



**MAURA BOLIVAR**

**BROAD AND CASSEL ATTORNEYS AT LAW**

*Ms. Maura Bolivar is an Associate in the Tallahassee office of Broad and Cassel. She is a member of the Firm's Commercial Litigation and Appellate Practice Groups. Ms. Bolivar has experience with business immigration matters. She has worked with national and multinational corporations that seek to bring employees from abroad to work in the United States. She also assists with the immigration needs of the employees' families. She can be reached at (805) 681-6810 or by e-mail at mbolivar@broadandcassel.com.*

## HIRING AND FIRING

### FOREIGN SPECIALTY OCCUPATION WORKERS

Although there is an increasing and controversial trend towards outsourcing, particularly in the information technology field, many computer, biotechnical, engineering and other "high tech" oriented businesses may have trouble finding qualified workers in the local job workforce. Such employers may seek to hire foreign nationals living in the U.S. or abroad.

Federal immigration law provides a visa category for such professionals: the H-1B visa. This visa is relatively easy to obtain and processing can be accomplished in several weeks upon payment of an expediting fee.

The H-1B visa generally sought by aliens who work in "specialty occupations." Such occupations are defined as requiring a "theoretical and practical application of a body of specialized knowledge," and generally require a bachelor's degree or higher, although experience can sometimes replace a degree.

Employers who wish to hire H-1B workers must file a petition with the U.S. Citizenship & Immigration Services (USCIS), an agency of the Department of Homeland Security which provides the services formerly offered by the INS. Prior to filing the petition, the employer must obtain a prevailing wage determination from the state (in Florida, the Agency for Workforce Innovation) and attest to the federal Department of Labor that the worker will be paid at least the prevailing wage.

There is a cap on the number of new H-1B visas

issued each year. The cap of 65,000 visas for fiscal year 2004 was reached on February 17, 2004. New petitions may be filed on April 1st, with employment commencing in October 1, 2004.

The H-1B visa is good for three years and can be renewed for another three years. Such renewals are not subject to the visa cap. The visa is also now "portable," allowing workers to change employers, where once this option was not available. An employer seeking to hire an H-1B worker who is currently employed on this visa needs to file a petition with USCIS and the worker may then accept and start employment, subject, of course, to governmental approval (which is generally forthcoming). Prevailing wage information must still be determined for the new employment.

USCIS must be informed of material changes in the employment approved in the initial petition by the filing of an amended petition. Amended petitions are not subject to the visa cap. A material change is a change that directly impacts the alien's continued eligibility for H-1B classification. The regulations do not contain any specific examples of situations where an amended petition should be filed and the determination is made on a case-by-case basis.

Promotion to a higher position within the same occupation does not normally require the filing of an amended petition, provided that the employee is required to utilize the same academic training as was required in the former petition. For example, the pro-

**PHONE:** (805) 681-6810 **FAX:** (805) 681-9792

**EMAIL:** MBOLIVAR@BROADANDCASSEL.COM **WEBSITE:** HTTP://WWW.BROADANDCASSEL.COM

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motion of an accountant to a supervisory accountant would not require the filing of an amended petition if the supervisory accountant would still be required to possess the theoretical knowledge of accounting normally possessed by an H-1B accountant. Similarly, a change in salary does not generally require filing an amended H-1B petition, unless the change is so dramatic that it indicates a significant change in responsibility or duties.

There is also nothing in the current regulations which specifies when an amended petition should be filed. Employers are generally advised to file the petition prior to the material change, but INS adjudicators have reported that filing is acceptable, at the latest, within a reasonable amount of time following the material change.

An amended petition is also be required if the employer's corporate structure goes through a significant change, or if the H-1B worker is transferred to a different legal entity within the employer's corporate structure. This applies where there is a change in job location but not any other changes in employment. Also be aware that if an H-1B employee moves, he or she must submit Form AR-11 to notify USCIS of the new address within 10 days. In a new security conscious environment, failure to comply with this rule may subject the employee to civil fines, criminal liability and deportation.

Employers who expect to implement a reduction in force (RIF) affecting their H-1B employees must be aware that there is no explicit "grace period" allowing such employees to stay in good immigration status while seeking new employment under the portability provision. This means that when the employment ends, they are required to either return home or change their immigration status in some way that allows them to remain in the U.S. For example, a RIFed employee could apply for a change to F-1 student status. The caveat is they must apply for the change in status before becoming unemployed.

However, USCIS can exercise its discretion and approve an untimely-filed request for extension or change of status if the delay was due to "extraordinary circumstances." Although a RIF is generally not considered an "extraordinary circumstance," immigration attorneys report that the agency has been exercising its discretion favorably in granting extension of stay requests where the employee has been unemployed for up to 30 days and in some cases, up to 60 days. It should be emphasized that there is no law that provides reliable guidance on this issue. The 30 and 60-day period discussed here is not law nor is it USCIS policy. The agency is currently considering regulations that would allow a 60-day grace period.

Always consult with an attorney specializing in Immigration & Nationality law for professional advice regarding specific situations.

*Maura Bolivar is an associate, in the Tallahassee office of Broad and Cassel. She has experience representing employers of foreign workers and can be reached at [mbolivar@broadandcassel.com](mailto:mbolivar@broadandcassel.com), or by calling (850) 681-6810.*