

H-1B Cap: Start Planning Today for "Buy American, Hire American"

December 18, 2017

Although we are still officially in the year 2017, it is a good time for employers to start preparing for the H-1B Cap for Fiscal Year 2019 (FY2019). H-1B cases must be filed between April 2, 2018 and April 7, 2018 to be included in the lottery. Demand for the H-1B has steadily increased over the years until last year when there was a slight drop in petitions. Specifically, USCIS received 199,000 H-1B petitions during the filing period, which began April 3, 2017; including petitions filed for the advanced degree exemption. For FY 2017, USCIS received nearly 233,000 filings for 85,000 available CAP numbers. This resulted in a larger percent of cases being selected in the lottery. However, the number of petitions filed is still much greater than the number of H-1Bs available. Employers should expect demand to continue to surpass supply and be prepared to file their H-1B petitions on the earliest possible date, which is April 2, 2018 this year (April 1, 2018 falls on a Sunday).

Recap of this past H-1B Cap: Filings received on April 3, 2017 through April 8, 2017 for employment starting October 1, 2017

Although a larger percent of cases were selected in the lottery this year, there were significant changes to the processing of these petitions. USCIS implemented the Executive Order "Buy American, Hire American: Putting American Workers First" which was signed on April 18, 2017. (See: <https://www.uscis.gov/laws/buy-american-hire-american-putting-american-workers-first>). Specifically there were both procedural and substantive changes that affected the H-1B cap and filings this year.

- Procedural changes:
 - Premium Processing Freeze: Premium Processing is expedited processing at USCIS. Generally, H-1B petitions are eligible for review in 15 days or less for an additional filing fee of \$1,225. USCIS will issue either an approval or a Request for Evidence in 15 days or refund the fee. On March 3, 2017, USCIS

suspended Premium Processing for ALL H-1B filings at USCIS for approximately 6 months. This suspension resulted in a slower processing of H-1B petition at USCIS so that some cases are still pending today.

- Surge in Requests for Evidence (RFE): There was an increase in RFEs for H-1B cap cases this year. In addition, USCIS implemented their power to issue second RFEs in many cases – a step previously reserved for the rarest of circumstances. This created additional delays in processing and a tougher environment overall.
- Substantive changes:
 - Specialty Occupation: The H-1B visa is reserved for jobs that qualify as a "specialty occupation." This year there was a tightening of what occupations qualify, as USCIS issued RFEs questioning the job classification and whether a degree was required for the role.
 - Salary: Specifically, there was a significant increase in the number of Requests for Evidence (RFEs) issued to employers seeking justification for entry level wages. Specifically, employers were asked to justify entry level wages indicating that such wages may undercut whether a role can qualify as an H-1B specialty occupation.
 - Beneficiary qualifications: In many instances, USCIS questioned whether the foreign national's degree and / or experience qualified the individual for the specialty occupation in the H-1B petition. Specifically USCIS focused on cases where the degree was not clearly related to the occupation or where the foreign national did not have an equivalent of a US degree.
 - Recent Graduates from US Academic Institutions: USCIS focused on recent graduates and students who were working pursuant to Practical Training. There were questions regarding whether these foreign nationals were properly maintaining their student status as well as whether their US universities had correctly granted Practical Training.

Many of the RFES include many or all of the substantive questions outlined above. In cases where all of the issues were not included in the original RFE, some were issued a second RFE. It appeared that USCIS officers were learning new ways to apply the Executive Order and related training. Most distressing, a greater number of H-1B Cap petitions were actually denied this year; although official numbers have not yet been released. Of course, not all of the H-1B Cap cases have been adjudicated yet due to the numerous RFEs that were issued and the interruption in Premium Processing.

Immigration Practitioners will be able to learn from the April 2017 filings and its results and plan more adequately for the April 2018 filing season. However, we may see additional changes or regulations that could continue to vex H-1B cap petitions for FY2019.

H-1B Cap Filings - Looking Ahead:

The H-1B is still a significant visa category as it allows qualified professionals to enter the U.S. for employment in a specialty occupation. Only a limited number may be granted each fiscal year (which runs from October 1st through September 30th). Under current immigration law, only 65,000 new H-1B petitions may be granted each fiscal year with an additional 20,000 available for those individuals with advanced degrees from a U.S. academic institution.

