

THE IMMIGRATION EDGE

**Stimulus Plan Provisions for Favoring U.S. Workers
Before Hiring H-1B Foreign Workers: Focus on
Financial Institutions**

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The economic stimulus package that Congress passed and President Obama signed into law on February 17, 2009, imposes U.S. worker recruitment and retention, as well as record keeping obligations, on certain federal funds recipients before hiring H-1B foreign workers.

The American Recovery and Reinvestment Act of 2009 (the “Recovery Act”) provides public funding, extended tax incentives, loans and outright grants to businesses to stimulate the economy. Under Section 1611, a provision subtitled the “Employ American Workers Act,” employers receiving funding under the federal Troubled Assets Relief Program (“TARP”) must try to hire U.S. citizens before recruiting foreign workers under H-1B status. Congress created TARP under a prior law, the Emergency Economic Stabilization Act of 2008, which was the \$700 billion bill passed and signed in October 2008.

What is H-1B status?

The general requirements for hiring a foreign worker in H-1B status are the following:

- The employer must have a position for which the company requires at least a bachelor’s degree or the equivalent;
- The beneficiary must hold the degree from the U.S. or the equivalent degree and/or experience from the U.S. and/or abroad; and
- The employer must pay the prevailing wage and have working conditions for the foreign worker no less favorable than for U.S. workers.

Under the general provisions, there is no requirement to recruit for U.S. workers before hiring a foreign worker in H-1B status.

How are Recovery Act H-1B rules different from general H-1B rules?

The Recovery Act restrictions require TARP funding recipients to show they have recruited for U.S. workers before petitioning for a foreign H-1B worker, and not to have displaced or replaced U.S. citizens with foreign workers. The restrictions are similar to those imposed on employers with a high percentage of H-1B workers, termed “H-1B dependent” employers.

The U.S. worker recruitment and hiring provision imposes on the employer the following attestations:

- The employer has taken or will take good faith steps to meet industry-wide standards to recruit U.S. workers for the job;
- It will offer compensation in at least the amount offered to the H-1B beneficiary;
- The employer has offered or will offer the job to any U.S. worker equally qualified with the foreign worker.

Following are the non-displacement obligations:

- The employer has not and will not displace or terminate any U.S. worker in a similar position to the H-1B during the 90 days before or 90 days after filing the H-1B petition; and
- Under “secondary” displacement restrictions, the employer will not place the H-1B worker at any secondary site without inquiry about displacement of U.S. workers in the position at the secondary site.

Currently, compliance is based on attesting on H-1B petition forms that the petitioning employer actively has recruited American workers and are not displacing or replacing U.S. citizens with foreign workers. The Department of Homeland Security or the Department of Labor could audit employers to require evidence of compliance. Employers who receive TARP funding should keep records in case of audit, such as the following:

- Ads and notices describing the position opening;
- Copies of resumes received for the position;
- Notes about lack of qualifications of applicants for the position; and
- Records of terminations and layoffs within the position.

Additional record keeping is advised for employers who place workers at secondary sites.

Who must comply with the H-1B recruitment and reporting rules?

The rules do not apply to all businesses that receive Recovery Act benefits. Only TARP funds recipients are subject to the rules, that is, primarily financial institutions. As of February 18, 2009, more than 420 companies have received TARP funding, according to a [list](#) the watchdog ProPublica is compiling. The rules also apply to Federal Reserve banks, under a specific provision of the Federal Reserve Act. Employers that receive other Recovery Act funds or benefits are not subject to the H-1B recruitment, nondisplacement and record keeping requirements.

When are the rules in effect?

With the signing of the bill into law, the rules are in effect now. The restrictions are scheduled to sunset in two years, on February 17, 2011. They apply to new hires, but not to extensions of current H-1B employees.

Employers who have received TARP funding need to keep the compliance provisions in mind when petitioning for new H-1B workers, including for petitions filed for the Fiscal Year 2010 H-1B quota. The fiscal year begins on October 1, 2009, but with demand anticipated to exceed the quota, employers need to plan to submit petitions six months in advance, that is, on March 31, 2009, to be considered for the random selection process. TARP recipients should compile and retain records to show compliance with the restrictions, in case of an audit.

What alternatives exist?

Alternative immigration options to H-1B status are available in many cases, including the following:

- L-1 intracompany transfers for persons who worked for a foreign entity related to a U.S. company for at least one year;
- For Canadians and Mexicans, TN status under the North American Free Trade Agreement (“NAFTA”), as well as TN-1 status for citizens of Chile and Singapore;
- J-1 training and other exchange programs;
- E-3 visas for Australians;
- O-1 for foreign workers with extraordinary ability;
- Employment authorization documentation (“EAD” cards) for recent foreign graduates with U.S. bachelor’s and master’s degrees; and
- Labor certification for permanent resident status under the “PERM” process as a first step toward “green cards.” Note, however, there are processing backlogs for many types of permanent resident applications.

What This Means for Employers

Employers need to resist any temptation to have potential employees begin or continue working, even in what might be considered volunteer positions, without the proper work authorization. Hiring employees without the proper authorization can subject the employer to penalties and subsequent scrutiny under immigration law.

Employers who have received TARP funds and are considering hiring foreign workers should consult with immigration counsel to determine eligibility to file an H-1B petition and to assess compliance with record keeping requirements.

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