

USCIS to Begin Accepting Cap-Subject H-1B Visa Petitions on April 2, 2018

On Monday, April 2, 2018, United States Citizenship and Immigration Services (USCIS) will begin accepting H-1B specialty occupation visa petitions for employment during fiscal year 2019 (FY 2019). Applications will likely only be accepted for approximately one week following April 2, 2018, so employers should submit H-1B petitions on that date or within a few days thereafter. Employment in H-1B status based on approved FY 2019 petition cannot go into effect until at least October 1, 2018.

H-1B visas are subject to a strict 65,000 annual cap, with an additional 20,000 H-1B visas available for applicants with advanced degrees from US colleges or universities. Of the 65,000 visas under the cap, 6,800 are already set aside for nationals of Chile and Singapore applying for H-1B1 visas. Certain H-1B applicants of 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.

High demand for H-1B visas is expected again this year. In 2017, USCIS received 199,000 H-1B petitions for FY 2018, down over 15% from the 236,000 petitions received in 2016, but still nearly two and one half times the 85,000 available visas. As a result of the large number of petitions, USCIS implements a blind "H-1B lottery" to randomly select petitions for adjudication. Nearly 57% of the petitions filed in 2017 were not selected. Petitions not selected are returned unopened to the employer without cashing the corresponding USCIS filing fees. Petitions filed after the filing period has closed (usually four to five business days after it opens) will be rejected.

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 a cap-subject H-1B petition that is filed with the USCIS prior to their OPT expiration. If their H-1B petition is selected for adjudication and approved, their stay and work authorization is automatically extended until the October 1 change to H-1B status. 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.

Last year's H-1B process saw several unexpected changes that make pre-planning this year even more important. For example, USCIS suspended its "premium processing" filing option for cap-subject H-1B cases. In return for paying an additional filing fee, premium processing guarantees an initial answer on an H-1B petition within 15 days of being selected in the H-1B lottery. Without it, employers and employees were left waiting up to five months before receiving an approval or a request for additional evidence (RFEs), by which USCIS asks for more evidence that a case qualifies for approval. Final decisions on RFE cases sometimes arrived after the October 1, 2017 effective date of employment, leaving employers scrambling to keep employees in status while waiting. The lack of premium processing was compounded by the fact that USCIS issued a record number of RFEs, with new emphasis on wage levels and qualifying educational background. Based on recent USCIS statements, we expect premium processing to again be suspended in 2018 for cap-subject H-1B cases filed and the high rate of RFEs to be repeated.

Given the short submission period and expected high demand for H-1B visas, employers should begin preparing H-1B filings well in advance of April 2, 2018. Waiting until one or two weeks before the deadline can lead to a late-filed petition, particularly given the complexities of the preparation process and various unforeseen problems that can arise in preparing H-1B filings.

Our immigration lawyers stand ready to answer your questions about H-1B petitions or other immigration developments.

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