

# April 1 H-1B Initial Filing Date for FY 2014 Quickly Approaching

With the federal government's fiscal year 2014 approaching, employers who wish to sponsor a first time H-1B worker should contact their immigration counsel soon to begin the petition process. There are only 65,000 H-1B slots available nationwide each federal fiscal year for foreign nationals seeking their initial grant of H-1B nonimmigrant status. There are also an additional 20,000 H-1B slots to foreign nationals who have earned a master's degree or higher from a college or university in the United States. This annual allocation of 85,000 H-1B slots is collectively referred to as the "H-1B Cap."

Employers' ability to seek one of these limited H-1B Cap slots for the upcoming federal fiscal year starts April 1, 2013 as United States Citizenship and Immigration Services (USCIS) regulations allow first time H-1B petitions to be filed up to six months before the start of the fiscal year (October 1, 2013) for which the slot will be allocated. The strong demand for new H-1B workers in previous years has caused the available annual allocation of H-1B Cap slots to run out soon after the April 1 start to the H-1B Cap filing window. In fiscal year 2013 the 65,000 H-1B Cap was reached on June 11, 2012. The fiscal year 2013 20,000 Master's H-1B Cap was reached even earlier—June 7, 2012. The H-1B Cap slots for fiscal year 2014 are expected to run out even sooner than last year as a result of the slowly, yet steadily, improving economy. USCIS awards H-1Bs on a rolling basis throughout the year, but when the cap is reached USCIS uses a random selection process to determine which petitions will be accepted for processing. Because no one knows when the Cap will be reached, employers should file a petition on April 1 if at all possible in order to guarantee an opportunity for an H-1B visa.

With the start of H-1B season looming, employers should review their workforce and recruitment pool very soon in order to determine whether they will need to file a first time H-1B petition for fiscal year 2014. Job applicants and current employees who may require a first time H-1B worker petition in fiscal year 2014 include, but are not necessarily limited to:

- Individuals currently working pursuant to their F-1 "Optional Practical Training" work authorization whose work authorization expires before April 1, 2014;
- Individuals seeking to change from another nonimmigrant status, such as H-4, TN, L, O or P, to H-1B status for the first time within the previous six years;

## **POSTED:**

Feb 12, 2013

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- H-1B workers seeking to change their H-1B employment from an employer that is exempt from the H-1B Cap to an employer who is subject to the H-1B Cap (e.g., an H-1B worker changing from employment with a university to employment with a private company); and
- Individuals currently residing outside of the United States who have never held H-1B status before or within the past six years and who an employer would like transfer or otherwise physically employ in the United States.

In order to qualify for H-1B status, the position being offered must be a "specialty occupation," generally meaning a position that normally requires the services of someone holding a bachelor's degree or higher. The foreign national who an employer is seeking H-1B status on the behalf of must also hold a Bachelor's degree or higher (or the equivalent thereof through any combination of formal education, progressive experience or training) in a particular field of education related to the position being offered in order to qualify for H-1B status. The H-1B petition process additionally requires that the employer: offer the foreign worker a wage that meets a governmentally defined threshold for the position based on numerous factors, including the category of the position and the geographic area of employment; post a notice to its existing workforce of the employer's intent to hire an H-1B worker; and agree to maintain certain documents available for public inspection and government audit.

USCIS grants H-1B status in increments up to three years at a time and individuals may generally hold H-1B status for a maximum of six years. Certain exceptions to the six year maximum exist for workers who have been sponsored for permanent residency in the United States before reaching their six year limit. While first time H-1B status may be applied for beginning April 1, a worker who is fortunate enough to secure one of the limited number of H-1B Cap slots is not authorized to begin his or her H-1B employment until the beginning of the federal fiscal year for which their slot has been granted. This means that individuals granted an H-1B Cap slot for fiscal year 2014 will not be able to begin their authorized period of H-1B employment until October 1, 2013. Employers should carefully plan with their immigration counsel to address any employment continuity issues that maybe caused by this "Cap Gap" for any workers already on their payroll in another work authorizing status as well as to analyze any travel and timing issues that may be caused for sponsored individuals currently residing outside of the United States. USCIS has provided limited forms of relief for certain individuals who fall into the Cap Gap. For example, some foreign students' non H-1B work



authorization may be extended temporarily to bridge a Cap Gap in their status.

Not all H-1B workers are subject to the annual H-1B Cap; under certain circumstances USCIS will consider employers or the foreign national herself or himself to be "Cap exempt," such as the following:

- Individuals who already have H-1B status and wish to extend the amount of time they remain in the United States;
- Workers who, in the past six years, have been counted toward a previous year's H-1B Cap, unless they would be eligible for another full six years of admission because they have been outside the U.S. for at least one full year since they last held their H-B status;
- Individuals who will be employed at an institution of higher education, a related or affiliated nonprofit entity, a nonprofit research organization or a governmental research organization;
- Petitions filed to change the terms of employment of a current H-1B visa holder;
- Petitions filed to allow a current H-1B worker to change employers (unless the worker is switching from a "Cap exempt" entity to an employer who is subject to the Cap);
- Current H-1B visa holders who wish to work concurrently in a second H-1B position; and/or
- J-1 foreign medical graduates who have received a "Conrad 30" waiver of the two-year foreign residence requirement. Reinhart stands ready to answer any questions you may have about the H-1B petition process and whether a visa will help your organization meet its workforce-related goals. If you are contemplating filing a petition, contact your Reinhart attorney or one of Reinhart's Immigration Group attorneys as soon as possible to ensure timely filing of the petition.

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