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IN PRACTICE

# IMMIGRATION LAW

## TARP Recipients Limitations on Foreign Worker Hiring

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Earlier this year, the U.S. Congress voted in the American Recovery and Reinvestment Act to put strict limits on recipients of Troubled Assets Relief Program (TARP) funding in regard to their employment of temporary highly-skilled workers from overseas through the H-1B visa program. The measure was introduced by Senators Charles Grassley (R-Iowa) and Bernie Sanders (Independent-Vermont) as an amendment to the Emergency Economic Stabilization Act of 2008 (EESA), which puts restrictions on those institutions receiving funding through TARP or under Section 13 of the Federal Reserve Act's "Discount Window" for short-term, secured loans to financial institutions and other companies. The H-1B provisions are not as strict as the original amendment by Sen. Grassley, who wanted to keep TARP recipients from hiring H-1B workers altogether. However, the amendment requires that TARP recipients follow the same rules as for H-1B dependent employers, defined below, meaning that firms using TARP funds face additional hurdles when trying to hire foreign workers. The restrictions became effective upon the stimulus bill's enactment on February 17 and remain effective for two years, expiring on February 16, 2011.

The H-1B is an employment-based, temporary visa category that allows employers to hire professional workers who hold a relevant bachelor's or higher degree in a "specialty occupation." INA Section 101(15) (H). Such specialty occupations include bankers, economists, insurance executives and accountants. Employers who wish to hire an H-1B worker must first file a Labor Condition Application (LSA) with the Department of Labor. All employers, in filing the LSA to hire an H-1B worker, must make the following attestations that they will : (1) pay the H-1B worker at least the local prevailing wage or the employer's actual wage, whichever is higher; pay for nonproductive time in certain circumstances; and offer benefits on the same basis as for U.S. workers; (2) such employment of an H-1B will not adversely affect the working conditions of workers similarly employed; (3) not employ an H-1B visa holder during a strike or lockout in the occupation (and notify the government of any future strike or lockout); and (4) within 30 days before the date the LCA is filed, provide notice that the employer intends to hire an H-1B worker to the collective bargaining representative of workers in the occupation, or if there is no bargaining representative, the employer must post such notices in conspicuous locations at the intended places of employment, or provide them electronically.

TARP recipients will be required to make "H-1B Dependent Employer" attestations on the LCA they file for new H-1B employees. Under the Immigration and Nationality Act Section 212(n)(3) (8 U.S.C. 1182(n)(3)), an H-1B Dependent Employer is defined as (1) an employer that has 25 or fewer full-time equivalent employees who are employed in the U.S. and at least seven such full-time equivalent employees are H-1B visa holders; (2) the employer has between 26 to 50 full-time equivalent employees and more than 12 are H-1B visa holders; or (3) the employer has at least 51 full-time equivalent employees who are employed in the U.S. and at least 15 percent of the number of such full-time equivalent employees are H-1B visa holders. 20 CFR Section 655.736 explains that the number of full-time equivalent employees are determined by counting the number of employees who hold 40-hour a week positions and aggregating part-time employees to full-time equivalent employees. TARP recipients are automatically given the designation of H-1B Dependent Employer regardless of how many H-1B workers they actually employ.

An H-1B Dependent Employer and TARP recipients must make the following additional attestations when fil-

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ing the LCA: that the employer will not displace any similarly employed U.S. worker within 90 days before and ending 90 days after the date of filing a petition for an H-1B; prior to filing any petition for an H-1B nonimmigrant pursuant to this application, the employer took or will take good faith steps to recruit U.S. workers for the job for which the H-1B is sought and offer compensation at least as great as required to be offered to the H-1B nonimmigrant; and the employer will not place the H-1B employer at the worksite of another employer unless the employer first makes an inquiry as to whether the other employer has displaced or intends to displace a similarly employed U.S. worker within 90 days before or after the placement of the H-1B worker. 20 CFR Sections 655.738 and 655.739. A U.S. worker is defined as U.S. citizens, or nationals, lawful permanent residents and other immigrants authorized to work. The H-1B dependent employer rules provide an exemption from the extra attestations for H-1B workers who possess master's degrees or who receive wages of at least $60,000. However, the act makes this exemption unavailable to TARP recipients.

20 CFR Section 655.738 explains displacement as the laying off U.S. workers (with the exception of for-cause discharge, voluntary retirement, and termination of the funding grant under which the U.S. worker was employed) and the laid-off U.S. worker's job must be "essentially equivalent" to the H-1B position. However, if the employer can show that such U.S. workers have been made a bona fide offer of a similar job with the same employer and such offer was refused, it will not be considered displacement.

20 CFR Section 655.739 articulates the requirements for good faith recruitment of U.S. workers for the H-1B position. First, the recruitment procedures must meet industry-wide standards. There is no set of approved procedures; rather, each employer must make a determination of recruitment procedures for the industry by using methods established by the industry, reported in trade organization surveys and official statements, or studies made by consultants. The recruitment must be made in a way that is common in the industry and include those strategies that have been proven to be successful in recruiting U.S. workers for that industry. The employer must use a combination of recruitment methods that reaches both an internal and external audience to the employer's own workforce and must include at least some active recruitment, methods which makes some proactive efforts to identify potential U.S. workers for the solicited position. The required wage must be the higher of the local prevailing wage or the employer's actual wage. Most importantly, the employer is to make good-faith efforts to recruit U.S. workers, and may not merely utilize the most minimal of recruitment methods used in the industry, or use only those methods which are unlikely to yield any U.S. worker candidates for the position, even if such methods are commonly used by those in the industry.

TARP recipients should be aware that they are subject to complaints from U.S. workers in hiring an H-1B worker. If a U.S. worker feels that he or she was denied a job that ultimately went to an H-1B employee, the U.S. worker may file a complaint with the attorney general, alleging either a failure to hire the complainant or the employer made a material misrepresentation with regard to his duty to offer employment to the U.S. worker. 20 CFR Section 655.705(b). If the attorney general finds reasonable cause, the employer is required to participate in binding arbitration and to pay the fees and expenses of the arbitrator. INA Section 212(n)(5).

The restrictions imposed on TARP recipients most likely do not apply to their H-1B employees seeking extensions of their current visas. The act defines "hire" as permitting "a new employee to commence a period of employment." EESA, Section 1611(b)(2). Thus, all new H-1B hires by a TARP recipient will be subject to these restrictions between February 17 and February 16, 2011. However, the government has not yet issued guidance implementing the new law, so this interpretation may be subject to further determination.

The Department of Labor has recently issued instruction on how to complete the newly revised forms that were redesigned for TARP recipients' use. The U.S. Citizenship and Immigration Services ( USCIS) has issued newly revised Form I-129 Petition for Non-Immigrant Worker. USCIS highly encourages employers to use the revised form, however, use of the revised form will not be required for fiscal year 2010.

### Conclusion

TARP recipients should carefully review the requirements of H-IB dependent employers so that they may avoid running afoul of federal regulation regarding the employment of foreign workers. ■