

Immigration Alert: USCIS Announces Interim Rule on Cap-Subject H-1B Visas for Fiscal Year 2009

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On March 19, 2008, U.S. Citizenship and Immigration Services (USCIS) released an interim rule updating the existing rules governing the H-1B visa program. These rule changes primarily affect the implementation of the random H-1B cap lottery system, and also clarify USCIS's policy regarding multiple H-1B petitions for the same H-1B worker.

As you may already know, Congress has placed a numerical "cap," or limit, on H-1B visas of 65,000 (58,200 + 6,800 for nationals of Chile and Singapore) each year, with an additional 20,000 reserved for applicants holding U.S. master's degrees or higher. All H-1B visas are gone for this current fiscal year ending September 30, 2008, and employers may file for fiscal year 2009 H-1B visas commencing April 1, 2008 (for validity beginning on October 1, 2008). For fiscal year 2008, the number of H-1B applicants was double the number of visas available, so USCIS used a random "lottery" system to determine which petitions would be accepted (and thus counted toward the numerical cap). For the upcoming fiscal year 2009 H-1B cap lottery process, USCIS has announced the following:

USCIS will consider petitions received within the first five business days of H-1B availability (April 1-April 7) for the random lottery process. (In previous years, USCIS only considered petitions received in the first two days.)

When USCIS determines that the numerical limit (the cap) has been reached, they will designate this date the "final receipt date." If the final receipt date falls within the five-business-day window described above, the random selection of H-1B petitions will be run using all cap-subject petitions received during those five days.

If the 20,000 limit on U.S. Masters cases is reached during the five-day period, USCIS will first run the lottery to assign U.S. Masters cap numbers. Those U.S. Masters cases that are not selected will be transferred into the subsequent lottery to determine the remaining 65,000 H-1B visa numbers. If the 20,000 limit on U.S. Masters cases is *not* met within this five-day period, USCIS will simply assign H-1B visa numbers on a "first in" basis until the 20,000 numerical limit is reached.

USCIS has also clarified its position on multiple H-1B filings for the same H-1B worker. Specifically, USCIS will now either deny or revoke multiple petitions filed by an employer for the same individual. While *all* of the employer's H-1B petitions will not be revoked, all petitions submitted for the same H-1B employee will be denied or revoked when multiple filings are discovered. If the duplicate filing is discovered *after* the initial petition is approved, USCIS will revoke these petitions and will not refund the filing fees for any of the duplicative filings. Furthermore, if a petition indicates that it is exempt from the numerical cap, and USCIS determines the petition is in fact "cap-subject" after the cap has already been reached, the petition will be denied and the filing fees will *not* be returned.

This multiple-filings rule does not prevent related employers (e.g. parent companies and subsidiaries) from filing petitions on behalf of the same employee for different positions, based on legitimate business need.

If you would like more information on any immigration matter, please contact your immigration attorney at Mintz Levin or go to www.mintz.com.

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