

## Plan Now For FY2018 H-1B Cap Filing Season

The H-1B filing period is fast approaching for employers who intend to sponsor a first time H-1B worker during the next federal fiscal year (*i.e.*, October 1, 2017 to September 30, 2018). U.S. Citizenship & Immigration Services ("USCIS") will begin accepting new H-1B petitions on April 1, 2017, as the H-1B regulations allow H-1B petitions to be filed up to six months before H-1B employment is to commence. Because USCIS grants a limited number of new H-1B visas each federal fiscal year, Employers are encouraged to apply on or as soon as possible after April 1, 2017 for any potential new employees who will require a new H-1B visa. Therefore, we recommend employers canvass their workforce and potential recruitment pool immediately to determine who is most likely to need H-1B status in the 2018 federal fiscal year.

USCIS grants 65,000 new H-1B visas per federal fiscal year to employers who hire foreign workers for positions that require at least a bachelor's degree in a specialty field. An additional 20,000 new H-1B visas are available to employers who hire foreign workers with a master's degree from a U.S. university or college. These annual allocation limits are generally referred to as the "H-1B cap."

Because the demand for new H-1B visas will almost certainly exceed the supply of available H-1B visas, USCIS often runs out of visas months before the fiscal year ends. When USCIS receives more H-1B petitions than available visas, a random selection process is triggered to determine which petitions are accepted for processing. The H-1B cap for the 2017 federal fiscal year was reached on April 7, 2016, with 236,000 petitions received within the first week of the 2017 fiscal year filing season.

An H-1B cap visa must be obtained in order for a foreign worker to engage in "new" H-1B employment. "New" H-1B employment generally refers to H-1B petitions that are filed for foreign nationals who are not currently in H-1B status. When new H-1B employment requires an H-1B cap visa, it is generally referred to as "cap subject." Foreign workers whose employment is cap subject may not begin their H-1B employment until the beginning of the federal fiscal year for which their H-1B cap visa was issued (*i.e.*, October 1). However, there are exceptions when both new H-1B and continued H-1B employment is not subject to the annual H-1B cap visa allocation—these are generally referred to as "cap exempt" petitions. Exempt from the H-1B cap are the following:

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- H-1B petitions filed to extend the amount of time a current H-1B worker may remain in the United States.
- Individuals who have already been counted toward an H-1B cap within the past six years, unless he or she would be eligible for another full six years of admission (e., unless the individual has been outside the United States for at least one full year since he or she last held H-1B status).
- H-1B petitions filed for employment at an institution of higher education or a related or affiliated nonprofit entity, or for employment at a nonprofit or governmental research organization.
- H-1B petitions filed to change the terms of employment for current H-1B workers.
- H-1B petitions filed to allow current H-1B workers to change employers. However, where the H-1B worker is moving from a cap-exempt nonprofit organization to a cap-subject for-profit company, the case will likely be considered to involve new employment and, as such, would be subject to the H-1B cap.
- H-1B petitions filed to allow current H-1B workers to work concurrently in a second H-1B position, including those workers whose original H-1B position is with a cap-exempt employer.
- H-1B petitions for J-1 foreign medical graduates who have received a "Conrad 30" waiver of the two-year foreign residence requirement.

For those who are unfamiliar with the H-1B program, USCIS grants H-1B status in three-year increments for up to six years to qualifying foreign workers who will work in professional occupations (*i.e.*, occupations which normally require a bachelor's degree or higher). The H-1B worker is authorized to work only for employers who have filed an H-1B petition on the worker's behalf. Employers must offer H-1B workers a wage that meets the prevailing wage for the position in the specific geographic area and satisfy certain mandatory notice requirements. Reinhart's attorneys can assist in determining how best to prepare for the upcoming H-1B filing season and they look forward to speaking with you soon.

For more information, please contact Attorney [Ben Kurten](#) at [bkurten@reinhartlaw.com](mailto:bkurten@reinhartlaw.com) or 414-298-8222.



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