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Editor, Matthew H. Wimberley

Volume VII, Issue I | A Newsletter of Hunter, Smith & Davis, LLP | Winter 2008

Inside ....This Issue

H-1B Visas: Sponsoring Foreign Nationals to Work in U.S.

by Senitria A. Goodman

You are a business owner who has been trying to fill a vacancy for six months but no one seems to have the right combination of education, skill and experience to meet your needs. Finally, you come across the perfect resume. After interviewing the candidate, you learn that she needs authorization to work in the United States. How does this affect you as a business owner and potential employer?

This article offers a summary of the process of obtaining work authorization through an H-1B visa, one of the most popular visas that allow foreign nationals to work in specialty occupations that require technical or theoretical expertise in specialty fields in the U.S. The H-1B visa is a temporary nonimmigrant visa that allows a beneficiary to stay in the U.S. for up to six years and also apply for permanent residency. Unlike other types of visas, the beneficiary of an H-1B visa can be a citizen of any country.

Benefits of Hiring a Foreign National

- The employer is able to fill a staffing shortage and promote the efficient operation of its company by turning to a professional, highly- educated worker.
- The employer/employee relationship will be governed by state and federal employment law.
- The foreign national employee provides unique, specialized skills that benefit an employer by making the employer's company more productive. The employment relationship may be maintained through "green card" or permanent resident status, which entitles the foreign national to live and work in the U.S. permanently.

H-1B's Generally

- A foreign national can stay in the U.S. on an H-1B visa for up to six years. The visa is issued in three-year increments.
- Despite temporarily expanding numerical limitations during fiscal years 2001, 2002 and 2003, Congress has determined that a maximum of 65,000 H-1B visas may be issued each fiscal year. There are certain exemptions to this numerical limitation for current H-1B holders extending their stay in the U.S. or who are petitioning to work for a new employer. There are also special set-asides for beneficiaries who have U.S.-earned masters' or higher degrees or those who will work at institutions of higher education, related or affiliated nonprofits or non-profit or governmental research organizations.
- H-1B visas are employer-specific. An H-1B employee cannot begin to work for a different employer other than the sponsoring employer until a new petition is filed with United States Customs and Immigration Services ("USCIS") to receive approval for the change of employment. The employee may begin working for the new employer as soon as the petition is filed with USCIS as long as the employee meets certain conditions.

Requirements

- The employer must offer employment in a "specialty occupation." A specialty occupation requires theoretical and practical application of a body of specialized knowledge. Some examples of a specialty occupation include engineers, physicians, researchers, pharmacists, accountants, computer programmers, journalists, fashion models, social workers or positions in religion and theology.
- The foreign national must have at least a bachelor's degree or its equivalent. Sometimes a combination of education, experience or training in the specialty field may be substituted for a degree. If a license is required for the position, the foreign national must already hold the appropriate license.

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Attorneys In The News

Bays Joins HSD

Nathan M. Bays has joined the law firm of Hunter, Smith and Davis, LLP. He will concentrate on general corporate transactional law as well as banking and healthcare law. Mr. Bays, a Johnson City native, graduated *Magna Cum Laude* from East Tennessee State University with an undergraduate degree in Finance and Accounting. He received his law degree from Wake Forest University.

Eastridge Joins HSD

The law firm of Hunter, Smith & Davis, LLP is pleased to announce that Michael A. Eastridge has joined the Firm. Mr. Eastridge returns to the Tri-Cities area after having recently practiced in the Atlanta office of a large Los Angeles-based law firm with a strong immigration practice. Eastridge worked in the firm's Immigration department where he focused on the preparation of employer-based non-immigrant visas for its large-employer clients.

Mr. Eastridge received undergraduate degrees from Emory University in Atlanta, a master's degree from The University of Tennessee and previously practiced law in the Tri-Cities area after earning his Juris Doctor degree from the University of Tennessee College of Law in 1994. In 2003, Eastridge attended The Hague Academy of International Law in The Netherlands and is a member of *L'Association des Auditeurs et Anciens Auditerus de l'Academie de droit International de La Haye* as well as the International Law Section of the American Bar Association. He is licensed to practice in Tennessee and Georgia. Eastridge is also the founder and director of The International Interfaith Accompaniment Program, a non-profit organization engaged in international transitional justice initiatives in African states emerging from prolonged conflict.

