With a new administration in the White House, there is significant concern regarding changes to visa programs that allow U.S. employers to hire talented international graduates of U.S. universities. The H-1B is the most common work visa in the United States. Using the H-1B category, U.S. employers are permitted to hire international graduates who have at least a four-year college degree, if they will work in a position requiring at least this type of degree. There are several changes recently that have impacted the H-1B program, and there is proposed legislation that may further impact H-1Bs.

**INTRODUCTION TO THE H-1B PROGRAM**

H-1B visas allow U.S. employers to hire international personnel who possess at least a four-year baccalaureate degree or the foreign equivalent. Only a U.S. employer can file an H-1B petition. The employer must offer a job that requires at least a four-year degree in a particular field of study, and the prospective employee must have at least a four-year degree in that particular field of study.

**Duration:** An H-1B visa is valid initially for up to three years and can be extended an additional three years for a total of six years. Extensions beyond six years are available in limited circumstances.
Procedure: Only an employer can file an H-1B petition with the U.S. Citizenship & Immigration Services (USCIS). Employers frequently file the H-1B petition while the employee is working using Optional Practical Training (OPT) following graduation from a U.S. college or university. Filing an H-1B petition does not obligate the employer to keep the employee for the entire duration requested (usually three years). The employer retains full authority to terminate the employment. Under current law, an employer has no obligation to advertise to determine if U.S. workers are available for the position in order to file an H-1B petition for an international employee.

Required Wage: Employers that file H-1B petitions are required to verify to the U.S. Department of Labor (DOL) that the employer will pay the H-1B worker at least the same wage paid to U.S. workers who perform similar work in the area of intended employment. This is called the “prevailing wage” for the job. Prevailing wages are determined by accessing a U.S. DOL database, or by referring to credible wage surveys that meet strict DOL requirements. If the employer pays its U.S. workforce more than the DOL (or survey) wages, the employer must pay its H-1B workers at least the same wage the employer pays its similarly employed U.S. workers.

Costs: The cost of the H-1B consists of the attorney fee (if an attorney is used), plus the USCIS filing fee. The filing fee is currently $2,460 for employers with more than 25 employees, and $1,710 for employers with 25 or fewer employees. These fees are regularly increased by Congress. The U.S. government considers all fees and costs for the H-1B process to be employer expenses.

Family: The spouse and children of H-1B employees receive H-4 visas and cannot work under that category.

H-1B Quota: USCIS issues 85,000 new H-1B approvals each fiscal year (October 1 through September 30). Graduates with U.S. advanced degrees have a special allocation of 20,000 H-1Bs of this 85,000 quota. Employers can file H-1B petitions as early as April 1 to try to secure one of the October 1 H-1B quota numbers. Each year, the USCIS receives many more H-1B petitions in the first five days of April than there are quota numbers available. As a result, the USCIS holds a random lottery to select 85,000 cases to process. Others are returned as exceeding the quota. There are exceptions to the H-1B quota:

- University jobs or jobs with nonprofit entities affiliated with universities have no quota;
- Jobs with nonprofit research organizations have no quota;
- Jobs with government research organizations have no quota;
- H-1B extensions with the same employer are not subject to the quota;
H-1B transfers to a new employer are not subject to the quota.

RECENT CHANGES TO H-1B RULES

USCIS issued a new rule on November 18, 2016, (effective January 17, 2017) that impacts the H-1B program. For the most part, this rule simply and formally adopted prior informal USCIS guidance. However, there were two notable changes.

Grace Period: H-1B employees’ immigration status is tied to their employment with the employer that filed an H-1B petition on their behalf. Previously, this meant that if an H-1B employee was terminated, laid off, or quit, that employee was immediately considered “out of status.” Fortunately, the new rule creates a grace period for H-1B employees whose employment ends prematurely. Now, these employees will not be considered to have failed to maintain their immigration status for 60 days from the date they stopped working or the end date of their approved H-1B petition, whichever comes first. This new provision creates much greater flexibility for H-1B employees to find new employment in the United States.

