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Legal Update
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What Every Employer Needs to Know About the FY 2019 H-1B Cap

Introduction

The current administration has made US immigration policy a central focus of its "America First" stance. In the past year, the administration has implemented extreme vetting of visa filings, residency filings, and port admissions. Through a deliberate and multi-pronged administrative agenda, the administration has imposed *de novo* review of all visa petitions; refused H-1Bs for an increasing volume of early-career IT workers; suspended expedited, premium processing options for H-1B filings; imposed record volumes of Requests for Evidence (RFEs) and audits on employers sponsoring H-1B and L-1 workers; and rolled out an aggressive fraud review process for IT staffing suppliers.

In this climate, employers must be more prepared than ever. Insight into the processes followed by US Citizenship & Immigration Services (USCIS) will help employers keep visa candidates and their hiring managers informed. Advance preparation, including providing additional documentation to bolster initial filings and clearly address agency eligibility concerns, will protect the interests of the business for cases that are selected in the annual lottery. Evaluating whether interim or alternative work authorization options are available for key candidates will mitigate risks of business disruption and personal distress for candidates.

We provide this advisory to help employers navigate each of these issues.

USCIS Selection Process

WHAT H-1B PETITIONS WILL BE ELIGIBLE FOR SELECTION THIS YEAR?

The US Immigration and Nationality Act (INA) imposes an annual quota (the "cap") of 65,000 on new H-1B visas, of which 6,800 are reserved by treaty for nationals of Chile and Singapore. In addition, another 20,000 visas are made available for individuals who have earned a master's degree or higher from an accredited non-profit US educational institution. Annual visas may be filed in April, up to six months in advance of the government's fiscal year, which begins October 1.

As has been the case in every year since 2014, demand for H-1B visas is expected to be substantially higher than the quota, with the FY 2019 cap expected to be reached during the first week of April. In 2017, for instance, 199,000 cap-subject H-1B petitions were filed during the first week of April. Reports of whether this year's demand will be higher or lower than last year have varied, but there is little question that the agency will receive a far higher volume of petitions than the allowable quota in the first five working days of April, the filing window during which USCIS must accept all appropriately filed cap-subject H-1B petitions.

This year's filing window for cap-subject H-1B petitions began on Monday, April 2, 2018, and will end on Friday, April 6, 2018. If, as expected, the cap is reached within this window, only

petitions received by USCIS by April 6, 2018 will be considered for selection in the FY 2019 lottery.

HOW DOES THE USCIS RANDOM SELECTION LOTTERY WORK?

When USCIS receives more H-1B petitions during the filing window than available visas, the agency relies on a computer-generated random selection process, a lottery, to select enough petitions to meet the 65,000 general-category cap and the 20,000 cap under the advanced degree exemption. All petitions submitted during the April five-day filing window will be considered for the computer-generated selection, while petitions submitted after this period will be rejected.

Selected petitions will be processed by the agency, and employers will be provided with a receipt notice confirming selection in the lottery. Petitions not selected in the lottery will be returned with all supporting documents and un-cashed filing fee checks.

WHEN WILL USCIS NOTIFY EMPLOYERS OF SELECTION OR REJECTION OF THEIR PETITIONS?

In 2017, the agency announced on April 7 that it had reached the annual cap (having received 199,000 petitions within the first five days of April 2017) and received more than the allotted 20,000 H-1B petitions filed under the advanced degree "master's cap." It concluded the random selection process on May 3, 2017, and most employers received notice of selection via issuance of agency receipt notices by mid-May.

Last year, the agency met this timeline despite having suspended premium processing—the service by which USCIS adjudicates petitions within 15 days for an additional fee—for all H-1B petitions, including extensions and amendments. This year, USCIS announced on March 20, 2018, a suspension of its premium processing expedite service for all new H-1B cap-subject petitions. In contrast to last year, USCIS has not suspended premium processing for other H-1B filing categories thus far this year.

USCIS's stated rationale for suspension of premium processing for the annual cap filings is to address legacy adjudication priorities, including those stemming from other types of H-1B petitions. Whether the backlog will slow down notifications of H-1B cap selection is not yet clear, but employers should expect prolonged processing times after selection, when USCIS is expected to issue a high volume of requests for evidence (RFEs), as discussed below.

USCIS Review of Petitions

WHAT LEVEL OF SCRUTINY SHOULD EMPLOYERS EXPECT FOR FY 2019 H-1B FILINGS?

Employers should prepare for heightened scrutiny of H-1B eligibility. USCIS has already initiated aggressive RFE issuance, which has resulted in a higher percentage of petition denials, a trend we expect to continue as the agency tackles FY 2019 cap-subject filings. The suspension of premium processing will provide USCIS with additional time to evaluate whether positions and job duties constitute specialty occupations eligible for H-1B classification.

