KIDAMBI & ASSOCIATES, P.C. 800 SUMMER STREET, SUITE 209 STAMFORD, CT 06901

Business Immigration
An Update

Volume 2 Issue 1 January 25, 2001

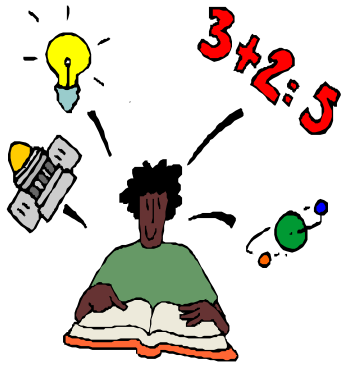
Stop! Who Goes There?! *Regulations defining H-1B Dependency and Compliance*

- By Vaman Kidambi, Esq.

Summary:

In 1998, the INS promulgated the American Competitiveness and Workforce Improvement Act [ACWIA]. While ACWIA was best known for increasing the H-1B visa quota until October 1, 2000, it also ushered in radical changes for employers, who are dependent on the H-1B program. No regulations were issued at that time and Employer's heaved a sigh of relief at the thought of the temporary respite. However, now based on ACWIA both the Department of Labor and the INS have issued Interim Final Regulations that will become effective January 19, 2001. Comments are due by February 20, 2001.

The possible ramifications of the voluminous set of regulations have intrigued the entire Immigration-Lawyer community. In a recent teleconference [January 11th] on the subject, AILA Attorneys pondered over the long-term effects of the new attestation provisions. In addition, the new regulations will require that employers indicate whether they are H-1B dependent, or not and agree to comply with the additional attestation provisions when filing a new Labor Condition Application. That same information will also need to be duplicated on a new Form I-129 W – H-1B Data Collection and Filing Fee Exemption Form.



On how to calculate H-1B dependency, and its impact on your business contact Attorney Vaman B. Kidambi at info@kidambi.com

In summary, the regulations do not prohibit the filing of H-1Bs per se, but will have the effect of making the process a whole lot more cumbersome.

Special Points of Interest

- H-1B Processing Dates at the Service Centers as on 11/18/00
- VSC - 10/15
- CSC- 10/26
- TSC- 10/27
- NSC- NA
- The LCA-FAX back system is currently down and will remain so until February 5th. Processing of new LCAs is currently being done at the Philadelphia Regional Service Center

New LCA Requirements:

What do the new interim-final regulations mean in terms of the H-1B program, as we know it today?

Well, for starters there is a new 3-page form for filing LCA's that goes into effect January 19, 2001. This Form replaces the present LCA and will be made available to the public on January 18, 2001. That gives us one day to actually get used to the new Form and then have it certified by the following day for new petitions being filed beyond the January 19th deadline. However, the INS has announced that there will be a transition period between January 19, 2001 and February 5, 2001, during which the fax back system will be retooled to accept the new 3-page form and hence be inoperative. Petitioner's are left with the option of mailing in the new form to Philadelphia Regional Office of the Department of Labor. That address is ETA-H1B, P.O. Box 13640, Philadelphia, PA, 19101. All Regional Offices will redirect LCAs received between January 19th and February 5th to this P.O. Box. Thus creating a huge backlog of uncertified LCAs.

There is also a new Form I-129W that is now in place and the INS expects to see this Form filed with H-1Bs filed on or after January 19th.

(Continued on page 2)

I suggest declaring H-1B dependency and complying with the new law. That way you do not open yourself up to an interpretation battle with the INS that could very well lead to an audit

(Continued from page 1)

H-1B Dependent Employers

Who is an H-1B dependent employer under ACWIA?

An employer is considered H-1B dependent if it employs in the U.S.:

(a) 25 or fewer Full-Time Equivalent ("FTE") employees and more than 7 H-1B employees;

(b) Between 26 and 50 FTE employees and more than 12 H-1B employees; or

(c) 51 or more FTE employees and 15% of the employer's workforce are H-1B employees.

In counting the number of FTE employees for this purpose, H-1B employees are included. Interestingly, *bona fide* independent contractors and consultants are not counted as employees. The DOL will accept the employer's definition of "employees," provided they are consistently treated as employees for all other purposes, including FICA and FLSA. The count of employees should be based on the most recent records of the employer before filing the LCA.

