

H-1B Cap Season for FY2020 is Here—Four Important Issues To Be Mindful of This Year

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If you are like me, the start of a new calendar year means many well-intentioned resolutions that will be abandoned by Groundhog Day. One month of good and 11 months of not so good has become my annual routine.

The changing of the calendar year also means that it is H-1B cap filing season once again. While the government remains shutdown, and while some H-1B cap filings from last year still remain pending, we move forward with preparing FY2020 cap cases.

Below you will find a general overview of the H-1B cap lottery system, as well as four (4) key issues to be aware of for this year when looking at any potential H-1B cap filings.

Overview of H-1B Cap Lottery System

Each U.S. government fiscal year (October 1st to September 30th), new H-1B petitions are subject to an annual cap of 65,000 with an additional 20,000 allotted to U.S. advanced degree individuals.

Companies need to evaluate their anticipated hiring needs for H-1B professionals, specifically those requiring initial H-1B status. This is particularly true for any current employees working under Optional Practical Training (OPT) and any individuals who were not chosen under last year's H-1B cap lottery process. These H-1B cap cases will be filed on April 1, 2019 requesting a start date of October 1, 2019, so now is the time to start planning.

Employers can file H-1B petitions no earlier than six months in advance of the anticipated start date, so April 1st signals the start of what has become an annual race to get petitions filed as early as possible to ensure acceptance before the cap of 85,000 visas is reached. The 85,000 cap includes the basic cap of 65,000, plus an additional 20,000 H-1B visas available to foreign nationals who have earned an advanced degree (Master's or higher) from a U.S. university.

Last year's H-1B cap was again reached right away in April. In fact, USCIS again received more filings than H-1B numbers available and a lottery was conducted. Therefore, some H-1B filings were unfortunately rejected under the lottery process. This has been the case for many years now.

The demand for new H-1B workers will again likely result in the new cap being reached right away in April this year. It is also very likely that the volume of filings will require another lottery process. While total H-1B filings may be down this year, I expect H-1B numbers will be immediately exhausted.

Some H-1Bs Not Subject to the Cap Lottery System

Some foreign nationals are not subject to the H-1B cap, including individuals who already have been counted toward the cap in a previous year. Also, certain employers, such as universities, government-funded research organizations, and some nonprofit entities are exempt from the H-1B cap. All other employers should be aware of the H-1B cap process.

Four Important Issues To be Mindful This Year

It would not be U.S. immigration law if there were not constant changes to procedures and policies. This H-1B cap season is no different, and there are four key issues to be aware of this year when assessing H-1B cap filings.

H-1B Cap Registration System

In accordance with President Trump's "Buy American/Hire American" executive order, DHS recently announced a proposed rule that would require petitioners seeking to file H-1B cap-subject petitions to first electronically register with USCIS during a designated registration period. Under the proposed rule, USCIS would also switch the order in which the Regular Cap and Master's Degree Cap are selected-the change would have the Regular Cap lottery process go first.

The comment period for this proposed rule just ended and it has not been finalized. Based on timing and overall implementation needs if this rule is passed, I do not anticipate any registration system in place for this year.

Government Shutdown

The government shutdown remains in place with no end in sight. Immigration issues are at the forefront of this political stand-off, but H-1B cap filings are not affected.

USCIS remains largely unaffected because it is a fee-based system. The Service Centers and local USCIS offices remain in operation and will continue to accept filings.

While a shutdown would normally affect H-1B filings because the DOL would not be issuing Labor Condition Applications (LCAs), it is not an issue right now because previously on September 28, 2018, President Trump signed an omnibus appropriations bill funding DOL through the end of September 30, 2019.

The DOL is open to process LCAs and USCIS is open to accept and adjudicate H-1B cap filings.

New Rules Affecting Unlawful Presence Considerations for F-1 Students

One new area of scrutiny that was clear to see with H-1B cap filings last year was a focus on F-1 individuals maintaining their status. USCIS issued RFEs (Request for Evidence) asking for proof of continual employment for F-1s working under OPT and proof that their Curricular Practical Training (CPT) complied with regulations. In short, USCIS was digging deep to see if the F-1 individual had violated any maintenance of status rules.

F-1s are under additional scrutiny now as a new rule changes how they may start to accrue unlawful presence. Attorneys need to fully review an individual's complete F-1 history to ensure there are no maintenance of status

issues that could affect a change of status request to H-1B status.

USCIS Exercising Discretion to Deny H-1B Cap Filings Without Issuing an RFE

One recent USCIS policy update in 2018 underscores the hyper-aggressive tact the Department of Homeland Security (DHS) is taking with its adjudications through USCIS.

This policy update clarifies that USCIS has the authority to deny filings w/o the need to send a Request for Evidence (RFE) or Notice of Intent to Deny (NOID). USCIS routinely (even more routinely lately with H-1B filings) sends an RFE if they feel additional information or documentation is needed. Now, under this new policy, USCIS may deny cases w/o providing the petitioner the opportunity to address any specific concerns about the filing.

The prospect of not being afforded the opportunity to address an issue with USCIS before it chooses to deny a filing is unsettling. Individual case strategies become more important as the immigration landscape continues to dramatically shift.

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