Q&A From the “Anticipating Changes to the H-1B Visa Program” Webinar

During CUPA-HR’s May 11 webinar on possible changes to the H-1B visa program, attendees submitted several questions to the presenters. Here is the full Q&A.

Q: How are you advising clients who want to file H-1B petitions for computer programmers?
A: We are advising clients in a few ways. First, be aware that requests for evidence are much more likely for any computer programmer job supported by a Level 1 LCA. Second, for all computer programmer petitions, but especially for Level 1, take additional time in the petition to explain the complex aspects of the job, including emphasizing those aspects of the job that involve business analysis rather than mere coding. Third, if the university can show that all employees holding the same position, including former employees that held the position, possess a four-year bachelor’s degree or equivalent in an IT field, assert this in the petition, and where possible, provide data on the number of such individuals and their professional education and experience. Finally, talk to stakeholders within the university (department chairs, managers, etc.) so they are aware of the risks and so that their expectations are set appropriately.

Q: What is the likelihood of legislation passing, and which bill is most likely to make it through Congress?
A: Hard to say, but take a close look at the I-Squared bill introduced by Sen. Hatch (R-UT) in 2015. This may have some legs.

Q: If H-1Bs do become harder to obtain, what alternatives are out there for colleges and universities?
A: This is hard, because if the employee is filling a job that, according the government, doesn't even require a degree, it may be hard to get an O-1 approved. Higher ed may be able to focus on TNs or E-3s if filing for citizens of Canada, Mexico or Australia.

Q: What is the database Jill Blitstein cites during the webinar?
A: We are referring to the ACWIA database. This is a wage database that shows prevailing wages for colleges and universities. See http://www.flcdatacentral.com/faq.aspx for more information, especially the last question and answer (regarding which data source to use).
Q: On H-1B, could you provide some context for the modifications/restrictions the administration can enact without congressional activity? As in, what further limitations could they impose to the program without legislation, just around the edges of statute?
A: The administration can step up enforcement of existing laws (more LCA audits, more site visits, etc.), but only Congress can change the way H-1B visas can be allocated or the quota number.

Q: What if anything can we do if an individual has an H-1B visa but needs to travel outside the country and are awaiting a travel stamp? This individual (from Iran) is in the administrative processing status and has been since January.
A: This is a tough situation and there may be little you can do. You can follow up with the consulate regularly. You may also want to reach out to the immigration liaison in your congress person’s office to see if they might try to intervene.

Q: With varying schedules for higher education professors/researchers, which tends to differ substantially from the standard corporate 9:00 a.m.-5:00 p.m., how have Fraud Detection and National Security officers reacted to faculty not being physically on-site at the time of visit (e.g. when they are not teaching classes)?
A: In general, FDNS officers have been reasonable when you explain to them that the H-1B worker does not work normal hours. You should offer to answer the questions in writing or help schedule a time when the employee will be in the office. At NC State, we have never had a problem rescheduling a visit if the person wasn’t around when the FDNS officer initially visited.

Q: What is the retention requirement for a public access file if the H-1B holder is no longer employed? In our case, they became a permanent resident prior to employment termination.
A: You must keep the public access file for one year after the last day the labor condition application supports the employment of the H-1B worker — so in this case, one year after he became a lawful permanent resident.

Q: Is there any information available for when there is a campus visit?
A: Check out the Law360 article “How Employers Can Prepare for H-1B and L-1 Site Visits.” (You will need to provide your email address in order to access the article.) Many of us have probably had different campus visit experiences, but at NC State the visits have either started or ended at the HR office, with the H-1B worker either coming to the HR office or the officer and our HR representative visiting the office of the employee. The content has been fairly straightforward — mainly confirming the information on the I-129 form.
Q: Any idea when they will update the processing time on the USCIS website? It hasn't been updated since February.
A: Unfortunately we don't know what type of schedule USCIS might have for updating its processing time information.

Q: On our employment applications, should we be asking if the applicant currently requires or in the future will require sponsorship?
A: The Department of Justice generally disfavors these questions, but has indicated that the following two questions are OK:
1) Are you authorized to work in the US?
2) Do you now or will you in the future require sponsorship (e.g. for an H-1B visa)?
At NC State, we use almost this exact language on all of our online employment applications, regardless of whether the position is for faculty, staff or temporary hires.

Q: Any idea as to whether new H-1B regulations would require institutions to document that they have attempted to recruit qualified U.S. workers? This has long been a complaint about the H-1B program, and our postdoctoral fellow positions are not subject to the recruitment requirements of faculty and staff titles.
A: Such a change would likely need to be made by Congress. There have been some bills introduced that would require a labor market test for all H-1B petitions, but most are not this broad. I think it is unlikely that future legislation would require a labor market test for all higher ed H-1Bs.