



Electronic Dispatch

Immigration Law Client Bulletin

January 2005

[Go to BS&K Immigration Law Home Page](#)

SIGNIFICANT CHANGES TO THE EMPLOYMENT OF PROFESSIONAL WORKERS AND INTRA-COMPANY TRANSFEREES IN THE UNITED STATES

On December 8, 2004, President George W. Bush signed into law the Omnibus Appropriations Bill which makes significant amendments and additions to certain provisions affecting the employment of specialty occupation professionals (commonly referred to as "H-1B workers") and L-1 intra-company transferees in the United States.

Overview Of The H-1B Category

Many U.S. companies, institutions and other organizations have looked to the H-1B category as a mechanism for employing foreign nationals as specialized professionals in the United States. To qualify, the professional occupation must require (a) the theoretical and practical application of a body of highly specialized knowledge, and (b) at least a bachelor's degree (or its equivalent) in a specific specialty as the minimum educational requirement for entry into the occupation. Professionals in the H-1B category include engineers, computer programmers, administrators and technicians, scientists, researchers, accountants, architects, health care professionals, professors, and other specialized professionals.

Under the current H-1B program, Congress has set an annual limit (based on the federal government's fiscal year, which runs from October 1 to September 30) on the issuance of new H-1B visas at 65,000 (of which 6,800 are set aside for foreign nationals from Chile and Singapore).¹ The annual limit on H-1B visas for 2004-05 was reached on October 1, 2004, the first day of the 2005 fiscal year. This visa shortage has created significant hardship for many U.S. employers who rely on the temporary employment of foreign professionals.

In addition, in prior years, United States employers, petitioning for H-1B specialty occupation workers, were required to pay a training fee of \$1,000 that was imposed by the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA"). In part, the training fee was intended to be used for U.S. citizens, lawful permanent residents (so called "Green Card" holders), and other U.S. workers to attend job training and receive low-income scholarships/grants for mathematics, engineering, or science enrichment courses administered by the National Science Foundation and the Department of Labor. The training fee was in addition to the standard filing fee (which currently is \$185) and the premium processing fee (currently \$1,000) that an employer may pay to expedite the processing of the case. The training fee had expired on October 1, 2003.

Changes To The Employment Of Temporary Professionals In The United States

The new Omnibus Appropriations Bill (H.R. 4818) contains significant changes to the U.S. immigration laws which pertain to the employment of H-1B professionals, including:

20,000 New H-1B Visas

The new legislation provides limited relief to the shortage of professional visas by authorizing an additional 20,000 H-1B visas for beneficiaries who have earned a Master's degree or higher degree from a U.S. college or university. This measure is unlikely to eliminate the shortage of these professional visas since it represents significantly fewer visas than were provided in prior fiscal



years when as many as 195,000 H-1B visas were available. In addition, the requirement that the beneficiary hold at least a Master's degree from a U.S. college or university not only limits the pool of candidates eligible for these visas, but also restricts the types of positions that may be eligible to those requiring a minimum of a Master's degree.

Reinstatement Of The Training Fee

The H-1B provisions of the Omnibus Appropriations legislation reinstate the ACWIA training fee, remove the sunset provision for this fee, thereby, making it permanent, and raise the fee from \$1,000 to \$1,500. This additional fee is effective for any petitions filed after December 8, 2004.

The legislation includes some relief for small employers. Those employers that employ not more than 25 full-time employees in the United States are only required to pay a reduced training fee of \$750. In addition, complete exemptions from the training fee continue for certain employers, including institutions of higher education, not-for-profit research institutions, and any employer filing a second or subsequent request for an extension of the beneficiary's H-1B status.

The New Fraud Prevention And Detection Fee

The legislation also imposes a new Fraud Prevention and Detection Fee of \$500, which must be paid by employers filing either an initial H-1B petition or a change of status petition. This fraud prevention fee is in addition to the training fee, the regular H-1B filing fee, and the optional premium processing fee. The proceeds from this program will be deposited in a Fraud Prevention and Detection Fund and divided equally among the Department of State, Department of Homeland Security, and Department of Labor to combat immigration fraud. The new \$500 fraud prevention fee will apply to petitions filed with the U.S. Citizenship and Immigration Services on or after March 8, 2005.

