



## Fiscal Year 2019 H-1B Cap Filing Season Begins April 2, 2018

Syracuse, New York

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On April 2, 2018, the United States Citizenship and Immigration Services (the "USCIS") will begin accepting H-1B petitions subject to the Fiscal Year ("FY") 2019 cap. Foreign employees whose H-1B FY 2019 petitions will be approved can start their employment in the United States on October 1, 2018. While April 2<sup>nd</sup> may seem far away at the moment, employers that have experience with H-1B filings know that it will arrive before you know it.

### Background

H-1B category is an attractive employment-based option for U.S. employers to hire foreign nationals in specialty occupations. Generally, in order to qualify for an H-1B visa, the employer must establish that the following requirements are met:

- i. the job is a specialty occupation, *i.e.* one that generally requires an employee holding at least a U.S. bachelor's degree or its foreign equivalent;
- ii. the foreign employee is such a professional; and
- iii. the employer obtained the certified labor condition application (the "LCA") from the Department of Labor (the "DOL"), in which the employer represented, in particular, that it will pay the foreign employee the required wage (*i.e.*, at least the same wages paid to similarly situated employees with that employer or the local prevailing wage in the respective geographic area, whichever is higher).

### Annual Cap

There is an annual numerical limit of new H-1B approvals ("H-1B cap"). Congress set the current annual H-1B cap at 65,000 (the "regular cap")<sup>1</sup> plus 20,000 for foreign nationals holding U.S. Master's or higher degrees (the "advanced degree cap").

Initial H-1B petitions may be approved for up to three years, with subsequent extensions for up to another three years. Typically, the H-1B worker's total period of admission may not exceed six years, with exceptions available to some H-1B holders, including beneficiaries of pending labor certification applications or employment-based immigrant petitions.

### Cap Exemption

There are some exceptions to the H-1B cap requirement. For instance, current H-1B holders who have been previously counted towards the cap are generally cap exempt. Therefore, when such H-1B holders seek to extend their status, amend terms of employment, transfer from one employer to another, or add concurrent H-1B employment, they can generally file their petitions with the USCIS any time. In addition, foreign workers seeking employment with institutions of higher education, related or affiliated nonprofit entities, nonprofit research organizations, or governmental organizations are also cap exempt.

### Timing and Process

USCIS accepts H-1B cap-subject petitions starting the first business day of April. As this year April 1<sup>st</sup> falls on a Sunday, the earliest date the USCIS will accept H-1B petitions requesting an October 1, 2018 employment start date is April 2, 2018.

<sup>1</sup>Up to 6,800 visas are set aside from the 65,000 each fiscal year under the terms of the U.S.-Chile and U.S.-Singapore free trade agreements. Unused visas in this category become available for H-1B use in the next fiscal year.



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If the number of H-1B petitions submitted during the first five business days exceeds the annually set limits, the USCIS will use a computerized process, known as a lottery, to randomly select the necessary number of petitions for further processing. Given that the lottery had to be administered during the last several years, we expect that it will take place again in April 2018. Based on the lottery results, USCIS will reject all unselected cap-subject petitions and return them to the employers, together with any applicable filing fees.

### Why Employers Should Start H-1B Preparation Now?

#### *Avoiding Delays in Labor Condition Application Certifications*

As stated above, every H-1B submission must be accompanied by a **certified** LCA. An H-1B filing that lacks a certified LCA will be rejected or denied. To satisfy the LCA requirement, the employer must complete an LCA and submit it to the DOL for certification. The normal processing time for the DOL review of the LCAs is 7 business days. As we approach the H-1B filing date, the number of LCAs filed with the DOL will increase significantly, resulting in potential delays in LCA certifications. A lack of advance planning will result in obtaining LCA certification too late to make it for the April 2<sup>nd</sup> targeted filing date. Therefore, employers are recommended to keep in mind this very important step when preparing the H-1B petitions and plan accordingly.

#### *Ensuring that Employees are On Track for Filing*

Employees should compile all documents related to their immigration and travel history, education, experience, foreign credential evaluation, and so on, sufficiently in advance of the H-1B filing. All foreign language documents must be accompanied by a certified English translation. If employees intend to include dependents as derivatives on their H-1B applications, they will need to ensure that all dependents' documents are also ready and up-to-date.

#### *Missing the H-1B FY 2019 Filing Season Means Employers Must Wait Another Year*

Employers who miss the H-1B filing season in 2018 will get a chance to submit new H-1B petitions only in April 2019 with an employment start date on October 1, 2019.

#### *Increased Scrutiny of H-1B Petitions*

Last year, the USCIS placed extra scrutiny on H-1B petitions, especially for entry-level positions. As such, it is important to have experienced immigration counsel to help navigate through the H-1B process.

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Considering the above, advance planning is critical to ensure timely filing of your H-1B petition, thereby making certain that your submission will have the greatest chance of being accepted for lottery and further processing by the USCIS.



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We work closely with our clients' in-house counsel and human resources professionals to create comprehensive immigration strategies and conduct immigration compliance training. For additional insight and information contact Anna Putintseva at 315.701.6372 or [aputintseva@BHLAWPLLC.com](mailto:aputintseva@BHLAWPLLC.com) or Anas Saleh at 315.701.6426 or [asaleh@bhlawpllc.com](mailto:asaleh@bhlawpllc.com)