Eastridge joins Hunter Smith & Davis, LLP attorneys Leslie Ridings and Senitria Goodman in the development of an immigration practice to meet the emerging needs of clients in a rapidly evolving area of law.

Eastridge and his wife Nancy, who was recently appointed Associate Pastor of Munsey Memorial United Methodist Church in Johnson City, have two children.

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Cook selected member of Tennessee Bar

Suzanne S. Cook, a Partner with Hunter, Smith and Davis, has been selected as a member of the Tennessee Bar Association's Class of 2008 Leadership Law program. Leadership Law is an award-winning program for emerging leaders. Members of the program will interact with judicial, legislative, community and bar leaders from across the state and nation. Leadership Law aims to serve the legal profession by equipping participants with the vision, knowledge and skills necessary to serve as leaders in the profession and in the community as a whole.

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H-1B Visas: Sponsoring Foreign Nationals to Work in U.S. *cont'd.*

- The employer must pay the minimum prevailing wage or actual wage, whichever is higher, as determined by the local state workforce agency or by an independent and legitimate source of wage data.

Application Process

- Submit a Labor Condition Application or "LCA" as a prerequisite to H-1B approval. The LCA contains information such as the proposed rate of pay, period of employment and work location. The employer's LCA must be certified by the Department of Labor ("DOL") before the H-1B petition is approved by USCIS.

- Gather all required information from the beneficiary to prepare the application to USCIS.

- Review the beneficiary's visa history and identify any potential areas of concern.

- Submit required documents such as the certified LCA, copies of the beneficiary's educational credentials and other forms required by USCIS as part of the H-1B petition.

Fees

- In addition to a base filing fee of $320, employers must also pay an "education and training" fee ranging from $750 to $1,500 depending on the size of the company. Employers filing first-time petitions, changes of status or changes in employment must also pay a $500 fraud fee.

- Employers are prohibited from requiring H-1B beneficiaries to pay or reimburse the employer for any part of these fees.

Filing Timeline

- On April 1 of each year, H-1B visas become available for the next fiscal year. This is the earliest date for which an employer may file a petition requesting an H-1B visa.

- For employers sponsoring foreign nationals for any visa, it is important to anticipate workforce needs and plan in advance. This is especially true for employers that will file petitions under the H-1B program because of the visa's limited availability and high demand. One option may be to interview college interns in order to identify potential H-1B applicants early.

Employer Compliance

- As part of the H-1B application process and in connection with the LCA, U.S. employers must meet specific labor conditions to ensure that American workers are not adversely impacted by the employment of foreign nationals. In addition to promising to meet certain wage requirements, an employer must attest that it is not using an H-1B employee to break a strike and that the employer has notified its work force that it plans to hire an H-1B employee.

- When an H-1B employee is out of work because there is no immediate work project available, as in the case of an employee who is employed by a job contractor who contracts the employee's services out to clients, the employee is still entitled to receive compensation.

- When an H-1B employee takes time off from working for personal reasons - for example, the employee takes a leave of absence - the employer does not have to compensate the employee for this time. However, the employer does have to compensate the H-1B employee if it normally compensates U.S. workers on similar leave.

- The employer is responsible for paying an H-1B employee even when the employer experiences a temporary shutdown in its operations. For instance, if the employer closes during a holiday season, it must continue to pay H-1B employees during this time.

- If the employer terminates the employee before the end of the period of authorized stay, the employer must pay the beneficiary's reasonable transportation costs "abroad," usually to the beneficiary's last place of foreign residence. The employer is also responsible for contacting USCIS and withdrawing the H-1B petition.

Employers accept important responsibilities when choosing to hire and sponsor foreign nationals for work authorization, especially under the H-1B program. Employers should be aware of their compliance obligations to ensure that they are acting in accord with both immigration and employment laws. The consequences of failing to comply can be harsh for both the employer, who may be subject to stiff civil penalties, as well as the foreign national, who may be subject to removal proceedings. To determine whether pursing an H-1B visa on behalf of a foreign national is the best course of action for you and your company, please contact us for a personal assessment of your situation.

