

Publications

Immigration Alert: Time to Prepare For April 1 H-1B Filings

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At the beginning of each government fiscal year, which starts October 1, the U.S. Citizenship and Immigration Services (USCIS) makes available an allocation of new H-1B visas. In general, the H-1B visa classification permits a foreign national to work in the United States for a temporary period in a "specialty occupation."

For the upcoming fiscal year (FY 2017), USCIS will begin accepting cap subject H-1B petitions on Friday, April 1, 2016. H-1B visas are numerically limited, with a total of 85,000 visas available each fiscal year. The quota is divided into the following: 65,000 for the regular H-1B cap for positions requiring a bachelor's degree or its equivalent, and 20,000 for individuals who hold an advanced degree (master's degree or higher) from an accredited U.S. college or university. 6,800 H-1B spots are reserved for Singapore and Chile citizens based on the Free Trade Agreements with these countries. These numerical visa limitations are referred to as the H-1B cap. USCIS anticipates that April 1, 2017 will see a repeat of the mass filings from last year, when nearly 233,000 applications were filed and the annual H-1B cap was reached within the first few days after the initial filing date. During the last two years, the H-1B cap was met the first week of filing, and we expect that this will be the case this year as well. If USCIS receives more petitions than it can accept during this first week of April, USCIS will use a lottery system to randomly select the petitions eligible for H-1B status.

Petitions that are subject to the annual cap include petitions that are filed for first time H-1B beneficiaries, or for people who have been outside the United States for one year or more since exhausting any prior permissible H-1B time and are seeking to return to the United States for a new period of H-1B admission. Employers should begin considering which of their employees may need H-1B cap-subject filings. Most commonly, these are recent college graduates who are working on F-1 Optional Practical Training (OPT). For multinational companies, the list may include L-1B employees who are nearing the five-year limit on their L-1B stays in the United States. Other typical examples include L-2 and E-2 employees working on Employment Authorization Documents (EADs), who may wish to hold a status that is not dependent upon their spouses. Employers should anticipate their

workforce needs for FY17, and consider whether the filing of cap-subject H-1B petitions is needed.

Note also that employees working pursuant to Optional Practical Training (OPT) often have work authorization that expires in the summer months, prior to the October 1 date where new H-1B visas become available. This has become known as the "cap gap" problem. However, the timely filing of an H-1B visa petition for any employee faced with a cap gap situation will automatically extend the employee's lawful F-1 status and work authorization until October 1, 2016, if the H-1B petition is accepted for processing. To be deemed timely, this petition must be filed on or after April 1, 2016 (until the cap has been reached) and prior to the expiration of the employee's current OPT work authorization.

If you think you have a candidate for H-1B status who might be subject to the cap, we encourage you to contact us as early as possible to discuss the timing of filing the petition. In light of the economic forecast, increased USCIS scrutiny of petitions, and the historical numbers of filings, employers should act quickly to allow sufficient time to prepare the H-1B petitions and assure the applications reach the USCIS on April 1, 2016. Given the likelihood of a FY2017 H-1B cap lottery, we also recommend that employers explore other possible visa options for employees.