Employers need to be aware of the definition of "single employer" in the regulations. A "single employer" under the Internal Revenue Code must combine their employees for determining their dependency calculation. In general, those sections include: 1) "controlled groups of corporations," such as a parent-subsidiary controlled group, a brother-sister-controlled group, or a combined group; 2) "trades or businesses under common control" which can include sole proprietorships, partnerships, estates, trusts, and corporations; or 3) "affiliated service groups," such as a service organization (health care organization, law firm, accounting firm) and other organizations that regularly perform services for the first organization and either are shareholders or partners in the first organization or the interest in the second organization is held by highly-paid employees of the first organization. At present, the Treasury Department has no regulations governing employee-leasing situations and thus such situations are not covered in this regulation. If, however, the Treasury Department issues regulations on the subject in the future, members of employee leasing groups might be treated as a single employer. This "single employer" definition is *only* to be used in dependency calculation, and not in any other element of H-1B LCA filing or enforcement.

This interpretation, no doubt, acts as a dampener to ideas that clients may have had of corporate reorganization to avoid being classified as H-1B dependent!

I suggest declaring H-1B dependency and complying with the new law. That way you do not open yourself up to an interpretation battle with the INS that could very well lead to an audit. On the other hand, declaring yourself H-1B dependent could potentially allow the DOL and INS to conduct a random investigation of your files without prior notice. I guess you are damned if you do and damned if you don't!

Exempt H-1B Workers

Who are exempt H-1B workers? What is the purpose of calculating exempt H-1B nonimmigrants?

Under ACWIA, "exempt H-1B nonimmigrants" (for whom an H-1B dependent employer is not obliged to meet the additional

(Continued on page 3)

(Continued from page 2)

attestation elements) are those holding a master's or higher degree or its equivalent in a specialty related to the intended employment, or who earn wages (including cash bonuses and similar compensation) at an annual rate of at least $60,000. The determination as to whether you are exempt will be made by the INS and based on the certified LCA being submitted.

In calculating the $60,000 figure employers should use a "cash in hand, free and clear" standard and in addition satisfy the prevailing and actual wage requirement. Under the regulation, part-time workers may not meet this requirement unless they actually receive $60,000 for their part-time work (*i.e.*, the $60,000 cannot be prorated for part-time employees). Employees who have worked less than a full year will retain their exempt status if they received at least the pro rata share of the $60,000 annual requirement for the period.

The degree equivalency is more complicated. While the Department of Labor rejects work experience equivalency, the INS has traditionally allowed work experience evaluations to be submitted to show a person qualifies for an H-1B visa. It appears from a reading of the Interim-Final regulations that an evaluation submitted from a reputed credential evaluation service will continue to be accepted. However, one has to wait to get a first hand experience of how this is going to be dealt with. Again, one should remember that the Master's or higher degree should be in a "specialty related to the intended employment." Now, again this has not clearly been defined in the regulations and my guess is that the INS will use the "Math, Computer Science, or Engineering" standard for computer related occupations. Employers should be more discerning in their recruitment of new candidates.

Attestation Provisions

What are the new attestation provisions for H-1B dependent employees and how am I affected if I declare dependency on the new LCA?

There are two new attestations that you will now be required to maintain. The first attestation is the "Displacement Attestation" and requires employers in contractor situations to attest to the non-displacement of U.S. workers. The second attestation is the "Recruitment Attestation" that requires employers to engage in "good faith recruitment" using industry standards.

a. Displacement Attestation:

ACWIA aims at protecting the employees of the petitioning employer and the end user (in contractor situations) from displacement by H-1B nonimmigrants. ACWIA uses "employees of the employer" and "employees of the other employer" to describe the relevant entities. In order to further determine the scope of employment with the "other employer" – the regulations offer a list relevant indicia of the employment relationship between the two entities that include,

- The other employer has the right to control when, where and how the nonimmigrant performs the job (the presence of this indicator would suggest that the relationship "approaches" the relationship that triggers the secondary displacement provision);
- The other employer provides tools, materials and equipment;
- The work is performed on the premises of the other employer (this alone would not trigger the secondary displacement provision);
- There is a continuing relationship between the nonimmigrant and the other employer;
- The other employer has the right to assign additional projects to the nonimmigrant;
- The other employer sets the hours of work and the duration of the job;

While the Department of Labor rejects work experience equivalency, the INS has traditionally allowed work experience evaluations to be submitted to show a person qualifies for an H-1B visa.

(Continued on page 4)

(Continued from page 3)

- The work performed by the nonimmigrant is part of the regular business of the other employer;
- The other employer is itself in business; and
- The other employer can discharge the nonimmigrant from providing services.