Exceptions to the Six-Year Maximum: As previously noted, H-1B employees are generally limited to a maximum of six years in H-1B status. The new rule formally implements prior legislation that created exceptions to the six-year maximum for certain H-1B employees who have started the employment-based “green card” process, but cannot complete that process due to processing delays or backlogs. However, H-1B employees who are eligible to complete the green card process, but who fail to make the final filing necessary to complete the process within one year of when they are eligible to do so, will no longer be eligible for additional H-1B extensions. This is an important departure from prior practice.

PROPOSED LEGISLATION

There are several different pieces of proposed legislation circulating, none of which are likely to be passed as written. However, there are some interesting provisions.

Minimum Salary: The proposed change that has received the most attention is a supposed $130,000 “minimum salary” requirement for H-1Bs. This provision has been misinterpreted by many as a minimum salary for all H-1B filings. That is not what the bill says: The provision relates only to “H-1B dependent employers”—those who employ more than 15 percent of their work force in H-1B status. Very few employers have more than 15 percent of their work force in H-1B status, and therefore very few employers will be subject to this rule. Even with those that are H-1B dependent, this “minimum salary” only applies in the following limited circumstance: If an employer is H-1B dependent, then the employer is subject to certain additional requirements, including having to advertise and show that it cannot find qualified
U.S. workers. (H-1B employers that are not “H-1B dependent” are not required to advertise.) Under current law, an H-1B dependent employer can avoid having to advertise if the H-1B employee it is filing for 1) holds a master’s degree; or 2) makes at least $60,000 a year. If the employee meets either criterion, the H-1B dependent employer does not need to advertise the position. The proposed bill would eliminate the master's degree exemption altogether and would require advertising of the position unless that employee was making at least $130,000 a year.

**Special H-1B Quota:** Another legislative provision of interest is a proposal to reserve a percentage of the H-1B quota specifically for F-1 students completing U.S. degrees. This would allow students completing U.S. bachelor's degrees to have their own quota similar to what is currently available to those who completed U.S. master's degree. The current proposal is 20,000. Another provision seeks to set aside 20 percent of the H-1B quota specifically for employers with 50 or fewer employees. It is unclear whether either of these “set asides” would be in addition to the current 85,000 threshold.

**Green Card:** The most beneficial provision is one that seeks to "build a bridge" from F-1 student status to permanent residence, potentially eliminating the need for H-1B status. First, it seeks to eliminate the requirement that F-1 students have the intent to return to their home country. This "intent" requirement has made it difficult for students to travel and/or obtain a student visa, especially if a green card application is in process. Eliminating the requirement allows more students to file for permanent residence, even during OPT.

Second, the proposal eliminates “per country” quotas on green cards. The current immigrant visa quota system states that every country receives the exact same allocation of green card numbers. This means that some countries with low demand never exceed the annual allotment and have no wait times, while other countries (like India and China) greatly exceed the annual quota based on significant demand, creating wait times of many years—and even decades—before a green card can be issued. Eliminating this “per country” requirement will make wait times the same for every person, regardless of nationality. To the extent that there are any wait times, the proposal allows for temporary work authorization while waiting.

It is important to recognize the distinction between proposed legislation and legislation that has actually been signed into law. None of the provisions discussed in this section have been signed into law and would have to undergo significant debate in Congress before they could be passed, likely resulting in revisions to the original proposals. Nonetheless, it is also
encouraging to recognize that not all legislation is bad. Proposals that create new H-1B allocations for F-1 students or a pathway to permanent residence can go a long way toward reducing the uncertainty of the existing H-1B lottery.

H-1B REMAINS AN EXCELLENT OPTION

The H-1B program remains an excellent option for employers that wish to hire talented international graduates of U.S. universities. Even if elements of the proposed legislation become law (and there is no way to determine that until it happens), employers will not doubt continue to use this program to remain competitive in United States and international markets.

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