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US IMMIGRATION & NATIONALITY LAW

USCIS ANNOUNCES RULE PROHIBITING DUPLICATE H-1B FILINGS AND ALLOWING FOR A 5-DAY FILING PERIOD

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by
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US Citizenship and Immigration Services (USCIS) transmitted an interim final rule to the *Federal Register* today that prohibits employers from filing multiple H-1B petitions for the same employee. According to the USCIS, these changes will ensure that companies filing H-1B petitions subject to congressionally mandated numerical limits have an equal chance to employ an H-1B worker. To ensure a fair and orderly distribution of available H-1B visas, USCIS will deny or revoke multiple petitions filed by an employer for the same H-1B worker and will not refund the filing fees submitted with multiple or duplicative petitions.

Specifically, an employer may not file in the same Fiscal Year more than one H-1B petition on behalf of the same alien if the alien is subject to either the 65,000 numerical cap or the 20,000 Master's cap. The rule goes on to state that "If an H-1B petition is denied, on a basis other than fraud or misrepresentation, the employer may file a subsequent H-1B petition on behalf of the same alien in the same fiscal year, provided that the numerical limitation has not been reached or if the filing qualifies as exempt from the numerical limitation."

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

The preamble to the rule cites the following example under which related entities can file H-1B petitions on behalf of one alien:

> "For example, a Fortune 500 company may be the parent company of numerous U.S.-based subsidiaries whose business is to engage in either the food, beverage or snack industries. Each line of business may, in turn, be divided into several business units and operate distinct companies (restaurant, bottled beverage plant, cereal manufacturer, etc) with different EIN numbers, addresses, etc. Although all the subsidiaries are ultimately related to the parent company through corporate ownership, this rule does not prohibit different subsidiaries from filing one H-IB petition each on behalf of the same alien so long as each employer/subsidiary has a legitimate business need to hire such alien for a position within that subsidiaries' corporate structure. Thus, in this example, if the bottled beverage plant owned by the Fortune 500 company and the cereal manufacturing company owned by the same Fortune 500 company are each in need of the services of a Chief Financial Officer, both may file one petition each on behalf of the same alien. A subsidiary should not file an H-IB petition for an alien just to increase the alien's chances of being selected for an H-IB number where that subsidiary has no legitimate need to employ the alien and is, instead, only filing a petition to facilitate the alien's hiring by a different, although related, subsidiary."

If, however, USCIS believes that the related entitles (such as a parent company, subsidiary, or affiliate) may not have a legitimate business need to file more than one H-1B petition on behalf of the same alien subject to the numerical limitations, USCIS may issue a request for additional evidence or notice of intent to deny, or notice of intent to revoke a petition. If the entities fail to demonstrate a legitimate business need to file an H-1B petition on behalf of the same alien, all petitions filed on that alien's behalf by the related entitles will be denied or revoked.

On April 1, 2008, employers may file petitions requesting H-1B workers for fiscal year 2009 employment starting on October 1, 2008. For fiscal year 2009, Congress has set a limit of 65,000 for most H-1B workers. Additionally, the first 20,000 H-1B workers who have a U.S. master's degree or higher are exempt from the cap. Under current procedures, which are not changed by this rule, once USCIS receives 20,000 petitions for aliens with a U.S. master's degree or higher, all other cases requesting the educational exemption are counted

toward the 65,000 cap. Once the 65,000 cap is reached for a fiscal year, USCIS will announce that the cap has been filled and reject further petitions subject to the cap.

This rule also stipulates that if USCIS determines the number of H-1B petitions received meets the cap within the first five business days of accepting applications for the coming fiscal year, USCIS will apply a random selection process among all H-1B petitions received during this time period. If the 20,000 advanced degree limit is reached during the first five business days, USCIS will randomly select from those petitions ahead of conducting the random selection for the 65,000 limit. Petitions subject to the 20,000 limit that are not selected in that random selection will be considered with the other H-1B petitions in the random selection for the 65,000 limit.

By allowing a 5-day business window, it appears that employer's will have from Tuesday, April 1 till Monday, April 7, 2008 to file H-1B petitions under both the 65,000 and the Master's cap in order to be selected under the randomized selection procedure, i.e. if the caps are reached in any one of the first five business days.

The rule further clarifies that USCIS will deny petitions that incorrectly claim an exemption from any H-1B numerical limits. Those filing fees will not be returned.

The interim final rule becomes effective upon publication in the *Federal Register*.

H-1B Fact Sheet

H-1B Frequently Asked Questions

Advanced Copy of H-1B Multiple Filing Rule

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