

H-1B Cap Season is Over, Now What?

AILA Texas Chapter – 2016 Spring Conference

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Overview

- H-1B Cap Overview and FY2017 Cap Season
- Common Issues That Arise While Cap Petition Pending/After Approved
- Options if Not Selected in Lottery
 - H-1B Cap Exemptions
 - H-1B Alternatives
- Takeaways
- Questions

FY2017 H-1B Cap Season

- Latest updates
- USCIS expects to begin premium processing for cap-subject petitions no later than May 16, 2016
- Recent cap lottery data:
 - FY2014: 124,000 filings
 - FY2015: 172,500 filings
 - FY2016: 233,000 filings

International Travel

- **Travel While Cap Petition Pending**
 - Departure while change of status pending generally abandons the change of status
 - June 18, 2001 Cook Memo
 - Confirmed by DHS in March 11, 2016 STEM OPT Final Rule (81 Fed. Reg. at 13,102)
 - Reminder: this applies to all change of status applications, not just H-1B beneficiaries (e.g., dependents)
 - May be unable to enter until late Sept. on H-1B

International Travel

- **Travel After Cap Petition Approved**
 - Not recommended
 - If travel while on OPT, will generally need these documents to return:
 - Endorsed I-20
 - Valid F-1 Visa
 - Unexpired Employment Authorization Document (EAD)
 - Also recommended: employment letter
 - Reminder: F-1 students must show nonimmigrant intent

F-1 Status and Cap Gap

- **“Cap gap” (8 C.F.R. § 214.2(f)(5)(vi)(A))**
 - If beneficiary of a timely-filed cap-subject H-1B petition for change of status that requests an H-1B employment start date of October 1st, then
 - F-1 status, as well as employment authorization, automatically extended to October 1st
- **Must be in valid F-1 status as of filing date**
 - If in 60-day grace period at time H-1B petition is filed, grace period extended, but not employment authorized

F-1 Status and Cap Gap

- “Cap gap” (8 C.F.R. § 214.2(f)(5)(vi)(A))
 - If not selected in lottery, will have standard 60-day grace period from the date of the rejection notice or the program end date, whichever is later
- Travel on cap gap
 - Not recommended

Change of Employer

- Example: Employer A files H-1B petition for beneficiary, who is currently working for Employer A on OPT. Selected in lottery/ approved. Beneficiary gets job offer from Employer B in August. What are beneficiary's options?



Change of Employer


- Counting against the H-1B cap
 - Counted when “issued a visa” or “otherwise provided nonimmigrant status under sections 101(a)(15)(H)(i)(b) . . . of the Act”
 - 8 C.F.R. § 214.2(h)(8)(ii)(A)
- Arguably, not counted against cap until “ascend” to H-1B status on Oct. 1st

Change of Employer

- Can Employer B file transfer petition before October 1st?
 - According to 2006 CSC Liaison Minutes, yes, if start date after October 1st
 - CSC & AILA Liaison Meeting Notes (Sept. 20, 2006), AILA Doc. No. 06100266
 - Safest approach: work with Employer A until October 1st, have Employer B file a change of employer H-1B on October 1st, port to Employer B once receive confirmation of filing

Termination by Cap Employer

- Example: Employer A files H-1B petition for beneficiary, who is currently working for Employer A on OPT. Selected in lottery/ approved. Employer A lays off beneficiary in August. What now?



Termination by Cap Employer

- If Employer revokes approved H-1B:
 - According to USCIS, if employer revokes H-1B petition before October 1st (or prior to beneficiary using petition to apply for a visa/ admission), then not considered to be counted under the cap
 - AILA/SCOPS Teleconference Notes (May 21, 2014), AILA Doc. No. 14052863
 - Revocation/withdrawal of H-1B petition also “automatically” terminates cap-gap extension

Termination by Cap Employer

- Where does that leave the beneficiary?
 - If petition is not revoked, could potentially work for new employer on OPT during approved cap gap period
 - If EAD still valid, could also work on OPT (and/or file for STEM OPT extension)
 - But, if after Oct. 1st, would require F-1 reinstatement
 - According to 2006 liaison minutes, new employer could file H-1B transfer before October 1st, if start date after October 1st
 - CSC & AILA Liaison Meeting Notes (Sept. 20, 2006), AILA Doc. No. 06100266

Other Potential Issues

- Multiple petitions for the same employee (8 C.F.R. § 214.2(h)(2)(i)(G))
 - Multiple cap-subject petitions by an employer for the same beneficiary in the same fiscal year "will result in the denial or revocation of all such petitions"
 - USCIS can issue RFE, NOID, or NOIR if it "believes that related entities (such as a parent company, subsidiary, or affiliate) may not have a legitimate business need to file more than one H-1B petition on behalf of the same alien"
 - Failure of any entity to demonstrate legitimate business need results in denial/revocation of all petitions

H-1B Cap Exemptions

- Cap-Exempt Organizations (INA § 214(g))
 - Institutions of higher education (i.e., universities)
 - Nonprofit entities related to or affiliated with an institution of higher education
 - Nonprofit research organizations
 - Governmental research organizations
- "Employed at" cap exemption

H-1B Cap Exemptions

- Concurrent employment with a cap-exempt employer
 - Current rule (2008 Neufeld Memo/AFM § 31.3(g)(13)(D))
 - If currently employed by cap-exempt employer, can accept concurrent employment with a non-exempt employer, as long as employed at the cap-exempt employer at the time the concurrent petition is filed
 - Note: proposed rule

H-1B Alternatives: STEM OPT

- New rule effective May 10, 2016
- 24 months of post-graduation employment for E-Verify employer after completion of initial 12 months of OPT
- Must apply before initial OPT expires and within 60 days of DSO's authorization for STEM extension in SEVP
- Note: can apply for STEM OPT during cap-gap extension period
 - But, cannot apply once cap-gap extension period terminated (e.g., if H-1B petition is rejected, denied, or revoked)

H-1B Alternatives: STEM OPT

- Qualifying STEM Degrees:
 - "STEM Designated Degree Program List"
 - Prior U.S. degrees obtained within the last 10 years generally can qualify, as long as program is on current STEM list
- Changes from new rule include:
 - Students/employers must prepare a "Training Plan" (Form I-983)
 - Reporting obligations to DSO for students and employers
 - Wage attestations
 - 150 total days of unemployment

H-1B Alternatives

- Re-enroll in new F-1 program
 - Note: advise of risk of F-1 programs promising immediate CPT
- Country-specific H-1B alternatives:
 - TN (Canada/Mexico)
 - H-1B1 (Chile/Singapore)
 - E-3 (Australia)

H-1B Alternatives

- L-1
 - For many students, will not satisfy requirements for one year of work experience abroad in prior three years
 - "Park abroad" option?
- E-1/E-2
- O-1
- Dependent EAD (e.g., H-4, L-2)
- Other possible options limited (e.g., J-1)
- Employment-Based Green Card?

Takeaways

- Maximize beneficiary's opportunities to win the lottery
- Hope for the best, plan for the worst
- Selecting the right alternative:
 - Employer considerations
 - Industry, comfort with risk, costs, etc
 - Beneficiary considerations
 - Likelihood of travel (and willingness)
 - Dependents
 - Qualifications

Questions???

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