In other words, even though you may be paying the beneficiary his salary and be the employer for tax purposes, the worker's status for the H-1B program may be dependent on the above-mentioned indicia of employment relationship. Now, let's assume we have determined you are an H-1B dependent employer and one of your employees is placed at a client site. You, as the placing employer are required to exercise "due diligence" in enquiring of the other employer as to displacement of U.S. workers during the relevant period (90 days before and after placement of the H-1B nonimmigrant at the worksite). The LCA makes it clear that making this inquiry will not protect a placing employer from sanctions if the secondary employer does in fact displace a U.S. worker within the relevant period. However, unless the employer knew or had reason to know of the displacement, the employer would be subject only to monetary penalties, and not to debarment. The other employer has no liability in such situations.

The placing employer may accomplish this inquiry in several ways, including securing written assurance from the other employer regarding displacements, preparing a *written memorandum of an oral statement of the other employer*, or including a displacement clause in the contract with the other employer

The placing employer may accomplish this inquiry in several ways, including securing written assurance from the other employer regarding displacements, preparing a *written memorandum of an oral statement of the other employer*, or including a displacement clause in the contract with the other employer. In my opinion this is possibly the best way to satisfy this attestation requirement. The regulations also states that the employer may be required, in the exercise of due diligence, to make further inquiries when it has other information which indicates that U.S. workers might have been or will be displaced (examples include where the employer is taking over a function of the other employer that was formerly conducted by its own employees, or following news reports of layoffs by the other employer) if the information is available before the placement of the H-1B nonimmigrant.

The regulations however clarify that an employer may terminate an employee for cause. In other words inadequate performance, violation of workplace rules, or worker's performance or behavior on the job. The worker may also voluntarily depart or retire (Employers should watch out for "constructive discharge" allegations that the DOL could reasonably investigate). In cases where the U.S. worker is discharged because of the expiration of a grant or contract, where such expiration essentially ends the need or funding for the job, DOL will not consider it to be a lay off, but will examine closely to determine whether or not the employer usually moves employees to a new contract or project when such expirations occur. The preamble states that in situations where an employer normally lays off U.S. workers when alternative work is not available and then rehires them when it is, DOL will expect the employer to first contact the laid off U.S. worker before hiring an H-1B nonimmigrant. An employer may also offer a U.S. worker who loses employment an alternative job offer that is a "similar employment opportunity" at equivalent or higher compensation. The alternative offer does not need to be in the same area of employment, but in a case where the job location is different, DOL will assess cost of living differentials and payment of moving expenses in determining whether the offer is at "equivalent or higher compensation." The comparison of the job opportunities will also include comparison of compensation and benefits, levels of authority, discretion and responsibility, opportunity for advancement and tenure and work scheduling.

In terms of actual documentation, as suggested earlier, a written memorandum of an oral statement regarding displacement should suffice. Clients could also phrase this as a question and make it part of a user requirements questionnaire.

b. Recruitment Attestation:

ACWIA requires that employers engage in "good faith recruitment" using "industry-wide standards." Reading through the regulations, I get the distinctive feeling that we are heading towards a 'Labor Certification' type review for H-1B Nonimmigrant visas. If this happens, clients can be assured of long delays in processing and complicated adjudication criteria based

(Continued on page 5)

(Continued from page 4)

on DOL guidelines.

An employer must, at a minimum, recruit both internally and externally and use both active and passive methods. Examples of active methods include attending job fairs, using college placement services or headhunters, and internal employee training. Examples of passive methods include print or Internet advertisement and internal job postings. The language of the regulation appears to require that at least some recruiting must target former employees.

The employer has the burden of proving, in an enforcement action, that its recruitment met "industry-wide standards," such as trade organization surveys, studies by consultative groups or reports/statements from trade organizations. Staffing firms must meet the standards of the industry in which they are placing employees, *i.e.* health care staffing firms must meet the standards of the health care industry, and technology-staffing firms must meet the standards of the information technology industry generally. The preamble also makes clear that an employer may advertise for multiple similar positions, and such recruitment may be acceptable if it accords with "relevant industry standards" applicable to that employer. The preamble also cautions employers that disproportionate use of certain recruitment methods, such as college campus recruiting, may have the unintended consequence of discriminating against older workers.

DOL also states that it would look with disfavor upon any practice that screens the applications of H-1B nonimmigrants or prospective H-1B nonimmigrants differently than U.S. workers.

