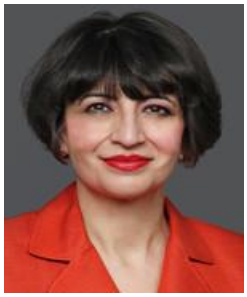
Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

H-1B Cap Completed: A Look At Employer Alternatives

By **Elizabeth Espín Stern, Grace Shie and Maximillian Del Rey, Mayer Brown LLP**

Law360, New York (May 9, 2017, 1:16 PM EDT) -- On Wednesday, May 3, 2017, U.S. Citizenship and Immigration Services announced that data entry for fiscal year 2018 H-1B petitions subject to the annual quota (i.e., the "cap") had been completed. The agency previously announced on April 17, 2017, that it had completed the H-1B cap random selection process to select the petitions for processing under the annual limit.



Elizabeth Espín Stern

U.S. law limits the number of regular new H-1B visas per year at levels originally established in 1990 — 65,000, with an additional 20,000 new H-1B visas available to workers with degrees from U.S. master's programs. This year, USCIS received more than 199,000 H-1B petitions — more than enough to reach the statutory cap of 65,000 visas for fiscal year 2018 and a lower amount than the 236,000 H-1B petitions received for inclusion in the FY 2017 cap a year ago. USCIS also has received more than the maximum 20,000 H-1B petitions filed under the advanced degree "master's cap."

Grace Shie

The following chart compares receipts over the last five fiscal years during which the random selection process has been used due to excess demand:

Fiscal Year	Number of Petitions	Year-Over-Year Percent Increase
2018	199,000	(16%)
2017	236,000	1.3%
2016	233,000	35%
2015	172,500	39%
2014	124,000	N/A

Maximillian Del Rey

As was expected, the number of H-1B petitions received by USCIS in the first five days of the annual filing period far exceeded the visa cap, so the question for many employers becomes, what now? If an employer's H-1B petition is not selected, and the employer is attempting to retain an excellent professional candidate, there are other options to consider. We outline the primary options below and highlight temporary "cap gap" options for students who are not selected.

F-1 Student Visa Status

Potential Extension of Practical Training

Foreign students seeking to change status from student (F-1) to H-1B whose petitions were not selected for visa processing may face the impending expiration of their post-completion optional practical training (OPT) work authorization, which is typically issued for an initial 12-month period. Students studying in science, technology, engineering or mathematics (STEM) fields, however, are eligible to receive an additional 24-month extension of post-graduate OPT (bringing their OPT total approval to 36 months) so long as their employers agree to register for the E-Verify program, an electronic identification and employment authorization system administered by the U.S. Department of Homeland Security and the Social Security Administration. These students should contact their designated school official to request extension of OPT to provide employment authorization through the next cap filing period for FY 2019.

F-1 visa holders in OPT who are not STEM graduates, however, are not eligible for this extension. These students may face more difficult options for extending their work authorization in the United States following nonselection in the H-1B visa lottery. A relatively straightforward option for non-STEM F-1 students is to return to school for further studies. Completion of graduate studies will eventually qualify the student for one of the 20,000 H-1B visas available only to graduates of U.S. master's (or higher) programs.

Cap-Gap Extension of Practical Training for Students

If their employer timely filed the H-1B petition for change of status, students in F-1 status with approved practical training work authorization and H-1B petitions selected in the visa lottery may remain in the United States in F-1 status during the period between the end of F-1 status and the beginning of H-1B status on Oct. 1, 2017. Students in F-1 status with approved practical training whose H-1B petitions were not selected in the visa lottery may remain in the United States in F-1 status during the period between the end of their underlying F-1 status and confirmation by USCIS that the employer's H-1B petition will not be approved or Oct. 1, 2017, whichever is earlier.

