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H-1B CAP FILING AFTERMATH: EVALUATING THE FATE OF THE COMPUTER PROGRAMMER AND THE H-1B DEPENDENT EMPLOYER

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On March 31, 2017, on the eve of the FY 2018 H-1B Cap filing season, the USCIS issued a policy memorandum stating that computer programmer positions are not always "specialty occupations" that would render the occupation eligible under the H-1B visa. This memo rescinded an earlier memo of the Nebraska Service Center from 2000, which acknowledged that computer programming occupations were specialty occupations for H-1B purposes. The new guidance references the relevant part reference computer programmers in the DOL's Occupational Outlook Handbook that states, "Most computer programmers have a bachelor's degree; however, some employers hire workers who have an associate's degree." The guidance also questions whether a computer programmer position that is offered an entry-level wage could qualify for an H-1B specialty occupation because, as the OOH suggests, an associate's degree is sufficient to enter into the field.

The fact that the guidance was issued just as employers had filed H-1B petitions to reach on the first day of the filing period, April 3, 2017, caused panic in many quarters. The media also suggested that the new guidance was aimed against India based IT firms who utilize most of the H-1B numbers each year. Such speculation was backed up by another announcement on the USCIS website entitled Putting American Workers First: USCIS Announces Further Measures to Detect H-1B Visa Fraud and Abuse. The announcement specifically indicated that USCIS would focus its resources on conducting site visits on employers who are dependent on H-1B workers and who place H-1B workers at client sites. It also set up an e mail where US workers could report alleged H-1B fraud and abuse. The DOJ also followed with an announcement cautioning employers

who hire H-1B workers to not discriminate against American workers and that its Immigrants and Employee Rights division would vigorously enforce the anti-discrimination provision of the INA. INA 274B prohibits citizenship, immigration status and national origin discrimination in hiring, firing or recruitment or referral for a fee; unfair documentary practices; retaliation and intimidation. Not to be outdone by sister agencies, the DOL also put out a news release on April 4 stating that it would rigorously use its existing authority to initiate investigations of H-1B violators.

None of these announcements suggest anything new. The USCIS has for many years been critical of viewing computer programmers as a specialty occupation, especially if the H-1B worker receives level 1 wages. A search of non-precedent decisions on the Appeals Administrative Office website reveals a number of affirmations of denials of H-1B petitions for computer programmers over the years. This is not to suggest that a computer programmer will never be able to qualify for an H-1B visa, but the employer should not rely on the OOH and should be prepared to rebut the OOH findings that an associate's degree would be adequate preparation for a computer programmer with respect to its niche position. In Fred 26 Importers Inc. v. DHS, a federal district court overturned a finding of the AAO that a Human Resource Manager did not qualify for an H-1B occupation as the OOH indicated that a broad range of disciplines, as opposed to a specialized discipline, could qualify a person for the occupation. The employer used expert witnesses to demonstrate that the position was complex, even in a small organization, to require a bachelor's degree in a specialized field. If the employer's business model requires assigning the H-1B worker at a third party client site, it is further important to demonstrate that both the petitioning employer and the client require a bachelor's degree in a specialized field. See Defensor v. Meissner, 201 F.3d 384 (5th Cir 2000). At the same time, under the Neufeld Memo, the petitioning employer must additionally demonstrate that it and not the client exercises control over the H-1B worker's employment. Moreover, not all computer occupations have received the same treatment by the OOH as computer programmers. For instance, according the OOH, a bachelor's degree in computer science is a requirement to qualify as a computer systems analyst, although some employers may require bachelor's degrees in business or liberal arts. With respect to software developers, the OOH categorically states that a bachelor's degree in computer science or related fields is a minimum requirement. Hence, a software developer or

computer systems analyst will fare better than a computer programmer, even at an entry level wage. It can also be argued that in every profession there is an entry level position, and that factor in itself should not undermine the ability of the employer to qualify the position for H-1B visa classification. If the position qualifies as a specialty occupation, then paying an entry level wage should not undermine it. If the position does not qualify as a specialty occupation for H-1B classification, then paying even at the highest wage level would not be able to salvage it.

Site visits of the FDNS are nothing new, and firms that heavily rely on H-1B workers who are placed at third party sites have been the focus in recent years. However, with respect to the USCIS's intention to conduct site visits, the announcement states, "Targeted site visits will allow USCIS to focus resources where fraud and abuse of the H-1B program may be more likely to occur, and determine whether H-1B dependent employers are evading their obligation to make a good faith effort to recruit U.S. workers." While it is true that H-1B dependent employers are obligated to recruit for US workers before filing H-1B petitions for foreign national workers, this obligation does not apply when a dependent employer files an H-1B petition for an exempt employee – one who is either paid $60,000 or higher or who has a master's degree or higher in the specialty that is relevant to the position. The USCIS announcement, unfortunately, is somewhat misleading, and a dependent employer who is not obligated to recruit because it has filed an H-1B petition for an exempt employee may be subject to a warrantless complaint or investigation. It is urged that the USCIS clarify this point in its announcement so that it can focus its resources on legitimate rather than frivolous complaints.

There is also no question that a US employer is prohibited from discriminating against an American worker in favor of an H-1B worker. However, in order to be found liable, it must be demonstrated that there was an intention to discriminate based on citizenship or national origin. If there was a lawful business objective to hire H-1B workers, or even contract with an IT consulting firm that uses H-1B workers, that would not be a legal basis to hold an employer liable under the anti-discrimination provisions of INA 274B. Only time will tell whether the DOJ intends to push the envelope further.

The USCIS on April 7, 2017 announced that the FY2018 H-1B cap had been reached. It is likely that more H-1B petitions will get rejected than accepted. Those petitions that get accepted, in the event that they face more scrutiny by

virtue of being filed for computer programmer positions, will not outright get denied. The USCIS will issue a Request for Evidence, which allows the employer to demonstrate that the position qualifies for a specialty occupation. If there is a denial after that, the employer may file an appeal to the AAO, and if the appeal is dismissed, the employer can seek review in federal court. Under Darby v. Cisneros, an employer may directly pursue review in federal court and bypass the AAO. A dependent employer who is the subject of a complaint for not recruiting US workers first has a rock solid defense if the employer filed an H-1B petition for exempt employees. Finally, employers must always hire objectively based on legitimate business criteria in order to stave off any allegations regarding discrimination. Although there are many challenges for employers filing H-1B petitions under the FY 2018 H-1B cap, they are not insurmountable.