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Workforce Management: H-1B Cap Season for Employers

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H-1B Cap Season for Employers - Agenda

- **Overview**

- Types of Employers who are H-1B Cap-Subject Petitioners
- Examples of H-1B Occupations
- Basic H-1B Eligibility Criteria
- Recent Case Law Updates
- Distinctions Between H-1B and Other Temporary Worker Statuses
- Status of Proposed Changes to H-1B Cap Selection (Hot Topic!)
- How to Prepare for H-1B Cap Registration
- Registration and Filing Timings



H-1B Cap Season for Employers - Overview

- **Overview:**

- What is H-1B Status?
- Why is there an H-1B Cap Season?
- What is H-1B Cap Season?



H-1B Cap Season for Employers – Overview (cont.)

- **Overview: What is H-1B Status?**
- **U.S. Company = Petitioner**
 - Offering Employment at Required Wage in *Specialty Occupation* –
 - Job requires theoretical and practical application of a body of highly specialized knowledge *and*
 - Bachelor's or higher degree in the specific specialty, *or*
 - Equivalent
- **Foreign National = Beneficiary**
 - Must possess at least U.S. Bachelor's or higher degree or equivalent for a professional level occupation that normally requires the degree
- Temporary status (3 years / 6 years +)



H-1B Cap Season for Employers – Overview (cont.)

- **Overview: Why is there an H-1B Cap Season?**
- Annual numerical limit on number of employer petitions that may be approved:
 - 65,000 new H-1B statuses / visas per fiscal year under Regular Cap
 - 20,000 Advanced Degree Exemption for beneficiaries w/ U.S. master's degree or higher per fiscal year



H-1B Cap Season for Employers – Overview (cont.)

- **Overview: What is H-1B Cap Season?**
- **Specific timings for:**
 - October 1st = Start of Federal Government fiscal year
 - April 1st = Earliest day when a Cap-Subject H-1B petition may be filed (Regulatory)
 - October 1st = Start date on H-1B Cap-Subject petitions
- **FY2022**



H-1B Cap Season for Employers – Overview (cont.)

- **Overview: What is H-1B Cap Season?**
- **Cap Lottery Used When Employer Demand Exceeds the Cap / Exemption:**
 - FY2021: 269,194 Valid Employer Registrations
 - Employer registration for H-1B Cap “Lottery”
 - USCIS’s selection of employers who may file H-1B Petitions
 - Window during which selected employers may file their H-1B Petitions



H-1B Cap Season for Employers – Types of Employers

- Most industries would need to file under the Cap.
 - Architecture
 - Engineering
 - Business
 - Law
 - Start ups – Robotics
 - Health care (private practices)



Who Can File For An H-1B?

- Just about any U.S. Employer can file for an H-1B visa for their employee if they can show the employee qualifies
- Let's start with who is **not** subject to the Cap first
- Who is not subject to the Cap?
 - Institutions of higher education
 - Non-profit entities which are “related to” or “affiliated with” institutions of higher education
 - Non-profit research organizations
 - Government research organizations
- It is important to note that it is not necessary that you work “for”, but only “at” an institution of higher education to be considered Cap-exempt



Who Can File For An H-1B? (cont.)

- In order for an institution of higher education to qualify as a cap-exempt H-1B employer, it must meet the following criteria:
 - According to Section 101 (a) of the Higher Education Act, an institution of higher education must:
 - Be considered a public or non-profit institution
 - Provide admission to students who have earned a secondary education
 - Be licensed by the proper institution to provide education beyond secondary school
 - Offer educational programs which award bachelor's degrees or, at a minimum, 2-year associate's degrees



Definition of “Related or Affiliated nonprofit entity”

