



GEARING FOR THE FY 2008 H-1B CAP

Posted on March 23, 2007 by Cyrus Mehta

by

Cyrus D. Mehta*

Every potential H-1B filer is scrambling to make it into the FY 2008 Cap, which starts on October 1, 2007. Petitioners can file six months in advance, and thus the first day for accepting an H-1B petition is April 1, 2007. This year, April 1, 2007, falls on a Sunday. Therefore, petitions received on April 2, 2007 will be considered as the first day for receiving an H-1B petition under the FY 2008 H-1B cap. Employers, prospective foreign national employees and attorneys are thus gearing up to mail out H-1B petitions via courier on Friday, March 30, 2007.

Although the US Citizenship and Immigration Service (USCIS) will accept filings even the day before, on Saturday March 31, 2007, there is no advantage to sending an H-1B petition out on Friday for Saturday delivery. Even if delivered on Saturday, USCIS will carry over the unopened package to Monday, April 2, 2007. Conversely, it will be fatal if the H-1B petition is mailed out on Thursday, March 29 and reaches the USCIS on Friday, March 30.

Speculation is rife that the USCIS will receive more than 65,000 filings on April 2. Immigration Daily (March 19, 2007), www.ilw.com, predicts that there will be at least 80,000 petitions filed on April 2 and basis its estimates on the following assumptions: "large law firms = 30,000, small law firms = 15,000, large H-1B dependents = 25,000, and small H-1B dependents = 10,000 (there have been reports that 10,000 petitions will be filed by two large H-1B dependent corporations, we have found no basis to these rumors)."

Even if petitions in excess of 65,000 are filed on April 2, 65,000 petitions will be selected at random pursuant to 8 C.F.R. 214.2(h)(8)(ii)(B), which provides:

"If the final receipt date is the same as the first date on which petitions subject to the applicable cap may be filed (i.e., if the cap is reached on the first day filings can be made), USCIS will randomly apply all of the numbers among the petitions filed on the final receipt date and the following day."

Under the random selection provision, petitions filed on both April 2 and the "following day," April 3, will be selected through a lottery. It will take several days or weeks for USCIS to announce the date of the cap and this announcement will be retroactive.

Note that there is a separate H-1B Master's cap of 20,000, which is in addition to the 65,000 cap. In FY 2007, the Master's cap was reached about two months later than the regular 65,000 cap. The master's cap was reached on July 22, 2006 while the 65,000 cap was reached on May 26, 2006. It is likely that the Master's cap will not be hit on April 2.

The USCIS has also announced that, effective April 2, 2007, H-1B petitions will be accepted by the California and Vermont Service Centers depending on the state the beneficiary will work in under the H-1B visa. Filers must carefully refer to the charts for [I-129](#) and [I-539](#) filings before determining the appropriate Service Center for filing the H-1B petition. Thus, if the job location is in Arizona, the H-1B should be filed at the California Service Center. If the job location is in Texas, it must be filed at the Vermont Service Center. In the event that the job locations are both in Arizona and Texas, the H-1B petition must be filed at the Service Center, which has jurisdiction over the company headquarters. If the headquarters are in New York, the H-1B petition must be filed at the Vermont Service Center.

Some are speculating that filing at the Vermont Service Center, rather than the California Service Center, will be advantageous because it is three hours ahead. We do not believe this is the case because all petitions filed on April 2, if greater than the 65,000 cap, will be randomized through a lottery regardless of whether they are filed at the California or the Vermont Service Center.

It makes sense to have the Labor Condition Application (LCA) certified prior to April 1, even if it shaves off the three years by a few days. For example, an LCA filed and certified on March 26, 2007 will have a validity date of September 26, 2007 till September 26, 2010. Since the validity date of the H-1B petition can

only commence October 1, 2007, it will only be possible to request the H-1B end date till September 26, 2010, which is the end date of the LCA.

Like the past two years, we do not expect a beneficial "cap gap" policy for F1 visa status holders this year too. Therefore, if the 60 day grace period of the F-1 status expires before October 1, 2007, it will not be possible to request a change of status from F-1 to H-1B in the United States. The H-1B petition would have to be approved for consular processing, and the Beneficiary must leave prior to the expiration of the 60 day grace period to apply for an H-1B visa stamp at the overseas consulate and return to start employment on October 1.

*** Cyrus D. Mehta, a graduate of Cambridge University and Columbia Law School, practices immigration law in New York City and is the managing member of Cyrus D. Mehta & Associates, P.L.L.C. He is the Past Chair of the Board of Trustees of the American Immigration Law Foundation and recipient of the 1997 Joseph Minsky Young Lawyers Award. He is also Secretary of the Association of the Bar of the City of New York and former Chair of the Committee on Immigration and Nationality Law of the same Association. He frequently lectures on various immigration subjects at legal seminars, workshops and universities.**