The employer must offer the job to any equally or better qualified U.S. worker who applies. The employer may use any "legitimate selection criteria relevant to the job that are normal and customary to the type of job. While the Department of Justice has jurisdiction over claims from U.S. workers who allege they were not offered the job but were equally or better qualified, DOL asserts its authority to determine whether or not legitimate selection criteria were used. The regulation indicates that each criterion must meet three standards: 1) legitimate, meaning legally cognizable and not violating any applicable laws, 2) relevant to the job, meaning having a nexus to the job and its duties and responsibilities, and 3) normal and customary to the type of job, meaning necessary and appropriate based on the practice or expectations of the industry, rather than the preferences of the particular employer.

The employer must maintain documentation of the recruiting methods used, including the places and dates of any advertisements, postings or other methods used, the content of the advertisements or postings, and the compensation terms, if such are not included in the advertisements or postings. The documentation may be in any form, including a summary memorandum. The employer must keep any documentation it has received or prepared concerning the treatment of applicants for the position, such as copies of applications and related documents, test papers, rating forms, records of interviews, and records of job offers and responses. The regulations emphasize that DOL is not requiring that the employer create any documents relating to the treatment of applicants, but it must keep any documents it does create or receive. Employer's may nevertheless want to maintain information pertaining to applicant contact, interviews and results, etc. A summary of the recruitment methods used and periods for recruitment must be in the Public Access file. All other documentation must be made available to DOL upon investigation and request.

Actual Wage Memorandum

What are the new guidelines for the Actual Wage Memorandum?

Under the old guidelines for the Actual Wage Memorandum, employers were required to develop and maintain a detailed objective wage system, "sufficiently detailed to enable a third party to apply the system to arrive at the actual wage rate computed by the employer for an H-1B nonimmigrant." That requirement has now been deleted. Instead, the DOL states that the employer's system must use legitimate business factors to arrive at a system that must only be detailed enough for a third party to "understand how the employer applied its pay system to arrive at the actual wage for its H-1B nonimmigrants." This Actual Wage Memorandum should be made part of the Employer's Public Access File.

(Continued on page 6)

(Continued from page 5)

Legitimate business factors could include 'performance'. Employer's should, however, also enumerate other objective criteria for how they arrived at an individual's salary.

Benefits

Do the regulations talk about what benefits H-1B nonimmigrants are entitled to?

The regulations require that H-1B nonimmigrants be treated exactly like other U.S. workers. They should be eligible for the same set of benefits offered to the employer's U.S. workers. The regulations require that employers retain, as documentation of the benefits attestation, a copy of benefit plan descriptions provided to employees, a copy of the benefit plans themselves and any rules used for differentiating benefits among groups of employees, evidence as to what benefits are actually provided to U.S. workers and H-1B nonimmigrants, and the benefit elections made by those employees. If the employer is a multinational employer providing "home country" benefits, evidence of the benefits provided to the H-1B nonimmigrant before and after the move to the U.S. also must be maintained.

DOL takes the view that benefits may have a monetary value and a violation under this provision would be treated as employer's liability for "back…fringe benefits." DOL also feels that benefits are more "in the nature of wages than working conditions."

Benching

When do I need to start paying an employee on H-1B nonimmigrant visa?

ACWIA made *benching* illegal. The regulations go further and clearly state that DOL cannot "forgive" employers from compliance with this rule due to annual plant shutdowns or holidays or other events that affect both U.S. workers and H-1B nonimmigrants. However, DOL indicates its view that laying-off U.S. workers in such situations while retaining H-1B nonimmigrants may violate other nondiscrimination laws.

If an H-1B employee is in a nonproductive status due to a "decision by the employer," which includes lack of work assignments and lack of a permit or license, the employee must nevertheless be paid the full *pro-rata* amount due. Part-time employees in nonproductive status must be paid at least the number of hours indicated on the petition. If a range of hours is indicated on the petition, then the employee must be paid for the average number of hours he or she ordinarily works. The preamble indicates that if an employee regularly works more than the designated number of part-time hours stated on the petition, DOL might charge the employer with misrepresentation.

These obligations begin once the H-1B employee "enters into employment," which is deemed to occur when the individual first makes him or herself available. The regulation indicates that "even if the nonimmigrant has not yet 'entered into employment'," once the petition is approved, the required wage must start to be paid 30 days after the nonimmigrant is first admitted to the U.S., or if he or she is already here, 60 days after the nonimmigrant first becomes eligible to work for the employer. The latter is deemed to be the later of the start date set forth on the petition or the date INS renders a status decision. Payment obligation ends if there has been a "bona fide" termination of the employment relationship. While the language of the regulation itself is less than clear on this point, the preamble indicates that a "bona fide" termination will be deemed to have occurred only when the employer notifies the INS of the termination, the H-1B petition is canceled, and the return fare obligation is fulfilled.