To be considered timely filed, the H-1B petition indicating change of status (rather than consular processing) must have been filed during the H-1B acceptance period while the student's authorized F-1 duration of status (D/S) admission was still in effect (including any period of time during the academic course of study, any authorized periods of post-completion OPT and the 60-day departure preparation period, commonly known as the "grace period").

Students who have not received notice confirming selection or a rejection notice for their H-1B petitions may continue to benefit from an automatic cap-gap extension until a rejection notice is received or Oct. 1, 2017, whichever is earlier. Following receipt of the rejection notice, students will have the standard 60-day grace period to prepare for departure from the United States.

Intracompany Transfer Visas (L-1)

Employers that operate in more countries than the United States may consider employing the candidate in one of their foreign offices to attain a full year's tenure with the foreign office. At the conclusion of the candidate reaching 365 days of work outside the United States, the employer may consider transferring the worker back to the United States from the related company abroad in the L-1 visa category. This option is attractive to multinational employers who manage projects from multiple geographic hubs, in addition to those who consider global service in other countries a key aspect of career development for highly skilled professionals and executives.

The L-1 visa is available to a worker transferred to the United States as (1) a manager or executive, in the L-1A category, or (2) a specialized knowledge professional, in the L-1B category. To qualify for the L-1A or L-1B category, the candidate must have at least one continuous year of full-time employment abroad within the preceding three years for the petitioning company or a parent, affiliate or subsidiary thereof. Days spent in the United States do not count toward but also are not interruptive of the one-year qualifying period. The manager, executive or specialized knowledge worker must be coming to the United States to fill a position that, for the L-1A category, is managerial or executive or that, for the L-1B category, requires specialized knowledge.

Employers considering this option should also investigate what visa and work permit requirements may be needed for the worker to serve in the host country for the one-year period, assuming the office is not in the worker's country of nationality.

Extraordinary Ability Visas (O-1)

The O-1 visa category is reserved for individuals with extraordinary abilities who seek temporary entry into the United States to continue working in their field of endeavor. O-1 visa applicants must demonstrate that they are at "the very top of the field of endeavor." Applicants who have received internationally recognized awards, such as a Nobel Prize, Academy Award or other major recognition, easily qualify, but there are also senior executives and outstanding researchers that may qualify based on their record of contributions to the business area in which they work. Executives with a record of innovation in their field may be able to demonstrate that their career achievements distinguish them as singular leaders in their precise area.

Treaty-Based Visa Options

H-1B1

Qualified nationals of Chile and Singapore benefit from respective treaties with the United States that allocate 6,800 H-1B1 visas annually (for Chile, 1,400 and for Singapore, 5,400) to these nationals specifically. The overall H-1B cap is reduced by the number of H-1B1 visas issued. H-1B1 visas and visa petitions are approved in one-year increments, but unlike H-1B, there is no six-year maximum limitation on stays in H-1B1 status.

TN

The TN "NAFTA" visa is available to foreign professionals who are citizens of Canada and Mexico. The TN visa has requirements that are similar to H-1B but is not subject to annual quotas and has a less time-consuming application process.

To qualify for TN status, a job offer must involve "business activities at a professional level" in one of the 63 occupational categories covered by the North American Free Trade Agreement. Examples of the more commonly used professions covered by NAFTA include: computer systems analyst, engineer, economist, lawyer, management consultant, biologist, chemist, industrial designer, and accountant.

TN status may be granted for up to three years initially and then may be extended in three-year increments without limit on the number of extensions. Employers seeking to hire Canadian or Mexican professionals should strongly consider this visa category.

E-3

Nationals of Australia coming to the United States to perform services in a specialty occupation are eligible for the E-3 treaty exchange visa. Similar to the H-1B visa, applicants for the E-3 visa must have a legitimate offer of employment in a specialty occupation in the United States, subject to certification by the U.S. Department of Labor, and must possess the necessary academic requirements. E-3 visas are granted for an initial period of two years, with unlimited extensions possible. Up to 10,500 primary E-3 visas will be issued annually, and to date this annual quota has not been fully utilized.

