

Publications

Immigration Alert: Time to Prepare For April 1 H-1B Filings (2017)

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CLIENT ALERT | 1.24.2017

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 (FY2018), USCIS will begin accepting cap subject H-1B petitions on **Monday, April 3, 2017**. H-1B visas are numerically limited, 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. 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 236,000 applications were filed and the annual H-1B cap was reached within the first few days after the initial filing date. During the last three 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 approve during this first week of April, USCIS will use a lottery system to randomly select the petitions eligible for H-1B status under the FY2018 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 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 FY2018, and carefully consider whether the filing of cap-subject H-1B petitions is needed.

Note also that employees working pursuant to 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, 2017, **if** that employee's H-1B petition is accepted for processing. To be deemed timely, this petition must be filed on or after April 1, 2017 (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 3, 2017. Given the likelihood of a FY2018 H-1B cap lottery, we also recommend that employers explore other possible visa options for employees.

Please feel free to contact your Vorys lawyer if you have additional questions or concerns.