ACWIA made *benching* illegal. The regulations go further and clearly state that DOL cannot "forgive" employers from compliance with this rule due to annual plant shutdowns or holidays or other events that affect both U.S. workers and H-1B nonimmigrants.

If the nonproductive period is due to "conditions unrelated to employment" as the employee's "voluntary request and conven-

(Continued on page 7)

(Continued from page 6)

ience" (such as caring for a sick relative or touring the U.S.) or due to circumstances like maternity leave that render the employee unable to work, the employer is not obligated to pay the employee, provided the period is not subject to pay under the employer's benefit plan or under other statutes.

Notices must be posted at new worksites within the area of intended employment on or before the date that the H-1B employee reports to that site

Penalty v. Liquidated Damages

Can I continue to have a liquidated damages clause in the employment agreement?

ACWIA prohibits the requirement of payment of a penalty for the H-1B employee ceasing employment prior to an agreed date, except that the employer may receive liquidated damages in such a case. However, the regulation indicates that liquidated damages cannot be recovered from the employee's paycheck. The regulation also states that attorney's fees may be included and made part of liquidated damages. In any event, the regulation indicates that the $1,000 surcharge [training] on the INS filing fees could never be a part of liquidated damages and cannot be recovered in any form.

Job Notice Posting at Client Site

Does ACWIA require posting a Job Notice at the client site?

Yes, notices must be posted at new worksites within the area of intended employment on or before the date that the H-1B employee reports to that site. It also explicitly requires postings not only in the employer's own facility, but at third party worksites. The Notice could be emailed to employees in the occupational classification at the place of employment, or by making the notice available for 10 days by electronic means such as a company intranet or bulletin board.

Complaint Procedure

Is it true that DOL can now conduct investigations based on statements made by an irate employee?

Under ACWIA, DOL is authorized to conduct investigations, under certain specified circumstances, based on information received from persons who would not be considered aggrieved parties. The regulation sets forth a process for receiving such information, which the DOL will then review to determine whether the source is likely to possess relevant knowledge, whether the information provided is specific and credible and provides reasonable cause to believe that the employer has committed a violation, and whether the alleged violation is willful, involves a pattern or practice, or involves substantial violations affecting multiple employees. The regulation specifies that "information" does not include information from DOL employees unless obtained in the course of a lawful investigation. However this will not preclude the DOL from conducting a random investigation as authorized by ACWIA.

In this analysis of the regulations based on a reading of the actual text and AILA summaries, I have tried to provide you with a clear picture of your obligations under ACWIA. I have deliberately kept my analysis of the regulations relevant to the Computer Consulting based industry to benefit a majority of my clients. I hope you find this useful.

This newsletter could not have been made possible, if it were not for your valuable suggestions. If you want to read about a special topic that would interest you, please do not hesitate to write to us at::

Kidambi & Associates, P.C.
800 Summer Street, Suite 209
Stamford, CT 06901
Phone: (203) 961 1886
Fax: (203) 961 1972
Email: info@kidambi.com

SPONSORED BY KIDAMBI & ASSOCIATES, P.C.

ACWIA BASED COMPLIANCE WORKSHOP

WORKSHOP REGISTRATION FORM

PLEASE RETURN REGISTRATION FORM BY FEBRUARY 12, 2001 WITH PAYMENT TO
KIDAMBI & ASSOCIATES, P.C. 800 SUMMER STREET, SUITE 209 STAMFORD, CT 06901

Due to the focus of our workshop, the Law Office reserves the right to reject applications from non-clients. A confirmation of participation will be emailed to you.

☐ **Clients: $295.00** ☐ **Non Clients: $345.00**

NOTE: ALL REGISTRATION FEES MUST BE PAID IN ADVANCE FOR CONFIRMED REGISTRATION

FEBRUARY 17, 2001 - HOLIDAY INN SELECT 700 MAIN STREET, STAMFORD, CT 06901

Name _____

Corporation _____

Address _____

Phone _____

Email _____

Continental Breakfast

☐ **9:30 A,M. to 10:00 A,M.**

Session I 10:00 A.M. to 11:00 A.M

☐ Form I-9 Verification
☐ Samples & Workshop
☐ Q & A Session

Session II 11:00 A.M.-12:00 P.M.

☐ H-1B INS File
☐ H-1B DOL File
☐ H-1B Public Access File

Session III 12:00 P.M. - 1:00 P.M.

☐ ACWIA Regulations
☐ Attestations
☐ Q & A Session

PLEASE PHOTOCOPY THIS FORM FOR ADDITIONAL PARTICIPANTS