Immigration Issues in Today's Changing Landscape

Presented by:
Fiona McEntee

About Fiona
• Managing & Founding Partner of McEntee Law Group
• Practicing immigration law exclusively for 12 years
• Originally from Dublin, Ireland and was once a foreign student – so immigration is personal!
• Founding Member of the O'Hare Airport Attorney Legal Team (re: Travel Ban)

About Fiona
• National Spokesperson for the American Immigration Lawyers Association (AILA)
• Recently was the leading moderator on a panel of experts on the extraordinary O-1 and EB-1A visas.
• National/international media commentator & contributor on immigration issues to media outlets in US & abroad including:
  MSNBC, CNN, BBC,
  The New York Times,
  The Chicago Tribune,
  Politico, Inc. Magazine,
  RTE, Irish Central, & Irish Times!
ABOUT McENTEE LAW GROUP
- Established in 2010
- Practice immigration law exclusively
- All types of immigration
- Business, entertainment, family, removal & deportation, waivers, etc.
- Diverse team of attorneys, law clerks, case managers & legal assistants
- Speak a variety of languages including: Spanish, Polish, Arabic, Aramaic, Gujarati, Japanese
- Headquartered in Chicago
- Satellite office in Dublin, Ireland
- As immigration law is federal, we represent clients throughout the U.S.

Today's Goals
- Discuss commonly used options for the hospitality industry (H-1B, H-2B, J-1, O-1, TN & Green Cards)
- Identify latest trends, topics & issues with each option
- How to be "audit or site visit ready"
- How to best prepare & ease anxieties
- How to handle ever-changing immigration policies & procedures

H-1B Overview & Terms
- Petitioner: Employer
- Beneficiary: Employee
- Requirements:
  - "Professional" level employees or those in "specialty occupations"
  - Position must require a Bachelor's degree (or higher) in a specific field or its equivalent (12 years) in experience
**H-1B Requirements**
- H-1B applicant must be qualified for the position—have that degree or its equivalent in experience.
- Must be paid the higher of prevailing or actual wage:
  - Prevailing Wage: determined by job category, location, level of position.
  - Actual Wage: wages paid to other workers in similar positions.

**H-1B Cap**
- New H-1B visas are limited in number.
- All new H-1B cap cases must be filed during the first week in April.
- Annual cap of:
  - 65,000 new H-1Bs.
  - Plus 20,000 for those with a US Master's degree or higher.

**H-1B Cap**
- Generally, demand > supply so there is a random lottery to see which cases will be adjudicated.
- In the first week of April 2019, USCIS received about 200,000 applications for the 85,000 numbers available.
- If selected & approved, the earliest an H-1B takes effect is October 1st.
H-1B Duration & Transfers:

- Initially granted for 3 years
- Can be extended in 3 year increments for up to 6 years
- If in green card process, can extend beyond this
- Important for Indian & Chinese nationals, stuck in green card backlogs
- Transfers can be requested for up to 3 years, assuming the individual has 3 years left
- BUT... if they have gone through some of the green card with former employer, can request 3 years even if "maxing out"
- Look for an approved I-140

Advantages of H-1B Visa

- Employees can transfer their H-1B from one employer to another
- Employees can have “dual intent” (i.e. allowed to pursue a green card while in H-1B status)

Disadvantages of H-1B Visa

- The “cap” is not available year-round, unless employer is cap exempt
- Application period is the first week in April
- Limited number of H-1B visas available – results in random lottery selection
- H-1B visas are under a heightened level of scrutiny under the current Administration
- Smaller companies face greater scrutiny
Hot Topics in H-1B Visa

- “BAHA” Executive Order
- USCIS Policy Memo, March 2017
- “Entry-level” computer programmer position would not qualify for an H-1B visa
- This change came down just days before cap
- Very recent changes to the H-1B process

H-1B Visa

Quick take?

- Timing is critical!
- Be aware of the very important deadline
- Keep recent trends & policies in mind

H-2B Temporary Worker (Non-Agricultural)
WHO Qualifies?

- Foreign Nationals from Eligible Countries (list changes every year)
- The Philippines was removed in the middle of the process last year

OR

- If not on list, National Interest Waiver (BUT it might be difficult!)

H-2B: Temporary Non-Agricultural Workers

Terms & Overview

- Petitioner: Employer
- Beneficiary: Employee

Requirements

- The "Cap" of 66,000 per year
  - Subject to potential increase by Congress each year

Typical H-2B Positions

- Landscaping & groundskeeping
- Housekeepers & cleaners
- Wait staff & other restaurant workers
- Construction laborers
H-2B: Temporary Non-Agricultural Workers

Temporary Positions Only
- One-time occurrence
- Seasonal Need
- Peak-load Need
- Intermittent Need

1. EMPLOYER Must Show
   1. There are not enough U.S. workers who are qualified to fill position
   2. Employing H-2B employee will not adversely affect the wages and working conditions of similarly employed U.S. workers
   3. The need must be temporary

H-2B: Step by Step

1. Get prevailing wage from DOL
2. File temporary labor cert w/ DOL
3. If approved, file case w/ USCIS
4. If approved, applicant applies for visa stamp at Consulate/Embassy abroad
5. If approved, applicant enters on H-2B visa & starts working
What is the H-2B Cap?

