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FILING UNDER THE FY 2018 H-1B CAP; NEW DEVELOPMENTS IN H-1B CAP EXEMPTION

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U.S. Citizenship and Immigration Services (USCIS) announced that it will begin accepting H-1B petitions subject to the fiscal year 2018 cap on April 3, 2017. All cap-subject H-1B petitions filed before April 3, 2017, for the FY 2018 cap will be rejected.

Congress set a cap of 65,000 H-1B visas per fiscal year. An advanced-degree exemption from the H-1B cap is available for 20,000 beneficiaries who have earned a U.S. master's degree or higher. The agency said it will monitor the number of petitions received and notify the public when the H-1B cap has been met.

If the USCIS receives more H-1B petitions than allocated under the two H-1B caps, then it will conduct a lottery of all H-1B petitions received in the first five days from April 3. Like last year, it is anticipated that many more H-1B petitions will be rejected rather than accepted. There will again be many disappointed applicants.

To compound the problem, USCIS also recently announced a temporary suspension of premium processing for all H-1B petitions starting April 3 for up to six months. While H-1B premium processing is suspended, petitioners will not be able to file Form I-907, Request for Premium Processing Service, for a Form I-129, Petition for a Nonimmigrant Worker that requests the H-1B nonimmigrant classification. While premium processing is suspended, any I-907 filed with an H-1B petition will be rejected, USCIS said. If the petitioner submits one combined check for both the I-907 and I-129 H-1B fees, both forms will be rejected.

USCIS reminded H-1B petitioners to follow all statutory and regulatory

requirements as they prepare petitions to avoid delays in processing and possible requests for evidence. The I-129 filing fee has increased to $460, and petitioners no longer have 14 days to correct a dishonored payment. If any fee payments are not honored by the bank or financial institution, USCIS will reject the entire H-1B petition without the option for the petitioner to correct it.

The USCIS announcement about the April 3 start date for FY 2018 H-1B petitions is at https://www.uscis.gov/news/news-releases/uscis-will-accept-h-1b-petitions-fiscal-year-2018-beginning-april-3. The announcement about the suspension of premium processing for H-1B petitions is at https://www.uscis.gov/news/alerts/uscis-will-temporarily-suspend-premium-processing-all-h-1b-petitions. Detailed information on how to complete and submit an FY 2018 H-1B petition is at https://www.uscis.gov/sites/default/files/files/form/m-735.pdf. For more information on the H-1B nonimmigrant visa program and current I-129 processing times, see https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-fiscal-year-fy-2018-cap-season

H-1B Cap Exemption Options

Many H-1B employers are not subject to the H-1B cap and are considered cap exempt. They include institutions of higher education and non-profits affiliated or related to institutions of higher education. See 214(g)(5)(A) of the Immigration and Nationality Act (INA). Employment at a university that qualifies as an institution of higher education, as defined under section 101(a) of the Higher Education Act of 1965, clearly exempts an H-1B beneficiary from the H-1B cap. What was less clear was the definition of a nonprofit entity related or affiliated to an institution of higher education. The Retention of EB-1, EB-2 and EB-3 Immigrant Workers and Program Improvements Affecting High Skilled Nonimmigrant Workers (High Skilled Worker Rule) , effective January 17, 2017, has broadened the definition of an affiliated or related nonprofit entity if it satisfies the following conditions:

1. The nonprofit entity is connected to or associated with an institution of higher education through shared ownership or control by the same board or federation;
2. The nonprofit entity is operated by an institution of higher education;

3. The nonprofit entity is attached to an institution of higher education as a member, branch, cooperative, or subsidiary; or
4. The nonprofit entity has entered into a formal written affiliation agreement with a institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education, and a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education.

See 8 CFR 214.2(h)(8)(ii)(F)(2).

The High Skilled Worker Rule added the fourth prong, 8 CFR 214.2(h)(8)(ii)(F)(2)(iv), which recognizes that affiliation may be demonstrated when the nonprofit enters into an agreement with the institution of higher education that establishes an active working relationship, and that a fundamental activity of the nonprofit contributes to the research or mission of the institution of higher education. This broadening of the affiliated relationship opens up the possibility of more H-1B cap exempt petitions for those who have not been able to make it under the H-1B FY 2018 cap and can be employed by nonprofit affiliated entities. Prior to the addition of the fourth prong, it was difficult to show affiliation unless the nonprofit entity was part of the institution of higher education, as defined under 8 CFR 214.2(h)(8)(ii)(F)(2)(i)-(iii). This is no longer the case if there is a formal written affiliation with an institution of higher education even if the nonprofit is not owned by it or part of it. For example, if the nonprofit enters into an agreement with a university to house student interns, and these interns focus on activities at the nonprofit that contribute to the mission of the university, it will be possible to demonstrate affiliation. Similarly, if the nonprofit enters into agreements that conduct research for the university, such an arrangement could also qualify for showing affiliation and thus H-1B cap exemption.

