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THE TIMES OF INDIA

H-1B visa: The procedural changes and 5 key challenges for India Inc

TNN | Mar 7, 2018, 09.11 PM IST

MUMBAI: Even as the US Congress has not taken a final decision on the future of H-1B visas, newly-announced administrative changes relating to third-party H-1B visa petitions have left India Inc grappling with a multitude of challenges.

Most IT companies in India (which corner a bulk of H-1B visas issued each year) work on an employer-vendor-client (E-V-C) module and the employee is deputed to work under an H-1B visa at a client (third party) site in the US.

These companies while petitioning (applying) for an H-1B visa for their employees or even for renewing an existing visa will have to provide a host of evidence in the form of detailed contracts and itineraries of employees, to substantiate that the H-1B visa holder's assignment will be specific, non-speculative and that it requires specialisation.

In addition, the United States Citizenship and Immigration Services (USCIS), the agency which oversees US immigration, in its policy memorandum issued on February 22, also requires H-1B petitioners (companies seeking H-1B visas for their employees) to prove that a legitimate employer-employee relationship is maintained while the employee is working at a third party worksite.

The new requirements will make filing of petitions for H-1B visas or renewals costlier and time consuming. The fear is that there will be a spike in site visits, more requests for further evidence or even denials. Indians lead the pack when it comes to

allotment of H-1B visas garnering a significant share of the 65,000 visas that are allotted each year. Thus, the recent policy memorandum has India Inc understandably worried.

USCIS' policy memorandum says that: "Petitioners must demonstrate that they have specific and non-speculative qualifying assignments in a speciality occupation for that beneficiary (ie: employee) for the entire time requested on the petition. While an H-1B petition may be approved for up to three years, USCIS will, in its discretion, generally limit the approval period to the length of time demonstrated that the beneficiary will be placed in non-speculative work and during which the petitioner will maintain the requisite employer-employee relationship."

The key challenges that have emerged are below:

1.) H-1B renewals are also covered: The policy memorandum also applies to visa renewals and not merely petitions for initial H-1B visas. "The petitioning employer must now also prove that the H-1B program requirements have been met for the entire prior approval period. This includes showing that the employee performed services in the specialised occupation, was paid the required wage and the employer maintained the right to control the employment, even as the place of work was at a third party work site," states EY-US, a major professional services firm in a communiqué.

2.) Shorter visa tenure? The initial H-1B visa can have a maximum tenure of three years and typically petitioning employees sought an entire three year period. "It is interesting to note that the third party worksite memorandum comes in the wake of a recent policy reformulation from the State Department (DOS) about the Foreign Exchange Manual which gives DOS officers the ability to utilise their discretion to curtail time given to individuals for particular H-1B projects in the US," points out US headquartered law firm NPZ Law Group.

"Now unless one can upfront prove a three year project, it is unlikely that an H-1B visa will be granted for the full period. Most master service agreements are for a year and the understanding is that they are automatically renewed. At the time of application proving that the employee needs to be in US for three whole years, may be difficult," says an in-house immigration expert at an IT company.

"Also if the tenure is reduced, employers will have to take a decision about either making a motion (contest it in court) or filing

an appeal, both of which are time consuming and could result in denials," says David Nachman, managing attorney, NPZ Law Group.

3.) Providing details of contracts: From February 22 onwards, employers submitting initial or renewal petitions for H-1B visas will have to provide all contracts between them, the intermediary vendors and all end clients. Other corroborative evidence may also be submitted, states EY-US.

USCIS has always required that the employee should remain under the control of the petitioning employer, even as he works at the site of an end client. "Letters were submitted from clients to enable easier processing of the H-1B applications, but these were generic in nature. Now detailed letters will be required from end clients, actually spelling out the nature of the work which will be done as well as contracts entered into at various levels. Mere submission of a Master Service Agreement will no longer help, detailed statement of work agreements will need to be submitted," says the in-house immigration expert.

"The fear is that if the end-client letter is detailed, the USCIS may then argue that the employee is not under the control of the petitioning employer but under the control of the end client," he adds.

Says Nachman: "H-1B employers will need to provide much higher levels of evidence to demonstrate that 'control' is not relinquished. Such evidence is likely to include copies of contracts, payroll stubs, itineraries, et all. It is likely that these higher level requirements for evidence will be very significantly scrutinized (extremely vetted) to ensure that there is no misuse of H-1B visas."

4.) Providing details of itineraries: Prior to issue of this policy memorandum, USCIS generally permitted petitioning employers to provide general statements regarding the dates and locations of an H-1B employee's proposed or possible deputation at third party locations. Now this stands overturned as a specific detailed itinerary corroborated with contracts is required.

"If the end client has more than one location, at the time of applying for a visa, it is not possible to know the exact dates where an employee will be at each of these locations," rues the inhouse immigration expert.

“Petitioning employers should provide the relevant contracts along with as detailed of an itinerary as can be provided based on the information available at the time of filing,” suggests Scott J. FitzGerald, Partner, Fragomen Worldwide.

5.) Possible increase in denials: Last application season, there was a spoke in the number of inquiries especially where the wages were entry level. USCIS sought evidence that the job was a ‘speciality occupation’ and there were delays in processing. The newly issued policy memorandum aligns with Trump’s Buy American and Hire American Executive Order meant to protect local employment. “It appears the administration is setting the stage for deeper vetting and scrutiny for third party worksite assignments,” says Nachman.

FitzGerald sums up by saying: “Challenges have been around for years. The new issue is that if the relevant information is provided and is complete, but large number of cases are denied, then it will result in an enormous problem. If this happens the only solution may be to sue the U.S. government for changing the applicable legal standard without notice and the opportunity for comment, or for making arbitrary and capricious decisions.”