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Memorandum

To Greenberg Clients and Friends

From GT Immigration Group

Date January 23, 2001

Re H-1B Dependent Employers

On December 20, 2000, The Department of Labor published interim final regulations implementing changes in the H-1B program. The regulations took effect on January 19, 2001. The regulations implement changes as passed by Congress in the the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA"). This alert will focus on those portions of the regulations that effect H-1B dependent employers.

Determining H-1B Dependency

1. Snapshot Test. An H-lB dependent employer may generally be defined as an employer who: (a) has 25 or fewer "full-time" employees and 8 or more H-lB employees; (h) has 26 to 50 "full-time" employees and 12 or more H-lB employees; or (c) has 51 or more "full-time" employees and at least 15% of its workforce consists of H-lB employees.

2. Full Calculation of Status. If the snapshot test reveals that a company may be dependent, it must conduct a full calculation of its status. A company must conduct the calculation of its dependency status each time an LCA (existing or new) is used to support an H-lB petition (for new employment or an extension of employment). The calculation should be made by comparing two numbers: (1) an actual head count of H-lB employees, without regard to full or part-time status, and (2) a computation of the employer's "full-time equivalent" employees. If the ratio is 15% or more (or if the numbers meet the cutoff for smaller firms as described above), the employer is then considered dependent.

A " time employee" is an employee who works at least 40 hours per week, unless the employer can show industry wide practices that a full time employee works less than 40 hours. However, according to the Department of Labor full time will not be less that 35 hours per week. If an employee is considered part-time the Department of Labor has offered two ways to calculate when a part time employee equals a full time employee. The first is to consider each part time worker as one half of a full time employee. The second method is to calculate the number of hours worked by all the part time employees and compare that to the number of hours worked by full time employees in one pay period.

Please note, independent contractors and consultants are not included when determining whether an employer is H-1B dependent. However, the classification as independent contractors and consultants must be consistent at all times, whether it be for H-1B dependency calculations or taxation purposes.

3. Attestation Obligations. If an employer is H-lB dependent, it is obligated to undertake certain attestation requirements unless the LCA is used only for employment of an "exempt" H-lB worker. To be exempt, the worker must (i) be paid at an annual rate of $60,000 per year; or (ii) have attained a masters degree or higher (or its equivalent) in a specialty related to the intended employment.

New LCA

There is a new LCA that must be filed with each H-1B petition (new or extension). The new LCA asks the employer to indicate whether it is 1) non-dependent; 2) H-1B dependent, but all H-1B employees are exempt from the new attestations; or 3) H-1B dependent, and all H-1B employees are not exempt from the new attestations. The new LCA may only be used for one type of employer and employee. If the employer uses a 15 "slot" multiple worker LCA and indicates that it is a non H-1B dependent employer and the 15th employee would cause the employer to become an H-1B dependent employer with non-exempt H-1B employees, the employer must file a new LCA. The new LCA must indicate that the employer is now H-1B dependent with non-exempt H-1B employees. The previous LCA will remain unused with one open slot. As a result, the employer must calculate its dependency status each time a new LCA is needed to support an H-1B petition (new or extension). The employer classification is very important and those employers that are on the borderline of being H-1B dependent will need to pay close attention to their dependency status. Failure to file the correct LCA may result in monetary fines.

New Attestations on LCA

1. Recruitment Attestation

Dependent employers will now be required to attest that they have recruited for U.S. workers, and to preserve all records reflecting efforts to recruit U.S. workers. This paperwork must include the places and dates of the recruitment, advertisements, postings, application forms, job offers, rating forms used by the employer's representatives at interview, and other personnel documentation related to the hiring process. The employer has the burden of proving, in an

enforcement action, that its recruitment met “industry-wide standards,” such as trade organization surveys, studies by consultative groups or reports/statements from trade organizations. An employer cannot satisfy the good faith recruitment obligation if it does not give good faith consideration to U.S. applicants.