Because of the large number of cases being filed, there is a significant chance that cases could miss the filing date due to delays, particularly at the Department of Labor (DOL). As part of the H-1B petition, employers must have a Labor Condition Application (LCA) certified by the DOL. No H-1B petition will be accepted by USCIS without a certified LCA. Normal processing of LCAs generally takes about 7 to 8 days. However, as volume increases in March, LCAs may take longer. Proskauer recommends filing as many LCAs in earlier months as possible to ensure that the H-1B petitions are ready for filing in anticipation of April 2.

Evaluating Your Potential H-1B Population:

Due to the increased demand for the H-1B, it is important that employers evaluate their employee populations early to ensure that all petitions are submitted by the earliest possible date. We outline below some of the types of employees to review when making decisions whether to file an H-1B petition.

F-1 Students: Students, particularly those on F visas and currently working for you pursuant to approved Optional Practical Training (OPT) should be the first group of employees to consider for filing an H-1B petition on April 2nd. The reason for this is simple. If you do not file H-1Bs for these employees, they will lose their employment authorization at the conclusion of their OPT (unless they are able to extend it in the limited circumstance described below).

Moreover, even when employees may extend their OPT it is advised to file an H-1B for Fiscal Year 2019. This gives the employees two opportunities to obtain the H-1B. If more applications are filed than visas available and these employees do not obtain the H-1B this year, then the OPT extension may serve as a backup and you can file for the H-1B again next year.

L-1Bs: In recent years the L-1B visa category has faced increased scrutiny. The L-1B is for intracompany transferees who are being relocated to the U.S. to serve in a specialized knowledge capacity after having been employed by the company abroad for one year in either a managerial or specialized knowledge role. The strict interpretation of what qualifies as specialized knowledge has resulted in denials of many L-1B petitions. Therefore, rather than file an L-1B extension many employers are opting to file H-1Bs.

Certain Green Card Cases: Certain applicants for green cards may run out of authorized time in the U.S. unless they are in H-1B status. We recommend you consult with counsel on such cases.

Employers and HR professionals should take time during the holiday season to evaluate their nonimmigrant population and determine which employees should apply for the FY 2019 H-1B Cap. It is not too soon to send H-1B cap cases to the lawyers!

Issues Spotting to Avoid RFEs This Year:

Although employers and immigration practitioners cannot control the entire H-1B process – and issues will surely arise – we can take actions to avoid issues with new H-1B petitions based on the lessons learned from last H-1B Cap season. Specifically:

- **Specialty Occupation:** Employers should evaluate whether the role and job description for the foreign national is one that requires a Bachelor's degree as a minimum to enter the occupation. If it is unclear, employers can discuss the roles further with Proskauer so that we can determine if the H-1B visa is the correct

classification for the role. If so, the information regarding the occupation and the employers past hiring practices for the role can be gathered and submitted proactively with the initial H-1B petition.

- **Salary:** We can review with employers the prevailing wage rates for each occupation per the Department of Labor's Wage Surveys and whether an entry level wage is appropriate. Although USCIS issued many RFEs for entry level wages this past year; if the role is for a recent graduates – the employer and attorney can work together to obtain such information and evidence and again, submit it with the initial H-1B petition to hopefully avoid an RFE.
- **Beneficiary qualifications:** Again, employers and immigration practitioners will be proactive this year in cases where there is not a clear nexus between the degree and the occupation. This may include submitting expert opinions with the initial filing. Regardless, employers will be better prepared should such an issue arise during the H-1B petitioning process.
- **Recent Graduates from US Academic Institutions:** Although the employer cannot change how much Practical Training a US university has granted an H-1B applicant; review of the potential issue will better prepare the employer and the foreign national for possible issues. As an example, only accredited institution graduates are eligible for the 20,000 U.S. Master's Degree visas.

We encourage employers to reach out to our Immigration & Nationality Group if they have questions. We will continue working with our clients to ensure that H-1B petitions are prepared and ready for filing by April 2.