



MID-APRIL 2017 IMMIGRATION UPDATE

Posted on April 19, 2017 by Cyrus Mehta

Headlines:

1. [**USCIS Reaches FY 2018 H-1B Cap**](#) – On April 7, 2017, USCIS reached the H-1B cap for FY 2018. USCIS also received a sufficient number of H-1B petitions to meet the 20,000 visa U.S. advanced degree exemption.
2. [**USCIS Changes H-1B Specialty Occupation Guidance for Computer Programmers**](#) – Attorneys are expecting an increase in requests for evidence challenging eligibility and in denials of applications for H-1B computer programmers, although some say this approach has been going on for some time.
3. [**USCIS Announces Multiple Measures To 'Deter and Detect' H-1B Visa Fraud, Abuse**](#) – Among other things, USCIS said it "will take a more targeted approach" when making site visits across the country to H-1B petitioners and the worksites of H-1B employees.
4. [**Visa Processing Delays Expected in Busy Summer Season Due to Increased Screening**](#) – Visa applicants, especially those coming from India, may experience processing delays due to heightened scrutiny over the busy summer season and beyond.
5. [**DHS Asks DC Circuit Court for 6 Months To Reconsider H-4 Employment Authorization Rule**](#) – DHS said it wanted time to reconsider whether to revise the H-4 rule through notice-and-comment rulemaking.
6. [**'Stalking' the Undocumented Immigrant: California Objects to Immigration Enforcement Tactics at Courthouses**](#) – California's chief justice said that "enforcement policies that include stalking courthouses and arresting undocumented immigrants, the vast majority of whom pose no risk to public safety, are neither safe nor fair." Among other things, she said that such actions "undermine the judiciary's ability to provide equal access to justice."

Details:

1. USCIS Reaches FY 2018 H-1B Cap

U.S. Citizenship and Immigration Services (USCIS) announced on April 7, 2017, that it has reached the congressionally mandated 65,000 visa H-1B cap for fiscal year 2018. USCIS has also received a sufficient number of H-1B petitions to meet the 20,000 visa U.S. advanced degree exemption, also known as the master's cap.

The agency said it will reject and return filing fees for all unselected cap-subject petitions that are not duplicate filings.

USCIS will continue to accept and process petitions that are otherwise exempt from the cap. The agency noted that it suspended premium processing as of April 3 for up to six months for all H-1B petitions, including cap-exempt petitions.

Petitions filed on behalf of current H-1B workers who have been counted previously against the cap, and who still retain their cap numbers, will not be counted toward the congressionally mandated FY 2018 H-1B cap. USCIS will continue to accept and process 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 employers; and
- Allow current H-1B workers to work concurrently in a second H-1B position.

USCIS said it encourages H-1B applicants to subscribe to the H-1B cap season email updates at

<https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-fiscal-year-fy-2018-cap-season>. The announcement that the cap has been reached for FY 2018 is at <https://www.uscis.gov/news/news-releases/uscis-reaches-fy-2018-h-1b-cap>.

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2. USCIS Changes H-1B Specialty Occupation Guidance for Computer Programmers

On April 3, 2017, the first filing day for fiscal year 2018 H-1B petitions, U.S. Citizenship and Immigration Services (USCIS) released a policy memorandum changing guidance on the H-1B specialty occupation designation for computer programmers. The memo, "Guidance Memo on H-1B Computer Related Positions," supersedes and rescinds a memo with the same title issued December 22, 2000.

The new memo states that petitioners may not rely solely on the *Occupational Outlook Handbook* (OOH) to prove that an entry-level computer programmer position is a specialty occupation: "it is improper to conclude based on this information that USCIS would 'generally consider the position of programmer to qualify as a specialty occupation.'" Among other things, the new memo states that the earlier memo "does not properly explain or distinguish an entry-level position from one that is, for example, more senior, complex, specialized, or unique." The fact that a computer programmer may use information technology skills and knowledge to help an enterprise achieve its goals in the course of his or her job "is not sufficient to establish the position as a specialty occupation," the memo states. Thus, "a petitioner may not rely solely on the to meet its burden" and must provide other evidence.

Many such H-1B applications presumably have already been filed, along with fees of several thousand dollars per application that the agency can keep whether it approves or denies the application. Attorneys are expecting an increase in requests for evidence challenging eligibility and in denials of applications for H-1B computer programmers, although some say this approach has been going on for some time.

The USCIS memo is at

<https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-6002-0142-H-1BComputerRelatedPositionsRecission.pdf>.

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3. USCIS Announces Multiple Measures To 'Deter and Detect' H-1B Visa Fraud, Abuse

On April 3, 2017, U.S. Citizenship and Immigration Services (USCIS) announced multiple measures "to further deter and detect H-1B visa fraud and abuse." USCIS explained that the H-1B visa program "should help U.S. companies recruit highly skilled foreign nationals when there is a shortage of qualified

workers in the country," but that "too many American workers who are as qualified, willing, and deserving to work in these fields have been ignored or unfairly disadvantaged." USCIS stated that it is prioritizing "combating fraud in our employment-based immigration programs."

