

## What U.S. Employers Need to Know About the FY 2019 H-1B Visa Cap Season

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It's the time of year when U.S. employers are preparing for the upcoming H-1B cap petition filing season. While it appeared that USCIS was considering revising the H-1B lottery process for this fiscal year by adding a new online pre-registration step, USCIS recently confirmed that there are no changes to the process at this time. USCIS will begin accepting H-1B cap-subject petitions in the same manner as they have in years past, starting on **April 2, 2018**.

The expectation is there will be a high volume of H-1B petitions filed in early April again this year. The number of petitions filed in the five-day filing window in the first week of April are expected to exceed the annual cap, which will again trigger the computer-generated random H-1B lottery. Therefore, it is imperative that employers plan ahead to ensure that any cap-subject petitions are properly prepared and filed in the first five business days of April.

### Premium Process for H-1B Cap Cases

USCIS has also indicated that, similar to last year, it expects that it will suspend premium process for H-1B cap cases for a "short period." Although it is not clear how long such a suspension would last, hopefully it will be shorter than the six-month suspension experienced last year. It is expected that premium process will continue to be available for the other H-1B petitions, such as extensions or amendments.

### Other Potential Changes Under the Trump Administration

In determining which employees need to have H-1B petitions filed on their behalf, keep in mind that the Trump Administration has signaled that it may cut back on some existing alternative work-authorized categories such as:

- H-4 work authorizations for certain spouses of H-1B visa holders
- STEM OPT work authorization
- NAFTA TN-1 status
- L-1B specialized knowledge employees.

Employers may therefore want to consider filing an H-1B for employees in those categories. To prepare for this year's H-1B cap filing season, we recommend the following:

- Identify new H-1B candidates
- Review and finalize job offers, job descriptions and salaries for those individuals
- Ensure that your job descriptions are detailed and show a direct connection between your employee's educational training and the job duties
- If possible, avoid paying a wage that would fall in prevailing wage Level 1 of the applicable DOL job category
- Gather the relevant documents required to prepare the H-1B petition (we can provide a checklist)

### Department of State's "90 Day" Rule

Employers should take precaution on the potential impact of the new Department of State's "90 day" rule with respect to preconceived

intent and misrepresentations. While the language of the new rule is vague, it could be interpreted in a way that could adversely impact a foreign national who enters the U.S. in a nonimmigrant status such as F-1, J-1, TN or E-3 in the 90-day period prior to the employer filing an H-1B petition at the beginning of April. In that situation, USCIS could use the rule as evidence that the individual made a misrepresentation as to the purpose of his/her entry, which could make the individual ineligible for a change to H-1B status. While USCIS's application of this rule is far from clear, the safest course for F-1 students who will have a cap-subject H-1B petition filed in April would be not to travel.

If you would like to discuss whether the H-1B visa or another visa option is appropriate for a particular employee, please contact our office.

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