

## H-1B Provision Included in Stimulus Bill

**This provision, known as the Sanders Amendment, provides that recipients of TARP funds can only hire H-1B workers if they comply with the rules applicable to H-1B Dependent employers.**

On February 18, 2009, President Obama signed the American Recovery and Reinvestment Act of 2009 (the “Stimulus Bill”). Among other things, the new law places restrictions on the hiring of H-1B workers by recipients of Troubled Assets Relief Program (TARP) funds. This provision in the Stimulus Bill, known as the Sanders Amendment, provides that recipients of TARP funds can only hire H-1B workers if they comply with the rules applicable to H-1B Dependent employers. Non-recipients of TARP funds are not affected. The H-1B restrictions contained in the Stimulus Bill expire on February 17, 2011.

Employers who receive TARP funds will, during the applicable period, need to attest as part of any H-1B petition that:

1. Hiring the H-1B worker will not result in a direct or secondary displacement of U.S. workers from the same or “essentially equivalent” positions in the 180 day period that encompasses the 90 days before and after the filing of the H-1B application;
2. The employer has made a good faith effort to recruit U.S. workers for the job indicated in the H-1B petition. The recruitment should meet industry-wide standards and offer compensation that is at least as much as the wage required to be paid to H-1B beneficiary. The employer may use legitimate selection

criteria relevant to the job that are normal or customary to the type of job involved, so long as such criteria are not applied in a discriminatory manner.

To prove that it has not violated the non-displacement rules, employers must retain all records relating to the termination of employees during the 180 day period at issue. Employers subject to the rule may still terminate U.S. workers for legitimate, job-related reasons, but the regulations list a variety of information that must be retained, including the terminated worker’s job title, job description, experience and qualifications, assignment, documents related to the decision to terminate the U.S. worker, documentation relating to the job performance, etc.

The H-1B restrictions in the Stimulus Bill appear only to apply to the hiring of new employees. The Act defines “hire” as permitting a “new” employee “to commence a period of employment.” Thus, the H-1B provision in the Stimulus Bill would not apply to extension petitions filed within the applicable two-year period. However, the exemptions contained within the H-1B Dependent regulations that apply to H-1B petitions for individuals with a masters or higher degree or who are paid at least \$60,000 per year do not appear to apply in the context of the restrictions and requirements contained in the Stimulus Bill.

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