

On Friday, April 1, 2016 US Citizenship and Immigration Services (USCIS) will begin accepting filings of H-1B specialty occupation visa petitions for employment in the fiscal year 2017 (FY 2017). It is important for employers to submit H-1B petitions as early as possible for new and existing employees eligible for a first-time H-1B visa to begin employment in FY 2017 (i.e., on or after October 1, 2016).

Congress has established a strict cap of 65,000 H-1B visas that may be issued, with an additional 20,000 visas available for applicants with advanced degrees from US colleges or universities. Furthermore, 6,800 visas are set aside from the 65,000 for Chile and Singapore nationals' H-1B1 visa. Specialty workers of certain educational and research institutions, as well as some workers in Guam and the Commonwealth of the Northern Mariana Islands, may be exempt from the cap.

Growing Demand

Despite their limited availability, demand for H-1B visas has been growing. In 2015, USCIS received nearly 233,000 H-1B petitions for FY 2016, including petitions for the advanced degree exemption. All of the petitions were received between April 1 and April 7, 2015, at which point USCIS closed the filing period. As a result of the massive influx of petitions, USCIS utilized a lottery system to randomly select petitions for adjudication.

The demand for H-1B visas in 2016 will likely be the same as, if not greater than, it was in 2015. Therefore, if the number of petitions received by USCIS again exceeds the numerical cap, which is expected, then only those petitions that are submitted within the first five business days of April will be eligible for the H-1B lottery. If a petition is not selected, or submitted after the final receipt date, the petition will be rejected.

Cap-gap Benefits for Students

As a reminder, the government's "cap-gap" relief allows F-1 student visa holders with Optional Practical Training (OPT) work authorization (via EAD card) to automatically extend their expiring period of stay and work authorization as long as they have a pending or approved cap-subject H-1B petition that was filed with USCIS prior to their OPT expiration. Further, cap-gap benefits require action by the student's school to update the student's Form I-20, Certificate of Eligibility for Nonimmigrant Student Status, and may impose travel restrictions on the student during the period between the end of the student's initial OPT period and their transition to H-1B status.

In a related development, a federal judge last year ruled that a 2008 DHS interim final rule extending the period of post-graduation OPT by 17 months for STEM (Science, Technology, Engineering and Math) students graduating from US universities was invalid, because DHS promulgated the rule without proper notice and comment. However, the court stayed execution of its order vacating the rule until February 12, 2016. In another recent development, the court further stayed execution of its order until May 10, 2016 in order to provide USCIS additional time to promulgate a new OPT STEM rule.

Next Steps

Early action in preparing H-1B petitions is becoming increasingly important. With the five-day petition submission period and increased demand for H-1B visas, employers should begin preparing H-1B filings well in advance of April 1, 2016. Prior planning will help avoid unforeseen problems in the petition preparation process to ensure timely H-1B filings.

If you have any questions, or would like more information regarding H-1B petitions or immigration developments, please contact your designated Squire Patton Boggs lawyer or one of the individuals listed in this publication.

Contact

Brian E. Schield

Partner, Los Angeles

T +1 213 689 5109

E brian.schild@squirepb.com

Rebekah J. Poston

Partner, Miami

T +1 305 577 7022

E rebekah.poston@squirepb.com

Gregory A. Wald

Principal, San Francisco and Miami

T +1 415 393 9828

E gregory.wald@squirepb.com

Samuel J. Mudrick

Senior Associate, Washington DC

T +1 202 457 5218

E samuel.mudrick@squirepb.com

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations nor should they be considered a substitute for taking legal advice.

© Squire Patton Boggs.

All Rights Reserved 2016