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H-1B Cap Season is Here – Are You Ready to File?

Authors: Melanie Colvert Walker
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Spring is in the air, and H-1B excitement abounds. Now is the time to take stock of your H-1B needs for FY20, which begins on October 1, 2019. Employers who are not considered "cap exempt" (e.g., universities, colleges, government research organizations) and do not otherwise qualify for an exemption based on affiliation or worker placement with an exempt organization need to be ready to file their new H-1B petitions so that they are received by United States Citizenship and Immigration Services (USCIS) on April 1 to be considered for FY20 H-1B classification. While most health care organizations are considered cap exempt or have physicians who may be eligible for individual exemption based on the J-1 waiver, there may be others who need to compete for H-1B numbers under the cap to secure an H-1B change of status for employees in other classifications (e.g., TN, OPT) or to facilitate new employment for a specialized applicant.

This specialty occupation category continues to capture the attention of the media and has garnered rigorous scrutiny and challenges by USCIS, with current agency data reflecting Requests for Evidence issued in 60 percent of cases for the period of October – December 2018 (up from 25 percent three years ago). The H-1B petition preparation process clearly requires an increasing level of care and attention to succeed in the current immigration climate. As employers take stock of the specialized workers who have not previously obtained H-1B classification and who may require such sponsorship in the new fiscal year, here are some additional developments to bear in mind.

Are you ready to file an LCA?

A new Labor Condition Application (LCA) ETA 9035/9035E was implemented by the Department of Labor (DOL) and made mandatory on November 19, 2018. This form, which must be filed and certified by the DOL before filing an H-1B petition, requires much more detail on the worksites, third-party sites, and specific attestation and supporting evidence for H-1B Dependent employers and Willful Violators. Workers who will be assigned to multiple locations over the three-year period of H-1B validity (and don't otherwise qualify for regulatory exception for "non-worksite" locations) need to make sure that all worksites are detailed on the LCA, with designation of third-party worksites as applicable to avoid having to file an H-1B amendment to change or add worksites later on. To ensure timely processing of the LCA, which typically takes seven full days, employers should be making arrangements now with each worksite to gather the necessary information and should coordinate the process for all prerequisite postings so that the LCA can be promptly filed well in advance.

For more information on the changes to the LCA and relevant considerations for employers, please see our prior article, "Immigration Update: The New Labor Condition Application ETA 9035/9035E and What It Means for Employers."

Do you still have an H-1B pending from last fiscal year?

Due to extremely lengthy processing times, it is quite possible that an employer may have an H-1B pending for FY19, filed in April of 2018, that has not been processed. Although USCIS has recently resumed premium (15-day) processing for all H-1B petitions filed on or before December 21, 2018, some employers may not wish to pay a $1,410 additional USCIS filing fee to "expedite" a case that has now been pending for more than ten

months, choosing to instead wait out the adjudication in the normal processing channels. If this is the case, there is some risk that a new filing, even for a different fiscal year, could be rejected due to a restrictive policy interpretation of the prohibition against employers (or related employers) filing more than one H-1B petition on behalf of the same beneficiary if the beneficiary is subject to the annual statutory cap. Considerations of a different offered position (if available) or additional legal argument distinguishing the multiple filings made in separate fiscal years should be discussed and explored carefully with immigration counsel to minimize the risk that USCIS rejects or denies BOTH prior and current filings or delays processing of one or both of the petitions, thereby frustrating the goals for both employer and employee.

Can you speed up processing?

Premium Processing has not yet been made available for FY20 H-1B cap filings or most H-1B filings made after December 21, 2018. Premium Processing *is* available for H-1B filings by cap-exempt employers (e.g., universities, colleges, government research organizations), for cap-subject employers that are pursuing cap exemption based on sponsored beneficiary's employment at a qualifying cap-exempt institution, organization or entity, and H-1B petitions that request "continuation of previously approved employment without change with the same employer," and include a concurrent request for an extension of H-1B status or consular notification. All other H-1B petitions will be processed within regular processing times of anywhere between 3.5 – 12.5 months unless they can demonstrate satisfaction of one or more of USCIS expedite criteria.

Are your Student/OPT workers maintaining status and eligible for a change of status to H-1B?

On August 9, 2018, a new and highly questionable USCIS policy became effective that significantly changed the calculation and accrual of "unlawful presence" for students and exchange workers. Even absent any other prior notice of violation, a student who failed to maintain his or her status before August 9, 2018 would begin accruing unlawful presence as of August 9, with 180 days elapsing as of February 5, 2019. A finding of a student status violation would make the worker unable to change status to H-1B within the U.S. In the past this could have been resolved by having the worker travel to get a new H-1B visa and return. But a student who has been unlawfully present for more than 180 days or more and leaves the U.S. is barred from returning for three years. Such a student worker would not be able to take advantage of an employer's ultimately approved H-1B petition (valid for a maximum of three years). If the H-1B petition is to be filed for a student worker (including those working under OPT or STEM OPT status), the student's consistent maintenance of status should be carefully reviewed and discussed with immigration counsel to try to ensure employers don't find themselves with an H-1B petition selected in the lottery and approved, but with a worker who is unable to work in the U.S. at any point during its approved validity period.

For a full discussion on the new policy and potential impacts on employers and student workforce, see our prior article, "Student Workers in Changing Times – What Employers Need to Know."

What about the family?

H-1B workers may or may not be married or have derivative family members. These important people need to change their status to H-4 by filing a Form I-539 and an I-539A. The new version of this form was released on March 8, 2019 (edition date 02/04/19), and the form will be mandatory as of March 21, 2019. USCIS began accepting filings on the new version of the form on March 11. (**USCIS has announced that it will continue to accept the prior version of I-539 that are received on or before March 21, rather than the previously announced March 11 deadline). This means that all cap filings on April 1 that include a change of status for family members will need to include the new Form I-539 and if applicable Form I-539A and required biometrics fee of $85 per applicant. USCIS will require biometrics to be completed for all derivative family members included on the application and supplement, even those children under 14 years of age. The delay in I-539 adjudication of family arising from biometrics could cause a disconnection of the family from speedy premium processing of the worker if and when that becomes available.

See additional details on the changes to the I-539 here.

Final versions of the I-539 and I-539A forms and instructions are available here.

Does the Cap Selection process work the same way?

For the most part, yes. USCIS published a rule that would completely change the H-1B cap filing process to one involving electronic registration, but that will not take effect for this cap season. The rule did immediately change the order by which USCIS internally selects H-1B petitions for processing. Effective April 1, USCIS will first select H-1B petitions submitted on behalf of all beneficiaries (including those eligible for the master's cap exemption) a number projected to reach the 65,000 visa numbers available for processing under the regular cap. USCIS will then select from the remaining eligible petitions, a number projected to reach the advanced degree exemption of 20,000 additional visa numbers. This reversed order of selection is estimated to result in an increase of up to 16 percent more advanced degree workers selected as part of the regular cap lottery.

For more details, see our prior article, "H-1B Cap Filings: Last Year of Current Processing Officially Set."

The developments highlighted above have been implemented since last year's cap season and are reflective of the numerous changes in this well publicized immigration classification that continues to be in high demand for specialty occupations in a wide range of industries. The time is now to take stock of your staffing needs and specialized workers requiring H-1B sponsorship. It is important to leave sufficient time for LCAs to be filed and certified by the DOL, and for H-1B petitions and more extensive supporting documentation to be quickly and properly finalized before the filing rush *on April 1*.

For additional information or to explore H-1B filing options and relevant considerations for a particular position or worker, please contact the author, Melanie Walker, or any member of Baker Donelson's Immigration Group.