INA 214(g)(5)(B) also provides for cap-exemption if the H-1B is employed or receives an offer of employment at a nonprofit research organization or governmental research organization. The High Skilled Worker Rule defines a governmental research organization as "a federal, state or local entity whose primary mission is the performance or promotion of basic research and/or applied research." See 8 CFR 214.2(h)(19)(iii)(C).

Under INA 214(g)(6), it is further permissible for an H-1B beneficiary to be

employed by a cap-exempt employer such as a university and then be able to obtain an H-1B, without being counted under the annual H-1B cap, through an employer who would otherwise be subject to the cap. The High Skilled Worker Rule affirms such concurrent employment between a cap-exempt and cap-subject H1B employer, but adds that there must be a demonstration that the "beneficiary's employment with the cap-exempt employer is expected to continue after the new cap-subject petition is approved, and the beneficiary can reasonably and concurrently perform the work described in each employer's respective positions." See 8 CFR 214.2(h)(8)(ii)(F)(6). The rule further cautions that if the cap-exemption employment is terminated or ends before the end of the validity of the petition that was approved under concurrent employment, the H-1B worker becomes subject to the numerical limitations of the H-1B, and that the USCIS may revoke the cap-subject H-1B petition. See 8 CFR 214.2(h)(8)(ii)(F)(6)(ii). Prior to the high Skilled Worker Rule, it may have been possible to argue that the H-1B worker did not become immediately subject to the numerical limitations even if concurrent cap exempt employment terminated and that he or she would only become subject to the cap upon the filing of the next H-1B petition. This is no longer the case.

Pursuant to INA 214(g)(5), an H-1B worker who is sponsored through a cap subject entity is not counted under the H-1B cap lottery if he or she is employed "at" a cap-exempt institution of higher education or is employed "at" a non-profit affiliated to an institution of higher education. The High Skilled Worker Rule affirms what is commonly referred to the "at" doctrine as the H-1B worker is working at a cap-exempt employer although he or she is the beneficiary of an H-1B petition filed by a cap-subject employer. While a plain reading of INA 214(g)(5) merely requires demonstration of employment at a cap subject employer, the High Skilled Worker Rule imposed additional requirements that are not supported by the statutory provision. It is now required to demonstrate that the "H-1B beneficiary will spend the majority of his or work time performing job duties at a qualifying institution, organization or entity and those job duties directly and predominately further the essential purpose, mission, objectives or functions of the qualifying institution, organization or entity, namely, either higher education, nonprofit research or government research. The burden is on the H-1B petitioner to establish that there is a nexus between the duties to be performed by the H-1B beneficiary and the essential purpose, mission, objectives or functions of the qualifying

institution, organization or entity." See 8 CFR 214.2(h)(8)(ii)(F)(4). This works best where the petitioner is closely tied to a cap exempt entity, such as a startup using the research laboratory of a university who have both received joint funding, and where the H-1B beneficiary performs research at the laboratory even though sponsored for the H-1B through the startup.

Any H-1B beneficiary who has previously been counted, within the 6 years prior to the approval of a petition shall not be counted towards that limitation again, unless the individual would be eligible for a full 6 years by spending one year outside the United States. See INA 214(g)(7). This is the case even if the beneficiary never entered the United States under the previously approved H-1B petition, unless the employer notified the USCIS and the petition got revoked. The High Skilled Worker Rule adopts a 2006 USCIS Memo that gave the beneficiary a choice of either recapturing the remaining time left on the H-1B or seeking a new period of six years if the beneficiary was outside the United States for more than one year. 8 CFR 214.2(h)(13)(iii)(C)(2) like the 2016 USCIS Memo now allows recapture of remaining time left in H-1B even if the previous H-1B petition was approved more than 6 years ago, and gives the beneficiary who has been physically outside the United States for more than 1 year a choice of either recapturing the remainder of H-1B time or seeking a new period of six years.

Although H-1B cap exemption possibilities clearly exist, and have somewhat broadened under the High Skilled Worker Rule, not everyone will qualify for cap-exemption unless they are specifically offered employment through cap exempt employers or work at cap exempt entities. Most people will not get selected under H-1B lottery. For FY 2017, the USCIS received over 236,000 H-1B petitions, all vying for one of the 85,000 visas available. This means that some 151,000 or more people – highly qualified individuals with dreams and career aspirations – will likely be denied the ability to work in the US. This is not for lack of skill, this is not for lack of good moral character, but for an arbitrary cap system that limits upward mobility and stifles US economic growth and innovation in many fields