Revisions To The Prevailing Wage Requirements

As a pre-requisite to the employment of an H-1B worker, U.S. employers are required to complete, file and obtain a certified Labor Condition Application ("LCA") from the U.S. Department of Labor. The LCA process is intended to avoid any adverse effect on the wages and working conditions of U.S. workers through the employment of foreign nationals, as well as to prevent the exploitation of foreign nationals through the payment of substandard wages. In submitting the LCA, the employer certifies that: (1) the H-1B worker's salary is equal to the actual wage rate paid to similarly-situated employees in the employer's establishment or the "prevailing wage" rate, whichever is greater; (2) the H-1B worker receives the same employee benefits as U.S. workers; (3) the employment of the H-1B worker will not adversely affect the working conditions of similarly-situated employees in the area; and (4) there is no strike, lockout or work stoppage creating the vacancy that the H-1B worker will fill.

Under existing law, the prevailing wage provisions were interpreted to require payment of at least 95% of the prevailing wage rate as determined from appropriate wage survey data. One source for the wage survey has been the online Occupational Employment Statistics ("OES") survey - a national survey managed by the U.S. Department of Labor, Bureau of Labor Statistics, which provides prevailing wage rates for nearly all occupations in every geographic area (SMSA) in the United States. The OES provides two wage skill levels; Level I (for entry level employees who have a basic understanding of the occupation through education or experience) and Level II (used for fully competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques).

Under the new legislation, the prevailing wage rate provision is amended to require employers to pay 100% of the prevailing wage, instead of the current 95% level. Further, the new legislation also mandates that the Department of Labor make available to employers a governmental wage survey which contains four wage levels that are commensurate with experience, education, and level of supervision. Where a two level wage survey is used, employers will be able to calculate two additional intermediate levels to take advantage of the four tier principle. These new requirements are to take effect on March 8, 2005. They will require all employers who employ H-1B workers as of that date to re-examine the salaries for all those workers to determine that the pay rates are consistent with the new prevailing rate structure.

Despite the new legislation and the sizeable fees it imposes, for most proprietary businesses seeking to employ bachelor degree-level candidates or those with a foreign degree, the H-1B option will remain closed until April 1, 2005, when the U.S. Citizenship and Immigration Services will likely begin processing H-1B applications for employment effective October 1, 2005. In the meantime, employers must consider alternatives to the H-1B visa for professional workers in these categories.

Provisions Affecting Intra-Company Transferees (L-1 Visa Holders)

Multi-national companies and their affiliates rely on L-1 visas to transfer foreign national employees from their non-U.S. operations to work in the United States. These visas are available for certain managers and executives (L-1A visas) and for employees with specialized knowledge, *i.e.*, individuals who possess an advanced level of knowledge or expertise in the company's products, processes, and/or services (L-1B visas).

Limits On Activity At Third Party Employer Sites

While Congress considered a number of issues and alleged abuses regarding the L-1 visa, it chose to address only one concern — the outsourcing of workers who come to the U.S. as L-1B specialized knowledge personnel and who are thereafter assigned to work at the facility of a third party employer.

The new legislation prohibits L-1B visa holders from being primarily stationed at the worksite of another employer where (1) the L-1B visa holders will be controlled and supervised by an unaffiliated employer; or (2) where the placement of the L-1B specialized knowledge worker at the third party site is part of an arrangement to provide labor for the third party, rather than placement at the site in connection with legitimate services for the sponsoring employer that require the employee's specialized knowledge. Thus, for example, an arrangement under which an L-1B worker is supplied to a third party client's worksite to serve as the database administrator for the client's computer network and who is under the day-to-day control of the client's management would likely be prohibited. However, the assignment of an L-1B computer programmer who is serving as the project manager for the development of proprietary software for a client where that assignment includes regular activity at the client's site to facilitate the design and implementation of the software would likely be permissible. These revisions to the L-1 visa category apply to petitions filed with the U.S. Citizenship and Immigration Services on or after June 6, 2005.

The New Fraud Prevention And Detection Fee

As with the H-1B visa category, the legislation also requires that L-1 petitioners pay the new Fraud Prevention and Detection Fee of \$500 for (1) an initial L-1 petition or (2) a petition seeking to change employers while the foreign national is in the United States. This new fraud fee is in addition to the current \$185 filing fee, and the premium processing fee (currently \$1,000) that an employer may pay to expedite the processing of the case. The new fee is effective on March 8, 2005.

If you have any questions regarding this information memo, please contact:

Thomas G. Eron	teron@bsk.com	315-218-8647
Mark P. Popiel	mpopiel@bsk.com	315-218-8232

(Endnotes)

¹ Petitions for new H-1B employment are not subject to the annual cap if the foreign national will be employed at: (i) an institution of higher education; (ii) a related or affiliated not-for-profit entity; (iii) a not-for-profit research organization; or (iv) a governmental research organization. In addition, employees who have been counted against the cap under a prior H-1B petition and have not left the U.S. for more than 364 days are not counted again for an H-1B extension or for new H-1B employment.