

FORD & HARRISON<sup>LLP</sup>  
THE RIGHT RESPONSE AT THE RIGHT TIME

LEGAL ALERT



## Legal Alert: New Rule Prohibits Filing Multiple H-1-B Petitions on Behalf of a Single Employee

3/20/2008

U.S. Citizenship and Immigration Services (USCIS) issued an interim final rule on March 19, 2008, that prohibits employers from filing more than one petition for an H-1B visa for a single employee in a fiscal year. USCIS will now either deny or revoke multiple petitions filed by an employer for the same H-1B worker. USCIS will not refund filing fees for duplicative or multiple H-1B petitions. The interim final rule will become effective upon publication in the Federal Register and is available on the USCIS website at <http://www.uscis.gov/>.

The rule does not prevent related employers (such as a parent company and its subsidiary) from filing petitions on behalf of the same alien for different positions, based on legitimate business needs.

The H-1B visa program is used to employ foreign workers in fields that require theoretical and practical expertise in specialized occupations requiring a bachelor's degree or higher (or its equivalent), such as scientists, engineers, or computer programmers. The number of H-1B visas currently is capped at 65,000 per year, subject to certain limited exceptions. The first 20,000 H-1B petitions filed on behalf of aliens with U.S.-earned masters' or higher degrees are exempt from the H-1B numerical limitation of 65,000. USCIS administers a separate "20,000 cap" for such exempt petitions.

Under the interim final rule, USCIS will use a random selection process for all the master's degree or higher cap-exempt cases received on the first five business days available for filing H-1B petitions for a given fiscal year, if necessary. If the U.S. master's exemption limit is reached on the first five business days, USCIS will first conduct the random selection process for such petitions before it begins random selection for petitions to be counted toward the 65,000 cap. Petitions eligible for the U.S. master's degree or higher exemption that are not selected to receive an H-1B visa number from the 20,000 cap will be considered with the other H-1B petitions in the random selection for the 65,000 cap filed on the first five business days.

USCIS will use the following process for handling H-1B petitions subject to the FY 2009 cap:

- April 1, 2008 is the first day petitions may be received for an October 1, 2008 start date. When it is determined that the numerical limitations have been reached, USCIS employs a random selection process to choose among the petitions received on the "final receipt date." If the "final receipt date" falls

within any one of the first five business days, the random selection will be run using all the cap-subject petitions received on those five days. (This is a change from the prior process, which selected from petitions filed in the first two business days available for filing H1-B petitions in a fiscal year.)

- USCIS will reject and return the filing fee(s) for all cap-subject H-1B petitions that are not selected in the process described above. The new rule clarifies that this provision only applies to petitions that indicate they are cap-subject. If a petitioner claims to be exempt from the cap and is later found to be subject to the cap, USCIS will not refund or return fees and that petition will be denied if no cap numbers are available.

- Petitions for the FY 2009 cap received before April 1, 2008 will be rejected. A petition is considered received when USCIS takes possession of and stamps the petition as received, not by the date the petition is postmarked.

Petitions filed on behalf of current H-1B workers do not count towards the congressionally mandated H-1B cap. Accordingly, this rule does not affect USCIS processing of petitions filed to:

- Extend the amount of time a current H-1B worker may remain in the United States;
- Change the terms of employment for current H-1B workers;
- Allow current H-1B workers to change from one cap-subject position to a different cap-subject position with a different employer; or
- Allow current H-1B workers to work concurrently in a second H-1B position.

#### **Employers' Bottom Line:**

It is likely the H-1B visa cap for FY 2009 will be reached quickly, as in the past. Ford & Harrison's immigration attorneys are experienced in applying for these visas on behalf of employers and can guide you through the process. Employers interested in applying for H-1B visas should contact us now to begin processing the paperwork, so these applications can be submitted on April 1, 2008, or as soon as possible to ensure the retention of valuable employees.

If you have any questions about the H-1B visa process or any other employment related immigration issue, please contact either Raazia Hall, [rkhall@fordharrison.com](mailto:rkhall@fordharrison.com), 404-888-3816, or Joyce Fleming, [jfleming@fordharrison.com](mailto:jfleming@fordharrison.com), 404-888-3888, in Ford & Harrison's Business Immigration practice group.