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Time to Start Preparing H-1B “Cap” Petitions for Filing on April 1

Now that the Super Bowl is over, we can turn our attention to the high-stakes game that we call “H-1B Cap Season.” On April 1st each year, United States Citizenship & Immigration Services (USCIS) begins accepting petitions from employers seeking to employ new H-1B workers during the next fiscal year, which begins on October 1st. The number of available new H-1B petitions is capped at 65,000 per fiscal year (“regular cap”), with an additional 20,000 slots available to foreign nationals holding advanced degrees (master’s degrees or higher) from U.S. institutions. This fixed number of H-1Bs available per fiscal year is known as the “H-1B cap.”

If, during the first five business days of April, USCIS receives more H-1B petitions than it is permitted to approve, USCIS will randomly select H-1B petitions for processing among all of the petitions received during the five-day filing window. For the last several years, USCIS received significantly more petitions than it was permitted to approve during the brief filing window. We anticipate that the number of petitions filed during this year’s five-day window will again exceed the H-1B cap. To ensure that H-1B petitions are included within the random selection process, **we recommend that employers make hiring decisions for foreign national workers and job applicants as soon as possible, and prepare to file petitions for new H-1B employment so that the petitions are received by USCIS on or about April 1, 2019.**

On January 31, 2019, the Department of Homeland Security (DHS) published a final rule, amending the regulations that govern H-1B cap petitions. Under the final rule, which takes effect April 1, 2019, USCIS will reverse the order by which it will select H-1B petitions. Previously, USCIS selected the 20,000 advanced degree petitions before the regular cap petitions. Under the new rule, USCIS will count all petitions (including advanced degree petitions) toward the regular cap. After selecting a sufficient number of petitions for the regular cap, USCIS will then select the 20,000 advanced degree petitions. USCIS estimates that this procedural change will increase the H-1B petitions selected for foreign nationals

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holding advanced degrees from U.S. institutions by up to 16 percent (the equivalent of 5,340 petitions). The final rule also adds an electronic registration requirement to the H-1B cap filing process. Seeking to create a more cost-effective H-1B process for both employers and USCIS, only those petitions selected during the registration process will need to submit complete H-1B petitions to USCIS. DHS has suspended the electronic registration requirement until next year's filing season, allowing for further testing of the registration system.

Note that the H-1B cap does not apply to employees of (i) colleges and universities; (ii) nonprofit organizations related to or affiliated with a nonprofit college or university; or (iii) nonprofit or governmental research organizations. Also note that, in most cases, individuals who currently have H-1B status, whether with you or another employer, need not worry about the annual H-1B cap. However, other individuals, including those who are currently in F-1 (student) or J-1 (exchange visitor) status may need new H-1B petitions filed on their behalf in order to transition to H-1B employment and avoid gaps in employment authorization. Further, we strongly recommend filing H-1B petitions on behalf of H-4 workers (spouses of H-1B workers), as DHS is seeking to end the H-4 employment authorization program.

In the event of a U.S. government shutdown, USCIS will continue to process H-1B petitions, as well as other immigration petitions that require filing fees.

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