For more information on any of these topics, please contact the Immigration Practice Group at sgoodman@hsdlaw.com or (423) 378-8877.

Injuries at Play- Employers Beware!

By Gregory K. Haden

Employers are well aware that workers' compensation liability generally attaches when one of their employees is injured at work. But what if an employee is injured at play? Certainly, an employer will not face workers' compensation exposure for an employee's knee injury sustained during a pick-up game of touch football, right? Well, think again. In the short span of two years, two key cases have been decided demonstrating that employers may very well face workers' compensation exposure to employees who sustain injuries while at play.

In 2005, the Tennessee Supreme Court handed down a decision which gave employers some workers' compensation protection from so-called "recreational" injuries at work. In Young v. Taylor-White, LLC, 181 S.W.3d 324 (Tenn. 2005), an employee was injured during a three-legged race at an employer sponsored (i.e., employer paid for) company picnic. Attendance at the picnic and participation in the three-legged race were neither required nor encouraged by the employer, but rather were activities "voluntarily" engaged in by the employee. The Tennessee Supreme Court ruled that the employee's injury did not occur in the course of her employment and therefore was not compensable under the Workers' Compensation Law of Tennessee. In so ruling, the Court held that "the voluntary nature of the activity, rather than the fact that the activity occurs on the employer's premises or provided a benefit to the employer, is the 'touchstone' for determining whether the injury occurred during the course of employment."

Employers generally applauded the Court's decision in Young, as it provided a bright-line test for determining the compensability of recreational or social injuries at work. The voluntary nature of the activity causing the injury, as the "touchstone" for determining compensability, was the key factor. So long as the employer did not compel the employee's participation in the recreational activity, injuries resulting from such an activity would generally not trigger workers' compensation coverage.

But what the Supreme Court giveth, the Supreme Court can taketh away, as the bright-line rule announced in Young, with its emphasis on the voluntary nature of the injury-producing activity, turned out to be short lived. Just two years after its decision in Young, the Tennessee Supreme Court, in a semi-about face, "clarified" its earlier analysis. In Gooden v. Coors Technical Ceramic Company, 236 S.W. 3rd 151 (Tenn. 2007), the Court conceded that Young's characterization of the "voluntary nature" of the activity as the "touchstone" for determining compensability of an injury was "not a judicious use of that term."

In Gooden the employee died of an acute myocardial infarction while playing basketball, on his employer's premises, during a work break. Even though the employees (as opposed to the employer) purchased the basketball goal, and even though the employee voluntarily participated in the game, the Court ruled that the employee's death occurred in the course of employment and was therefore compensable under the Workers' Compensation Law of Tennessee.

The Court cited several factors, besides the employee's voluntary participation, in arriving at its decision. The Court noted, first, that the death occurred "on the employer's premises." Second, the employees were "not permitted to leave the employer's premises on their breaks." Third, the employer "knowingly permitted" its employees to play basketball on their breaks. Fourth, the games were played with "regularity," three or four times a week. And fifth, the employee's supervisors "sometimes participated" in the games.

Thus, Gooden stands for the proposition that the voluntary nature of an activity, while still an important consideration, is but one factor to consider in determining whether an activity occurs during the course of employment. The factors quoted above, while certainly not exhaustive of the issue, are among those the courts will consider in deciding a particular case. "Each case must be decided with respect to its own attendant circumstances and not by resort to some formula."

In this respect, Gooden represents a return to the pre-2005 (i.e., pre-Young) analysis for determining the compensability of recreational or social injuries occurring in the employment context. Employers should recognize that injuries at play may be just as compensable as injuries at work under the Workers' Compensation Law of Tennessee. To help mitigate their workers' compensation exposure, employers should strive to eliminate, where practical, those factors referenced above which were cited by the Court in Gooden.
In short: Employers Beware!

For more information on any of these topics, please contact Gregory K. Haden, a member of the Litigation Group, at ghaden@hsdlaw.com or (423) 378-8830.

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