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Plan Now for Filing H-1B Petitions for Foreign National Candidates and OPT Employees

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It's time to begin preparing H-1B petitions for an early April filing and October 1, 2015 effective date.

What is H-1B Classification?

The H-1B classification provides work authorization to foreign nationals seeking long-term, but temporary, positions in "specialty occupations" with U.S. employers. A specialty occupation is one which requires theoretical or technical expertise in specialized fields including, but not limited to, architecture, engineering, business, mathematics, science, arts, law and medicine, and which require a bachelor's degree or higher.

To obtain H-1B classification, the employer must file a petition with U.S. Citizenship and Immigration Services (USCIS) on behalf of the prospective employee. If approved, the employee may initially work in the U.S. for up to three years. Work authorization can be extended up to six years, with further extensions possible for those who have started the permanent residency process.

How does one obtain H-1B classification?

Foreign nationals seeking an H-1B status for the first time are subject to an annual cap. Only 85,000 new H-1B visas are available each governmental fiscal year beginning October 1. Of those, 20,000 are reserved for foreign nationals who possess a master's degree or higher from a U.S. academic institution. Those with advanced degrees who are not selected (due to the cap) for one of the 20,000 available visas are then considered for one of the remaining 65,000 H-1B visas. For all applicants subject to the cap, employment cannot commence any earlier than October 1 of each year and

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applications cannot be filed before April 1 of each year. Generally, the cap does not apply to foreign nationals who will work at institutions of higher education or nonprofit entities related to or affiliated with institutions of higher education; at nonprofit research organizations; and at governmental research organizations. These organizations may file H-1B petitions for prospective employees at any time without limitation.

In 2014, USCIS received approximately 172,500 H-1B petitions by April 7. **All applications received on or after April 8 were rejected.** Applications received between April 1 and 7 were subject to a lottery and randomly selected for processing. Those not selected were not able to obtain H-1B visa classification but may apply again, subject to the annual cap, in 2015.

When should I start planning?

Advance planning is crucial. Due to the improving economy and the backlog of demand from April 2014, the cap will likely be exceeded again this year. Employers that fail to file H-1B petitions on April 1 may lose the opportunity to employ the intended foreign national candidate. Therefore, we recommend employers contact an immigration attorney as soon as possible, preferably by February 15, for assistance in evaluating their options and to begin gathering necessary documentation.

What about graduates on F-1 student visas whose OPT authorization expires after April 1, but before the October 1 H-1B effective date?

Many foreign students on F-1 student visas obtain work authorization after graduation to remain in the U.S. and work for 12 months under the Optional Practical Training (OPT) program. Those who earned degrees in STEM fields (science, technology, education, and math) are eligible for an additional 17 months of work authorization. Insofar as most academic years conclude in early summer, many foreign students' OPT work authorization likewise expires in early summer. Upon expiration, the employee is no longer authorized to work. An employer may wish to retain the employee under H-1B status, but, if the employee is subject to the H-1B cap, the employee cannot begin working until October 1 at the earliest. This creates the potential for a gap in work authorization between the time the OPT expires and October 1, known as the "cap gap." For those employees whose employers have filed an H-1B cap petition prior to the expiration of their OPT work authorization, their work authorization will be extended until October 1 so long as their petition is selected by USCIS for processing. Employers wishing to retain employees who are working pursuant to H-1B should therefore plan to file an H-1B petition during the first week of April.

What This Means to You

Now is the time to begin your H-1B planning process. Unless your organization is exempt from the H-1B cap, any petitions filed after the first week of April will likely be rejected. Even those filed on April 1

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may be eliminated by the lottery in the event applications again exceed the cap. For more information or to get started, contact Husch Blackwell attorneys Toni Blackwood at 816.983.8152 or Kelli Stout at 816.983.8309.

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