- **The below USCIS regulation defines a “related or affiliated nonprofit entity”:**
 - *“The term ‘related or affiliated nonprofit entity’ is defined, both for ACWIA fee (8 CFR §214.2(h)(19)(iii)(B) and cap exemption purposes, to include nonprofit entities that satisfy any one of the following conditions:*
 - *(1) the non-profit is connected or associated with an institution of higher education through shared ownership or control by the same board or federation*
 - *(2) the non-profit is operated by an institution of higher education*
 - *(3) the non-profit is attached to an institution of higher education as a member, branch, cooperative, or subsidiary*
 - *(4) the non-profit has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship with the institution of higher education for the purposes of research or education; and a fundamental activity of the non-profit is to directly contribute to the research or education mission of the institution of higher education.” 8 CFR §214.2(h)(8)(ii)(F)(2)*
 - In addition, some physicians who have received J waivers are cap-exempt



H-1B Cap Season for Employers – Examples of Occupations

- Examples of H-1B Occupations:

- Architecture
- Mathematics
- Social Sciences
- Education
- Law
- The Arts
- Engineering
- Physical Sciences
- Medicine and Health
- Business
- Technology



H-1B Cap Season for Employers – Basic Eligibility Criteria

- Nonimmigrant or temporary status
 - Work authorization is incidental to status
 - Duration (3 years / 6 years +)
 - Greencard sponsorship is separate
 - Application for US Citizenship is separate



H-1B Cap Season for Employers – Basic Eligibility Criteria (cont.)

- U.S. Company = Petitioner
- U.S. Employer = person, firm, corporation, contractor, or other association, or organization in the U.S. which:
 - Engages person to work in U.S. in a Specialty Occupation
 - Employer-Employee relationship with H-1B worker
 - May hire, pay, fire, supervise, or otherwise control the work
 - Internal Revenue Service Tax identification number (FEIN)
 - Can pay and will pay required wage



H-1B Cap Season for Employers – Basic Eligibility Criteria

- **Job Offered = Specialty Occupation** – To fully perform the job
 - Requires theoretical and practical application of a body of highly specialized knowledge *and*
 - Bachelor's or higher degree in the specific specialty, *or*
 - Equivalent



H-1B Cap Season for Employers – Basic Eligibility Criteria (cont.)

- **Standards** - To qualify as Specialty Occupation, position must meet one of the following:
 - Bachelor's or higher or equivalent is normal, minimum requirement for entry into the particular position
 - Degree requirement is **common to the industry** in parallel positions among similar organizations **or** the particular position is so complex or unique that it can be performed only by an individual with a degree
 - **Employer normally requires degree** or equivalent for the position **or**
 - Nature of specific **duties are so specialized and complex** that knowledge required to perform the duties is usually associated with the attainment of bachelor's or higher degree



H-1B Cap Season for Employers – Basic Eligibility Criteria (cont.)

- Foreign National = Beneficiary
- Must possess at least:
 - U.S. Bachelor's or Higher Degree
 - Foreign Degree Equivalent
 - Translation
 - Equivalent to Required U.S. Degree
 - Education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. Bachelor's higher degree in the specialty occupation, and
 - Recognition of expertise in the specialty through progressively responsible positions directly related to the specialty
- Must not have accepted prohibited public benefits



H-1B Cap Season for Employers – Recent Case Law Updates

- Several recent Federal District Court cases have opined on issues in association with reviewing the denial of H-1B petitions. These include RELX, Inc. d/b/a/ LexisNexis USA and Subhasree Chatterjee v. Kathy A. Baran; *Chung Song Ja Corp. v. USCIS*, 2015 WL 1058110 (W.D. WA, Jan. 14, 2015), (“*Chung Song Ja Corp. v. USCIS*”) and *Residential Fin. Corp. v. USCIS*, 2012 U.S. Dist. Lexis 32220 (S.D. OH), (“*Residential Fin. Corp. v. USCIS*”)
- These courts held that USCIS abused its discretion in denying an H-1B petition indicating that based on the OOH (The Department of Labor Occupational Outlook Handbook), there was no specific specialty degree that must be attained to enter the occupation



