# PUBLICATION

## Immigration Update: H-1B Cap Season and a Cautionary Fairy Tale; Changing ESTA/VWP Questions Answered; Improvements to E-3, H-1B1, CW-1 and EB-1 Regulations

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**February 12, 2016**

### H-1B Season and a Lesson from *Disney*

H-1B Cap season is approaching, and, with a similar flurry to file petitions for eligible specialized knowledge workers expected for April 1 as we experienced in 2015, H-1B employers should carefully consider the obligations of employee sponsorship imposed by the Department of Labor (DOL) and United States Citizenship and Immigration Services (USCIS). Among the required employer attestations included with the Labor Condition Application, which must be filed with the DOL and certified before the employer can file an H-1B petition, the H-1B employer attests that it has read and agreed to the following statements:

Form ETA 9035 Part H:

1. Wages: Pay nonimmigrants at least the local prevailing wage or the employer's actual wage, whichever is higher, and pay for nonproductive time. Offer nonimmigrants benefits on the same basis as offered to U.S. workers.
2. Working Conditions: Provide working conditions for nonimmigrants which will not adversely affect the working conditions of workers similarly employed.
3. Strike, Lockout, or Work Stoppage: There is no strike, lockout or work stoppage in the named occupation at the place of employment.
4. Notice: Notice to union or to workers has been or will be provided in the named occupation at the place of employment. A copy of this form will be provided to each nonimmigrant worker employed pursuant to the application.

These attestations formed the underlying basis for racketeering suits filed by two former Disney employees against Walt Disney World and two outside consulting firms, HCL Technologies Ltd. and Cognizant Technology Solutions. These proposed class actions allege abuse of the H-1B program including conspiring with the consulting companies to replace technology staff with foreign workers. Specifically, plaintiffs allege that the defendants were required to certify the provision of conditions that would not adversely affect similarly situated U.S. employees (item 2 in the list above) and violated this obligation.

The litigation is in its early stages, and plaintiffs face a difficult task of proving racketeering conspiracy claims and that violations rose to the level of fraud. Regardless of the outcome, these cases provide a cautionary reminder to employers to carefully review their practices to ensure compliance with H-1B requirements. An employer's internal review should extend to any vendors providing foreign workers to the employer site, as in the case with the consulting companies named in the lawsuits.

As we all gear up to prepare for the new H-1B filings at the end of March, now is the time to make sure any existing H-1B sponsorship remains compliant and to discuss any concerns or questions with a qualified immigration attorney.

## Visa Waiver Changes – Answers to your ESTA-cancellation Questions

As reported in last month's article, the enactment of the Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015 will restrict certain travelers from using the Visa Waiver Program (VWP) and require them instead to obtain a nonimmigrant visa from a U.S. embassy or consulate abroad. U.S. Customs and Border Protection (CBP) has published a series of FAQs on the changes to the VWP following the December 18, 2015 enactment.

Currently, the affected VWP travelers include:

- Nationals of VWP countries who have traveled to or been present in Iran, Iraq, Sudan or Syria on or after March 1, 2011 (with limited exceptions).
- Nationals of VWP countries who are also nationals of Iran, Iraq, Sudan or Syria.

The second category of travelers listed above should have received an email on or about January 21, 2016, to notify them that their current Electronic System for Travel Authorization (ESTA) is no longer valid. Other travelers in the first category may not be alerted to the cancellation until they arrive at the port-of-entry and are told by the inspecting officer.

Current ESTA holders are strongly encouraged to check their ESTA status prior to travel by clicking on "Check Existing Application" at the CBP website.

The CBP FAQs provide further guidance on critical aspects of the new law, including the specific changes to the VWP, the process for notification of affected travelers, exceptions to the restrictions listed above and potential for waivers.

For those who travel using the VWP and who have confirmed their ESTA is still valid, we recommend reviewing the FAQs and the Joint Statement released by the United States Department of Homeland Security (DHS) and the United States Department of State (DOS) before your next trip.

## Revised Rules for H-1B1, E-3 and CW-1 Workers and EB-1 Petitioners

DHS recently published amended regulations affecting certain highly skilled workers in specialty occupations from Chile, Singapore (H-1B1) and Australia (E-3), nonimmigrant workers in the Commonwealth of the Northern Mariana Islands (CNMI)-Only Transitional Worker (CW-1) classification and applicants seeking immigrant status in the employment-based first preference (EB-1) outstanding professor and researcher classification. The final rule, effective February 16, seeks to minimize the potential employment disruptions for U.S. employers of current employees in the H-1B1, E-3 and CW-1 classifications and to enable recruitment of outstanding professors and researchers by expanding types of acceptable evidence.

For H-1B1, E-3 and CW-1 workers, the new regulations authorize continued employment authorization for the sponsoring employer for up to 240 days beyond their status expiration with a timely filed extension of stay pending with USCIS (similar to provisions for H-1B, TN, L-1). Filing procedures for extension of stay and change of status requests have been updated to include the E-3 and H-1B1 nonimmigrant classifications.

Petitions for outstanding professors and researchers can now rely on a broader range of comparable evidence and substitute such comparable evidence for the currently listed evidence in 8 C.F.R. 204.5(i)(3)(i)(A)-(F). This flexibility now gives petitioners an ability to support their filings with a broader scope of materials to show their achievement and not limit petitioners to only the detailed list.

To access the final rule, please click here. The DHS announcement is available here. For more information on the H-1B1 and E-3 classifications and the EB-1 path to permanent residence, see our summaries here and here, while the USCIS and DOS guidance can be found in each of the links below:

- E-3
- H-1B1 or H-1B1
- CW-1
- EB-1