

Insights, News & Events

THE H-1B LOTTERY: HOPING FOR THE BEST, PLANNING FOR THE WORST

Demand For FY17 H-1Bs May Exceed 300k

Insights

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As it does each year, the office of U.S. Citizenship and Immigration Services (USCIS) will accept H-1B petitions from U.S. employers during the first five business days in April. If the USCIS receives more than the allotment of new 85,000 H-1Bs for the 2017 fiscal year (which begins October 1, 2016), it will use a random lottery to select petitions. If your business will participate in the H-1B process this year, the time to prepare is now.

Begin Planning Now

Employers must plan more carefully than ever to ensure the highest likelihood of success to secure one of the coveted new H-1Bs. Last year, U.S. employers filed over 233,000 H-1B petitions during the first week in April. This year demand is expected to be even higher, many believing that it could reach over 300,000.

You should spend the next few weeks identifying those foreign workers who may need H-1B sponsorship, preparing the H-1B petitions as early as possible, and developing backup strategies should the petition not be selected.

The H-1B: A Background

The H-1B is the most popular temporary work visa

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option to employ professional foreign workers. To sponsor a foreign worker, a U.S. employer must first petition USCIS for approval showing that both the role and the foreign worker meet the legal requirements for sponsorship. If the sponsored worker has never previously worked in the U.S. in H-1B status, the employer's H-1B petition will be subject to the yearly H-1B quota.

Specifically, USCIS cannot approve more than 85,000 new H-1B petitions each fiscal year. This total includes 65,000 general H-1Bs and an additional 20,000 H-1Bs for holders of a master's or higher degree issued by a U.S. college or university. The cap does not apply to existing H-1B workers who are extending their current H-1B status or who are changing H-1B employers. The cap also does not apply to certain nonprofit organizations.

Because employers are permitted to file H-1B petitions up to six months in advance of the start date, April 1 is the earliest date on which new H-1Bs can be filed. Because April 1, 2016 falls on a Friday, USCIS is required to accept H-1B cap filings through the following Thursday, April 7, 2016. If selected and approved, the approval will be effective for H-1B employment on or after October 1, 2016, which is the beginning of the 2017 fiscal year.

Alternative Options May Be Available

Due to the expected high demand, employers should be planning now for a possible rejection of their H-1B petitions. Alternative visa options for affected employees include, but are limited to, the following:

- for Canadian and Mexican professionals, the TN visa available under the North American Free Trade Agreement;
- for nationals of Australia, the E-3 visa;
- for nationals of Chile or Singapore, the H-1B1 visa;

- for intracompany transferees, the L-1 visa (an organization with foreign operations can transfer employees to its U.S.-affiliated company in a similar position under certain circumstances);
- for individuals with a U.S. degree in a science, technology, engineering or math (STEM) field and employers enrolled in E-Verify, the 17-month optional practical training (OPT) extension;
- for individuals who may qualify under the extraordinary ability criteria, the O-1 visa;
- for essential employees if the company and foreign national share the same nationality, the E-2 visa;
- for individuals in F-1 status, continue with F-1 studies and look at internship opportunities under curricular practical training (CPT);
- for individuals who may qualify under the EB-1 extraordinary ability, EB-1 outstanding researcher and/or EB-2 national interest waiver (NIW) criteria, pursue concurrent I-140/485 green card process and work authorization issuance;
- for individuals whose employers have offices outside the United States, the individuals can be placed on the foreign payroll and work abroad until next year's H-1B filing period or until another type of work visa becomes available;
- for individuals entering a structured training program, the H-3 visa; and
- for individuals who can be categorized as an Exchange Visitor, the J-1 visa.

Every situation is different and you should consult your legal representative to ensure you have viable alternatives should your H-1B petition be rejected. If you have questions about the upcoming H-1B cap or how it may affect your business, please contact your Fisher Phillips attorney or one of the attorneys in our Global Immigration Practice Group.

A version of this article originally appeared on Fisher Phillips' Cross Border Employer blog, which can be found [here](#) or at www.crossborderemployer.com.

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