Among the issues the agency has focused on in the past year are:

- Low-wage positions, including positions classified as Level 1 (lowest level) in computer- and information technology-related occupations;
- Degree relevancy issues, including for positions where the industry accepts multiple categories of degrees; and
- Petitions seeking placement of H-1B workers at third-party worksites.

All three of these issues have been the subject of USCIS policy memoranda, including, most recently, the February 22, 2018 memorandum, "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites."

In addition, the agency included the definition of specialty occupation in its Fall 2017 proposed regulatory agenda.

WHAT SHOULD EMPLOYERS BE PREPARED TO DEMONSTRATE TO PROTECT THEIR H-1B FILINGS?

In view of the USCIS-announced policy interpretations, employers should be prepared to demonstrate that their petition complies with each aspect of the regulatory criteria, with exhibits that leave little room to interpretation. The criteria will include:

1. A bachelor's or higher degree is normally the **minimum** requirement for the position, and the beneficiary holds the degree or its equivalent.
2. The specific degree requirement is common to the industry, or the job is a unique one with duties so complex that they can only be performed by an individual who possesses the requisite degree.
3. The employer normally requires the specific degree or its equivalent for the particular job.
4. The precise job duties, with appropriate delineation of the proportion of time typically spent on each aspect of the duties, are so specialized and complex that the knowledge required to perform the job is normally (and broadly) associated with attainment of a bachelor's or higher degree.
5. The wage level comports with the compensation associated with such degreed specialty workers.
6. The petitioner will exercise the exclusive personnel authority over the H-1B worker, supervise the worker's day-to-day duties (including in remote, third-party worksite situations), and retain the right to control the work product and service delivery by the H-1B worker.
7. The job, or in the case of a third-party placement, the contract or statement of work pursuant to which the individual will provide services, will require the individual's services for the specific job duties for the full period of time requested (e.g., three years).

In preparing the documentation that can address these points, the employer should turn to multiple sources. Company recruiters will have documentation about normal careers placements and standards, which the employer can use to show that degree requirements are in fact standard convention for the company. Those same recruiters are also likely to know what peers in the industry require, and can point the employer to industry resources to demonstrate that norm. The business unit leaders and company HR leaders will have records of employees in comparable positions, including the degrees these employees possess. Organizational charts that depict the degree qualifications (or equivalency) of such teams can be quite compelling, as can statements about recruiting mandates that are provided by hiring managers and/or recruiters.

Descriptions of the H-1B position itself should also be developed with input from hiring managers to avoid the agency drawing its own conclusions, often based on the job classification code used in the Labor Condition Application or the job title, either of which is likely to be too broad to convey what the job actually entails. If the title of the position is generic—e.g., analyst, associate, consultant—it is all the more important to provide a more vivid and understandable description of what the job requires and what it is about the particular business that mandates the level of skill or experience that only a degreed career professional is likely to hold. Expert evaluations, such as those provided from credential agencies, may be useful not only to demonstrate the degree requirement but also to attest to industry norms.

Supervision and control of the employee is similarly important, particularly if the individual will work at a client worksite. Showing that the direct employer has an account manager or supervisor that is directly responsible for the H-1B worker's duties, that the contractual agreements or work orders confirm this, and that working hours, progress reports, self-evaluations, and other aspects of performance are provided directly to the employer (not the customer) is key. Contracts, statements of work, itineraries, and work orders, as well as demonstration of extension and/or continuation of service agreements, are equally important to demonstrate that workers at a third-party worksite will be required for the full period requested in the H-1B petition.

Options for Continued Work Authorization

IS THERE A GAP-FILLING AUTHORIZATION FOR F-1 STUDENTS WHOSE F-1 STATUS WILL EXPIRE PRIOR TO OCTOBER 1?

Yes. The agency regulations provide certain students with pending or approved H-1B cap petitions with an automatic extension to fill the "gap" between the end of F-1 status and the beginning of H-1B status. Provided the employer of an F-1 student timely files a request for change of status[1] to H-1B while the student's authorized F-1 duration of status (D/S) admission is still valid (including any period of time during the academic course of study, any authorized periods of post-completion optional practical training (OPT), or the 60-day grace period provided to F-1 students for departure preparation), the student will receive an automatic "cap-gap" extension pending the conclusion of the H-1B adjudication process by USCIS. Petitions are considered timely filed if the H-1B cap-subject petition[2] is filed during the H-1B acceptance period beginning on the first working day of April.

During the cap-gap period, the student will remain lawfully in the United States. In addition, for students who are engaged in post-completion OPT and whose OPT work authorization is valid and unexpired on the date of the H-1B petition filing, the cap-gap extension will automatically include work authorization.[3]

Students whose H-1B petitions are selected and approved in the annual lottery will benefit from the cap-gap through September 30, 2018, the date immediately before which H-1B status for cap-selected cases takes effect. Students whose H-1B petitions are denied, withdrawn or revoked, or not selected may continue to benefit from the cap-gap extension until a rejection notice is received or September 30, 2018, whichever is earlier. Students in this situation will have the standard 60-day grace period from the date of the rejection notice or their OPT program end date, whichever is later, to depart the United States.