Residential Finance

- In *Residential Fin. Corp. v. USCIS*, the court noted that USCIS' approach was "too narrow"
- Plaintiff provided evidence that it required a baccalaureate degree for this position, and there is no apparent requirement that the specialized study need be in a single academic discipline as opposed to a specialized course of study in related business specialties
- Defendant's implicit premise that the title of a field of study ignores the realities of the statutory language involved and the obvious intent behind them
- The knowledge and not the title of the degree is what is important; **diplomas rarely come bearing occupation-specific majors**
- What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge
 - This is a "specialty occupation"



Chung Song Ja Corp. v. USCIS

- In *Chung Song Ja Corp. v. USCIS*, in reversing the denial, the court found:
 - The first regulatory criterion for what constitutes an H-1B specialty occupation **“does not restrict qualifying occupations to those for which there exists a single, specifically tailored and titled degree program.”**
 - Indeed, such an interpretation ignores the statutory and regulatory allowance for occupations that require the attainment of the “equivalent” of specialized bachelor’s degree as a threshold for entry
 - The court also noted, “Congress and the INA recognized that the needs of a specialty occupation can be met even where a specifically tailored baccalaureate program is not typically available for a given field”



Next Generation Technology v. Johnson

- This is a 2017 case that confirmed that where the OOH specifies that most workers within the field have a bachelor's degree, even if some do not, a rational interpretation and "fair reading" of the OOH is that it is a normal requirement for the position



Relx, Inc. v. Baran

- *Relx, Inc. v. Baran* (2019), where the U.S. District Court for the District of Columbia cites to *Residential Fin. Corp.* with the preceding remark, “...if the position requires the beneficiary to apply practical and theoretical specialized knowledge and a higher education degree it meets the requirements. Nowhere in the statute does it require the degree to come solely from one particular academic discipline”



Taylor Made Software, Inc. v. Cuccinelli

- This is a 2020 case in which the court considered USCIS's interpretation of the specialty occupation for Computer Systems Analysts
- The court found that while there “has to be some connection between the degree and the requirements for the position”, this does not mean the degree is restricted solely to one academic discipline
- The court rejected USCIS's conclusion that because the OOH allows for the possibility that some CSA's do not hold at least a bachelor's degree, this means that the position are not normally required to have earned at least a bachelor's degree



3Q Digital, Inc. v. USCIS

- This is another 2020 case in which the court analyzed a Search Engine Marketing Account Manager and found that it meant the definition of specialty occupation
- USCIS was trying to use the OOH over O*Net report
- The court held that “using the OOH over the O*Net report is arbitrary and capricious”
- O*NET OnLine is sponsored by the U.S. Department of Labor, [Employment & Training Administration](#), and developed by the National Center for O*NET Development



Other recent Court Cases

- Most recently (end of 2020), federal courts struck down both of the Trump administration's restrictive Interim Final Rulings (IFRs) proposed to significantly restrict H-1B visas.
- The US Chamber of Commerce filed lawsuits in California against both the Department of Labor and the Department of Homeland Security for their IFRs:
 - “Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States Rule” and “Strengthening of the H-1B Nonimmigrant Visa Classification”, respectively



DOL Prevailing Wage Increase overturned

- The DOL rule which went into effect in October, targeted the minimum wage for those employed through the H1B work visa. Even at the lowest wage level, the minimum wage would have increased significantly (specifically from the 17th to the 45th percentile), a change that would mean positions categorized as wage level 1 must meet or exceed the salary standing as the current minimum for wage level 3 occupations
- The proposal faced immediate backlash, having two lawsuits quickly filed – stating the approval of the rule and the calculation of wages were wrong, garnering little benefit for the American economy, which was the foundational argument for the DOL’s proposal



