



January 2017

Preparing for H-1B Cap Season in Fiscal Year 2018

This year’s H-1B cap is fast approaching. USCIS will start accepting new H-1B petitions for Fiscal Year 2018 on April 1, 2017. Although the federal government annually allocates 65,000 H-1B visas to eligible foreign national employees, USCIS receives far more H-1B petitions within the first weeks or even days of April during each fiscal year - leading to a random selection process that leaves many applicants waiting in the wings until the following year.

H-1B petitions subject to the 2018 annual cap may be filed beginning on April 1, 2017, six months prior to the start date of the 2018 fiscal year (Oct. 1, 2017). It is important to prepare all cap-subject H-1B petitions for filing on or as close to April 1, 2017 as possible in order to maximize the probability of securing one of the limited number of visas available for employer sponsorship. This H-1B cap season will likely be as busy as the past few and it is likely that the annual cap limit will be reached within the first five business days in April.

Prior H-1B Cap Season Figures

Below is a summary of the number of H-1B cases filed in the first 5 days of the last four fiscal years:

FY 2017	FY 2016	FY 2015	FY 2014
• 236,000	• 233,000	• 172,500	• 124,000

Eligible H-1B Cap Employees

Companies utilize the H-1B program to employ qualified foreign nationals in positions that require specialized knowledge or skills, including areas such as science, engineering, teaching, and computer engineering. In order to qualify for an H-1B visa, a foreign national must possess at least a bachelor's degree or higher (or its equivalent) in their relevant field of work. In other words, the degree requirement for the job must be common to the industry or the job to be performed by the H-1B worker must be so complex or unique that the knowledge required to perform the duties of the position is usually associated with the attainment of a bachelor's degree or higher. Alternatively, a foreign national can show fulfillment of this requirement by a combination of education, training, or progressively responsible experience in the specialty occupation that is evaluated to be the equivalent of the completion of a bachelor's degree or higher.

In addition to the 65,000 cap-subject H-1B visas allotted each year, the federal government allocates an additional 20,000 H-1B visas for workers who have earned advanced degrees such as a Master's or Ph. D. in the United States. In order to be eligible for the "Master's cap," the employee must complete his/her advanced degree program prior to the filing date and may be eligible for selection in the regular H-1B lottery if he/she is not picked in the separate lottery process that occurs when the additional quota of 20,000 advanced degree H-1B visas is also exhausted ahead of time.

Barring certain exceptions, current H-1B employees are generally not subject to the annual cap. This category includes workers who petition to extend a previously granted H-1B status, "port" from one H-1B employer to another, amend the terms of existing H-1B employment, or file for a concurrent H-1B position. In addition, foreign nationals who seek employment with an institute of higher education, a related or affiliated non-profit entity, or a non-profit private or government research organization are not subject to the annual H-1B quota.

Timelines and Processes

In order to successfully file cap-subject H-1B petitions for receipt by USCIS on April 1, it is recommended that H-1B cases should be initiated immediately. It can take two to four weeks or more to gather all of the necessary information and documentation, and prepare the requisite forms and supporting documentation for filing of an H-1B petition. Among these is the Labor Condition Application (LCA), which must be posted at the employee's worksite(s) for ten (10) federal business days and submitted to the U.S. Department of Labor (DOL) for certification. A certified LCA must accompany each H-1B petition. Although delays are possible, LCA certification typically takes seven (7) calendar days. Thus, employers and their counsel should budget the LCA certification period into the total preparation time of H-1B petitions, particularly time-sensitive applications.

Rejected Cap Cases

Petitions not selected in the H-1B lottery will be rejected. Should such a rejection occur, an affected foreign national seeking immigration and employment authorization sponsorship with an employer will be unable to obtain an H-1B visa until at least Oct. 1, 2018, (with the filing season beginning April 1, 2018). Affected foreign nationals may also be required to forego employment and possibly leave the United States. In such cases employers will need to look at alternative visa options for employees unable to secure an H-1B visa.

Based upon the above, Greenberg Traurig's Business Immigration & Compliance group urges employers to consult with their immigration counsel for information on filing H-1B cap-subject petitions with USCIS as early as possible, in order to provide the best possible chance for acceptance of the H-1B petition.

For more information on the H1-B Cap or other Immigration matters, please visit Greenberg Traurig's [Inside Business Immigration Blog](#).

Business Immigration & Compliance Group

Greenberg Traurig's Business Immigration and Compliance Group is a multidisciplinary business immigration practice representing businesses, organizations, and individuals from around the world on a wide range of immigration-related matters. The group has achieved international recognition for legal advocacy, results-oriented service, and responsiveness to its clients. Greenberg Traurig's *Inside Business Immigration* blog addresses the latest developments affecting employers, including the E-Verify program, Form I-9 compliance, Department of Labor issues (H-1B, H-2B and LCA), identity fraud in the workplace, electronic Forms I-9s, EB-5 investor regional center compliance, and ICE worksite enforcement audits.

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