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The 2019 H-1B cap season is upon us

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We are less than three months away from the new H-1B (cap-subject) filing season. On April 1, 2019, U.S. Citizenship and Immigration Services (USCIS) will begin accepting H-1B visa petitions for Fiscal Year 2020, which starts on October 1, 2019.

For each fiscal year, there are only 85,000 new H-1Bs available: 65,000 for foreign nationals with a bachelor's degree (or equivalent education) from a U.S. or foreign college or university, and 20,000 for foreign nationals with a graduate degree from a U.S. college or university.

We believe that in FY 2020, USCIS will again receive more petitions than there are H-1B visas available, necessitating a lottery. Only petitions received in the first five business days of filing (April 1 to April 5, 2019) will be included in the lottery, so employers hoping to secure H-1Bs on behalf of current or prospective employees must plan ahead and must file their H-1B petitions during the first week of April. This means that now is the time to assess your needs and begin preparation of H-1B petitions on behalf of current and prospective employees.

On January 31, 2019, USCIS issued its [final rule](#) changing the process by which H-1B cap-subject petitions will be selected in the lottery. Specifically, the final rule (1) adds a pre-registration process to the H-1B lottery, and (2) reverses the order by which H-1B petitions are selected in the lottery thereby increasing the total number of petitions selected for H-1B beneficiaries possessing a master's degree or higher from a U.S. college or university. Importantly, USCIS will only implement the reversed selection process for the FY 2020 H-1B cap filing season. The final rule's pre-registration requirement is being suspended until at least the FY 2021 cap filing season (April 2020).

Employers should consider:

- Foreign national employees who are in F-1 student status and working pursuant to a period of Optional Practical Training (OPT) following completion of a U.S. degree program. OPT is generally limited to 12 months (although those who received a U.S. degree in a science, technology, engineering or math (STEM) discipline may be eligible for an additional 24

months of employment authorization) so employment beyond the first year is typically contingent on securing an H-1B.

- Employees in L-1 status, whom you are sponsoring for legal permanent residency (or will sponsor in the future), but who are unlikely to receive a “green card” within the allotted period of admission (i.e., five years if in L-1B status or seven years if in L-1A status). Your Nixon Peabody legal professional can help evaluate H-1B options for your L-1 employees.
- Employees who are currently authorized to work pursuant to the [final rule](#) providing employment authorization for certain H-4 dependent spouses. The current administration has announced its intention to rescind the rule allowing such employment authorization.
- Prospective employees who have not previously been counted against the H-1B numerical limits within the past six years (e.g., with another U.S. employer), and whom you wish to employ in the United States.

In short, the H-1B nonimmigrant visa classification is for foreign national workers in “specialty occupations,” meaning occupations that require theoretical and practical application of highly specialized knowledge (generally by requiring at least a bachelor’s degree, or equivalent, in a specialized field). If you have questions regarding whether or not a particular position qualifies as a “specialty occupation,” or if your foreign national worker’s education qualifies, please let us know.

Importantly, if you miss the filing deadline in April, under the current system there will be no new H-1B visas available for the remainder of the fiscal year.

If you are interested in employing a foreign national in the U.S., your Nixon Peabody professional can discuss with you the H-1B process further as well as other work authorization options that may be available (e.g., O-1, etc.).

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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