



April 1, 2016 - H-1B “Lottery” Begins Again!

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USCIS to accept new H-1B filings beginning April 1, 2016.

Filing by April 7th will be critical:

U.S. Citizenship and Immigration Services will start accepting filings of new H-1B petitions on April 1st for the fiscal year which begins on October 1, 2016. There is an annual “cap” on new petitions. 65,000 petitions will be approved subject to the cap.

An additional 20,000 petitions will be approved for “cap exempt” aliens (i.e. those who have master’s degrees from U.S. universities.)

Last year the “cap” was reached in the first week. We expect this year to be the same.

Applications received after the date the cap is reached will be returned. If the cap is reached in the first week of April, all applications received that week will be subject to a lottery selection process. Last year the USCIS received 233,000 H-1B petitions in the first week!

What this means to you:

If you have employees who will be needing H-1B sponsorship any time between now and October 1, 2017, you should be prepared to file an H-1B petition before April 8, 2016. This includes current non U.S. employees who are not now in H-1B status, and whose employment authorization will end before April 1, 2017.

Plan on filing April 1st for F-1 students with optional practical training to keep them employed after the expiration of their current employment authorization.

A new H-1B petition will grant H-1B status no earlier than October 1, 2016. An employee whose F-1 OPT employment authorization expires before that date and for whom an H-1B petition is filed while they still maintain employment authorization, will have their employment authorization automatically extended through October 1, 2016 if they are selected in the H-1B lottery, or the date you are notified their H-1B petition is rejected.

Once the H-1B cap is reached, the USCIS will no longer accept new cap subject applications for H-1B status for the fiscal year which begins October 1, 2016 and ends on September 30, 2017.

What you should do now:

Identify any current employees who have temporary work authorization such as F-1, J-1, J-2, L-2, E or TN. In some cases you may want to consider filing H-1B petitions for L-1A or L-1B employees to avoid the five or seven year limit on L-1 stays.

Notify your recruiters that before offering employment to new graduates with optional practical training, they should verify that employment authorization extends at least until an H-1B petition may be filed on their behalf. They should notify HR immediately so that an application for H-1B change of status can be promptly prepared and filed.

Contact our office. As soon as you identify current employees or new hires who will need H-1B sponsorship, notify our office to begin process.

Petition for L-1B employees you want to keep beyond five years. Because L-1B employees are limited to five years, and H-1B employees may be extended indefinitely once a preference petition is approved, consider filing **petitions to change your L-1B employees to H-1B**. Don't wait until the fourth year - as the chances of any particular application being selected in the H-1B lottery in the future is not guaranteed, and may be considerably less than 50% if H-1B cap demand continues at previous levels.

Petition for some TN employees. If you may be filing labor certification applications for employees currently in TN status, consider filing for change to H-1B status now. "Dual intent" (immigrant and nonimmigrant) is consistent with H-1B status - not with TN. Therefore, renewing TN status may be difficult once the labor certification/preference process begins.

Consider applying for H-1B this year for F-1 students who have or may be eligible for STEM extensions. Although STEM eligible students may be able to maintain employment authorization through next year and thus be able to apply for H-1B status in April 2017, filing this year will maximize their chances of "winning" the H-1B cap lottery.

Facts

The H-1B is a nonimmigrant status which allows an alien to be employed by a specific employer, in a specific job, at a specific location. An employer files a petition to classify an alien's employment as qualifying for H-1B. The H-1B position must be "professional," and the employer must attest that it will comply with certain wage and other regulatory requirements.

The limit on new H-1B petitions **does not apply to renewals or H-1B transfers**.

You may continue to file petitions for aliens already in H-1B status who are changing employer, taking a second job, changing the terms of employment, or extending their stay - provided their previous employment was not exempt from the H-1B cap.

Employees of institutions of higher education, and of some non-profits affiliated with institutions of higher education as well as employees of governmental or nonprofit research organizations, may not be subject to the H-1B cap - until they change employers.

An alien who previously had an H-1B within the last six years, and who has not left the U.S. for over a year, is not subject to the H-1B cap.

There are reserved H-1B numbers for people from **Singapore and Chile**. If your employee is from Singapore or Chile, H-1B visas should be available well into next fiscal year.

Australians who would qualify for H-1B will often qualify for E-3 visas which are not subject to the same cap.

Canadians and **Mexicans** may qualify for TN visa status which has no cap.

There is a *six year limit* on the total amount of time an alien may spend in the U.S. in H-1B status, unless:

- they leave the U.S. for at least a year, in which case the six years starts over - and they must qualify under the cap again, or
- an application for labor certification ("PERM") is filed before the end of their 5th year in H-1B status, and has not been withdrawn or denied, or
- a preference petition (I-140) has been filed and approved for the alien, and a visa number is not currently available.

Join AGG Partner Teri A. Simmons, who will be providing an in-depth analysis of the fundamentals as well as updates of the significant issues on Cap-Subject H-1B Petitions, in a complimentary webcast¹ on February 2, 2016.

¹ <http://www.agg.com/Emerging-Issues-on-Cap-Subject-H-1B-Petitions-in-2016-02-02-2016/>

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