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Immigration Alert: Be Prepared for the H-1B Filing Season

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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 (FY2019), USCIS will begin accepting cap subject H-1B petitions on **Monday, April 2, 2018**. H-1B visas are numerically limited, commonly referred to as the H-1B “cap,” with a total of 65,000 new visas available each fiscal year (6,800 of these H-1Bs are reserved for Singapore and Chile citizens based on the Free Trade Agreements with these countries). In addition, the first 20,000 new visas issued for beneficiaries who hold an advanced degree (master’s degree or higher) from an accredited U.S. college or university are exempt from the annual limitation. Petitions filed by certain non-profit organizations and by institutions of higher education are exempt from the cap. In addition, individuals who have already received H-1B visas may not be subject to the cap.

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 U.S. for one year or more since exhausting any prior permissible H-1B time and are seeking to return to the U.S. for a new period of H-1B admission.

Employers should begin considering which of their employees or prospective 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 U.S. Other common 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 spouse’s status. Employers should anticipate their workforce needs for FY2019, and carefully consider whether the filing of cap-subject H-1B petitions is needed.

USCIS anticipates that April 2, 2018 will see a repeat of the mass filings from recent years. In 2017, for example, nearly 199,000 applications were filed and the annual H-1B cap was reached within the first few days of the initial filing date.

Currently, the filing fees for an H-1B visa petition are \$460.00 for Form I-129; \$500.00 for the anti-fraud fee; and \$1,500.00 (\$750 if employer has less than 25 employees) for the fee paid into a fund used to train U.S. workers to lessen the need for foreign professionals. In addition, employers who would like to expedite the processing of the petition and pay an additional \$1,225.00 filing fee for premium processing.

It has been reported that the Department of Homeland Security plans to terminate the H-4 work authorization program, which currently allows certain H-4 visa holders (spouses of H-1B beneficiaries) to receive employment authorization documents ("EADs"). H-4 dependent spouses are eligible for EADs if the H-1B visa holder is the beneficiary of an approved Form I-140, Immigrant Petition for Alien Worker, or has been granted H-1B status under sections 106(a) and (b) of the AC21. Information has not been released regarding when the program will be terminated and whether a grace period will be afforded to renew existing EADs. We recommend filing timely H-4 EAD extensions, or initial applications, before the program is terminated.

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 2, 2018. Ideally, preparation of these petitions will begin at least a month in advance.