

# Management Alert



## H-1B Work Permit Filings: Will You Beat the Cap?

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**Seyfarth Synopsis:** This Management Alert is intended to enable employers to identify any current employees and employment candidates who may require H-1B work permit sponsorship before October 1, 2019. We recommend that employers identify any such candidates as soon as possible, as on April 2, 2018, United States Citizenship and Immigration Services (USCIS) will begin accepting H-1B petitions for the fiscal year 2019 H-1B quota (which begins on October 1, 2018). It is likely that, as in previous years, USCIS will receive H-1B requests far in excess of the annual quota within the **first week** of filing eligibility, in effect resulting in a random lottery-type selection process. This occurred last year in the 2018 H-1B cap, which was reached in the first week of filing eligibility based on USCIS receiving over 199,000 H-1B cap petitions. The most conservative and recommended approach is to submit all 2018 cap cases during the first week of filing eligibility, which begins on April 2, 2018.

### Background

There is an annual limit on the number of H-1B petitions that USCIS can approve during the government's 2019 fiscal year (beginning October 1, 2018 and ending September 30, 2019). The H-1B cap for fiscal year 2019 is 65,000 (of which about 6,800 are reserved for nationals of Chile and Singapore under Free Trade Agreements with those countries). USCIS will begin accepting petitions for FY 2019 on April 2, 2018.

There is an additional quota of 20,000 H-1Bs reserved for persons holding a master's degree or higher awarded by an accredited college or university in the United States. To be eligible for the "master's cap," the employee must have completed the master's degree program prior to the filing date. This additional quota of 20,000 H-1Bs has historically not been exhausted as early as the general H-1B quota of 65,000. However, both the regular cap and the master's cap were exhausted last year during the first week of availability.

If USCIS receives more than 20,000 H-1B petitions towards the so-called master's cap, a separate lottery process is applied. USCIS will apply the random selection process to the master's cap petitions prior to conducting the regular H-1B lottery. Any master's cap petitions not selected in the master's lottery will be eligible for selection in the regular H-1B lottery, effectively being granted two opportunities at H-1B status.

## Exceptions

With some exceptions, current H-1B workers are not subject to the annual cap. Non-cap cases include H-1B workers extending their status, changing from one H-1B employer to another, changing the terms of existing H-1B employment, or filing for a second (concurrent) H-1B position. In addition, foreign nationals seeking to work for an institution of higher education, for a related or affiliated nonprofit entity, or for a nonprofit research organization or a government research organization are not subject to the H-1B cap.

## Anticipated Unavailability of H-1B Work Permits Means Filing Early

In 2008, USCIS announced that it would apply the lottery process to all H-1B petitions received during the first five business days of the cap period, even if enough petitions were received to fill the annual quota on the first day of the filing period (i.e., April 1). We do not know how quickly the H-1B numbers will be exhausted this year, but the most conservative strategy is to assume that the H-1B numbers will be unavailable after the initial five-day filing period. Once the H-1B numbers are exhausted, new H-1B work permits will not be available until October 1, 2019.

Thus, to maximize the likelihood that affected employees will obtain an H-1B number effective as of October 1, 2018, employers must be in a position to file the H-1B petition with the government between Monday, April 2, 2018 and Friday, April 6, 2018. We are preparing "cap-subject" H-1B petitions at this time and recommend that employers begin the process now for any employees or candidates who need an H-1B.

## Persons Affected

The persons who need to file an H-1B include any current employees who hold F-1 student status and who will thus need H-1B status to continue working once their F-1 Employment Authorization (known as Optional Practical Training or "OPT") expires. In addition, any pending hires should be assessed to determine whether an H-1B will be needed for eventual continued employment, including those in J-1 academic programs with limited practical training time as well as those who currently reside outside the United States. Further, any current employees who hold TN, E-3, or L-1 status and who are beginning the green card process may need to convert to H-1B status.

## "Cap-Gap" Relief for F-1 Students

Under a rule issued in 2008, DHS grants "cap-gap" relief to F-1 students whose OPT expiration dates fall between April 1, 2018 and September 30, 2018 and whose employers have filed H-1B petitions on their behalf. Such students will be given a bridge of both status and work authorization until October 1, 2018. This means that individuals in the U.S. in F-1 status who are completing OPT and whose employers have filed H-1B "change of status" petitions on their behalf will have their work authorization automatically extended until October 1, 2018 (the required start date on the H-1B petition), provided that the H-1B petition is received and approved. These individuals will not experience the gap in employment eligibility or in status that may otherwise have occurred. If the petition is rejected or denied prior to October 1, 2018, the "cap-gap" employment eligibility ends immediately.

In addition, the 2008 "cap-gap" rule grants a bridge of status -- but not work authorization -- to individuals in the U.S. during the 60-day grace period following completion of their F-1 status who do not hold a valid EAD. This means that individuals in the U.S. in F-1 status who are in their 60-day grace period and whose employers have filed H-1B "change of status" petitions on their behalf will have their status, but not employment authorization, automatically extended until October 1, 2018, provided that the H-1B petition is received and approved.

## Alternatives to the H-1B Work Permit

In some cases, there may be alternatives to the H-1B work permit. If an affected employee falls into one of the following categories, that employee may not need to file for an H-1B work permit in April:

- Citizens of Canada or Mexico who are eligible for a TN visa. Please note, however, that not all H-1B eligible Canadian or Mexican employees will qualify for TN status. In addition, TN visa classification falls under the North American Free Trade Agreement (NAFTA) which continues to be closely examined by the current administration.
- Citizens of Australia, Chile, or Singapore.
- The spouse of an L, E or H-1B work permit holder, who is eligible for spousal employment authorization (EAD).
- J-1 nonimmigrants who have at least 18 months of academic training available as of April 1, 2017.
- With limited exceptions, H-1B employees who have held H-1B status at any time during the last six years with a cap-subject employer.
- A foreign national who is married to a U.S. citizen and has received or will receive an Employment Authorization Document in connection with the pending green card process.
- Certain other foreign nationals who may qualify for O, E, or L visas.

## Conclusion

Employers must act now to identify and begin H-1B processing for candidates or current employees who require sponsorship and who do not meet one of the above exceptions. If an employer misses the filing deadline for an employee who requires H-1B sponsorship, the employee can lose legal status in the United States, including permission to work.

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