that an H-1B position could not be a "specialty occupation" if a level 1 entry level salary was being paid to the foreign national worker. This year, it is important for employers to articulate in any work visa petition that an entry level salary does not mean that the position is not a specialty occupation. After all, most professionals start their careers in what may seem to be entry level positions. A level 1 wage should not preclude the USCIS from finding that the position is an H-1B specialty occupation. **Process the Work Visa Petition Early in the Season** This year, it will be especially critical to have the work visa petition processed as early as possible with the USCIS offices. The position, its education and experience requirements, and the foreign national's skill set must be heavily documented and supported by a clear and detailed employer statement. This statement should be submitted to the USCIS early in the H-1B cap season to ensure that the H-1B petition is filed no later than March 30. The USCIS must receive the H-1B petition by April 1, which is six months in advance of when the U.S. government fiscal year begins, and the date the H-1B visa petition becomes effective.

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