Among other things, USCIS said it "will take a more targeted approach" when making site visits across the country to H-1B petitioners and the worksites of H-1B employees. The agency said it will focus on:

- Cases where USCIS cannot validate the employer's basic business information through commercially available data;
- H-1B-dependent employers (those who have a high ratio of H-1B workers as compared to U.S. workers, as defined by statute); and
- Employers petitioning for H-1B workers who work off site at another company or organization's location.

Targeted site visits will allow USCIS to focus resources "where fraud and abuse of the H-1B program may be more likely to occur," the agency said, and to "determine whether H-1B dependent employers are evading their obligation to make a good faith effort to recruit U.S. workers." USCIS said it will continue random and unannounced visits nationwide. "These site visits are not meant to target nonimmigrant employees for any kind of criminal or administrative action but rather to identify employers who are abusing the system," USCIS said.

USCIS also has established an email address, ReportH1Babuse@uscis.dhs.gov, "to allow individuals (including both American workers and H-1B workers who suspect they or others may be the victim of H-1B fraud or abuse) to submit tips, alleged violations and other relevant information about potential H-1B fraud or abuse." Information submitted to the email address will be used for investigations and referrals to law enforcement agencies for potential prosecution, USCIS said.

The announcement is at

<https://www.uscis.gov/news/news-releases/putting-american-workers-first-uscis-announces-further-measures-detect-h-1b-visa-fraud-and-abuse>.

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4. Visa Processing Delays Expected in Busy Summer Season Due to

Increased Screening

According to reports, visa applicants, especially those coming from India, may experience processing delays due to heightened scrutiny over the busy summer season and beyond. The Department of State issued several related cables to diplomatic and consular posts that were publicly leaked, such as one issued on March 17, 2017, calling for increased scrutiny and consideration of security advisory opinions (SAOs) when additional checks may be warranted, along with generally limiting visa interviews to 120 per consular officer per day.

To support an SAO request, consular officers may ask visa applicants probing questions. It was also reported that those coming to the United States may be required to disclose their mobile phone contacts, social media passwords, financial records, and ideology. The March 17 cable's leaked text says that if a consular post determines that an applicant "may have ties to ISIS or other terrorist organizations or has ever been present in an ISIS-controlled territory, post must/must refer the applicant to the Fraud Prevention Unit for a mandatory social media review." The cable states that the post should scan the results of this review into the nonimmigrant visa case for consideration during the SAO process.

For the text of the March 17 cable, see <https://tinyurl.com/lbam9fn>.

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5. DHS Asks DC Circuit Court for 6 Months To Reconsider H-4 Employment Authorization Rule

The Department of Homeland Security (DHS) has filed a motion asking the U.S. Court of Appeals for the District of Columbia Circuit to delay proceedings in *Save Jobs USA v. DHS* for up to 6 months so the agency may reconsider a February 2015 rule, "Employment Authorization for Certain H-4 Dependent Spouses," that allows certain people maintaining H-4 nonimmigrant status to apply for and receive employment authorization. DHS said it wanted time to actively reconsider whether to revise the H-4 rule through notice-and-comment rulemaking.

The motion, filed April 3, 2017, is at

<http://www.balglobal.com/wp-content/uploads/4-3-17-DHS-motion.pdf>.

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6. 'Stalking' the Undocumented Immigrant: California Objects to Immigration Enforcement Tactics at Courthouses

California Chief Justice Tani G. Cantil-Sakauye recently sent a letter to U.S. Attorney General Jeff Sessions and Department of Homeland Security Secretary John Kelly expressing concerns about reports that immigration agents "appear to be stalking undocumented immigrants in our courthouses to make arrests."

In the letter, Chief Justice Cantil-Sakauye said that courthouses "should not be used as bait in the necessary enforcement of our country's immigration laws." She noted that courts are the main point of contact for crime victims and witnesses. "As finders of fact, trial courts strive to mitigate fear to ensure fairness and protect legal rights. Our work is critical for ensuring public safety and the efficient administration of justice," she noted.

Chief Justice Cantil-Sakauye said she is concerned about "the impact on public trust and confidence in our state court system" if the public feels that state institutions are being used to facilitate goals and objectives other than their primary purpose. She said that "enforcement policies that include stalking courthouses and arresting undocumented immigrants, the vast majority of whom pose no risk to public safety, are neither safe nor fair." Among other things, she said that such actions "undermine the judiciary's ability to provide equal access to justice," and requested that this type of enforcement not be pursued.

The letter is at

http://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20172/Chief%20Justice%20Cantil-Sakauye%20Letter_AG%20Sessions-Secretary%20Kelly_3-16-17.pdf.

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