In addition, an employer may not use the "least common dominator" when recruiting that will not result in identifying viable U.S. candidates, even though the methods are accepted in the industry. Again, a good faith effort must be made to attract qualified U.S. employees. Active and passive recruiting methods must be utilized. Active methods would be attending college fairs and other job fairs and using headhunters. Passive methods would be advertisements in trade journals and newspapers as well as internet postings.

The employer must hire a qualified U.S. candidate. The job may not be held for the foreign national. The employer must use industry wide standards in determining if a U.S. candidate is qualified for the position.

2. Secondary Displacement Attestation

The statute provides that “employees of the employer” and, in contractor situations, “employees of the other employer” (“secondary displacement”) are protected from displacement by H-1B nonimmigrants. Dependent employers must now attest that they have not displaced U.S. workers in the same occupational classification for a period of 90 days prior to filing the H-1B petition, and will not displace U.S. workers in that occupational classification for 90 days after the filing of the petition. The dependent employer must also attest that it has asked and determined that the secondary employer has not displaced U.S. workers for the same period. The new interim final rule uses a “common law” test to determine whether an individual is an “employee” of either the principal employer or the secondary employer. The secondary displacement prohibition controls when an H-1B employer places its H-1B employee at a worksite operated or owned by another employer where there are “indicia of employment” between the H-1B professional and the other employer.

For the secondary employer there may be an “indicia of employment” between the H-1B employee and the other employer. This indicia of employment may hold the first employer responsible for the displacement of the U.S. worker at the secondary employer’s worksite. The first employer must exercise “due diligence” and inquire of the second employer whether a U.S. worker has been displaced 90 days before and after the placement of the H-1B employee at the worksite. The secondary employer does not have liability in this situation. The first employer would be required to secure written confirmation from the second employer that no U.S. workers have been displaced during the applicable time period.

Some of the factors that will be considered in determining whether an indicia of employment exist are:

1. whether the secondary employer furnishes tools and equipment (such as computer terminals);

2. whether the work is performed on the premises of the secondary employer;
3. whether there is a continuing relationship between the H-1B worker and the secondary employer;
4. whether the secondary employer has the right to assign additional projects to the H-1B worker;
5. whether the secondary employer sets the hours of work and duration of the job;
6. whether the work done by the H-1B worker is the same type of work typically done by the primary employer; and
7. whether the secondary employer directly employs workers in the same specialty as the H-1B employee.

For the purposes of displacement, the Department of Labor also evaluates whether the displaced U.S. worker was "essentially equivalent" to the H-1B worker that replaced the U.S. worker. The Department of Labor will look to see if a U.S. worker in the same locality performing the same occupation was dismissed in the period of 90 days before and after the filing of an H-1B petition. "The employer is also required to keep all documents concerning the departure of such employees and the terms of any offers of similar employment to such U.S. workers and responses to those offers. These records are necessary for the Department of Labor to determine whether the H-1B employer has displaced similar U.S. workers with H-1B nonimmigrant workers."

Records on H-1B Dependency

When the employer determines H-1B dependency based on its "snap shot" calculations, no documentation is required because the employer's dependent status is clear. Those employers who determine dependency by the full calculation must keep records of exactly how that determination was made. In addition, if the snap shot determination indicated the employer is dependent, but the full calculation determines the employer is non-dependent, a record of the exact calculation must be made. Also, if the employer's status changes from dependent to non-dependent, records must be kept documenting the change in status. These records do not need to be submitted with each H-1B petition, however they must be available in the event the Department of Labor wishes to review the calculations. This documentation does not need to be filed in the public access file.

Willful Violators

If an employer is found to have willfully violated the provisions of the LCA or the H-1B program, the employer will be subject to additional attestations and random investigations and audits by the Department of Labor for a period of five years following the determination of willful violation. The regulations also allow debarment from the H-1B program.