

PUBLICATION

New H-1B & L-1 Visa Reform Laws

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Two new immigration laws affecting the H-1B and L-1 visa categories are scheduled to be passed by Congress on December 6, 2004 and signed shortly thereafter by the President. Both laws are wrapped up in the massive \$388 billion omnibus spending bill and contain significant changes that all employers and their foreign national employees should be aware of.

The first law is called the "L-1 Visa (Intracompany Transferee) Reform Act of 2004." It is intended to begin dealing with the perceived problem of abuse in the L-1 visa category. The second law is entitled, "H-1B Visa Reform Act of 2004." It deals with a number of issues, including limited cap relief, the prevailing wage, and the expired training fee. The following is intended to be a summary of the main provisions.

Summary of Changes to L-1 Laws

- **Third-party Worksites.** An L-1B "specialized knowledge" transferee cannot be placed at a third-party client site where his or her work will be principally controlled or supervised by the client or where the placement of the worker at the site is "essentially an arrangement to provide labor for hire for the unaffiliated employer."
- **Period of Continuous Employment Abroad.** An exception was previously created for L-1 visa applicants using a blanket petition at U.S. Consulates abroad. The rule allowed such persons to have only worked for the foreign employer for six months prior to applying for the visa. Now, all persons seeking an L-1 visa must have worked for the employer abroad for at least one continuous year.
- **\$500 "Fraud Fee."** This fee is actually referenced in the H-1B law, but also applies to all L-1 petitions whether filed with USCIS, a Consulate abroad, or the Canadian border. It is a new fee in addition to the \$185 filing fee and will take affect immediately upon the law's enactment. See additional details about the fee below.

The law also requires the keeping of statistics, a report by the inspector general, and the establishment of a task force. As such, one might expect more changes to the L-1 program in the future. The changes referenced above (except for the \$500 fee) will take affect 180 days after the law is passed.

Summary of Changes to H-1B Laws

- **H-1B Cap Exemption for Persons with U.S. Master's Degrees.** A person who has earned a Master's degree from a U.S. university will be exempt from the 65,000 cap starting 90 days after the law passes. The number of people who can take advantage of this exemption has been limited to 20,000. Therefore, it is advisable that petitions for such persons be filed immediately with a start date that is 90 days after the law passes.
- **"Training Fee" Returns (\$1,500 or \$750).** The old \$1000 "training fee" that expired on October 1, 2003 is back. The same exemptions apply (e.g. non-profits, institutions, second extensions), but the fee for most employers will now be \$1,500. For any employer that has 25 or fewer full-time employees, the fee will be \$750. This fee will be collected beginning immediately after the law passes.
- **\$500 "Fraud Fee."** This new fee applies to all H-1B and L-1 petitions, whether for new employment, changes of status, or extensions. There does not appear to be any exemptions to the fee which will

take affect immediately after the law passes. The fee will be used to create an account that will be used to "combat fraud" in the H-1B and L-1 categories. One third of the account will be given the Department of State, one third to the Department of Homeland Security, and one third to the Department of Labor.

- **Prevailing Wage Levels.** An H-1B employer will now have to pay 100 percent of the prevailing wage for the occupation. The old rule allowed employers to pay 95 percent of the prevailing wage. The good news is that the Department of Labor will be required to provide a 4-level wage survey based on experience, education, and the level of supervision, instead of the current, unrealistic 2-level system. If the 2-level system remains in place, a formula has been devised to calculate two additional levels.
- **Department of Labor Investigations.** With the help of the new "fraud fee," the ability of the DOL to initiate its own investigations where there is reasonable cause to believe an employer is violating LCA regulations has been reinstated and made permanent. The DOL will also be able to conduct an investigation when it receives credible information from a person likely to have knowledge of an employer's practices. An employer who makes a "good faith effort" at compliance, notwithstanding a technical or procedural violation, will be deemed to have complied. This "good faith" exception will not apply, however, if DOL instructs the employer to take corrective action and the employer fails to do so.

The new fees (totaling an additional \$2000 for most H-1B petitions) will all take affect immediately. All other changes, including the H-1B cap exemption, take affect 90 days after the law is passed.

How We Can Help

Baker Donelson's Immigration Team can pick the classification that is best suited for a particular worker's credentials, duties, location, employer, and other factors, and then expeditiously prepare the papers necessary to pursue that status. We know the twists and turns and the seemingly infinite variables involved, and can lead the employer and international worker confidently through the maze of procedures, providing written guidance at each step and providing real-time status information to each worker and to the employer representative. We keep in mind the prospect of permanent residence from the beginning and avoid missteps that would prejudice speed and success in the ultimate goal.