

Insights: Alerts

Deadline Fast Approaching to File Cap-Subject H-1B Petitions for Foreign National Workers: Important Dates and What You Can Do Now

February 16, 2016

Authors: Business Development Manager Nicole Brooks and Senior Department Attorney Chuck Rice

The federal government's H-1B visa program helps U.S. employers deal with the shortage of qualified candidates for skilled positions by allowing employers to employ foreign national workers in a "specialty occupation" – that is, an occupation requiring the theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor's or higher degree. Federal law limits the number of new H-1B visas that are available each Fiscal Year (FY). Therefore, employers wishing to add new H-1B visa employees to their payrolls should be aware of an important filing deadline that is fast approaching. The filing period for "new" H-1B petitions to be counted against the annual H-1B quota (the "H-1B cap") for FY 2017 begins on Friday, April 1, 2016. Employers should be prepared to send all cap-subject H-1B petitions by overnight delivery on March 31, 2016 to be received by the U.S. Citizenship and Immigration Services (USCIS) on April 1, 2016.

New H-1B petitions subject to the H-1B cap in FY 2017 will have an employment start date of October 1, 2016 or later. Individuals currently holding F-1 student visas, individuals seeking to change to H-1B status from another work status (such as E-3, L-1, O-1, or TN), and individuals outside of the United States commonly require new, cap-subject H-1B visas.

Annual Numerical Limitation

Since the number of new H-1B visas issued each fiscal year is subject to annual limits, it is critical that employers get their petitions for new H-1B visas to USCIS at the start of the filing period on April 1, 2016. Currently, the annual limit for new H-1B visas is 65,000 (6,800 of which are set aside for nonimmigrants who are citizens of Chile or Singapore based on the Free Trade Agreements that the United States maintains with these countries). In addition to the regular or "Bachelor's" quota, there are an additional 20,000 H-1B visas available to beneficiaries who, at the time of filing, possess an advanced degree (*i.e.*, a Master's degree or higher) from a U.S. academic institution.

If the number of petitions received by USCIS within the first five business days of April exceeds the annual quota, a computer-generated random selection process, or lottery, will be conducted to select cases for processing. The first lottery will be limited to those applicants who hold an advanced degree from a U.S. academic institution. If an advanced degree petition is not selected in the advanced degree lottery, it will be

included in a second lottery for the regular quota. Any cap-subject H-1B petitions that are not selected in the lottery will be returned by USCIS with filing fees.

Exemptions: Not All H-1B Petitions Are Subject to the Annual Quota

Not all H-1B petitions are subject to the annual fiscal year limitation. The following types of H-1B petitions are exempt from the H-1B cap:

- petitions filed to extend or amend H-1B employment for foreign workers already in H-1B status; and
- petitions filed on behalf of new workers to be employed by institutions of higher education or related nonprofit entities, nonprofit research organizations, or governmental research organizations.

Immediate Steps Employers Can Take to Prepare for the FY 2017 H-1B Cap Filing Season and Ensure Timely Filing of Petitions

In the last few fiscal years, the H-1B cap was met within the first week of the filing period. In the most recent fiscal year, approximately 233,000 applications, including petitions filed for the advanced degree exemption, were submitted during the filing period and demand for the FY 2017 quota numbers is likely to be even greater than last year. In view of these statistics, employers should immediately begin identifying current and future employees who will need H-1B visa status for legal employment in the United States. Such careful pre-planning will allow sufficient time for document collection and petition preparation, including the time required to file and receive certification of the requisite Labor Condition Application (LCA).

The LCA, which is submitted online with the U.S. Department of Labor, is a prerequisite to a properly-filed H-1B petition. As part of the application, employers attest that they will pay the H-1B worker the higher of the prevailing wage or actual wage (market rate) for that position in the geographic area of intended employment. To guarantee the timely approval of the LCA and the ability to send the H-1B petition on March 31, 2016 for overnight delivery to USCIS on April 1, 2016, employers must take into consideration the additional processing time necessary for the LCA to be certified, which can be up to 10 days. Once the H-1B cap is reached, employers will not be able to petition again for cap-subject H-1B employment until April 2017 for FY 2018 start dates.

In light of the above, employers should make the necessary preparations in advance and initiate any cap-subject H-1B petitions as early as possible to ensure they reach USCIS on April 1, 2016, the opening day of the filing period (Friday, April 1 to Thursday, April 7, 2016). Such advance preparation will maximize your organization's ability to secure new H-1Bs for employment in the next fiscal year.