Specialty Occupation Rule Overturned

- The other interim final rule, proposed by the DHS, called for a stricter definition of the term “specialty occupation”, changing the requirements that an applicant possess the equivalent of a bachelor’s degree to stating that an applicant must be a specialist in the field which the position requires knowledge of, and a limit on contract work, decreasing a candidate’s stay from three years to only one
- The DHS’s rule was to go into effect in December 2020. Now enjoined, this rule would have had a crippling effect on the H-1B program



H-1B Cap Season for Employers – Distinctions Between H-1B and Other Temporary Statuses

- L-1: Intracompany transfer. L-1A is for Managers and Executives. 7 years total. L-1B is Specialized Knowledge. 5 years total. Must have worked for at least 1 continuous year within the preceding 3 years outside the U.S.
- H-1B1: For Chile and Singapore. Similar to H-1B otherwise. One Year Extension-No 6 Year Cap
- E-1/E-2: E-1 is a Treaty Trader, who is a national of the treaty country. Usually Executive of Manager. Involved in trade and services. E-2 Treaty Investor, is also a national of the treaty country. Most common to use instead of an H-1B. To develop and direct a bona fide enterprise in which there has been a substantial amount of capital. 2 Years Validity and renewable throughout
- E-3: For Australians. Similar to H-1B requiring specialty occupation. 2 years validity and renewable
- B-1: Temporary Visitor for Business. Usually come for Business conferences, negotiate contracts. Fine line between what is permissible and not. 6 months
- B-1 in lieu of H-1B: No longer really an option under Trump administration. Generally not to exceed 6 months and traditionally is for an alien who would otherwise qualify for H-1 status but receive no salary or remuneration other than an expense allowance. Essentially for foreign workers of a company to enter
- O-1: Extraordinary Ability, up to three years, aliens must have extraordinary ability or achievement. Can use for Executives and key support staff. Specific event or performance. Often used instead of an H-1B. Three year validity and renewable



Distinctions Between H-1B and Other Temporary Worker Statuses

- H-2B: Nonagricultural temporary or seasonal worker; less than 1 year
- H-3: Trainee; up to 2 years
- J-1: Exchange Visitor; program sponsorship required and often used with medical doctors; graduate medical training subjects to 212(e) 2-year residency requirement
- P-1: International recognized professional artists, athletes, entertainers; athletes may come as an individual or as part of a group; entertainers must come as part of a group; all P visas require consultation with labor organization; not really relevant for H-1B as alternative option; 5 year for an athlete, otherwise 1 year
- R-1: Religious worker; must be coming solely to carry on vocation of minister or to work for the religious organization in a professional capacity in a religious vocation or occupation; 3 year validity



H-1B Cap Season for Employers – Proposed Changes to Cap Lottery Selection

- January 8, 2021 - USCIS Final Rule published creating wage-based selection process for employer registrations
 - March 9, 2021 - Effective date
 - Possible 60-day pause (at least?) until May through Presidential or Administrative Action, Rule-making, Litigation, etc.
 - Same text as November 2, 2020 Notice of Proposed Rulemaking (NPRM)
 - Changes lottery / random selection process to favor employers who can pay highest wage levels for the job in the geographic location



H-1B Cap Season for Employers – Proposed Changes to Cap Lottery Selection (cont.)

- Reminders about Last Year's H-1B Cap Season:
 - USCIS implemented **Employer Electronic Registration**
 - Preceded actual filing of H-1B petitions
 - Streamlined selection process
 - Consistent with historical practice, USCIS then conducted **random electronic selection lottery** to determine which US employers would be able to sponsor workers
 - Essentially same chance to all employers under cap or under advanced degree exemption
 - **Reversed order of cap selection** to benefit employer's sponsoring those w/U.S. advanced degrees
 - Selected registrations first from Regular Cap, then registrations under Advanced Degree Exemption



H-1B Cap Season for Employers – Proposed Changes to Cap Lottery Selection (cont.)

