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H-1B Cap Season in Full Swing

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Engaging and retaining smart, competitively trained, and diverse talent is critical for all businesses competing in a global economy. For many U.S. businesses across all industries, this means employing foreign workers who have either earned their college or graduate degrees abroad or in the U.S. and who seek to contribute to the U.S. economy. This brings us to the most used visa category in the U.S. providing businesses with access to this talent, the H-1B and the impending H-1B cap season.

Given that there are only a limited number of new H-1B visas issued each fiscal year, it is critical to start planning well in advance of the expected filings to take place for the 2017 FY. While the government fiscal year may not start until October 1, filings to secure an H-1B visa take place the first week of April. As a great deal of groundwork goes into preparing an H-1B petition, now is the time for employers to begin the process.

U.S. businesses hoping to apply for one of the coveted H-1B visas for the 2017 FY should immediately take account of their current workforce and recruiting efforts to identify potential H-1B petitions that may be subject to the H-1B annual quota. H-1B petitions for the 2017 FY must be ready and filed within the first five date of April to have a chance at the visa. In April 2015, the cap for the 2016 FY was reached during the first week of submissions (April 1-5), with more than 233,000 petitions being filed. A daunting number considering that only 65,000 new H-1B visas are available each fiscal year with an additional 20,000 available for individuals who earned a Master's or higher degree from an accredited school in the United States.

As offers go out to current or prospective employees in the U.S. in temporary student status (F-1) or to individuals not in the U.S. or not in H-1B status, planning and taking action early will at minimum ensure your petitions are filed in a timely manner.



Here is a quick refresher on who is subject to the 65,000 annual cap and who is not:

The cap applies to:

1. Individuals who do not already hold H-1B status and are in the U.S. in another status, i.e., F-1, F-2, H-4, L, O, J, etc.
2. Individuals who already hold H-1B status but the H-1B was filed by an institution of higher education or a related or affiliated nonprofit entity, or at a nonprofit research organization or a governmental research organization that was not subject to the annual H-1B visa numbers.
3. Individuals who are abroad and have not held H-1B status within the preceding six years.

The cap does not apply to:

1. Individuals who already hold H-1B status and are extending or amending their existing status.
2. Individuals who already hold H-1B status and are changing the terms of employment or changing employers.

In addition, there are additional H-1B numbers set aside for the following:

1. Chilean and Singaporean nationals under the additional quota designation under the Free Trade Agreements with those countries.
2. Foreign nationals who have earned a U.S. master's or higher degree. The degree must be completed and issued at the time the H-1B petition is filed (this is the 20,000 set aside).

While considering whether or not your company will be sponsoring any individuals for H-1B visas, the time is right to review compliance in all aspects of immigration-related matters including Department of Labor and U.S. Citizenship and Immigration Services filings. For those charged with immigration responsibilities, now is the time to dust off the Form I-9 binders, PERM Audit files and Public Access Folders to

ensure they are being maintained properly and discarded at the appropriate time.

What is an H-1B Employee?

The H-1B program allows U.S. employers seeking to employ foreign workers in "specialty occupations," that is, positions that require the minimum of a Bachelor's degree or its equivalent and specialized knowledge or skills: think scientists, engineers, teachers, architects, lawyers, accountants, doctors and computer programmers, among many others.

When can new H-1B visas be filed?

Cap-subject H-1B petitions can be filed for receipt by USCIS on April 1 of each year, for an employment start date of October 1. The number of H-1B petitions filed has increased during the last few years as the economy and job market have improved, a sign that H-1B demand is markedly tied to the market and economy.

How is the Department of Labor involved?

The filing of an H-1B petition with the USCIS requires certification of the job offer by the Department of Labor (DOL). The H-1B sponsoring employer must submit Labor Condition Application (LCA) to the DOL certifying that the company will pay the H-1B worker the **higher** of the actual or prevailing wage. The DOL certification must accompany each H-1B petition and, as part of the U.S. worker protections inherent in the H-1B program, employers must post a notice at the worksite identifying the position and terms of employment, including the offered salary. All H-1B



sponsorship and terms of employment must meet certain standards governed by H-1B regulations designed to protect similarly employed U.S. workers from being adversely affected

by the employment of the H-1B workers, as well as to protect the H-1B workers from abuse.



For More Information

If you have questions regarding this alert, please contact the author or your Polsinelli attorney.

■ Mahsa Aliaskari | 310.203.5374 | maliaskari@polsinelli.com

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About Polsinelli's Immigration Practice

In a global and competitive labor market, businesses need immigration advice that meets their commercial objectives. Polsinelli's immigration practice understands the need for creative, yet compliant, immigration solutions. Working with multinational corporations, national, regional and local employers, start-up ventures, educational institutions, investors, and individuals, we understand that each circumstance is unique and requires a tailored approach and response.

Our immigration team provides services to a variety of clients, including national and regional health systems and hospitals. Regardless of the visa requirement or compliance concern, our attorneys help navigate and simplify the process.

Offering advice to clients from startups to established companies, our seasoned attorneys effectively partner with businesses dealing with global mobility, compliance and foreign investor issues. Our services include: U.S. Immigration; Immigration Compliance Services ; EB-5 Immigrant Investment and Finance,

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* 2016 BTI Client Service A-Team Report

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