- Congressional "cap" on the amount of H-2B visas granted per fiscal year:
  - Currently set at 66,000
  - 33,000 workers who begin employment in the first half of the FY
  - As of October 10th, USCIS had received 20,519 cases toward 33,000 cap for the first half of FY 2020:
    - 18,188 approved & 2,331 pending

Employers MUST adhere to the conditions outlined in the H-2B petition.

Issues in high profile case that resulted in lawsuit:
- Paid workers less than the required wage
- Failed to notify federal agencies of early separation of six H-2B workers
- Assigned H-2B employees to work in locations outside the certified job location
- Failed to accurately identify the number of workers needed & the period of need
- Failed to pay workers' inbound & outbound transportation costs from their home countries as required
- Failed to pay housing & visa costs
- Took impermissible deductions from H-2B workers' wages
- Failed to post the required H-2B poster

H-2B Visa

Quick take?
- Timing is critical!
- Temporary, Season, Intermittent, Peak load
- Adhere to conditions as outlined in H-2B petitions
- Be audit-ready
Types of J-1 Visas
- Trainees
- Interns
- Summer Work & Travel Workers

J-1 Visa Employer Notes
- Decide who to hire
- Decide what type of J-1 visa will work best (Trainee, Intern, Summer Work & Travel)
- Make sure you’re aware of employer obligations, position limitations & duration of the various J-1 options

J-1 Process: Step by Step
1. Work with J-1 agency & attorney to prepare case
2. Prepare for possible site visit if:
   1. < $3M annual revenue
   2. <25 employees
   3. First-time J-1 sponsor
   4. J-1 Agency issues DS-2019
3. J-1 Agency issues DS-2019
4. Applicant attends U.S. Embassy/Consulate Interview
J-1 Visa
Quick take?
Make sure you’re aware of:
• Employer obligations;
• Position limitations; AND
• Duration of the various J-1 options!

TN Visa
Requirements:
• Individual must be a citizen of Canada or Mexico
• The offered position must fall within one of the specific categories on the NAFTA list – almost all require at least Bachelor’s degree
  • e.g. Architect, Computer Systems Analyst, Industrial Designer
• Must have job offer from a U.S. employer for that specific job/category
• Individual must meet the requirements for that position as outlined in the NAFTA list (e.g. have a Bachelor’s degree in that field)

O-1 Extraordinary Visa
• Stringent list of evidentiary criteria that must be met - standard is high & scrutiny has increased
• U.S. sponsor or company files the case on employee’s or your behalf
• Unlike H-1B visa, there is no cap on O-1 visas, so they are available all year
• Great option for rockstar employees or potential employees
Green Card Options: PERM

- The employment Based (EB) green card process generally involves a 3-step PERM process
- U.S. employer conducts required recruitment to show that there are no qualified U.S. workers available to fill the position
- 2 main categories in PERM cases:
  - EB-2: Position requires at least a Bachelor's degree and 5 years of experience OR position requires a Master's degree
  - EB-3: Position requires less than the EB-2 requirements

PERM Green Card: 3-Step Process

1. First Step: Labor Certification
2. Second Step: I-140 Petition
3. Third Step: Adjustment of Status Application

T Visa:
Victim of Trafficking or Unlawful Employment Practices

BEWARE
Red Flags:

- Employee was not paid overtime
- Employee had to work in unsafe conditions
- Employee was threatened with immigration consequences
- Employee was harassed on the job

T Visa: Qualifications

I-9 Audits:
How to Prepare?

- Conduct a self-audit - Priority of Audit:
  1. Get I-9s for any current employees who are missing I-9s
  2. Current Employees
  3. Terminated Employees

Proactive Steps

Remember, a USCIS site visit, ICE I-9 audit, ICE raid or DOL investigation can happen at any time & with little or no notice.

Employers can take proactive steps to prepare ahead of time to ease anxiety!
Helpful Resources

- Immigration law/policy is changing constantly
  Follow me on Twitter for real-time updates!
  @USVisaLawyer
- Follow our blog at www.McEnteeLaw.com
- Join our email newsletter
  – We promise to never send you SPAM!

Contact Us

Twitter & Instagram: @USVisaLawyer
Email: info@mcenteelaw.com
Website: www.mcenteelaw.com

Disclaimer & Copyright

Disclaimer: Information provided here is offered for informational purposes only. No part of this material should be construed as legal advice.

Copyright: All copyrightable text & graphics, the selection, arrangement, presentation of all materials & the overall design of this presentation are copyright © 2019, McEntee Law Group P.C. All rights reserved. Permission is granted to download & print materials for the purpose of viewing, reading & retaining for informational reference. Any other copying, distribution, display, retransmission, or modification of information or materials, whether in electronic or hard copy form, without the express prior written permission of McEntee Law Group is strictly prohibited.