Proskauer

H-1B Cap: Start Planning Today for the H-1B Cap Lottery

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It is now time to prepare for the H-1B Cap for Fiscal Year 2020 (FY2020). H-1B petitions filed between April 1, 2019 and April 5, 2019 will be included in the lottery. Demand for the H-1B has steadily increased over the years until FY 2018 and FY 2019, which both had slight drops in petitions from the prior year. See the chart below:

FY	TOTAL
FY 2019	190,098
FY 2018	199,000
FY 2017	236,000
FY 2016	233,000
FY 2015	172,000
FY 2014	124,000

Although there is presently a proposed rule that would implement an online registration process for the H-1B Cap and switch the order that Regular Cap and US Master's Cap lotteries are run, USCIS has indicated that it is unlikely that the H-1B online registration will be implemented in time for April 1. As such, Proskauer is advising its clients to proceed as in years past and continue to prepare H-1B Cap Petitions for filing on April 1, 2019.

Regardless of implementation, it is critical that Employers start the process of identifying potential H-1B workers and preparing the petitions.

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 are available each fiscal year (which runs from October 1 through September 30). 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 volume of H-1B cases, 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. All H-1B petitions filed at USCIS must include 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 1.

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 1. 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 (limited circumstance).

Moreover, even when employees may extend their OPT it is advised to file an H-1B for Fiscal Year 2020. 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.

Once Employers have identified their employee population who they will be sponsoring for H-1B visa, they must work with Proskauer to prepare the strongest H-1B petition possible.

Issues Spotting:

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 past H-1B Cap seasons. 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 to determine whether a wage is appropriate. For example, although USCIS has issued RFEs for entry-level wages in the last two years; if the role is for a recent graduate – the employer and attorney can work together to obtain such information and evidence to demonstrate the validity of the entry-level wage category and submit it with the initial H-1B petition to hopefully avoid an RFE.
- Beneficiary qualifications: Again, employers and immigration practitioners must be proactive 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 1.