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US IMMIGRATION & NATIONALITY LAW

FEW H-1B PETITIONS FILED SO FAR FOR FISCAL YEAR 2011 CAP

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U.S. Citizenship and Immigration Services (USCIS) announced on April 8, 2010, that it continues to accept H-1B nonimmigrant petitions subject to the fiscal year (FY) 2011 cap. USCIS will monitor the number of petitions received for both the 65,000 general cap and the 20,000 U.S. master's degree or higher educational exemption.

USCIS has received approximately 13,500 H-1B petitions counting toward the 65,000 cap. The agency has received approximately 5,600 petitions for individuals with advanced degrees. This is lower than the number of H-1B petitions USCIS had received by the same date in 2009. If this trend continues, H-1B numbers may be available for some time.

When USCIS receives the necessary number of petitions to meet the cap, it will issue a public update that the FY 2011 H-1B cap has been met as of a certain date (the "final receipt date"). The final receipt date will be based on the date USCIS physically receives the petition, not the date that the petition has been postmarked. The date USCIS informs the public that the cap has been reached may differ from the actual final receipt date.

USCIS said it may randomly select the number of petitions required to reach the numerical limit from the petitions received on the final receipt date. USCIS will reject cap-subject petitions that are not selected, as well as those received after the final receipt date.

For cases filed for premium processing during the initial five-day filing window of April 1-7, 2010, the 15-day premium processing period began April 7. For cases filed for premium processing after the filing window, the premium processing period begins on the date that the petition is physically received at

the correct USCIS Service Center.

Petitions filed by employers who are exempt from the cap or petitions filed on behalf of current H-1B workers who have been counted previously against the cap within the past six years will not count toward the congressionally mandated H-1B cap.

USCIS's notice is available at http://tiny.cc/bpy6w.

USCIS Discusses Extension of Post-Completion Optional Practical Training and F-1 Status for Students Under H-1B Cap-Gap Regulations

U.S. Citizenship and Immigration Services (USCIS) released a Q&A (questions and answers) document on April 2, 2010, that addresses the automatic extension of F-1 student status in the United States for certain students with pending or approved H-1B petitions (indicating a request for change of status from F-1 to H-1B) for an employment start date of October 1, 2010, under the fiscal year (FY) 2011 H-1B cap.

The Q&A notes that an employer may not file, and USCIS may not accept, an H-1B petition submitted earlier than six months in advance of the date of actual need for the beneficiary's services or training. As a result, the earliest date that an employer can file an H-1B petition for the following fiscal year is April 1. If USCIS approves the H-1B petition and the accompanying change of status request, the earliest date that the student may start the approved H-1B employment is the first day of the new fiscal year, October 1. Consequently, F-1 students who do not qualify for a cap-gap extension, and whose periods of authorized stay expire before October 1, must leave the U.S., apply for an H-1B visa at a consular post abroad, and then seek readmission to the U.S. in H-1B status for the dates reflected on the approved H-1B petition.

H-1B petitions must be timely filed on behalf of an eligible F-1 student, the Q&A notes. Timely filed means that the H-1B petition (indicating change of status rather than consular processing) was filed during the H-1B acceptance period, while the student's authorized duration of status (D/S) admission was still in effect (including any period of time during the academic course of study, any authorized periods of post-completion OPT, and the 60-day departure preparation period, commonly known as the "grace period").

Once a timely filing has been made, the Q&A notes, the automatic cap-gap extension will begin and will continue until the H-1B petition adjudication

process has been completed. If the student's H-1B petition is selected and approved, the student's extension will continue through September 30 unless the petition is denied, withdrawn, or revoked. If the student's H-1B petition is not selected and approved, the student will have the standard 60-day grace period from the date of the rejection notice or his or her program or OPT end date, whichever is later, to prepare for and depart the U.S.

USCIS strongly encourages students "to stay in close communication with their petitioning employer during the cap-gap extension period for status updates on the H-1B petition processing."

The Q&A, which includes details about how to obtain proof of continuing status under the cap-gap extension, limitations on travel and unemployment, and other information, is available at http://tiny.cc/ny5wb.