In cases where a student petition is selected but the adjudication by the agency is delayed past early September, employers may consider requesting premium processing service once the agency reinstates this service, which USCIS stated is expected to resume on September 10, 2018. This will avoid the uncertainty of a cap-gap beneficiary losing work authorization on October 1, 2018, pending final adjudication of the petition.

Foreign students who complete US degree programs are eligible for 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 are eligible to receive an additional 24-month extension of post-graduate OPT (bringing their OPT total approval to 36 months). In either case, if their OPT work authorization will expire prior to October 1, 2018, the first date on which FY 2019 H-1B status is available, they may benefit from an additional period of work authorization during the period their petitions are pending.

To extend their work authorization throughout the cap-gap period, three factors must be met:

1. the H-1B petition must be filed during the H-1B acceptance period, which began on April 2, 2018;
2. the student's OPT work authorization must be valid and unexpired on the date of the H-1B petition filing; and
3. the H-1B petition (Form I-129) must include a request for change of status from F-1 to H-1B upon adjudication of the petition, as opposed to a request for consular processing.

WHAT ALTERNATIVE VISA OPTIONS SHOULD EMPLOYERS CONSIDER?

Employers should assess the options for alternative work authorization in the United States in the event that an employee's H-1B cap-subject petition is not selected in the visa lottery or ultimately not approved. Among the potential alternatives are:

- **Treaty Options.** Employers should assess if the employee is eligible for treaty-provided work authorization, such as the NAFTA-based TN visa category for Canadian and Mexican nationals, the H-1B1 visa for Chilean and Singaporean nationals, or the E-3 visa for Australian nationals. Each of these visas has features in common with the H-1B visa but are less restrictive in terms of availability.
- **Overseas Deployment.** Employers that operate in other countries in addition to the United States may also consider employing the candidate in a foreign office for a temporary period. At the conclusion of the candidate completing one year of work outside the United States in a managerial or specialized capacity, the employee could be eligible for sponsorship for the L-1 intracompany transfer visa, and the employer could then transfer the employee to the United States.
- **Training Visas.** Employers should also review options for professional trainee visas such as the J-1 and H-3 visas. These visa categories permit employers to host foreign workers to provide temporary training in the United States pursuant to a defined training plan. Visas in these categories, however, are normally limited in scope and duration and are not intended for regular employment. Rather, employers utilizing J-1 or H-3 visas must provide foreign trainees with short-term, job-related training that will benefit the worker following their departure from the United States.
- **Extraordinary Ability O-1 Visas.** In addition, experienced candidates who are at the very top of their fields may qualify for the O-1 extraordinary ability visa. While the visa (commonly referred to as the "Einstein visa") is associated with individuals who have received internationally recognized awards such as a Nobel Prize, Academy Award, or other major recognition, senior executives and other business, scientific, or technical professionals may qualify based on a multi-factor test that considers, among other factors, compensation, leadership within a renowned enterprise, media coverage, and academic scholarship.
- **Family-Based Options.** These include both nonimmigrant (temporary) and immigrant (permanent) visa options. For instance, if the spouse of an employee holds a visa status that permits spousal work authorization, such as L-1or E status, the spouse may also be eligible to obtain work authorization as the dependent of that principal worker. Additionally, an employee who is the spouse, parent, or child of a US citizen may be immediately eligible for US permanent residence through the family-based immigrant visa categories. An application for permanent residence, accompanied by an application for employment authorization, may grant these employees authorization to accept employment of their choosing.

For more information about this topic, please contact any of the authors below.

Elizabeth (Liz) Espín Stern
+1 202 263 3825
stern@mayerbrown.com

Maximillian L. Del Rey
+1 202 263 3350
mdelrey@mayerbrown.com

Anthony Tran
+1 202 263 3489
atran@mayerbrown.com

Endnotes

[1] The petition form (I-129) must indicate a change of status request, as opposed to a request for consular processing. Change of status authorizes automatic conversion to H-1B status upon approval of the petition, whereas consular processing requires a visa application at a US consulate abroad and reentry to the United States before the H-1B status becomes active.

[2] The cap-gap extension is only available to beneficiaries of cap-subject H-1B petitions, not to beneficiaries of cap-exempt H-1B petitions.

[3] Students who have entered the 60-day grace period when their H-1B cap-subject petition is filed are not eligible for employment authorization through the cap-gap exemption. Although they will receive automatic extension of their F-1 status, they will not become employment-authorized since they had no employment authorization at the time their H-1B petition was filed.