PUBLICATION

TARP Recipients Saddled with Restrictions for Hiring H-1Bs

Authors: Robert C. Divine
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The stimulus bill being enacted weekend contains a provision adding onerous new restrictions to the hiring of H-1B workers by entities receiving TARP funding or Federal Reserve loans. This comes just before this year's filings on April 1 for the limited number of H-1B slots for new workers and amidst a great deal of consolidation of banking and other institutions that require large amounts of sophisticated software engineering to merge complex data systems.

Section 1611 of the bill prohibits "any recipient of funding under title I of the Emergency Economic Stabilization Act of 2008 (Public Law 110-343) or section 13 of the Federal Reserve Act (12 U.S.C. 342 et seq.) to hire any [H-1B worker] unless the recipient is in compliance with the requirements for an H-1B dependent employer." "Hire" is defined to mean "to permit a new employee to commence a period of employment," and the provision is to sunset 2 years from enactment.

The stimulus bill's relevant section, separately titled the "Employ American Workers Act," ties to banks and other TARP recipients a set of requirements previously limited to employers whose H-1B workers are a significant portion of their workforce. Banks have employed only negligible percentages of H-1B numbers, but the law now requires a TARP recipient or other bank filing an H-1B petition for a new worker (as opposed to extension for existing employee) to attest that it:

- Will not have "displaced"(statutorily defined) any U.S. worker (defined as citizen, national, permanent resident, refugee, asylee, or "immigrant otherwise authorized" for employment) from an "essentially equivalent" position within the 90 days before and after filing any H-1B petition based on that LCA,
- Will not place the H-1B worker with a related employer without confirming that the other employer will not have made such a displacement.
- Has taken good faith steps to recruit in the U.S. using industry-wide standards and offering prevailing wages.
- Has offered the position to any equally or better qualified U.S. worker who has applied.

While the costs and obligations of the normal H-1B rules and process tend to cause employers to resort to H-1B hiring when U.S. workers are not readily available, H-1B workers often provide unique training and skills that tend to enhance the employment of U.S. workers in the same area. Nevertheless, employers affected by the new law must anticipate administrative challenges by individual and collective workers claiming that they were equally or better qualified or were laid off to make room for H-1B workers.

An H-1B dependent employer should retain for at least one year documentation of its recruitment efforts, the qualifications of U.S. workers who applied, and reasons for terminating any employees in affected occupations. Penalties for noncompliance can be substantial, although the penalty of 3-year debarment from sponsoring any temporary or permanent workers is specifically removed in the bill.

How We Can Help

Baker Donelson's Immigration Team can pick the classification that is best suited for a particular worker's credentials, duties, location, employer, and other factors, and then prepare expeditiously the papers necessary

to pursue that status, in a manner least burdensome to the clients but most likely to result in a speedy approval. We know the twists and turns and the seemingly infinite variables involved and can lead the employer and international worker confidently through the maze of procedures, providing written guidance at each step and providing real-time status information to each worker and to the employer representative via internet. We coordinate cases for volumes of workers for a single employer or conglomerate. We keep in mind the prospect of permanent residence from the beginning and avoid missteps that would prejudice speed and success in the ultimate goal. We take care of the status of family members of the principal workers.