- Lottery / Random Selection Process
 - Held if registrations exceed Regular Cap and Advanced Degree Exception limits
 - FY2021: Received 274,237 of which 5,043 were invalid, so 269,194
 - FY2021 Selection Numbers:
 - Round 1: 106,100
 - Round 2: 18,315
 - Total selected to exhaust Cap and Advanced Degree Exception: 124,415
 - Regular Cap = 65,000
 - Advanced Degree Exemption = 20,000



H-1B Cap Season for Employers – Proposed Changes to Cap Lottery Selection (cont.)

- If lottery needed, USCIS Final Rule creates strong preference for employers who can pay the highest Occupational Employment Statistics (OES) prevailing wage level for the job category (Standard Occupational Classification or SOC code) in the area of intended employment
- Foreign Labor Certification Data Center website:
<https://www.flcdatcenter.com/>
- 4 Wage Levels
- FY2021 ~70% of Regular Cap Registrations > Level 1
- FY2021 ~63% of Advanced Degree Exemptions > Level 1



H-1B Cap Season for Employers – Proposed Changes to Cap Lottery Selection (cont.)

- Final Rule:

- Level IV or higher selected first from all registrations
- If Level IV registrations exceed Regular Cap, random selection from only Level IV registrations (then selection of Level IV registrations for Advanced Degree Exception)
- Conversely, if not enough registrations indicate Level IV or higher wage, selection process would continue in descending order (Level III wages, then Level II and finally, Level I)
- Must use Level 1 if use wage survey / other independent authoritative wage source rather than the OES wage, regardless of any other case factors
- Calculate Wage Level if OES Default Wage



H-1B Cap Season for Employers – Proposed Changes to Cap Lottery Selection (cont.)

- **Final Rule:**

- Additional information needed from employer for Electronic Registrations so USCIS can rank the registrations
 - When Registering, would indicate highest OES wage level that proffered wage equals or exceeds for the relevant SOC code in area of intended employment
- More in-depth analysis needed prior to registration



H-1B Cap Season for Employers – How to Prepare for Cap Registration

- We will also want to review their CVs, degree documents and transcripts, Passport biographic page to confirm proper name and the job description with requirements.
 - Also want to confirm whether on OPT/STEM OPT, etc.
- To prepare for the H-1B lottery for FY 2022, the employer will want to start collecting information that will be needed for the mandatory electronic H-1B registration system



As Per the Process from 2020

- Department of Homeland Security (DHS) will charge the employer a \$10 registration fee per H-1B candidate
 - Catherine will discuss more regarding the timing
- The employer will provide, the employer's name, employer identification number (EIN), and mailing address, and the name, job title, and contact information (telephone number and email address) of employer's authorized representative



Information To Register - Employer

REGISTRANT INFORMATION

U.S. Citizenship and Immigration Services

About Registrant | About Beneficiary | Review and Submit

Employer/Agent | Authorized Signatory

What is the legal name of the prospective petitioning company or organization?
If filing as an individual registrant, list the individual's legal name.

What is the Doing Business As name of the prospective petitioning company or organization?
Doing Business As (DBA) name is the operating name of a company, as opposed to the legal name of the company.

The prospective petitioning company or organization does not have a Doing Business As name.

What is the employer identification number (EIN) of the prospective petitioning company or organization?
If filing as an individual registrant, provide the registrant's individual IRS Tax Number (SSN or ITIN).

What is the primary U.S. office address of the prospective petitioning company or organization?
USCIS notices will not be mailed to this address.

Address line 1
Street number and name

Address line 2
Apartment, suite, unit, or floor

City or town | State | ZIP code

Next



SIGNATORY INFORMATION



About Registrant About Beneficiary Review and Submit

Employer/Agent Authorized Signatory

What is the authorized signatory's legal name?

Given name (first name)

Middle name (if applicable)

Family name (last name)

What is the authorized signatory's title?

What is the authorized signatory's contact information?