E-1/E-2

Nationals of countries with treaties with the United States designed to promote trade and investment may obtain E-1/E-2 visas to work in the United States to develop and direct their investments or trade. The visas are available in two types: the E-1 treaty trader visa for companies that trade a substantial level of goods and services and the E-2 investor visa for individuals or enterprises that invest a substantial amount of funds in the United States with the prospect of job creation.

Nationals applying for the E-1 visa must be foreign business people conducting substantial trade between the United States and their home country. Nationals applying for the E-2 visa must make a substantial capital investment in a U.S. business. No minimum value threshold is set for the investment, and the amount is measured in relation to the total cost of the U.S. business. E-visa status is available to individual investors as well as to employees coming to work in either a supervisory role or a position involving skills essential to the business.

Other Options

Spousal or Other Family-Based Employment Authorization

If the spouse of a beneficiary of a rejected H-1B petition holds a visa category that permits spousal work authorization, such as J-1 or L-1, the beneficiary may also be eligible to obtain work authorization as the derivative of that principal worker by filing an application for employment authorization with USCIS (Form I-765). Additionally, the beneficiary of a rejected H-1B petition who is the spouse, parent or child of a U.S. citizen may be eligible for family-based permanent residency. An application for permanent residency, accompanied by an application for employment authorization, may grant these beneficiaries relatively rapid authorization to accept employment of their choosing in the United States.

H-1B Work with Cap-Exempt Employers

Federal regulations exempt from the H-1B cap the petitions for workers employed at institutions of

higher education, related nonprofits and government research organizations. An employer may file a cap-exempt H-1B petition if the sponsored worker will work "at" an exempt institution. Therefore, employers may claim exemption if the beneficiary will physically perform job duties at an exempt institution. The burden is on the employer to establish that there is a "logical nexus" between the work performed by the beneficiary and the normal work performed by the cap-exempt entity. In addition, if a worker will perform concurrent employment with an exempt and a nonexempt employer, the H-1B petition will not be counted against the cap.

In either of the above scenarios, employers subject to the cap may seek to formalize such an arrangement with an exempt organization, such as a university engaged in research related to the business of the employer. However, should the H-1B worker cease work at/with the exempt entity, a subsequent petition by a commercial (nonexempt) employer will be subject to the cap.

On the Horizon

On April 18, 2017, President Donald Trump announced that his administration was launching new measures to address potential reforms to the H-1B visa program. The measures form part of the Trump administration's policy to put "American workers first."

The "Buy American and Hire American" executive order signed on April 18 singles out the H-1B program, requiring an interagency group to "suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries." Based on the remarks made by the president during the signing of the EO and, previously, at the White House press briefing on April 17, 2017, the reforms are designed to attain the following:

- Merit-Based Versus Random, Allocation of Annual Visas: H-1B visas are currently awarded by random lottery. The agencies are directed to consider ways to allocate H-1B visas based on merit and to ensure that the beneficiaries of these visas are the best and the brightest, consistent with the intent of the "specialty occupation" visa category.

- Heightened Wage and Skill Levels to Avoid Undercutting U.S. Jobs and Wages: The president stated that reform is needed to restore a "level playing field" in the jobs market, which he indicated "has not happened for decades." In the White House press briefing the day before the EO's signing, a senior administration official stated that 80 percent of H-1B workers are paid less than the median wage in their fields. The official was quoted as saying, "If you change that current system that awards visas randomly without regard for skill or wage to a skills-based awarding, it makes it extremely difficult to use the visa to replace or undercut American workers because you're not bringing in workers at beneath the market wage."

While the above reforms will not directly impact the FY 2018 H-1B cap-subject petition filing period, we expect legislative and regulatory action in the coming year that may impact next year's H-1B filing period.

Elizabeth Espín Stern and Grace Shie are partners and Maximillian L. Del Rey is an associate at Mayer Brown LLP in Washington, D.C.