H1b 2018 Filing Season Is On: What Employers Need to Know About Wages

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San Diego, CA. March 2nd, 2018. Immigration attorney Steven Riznyk has been working with H1b visas for 30 years examines some issues and risks. The H1b visa has witnessed many changes since it origins in 1952. At that time, the visa was simply the H1, and the Immigration and Nationality Act described a beneficiary as:

"an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform temporary services of an exceptional nature requiring such merit and ability."

Since that time, especially beginning in 1970, it has undergone some change. Since 1990 it offers dual intent (ie you can apply for a Green Card while on the visa) and is no longer temporary. In addition, President Trump's Executive Order 13788, and with that spirit the cases are decided, making it harder to prevail. As a result, questions from the government called RFEs (Requests for Evidence) started flowing.

More than ever, states Steven Riznyk, H1b cases are being challenged. The days when someone with little experience (ie what is referred to as a 'Level 1 wage) could apply and win a case are all but gone. In this day and age, knowledge is not enough, and experience will help win a case.

What this translates to for the employer is higher wages that must be paid. As a result of these types of cases, questions from the government called RFEs (Requests for Evidence) started flowing. What

many employers were hoping to do was to pass experienced people as lower level in order to pay lower wages. One of the arguments from the UCSIS was that Level 1 is not a 'specialty occupation', the requirement for an H1b. About half of the RFEs issued concerned Level I issues and could have been avoided had the employer paid more.

For employers, this makes it difficult. An H1b application must be filed with a form called a Labor Condition Application, and that is where the 'prevailing wage' the employer will pay is stated. Wages are broken down in four categories by the Department of Labor and they are listed as Levels I through IV.

Additional challenges arrive from the DOT and O*Net where jobs are described. Often, they list a job as having an employer preference for a degree and thus are denied on the basis that a degree is not a requirement of the position. Additionally, many employers state that 'any' degree is permissible. In this case, they are opening themselves up to an RFE as a position should require only one degree and that should be in the field of the work required. Last but not least, if the prevailing wages become too onerous for the employer, they can always hire the person part-time.

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Steven Riznyk is a business and immigration attorney who has been practicing for 30 years. He is an author and creates cases for both immigration lawyers and the public. He has been training lawyers for decades in the complex areas of immigration law, and is an immigration author and strategist. He can be reached at (619) 677-5727 or Info@SanDiegoBizLaw.com

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