Daytime phone number

Email address

Next



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Information To Register - Employee

- The beneficiary's full name, date of birth, country of birth, country of citizenship, gender, passport number, and whether the beneficiary has received a master's or higher degree from a U.S. institution of higher education



BENEFICIARY INFORMATION



U.S. Citizenship
and Immigration
Services

About Registrant About Beneficiary Review and Submit

Beneficiary Information

Test Company

Beneficiary Information

You may submit as many beneficiaries as you would like for one registrant (employer/agent) per registration.

What is the beneficiary's legal name?

Given Name (first name)

Beneficiary does not have a first name.

Middle Name

Beneficiary does not have a middle name.

Family Name (last name)



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BENEFICIARY INFORMATION



U.S. Citizenship
and Immigration
Services

What is the beneficiary's gender?

- Male
 Female

What is the beneficiary's date of birth?

MM/DD/YYYY

Does the beneficiary have a master's or higher degree from a U.S. institution of higher education such that the beneficiary is eligible for the advanced degree exemption under INA 214(g)(5)(C)?

- Yes
 No

What is the beneficiary's country of birth?

What is the beneficiary's country of citizenship?

What is the beneficiary's passport number?

Beneficiary does not have a passport number.

Save Entry

Cancel



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H-1B Cap Season for Employers Registration and Filing Timings (Anticipated)

- **Who Registers?**

- Prospective FY2022 H-1B Cap-subject Petitioners (or authorized representatives)

- Not prospective H-1B workers
 - Employer attests to complete, true and correct information and that it intends to file H-1B petition on behalf of beneficiary if selected



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H-1B Cap Season for Employers Registration and Filing Timings (Anticipated)

- **When is the FY2022 Registration Period?**
 - ~Late February –Create New Accounts (*Anticipated*)
 - ~March 1 – March 19, 2022 (*Anticipated*)
 - FY2022 H-1B Cap Electronic Registration Period (*initial?*)
 - Watch exact timings (**last year noon to noon Eastern Time**)
 - After registration, status is “submitted”

– Begin to Prepare for this Now!



H-1B Cap Season for Employers Registration and Filing Timings

- If Employer Electronic Registrations exceed H-1B cap of 65,000 and 20,000 advanced degree exemption, USCIS will conduct FY2022 H-1B cap lottery using the Employer Electronic Registrations
 - Last year, on March 27, 2020, USCIS announced receipt of enough Electronic Registrations
- Employer Registration **must be selected** in Electronic Registration Lottery **in order to File** H-1B Petition
 - Last year, by March 31, 2020, USCIS issued Notifications of Selection
 - Registration statuses: “Submitted”, “Selected”, “Denied” or at end of fiscal year, “Not Selected”



H-1B Cap Season for Employers - Registration and Filing Timings (Anticipated)

- **When can FY2022 Cap-Subject H-1B Petitions be Filed?**
 - Selected petitioners **should be able to file on April 1, 2021** (*Anticipated*)
 - File within specified filing window
 - **90 Days**
 - Last year, first filing window was April 1, 2020 – June 30, 2020
 - USCIS issued receipt notices through early August 2020
 - **Only file for person named in selected registration**



H-1B Cap Season for Employers - Registration and Filing Timings (Anticipated)

- **Not Selected?**

- Unselected registrations may still have a chance
- **Kept in reserve** for the fiscal year in case more petitions are needed to use all 65,000 spots in the regular cap and meet the 20,000 Advanced Degree Exemption
 - Last year, on August 14, 2020 USCIS conducted an additional round of selections
 - Last year, second 90-day filing period was August 17, 2020 – November 16, 2020



H-1B Cap Season for Employers Registration and Filing Timings

- **How many times may an employer register?**
 - Employer may only **register once per individual per fiscal year**
 - No duplicates
 - If duplicates, employer's registrations relating to that beneficiary for that fiscal year become invalid



Thank You

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