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Categories:

Publications

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USCIS announces that the H-1B cap has been met and the lottery conducted

On April 7, USCIS announced that, for the fourth straight year, the annual H-1B cap was met within the first five business days of April 1. By April 12, the lottery was completed and the 20,000 master's cap and 65,000 regular cap cases that will be processed were selected. In total, 236,000 petitions were received, which is just 3,000 more than were received last year.

USCIS announced on April 22 that petitions selected in the lottery that were filed with requests for premium processing will begin to be processed on May 12.

While employers that filed petitions via premium processing likely already know the fate of their petitions based on whether or not they have received, via email, an electronic receipt notice, it may be several more weeks before they know about the petitions filed via regular processing. During this uncertain time, employers should begin to consider the alternatives that may be available to them should their petitions be rejected. Below is a list of alternatives that may be available to employers along with questions that cover some of the fundamental eligibility requirements.

- B-1 in lieu of H-1B: If the employee is overseas, can his/her foreign employer send the employee to the U.S. for short periods of time to work with the employer?
- E-2: Has the employer received substantial investments from its foreign parent company and does the employee share the same nationality as the foreign parent?
- E-3/H-1B1: Is the employee in a specialty occupation position and a citizen of Australia, Chile, or Singapore?
- F-1: Can the employer support the employee's request for a STEM OPT extension?

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- L-1: Can the employee be placed overseas with a related entity in a specialized knowledge, managerial, or executive capacity for at least one year?
- O-1: Is the employee an extraordinary ability alien?
- TN: Is the employee in a TN-eligible occupation and a citizen of Canada or Mexico?

USCIS publishes new STEM OPT extension rule

On March 11, 2016, the U.S. Department of Homeland Security (DHS) published the final rule amending the Optional Practical Training (OPT) extension regulations for F-1 students with degrees in science, technology, engineering, or mathematics (STEM). The new rule will go into effect on May 10, 2016. While it will extend the STEM OPT extension period from 17 months to 24 months, it will impose new burdens on employers, as outlined below.

As the new rule's implementation approaches, employers should know the basics. While an overview provided by USCIS is available here, we wish to highlight the main points.

Key elements that will remain in place

- Automatic 180-day extension of work authorization if STEM OPT extension is timely filed.
- Employers must be registered with E-Verify.
- F-1 "cap gap" benefits remain if a H-1B cap-subject petition seeking a change of status is timely filed.

Key changes

- STEM OPT extension period will be extended from 17 months to 24 months.
- DHS may visit employers to ensure compliance with the program requirements.
- Employers must implement a formal mentoring and training program, which must be memorialized in a new USCIS form (Form I-983).

Employer Attestations

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- Employers must sign a self-evaluation provided by the F-1 student to the designated school official (DSO).
- Employers must report changes in employment status as well as materials changes to or deviations from the formal training plan to the DSO.
- The new Form I-983 will require employers to attest that:
  - has sufficient resources and trained personnel available to provide appropriate training in connection with the specified opportunity.
  - The student on a STEM OPT extension will not replace a full- or part-time, temporary or permanent U.S. worker.
  - The opportunity helps the student attain his or her training objectives.

Pre-May 10 STEM OPT extensions

- If USCIS approves a STEM OPT extension before May 10, 2016, the former 17-month STEM OPT controls unless the student seeks a 7-month extension.

Extending 17-month STEM OPT extensions to 24 months

- To obtain a 7-month extension, (1) the Form I-765 must be filed before August 8, 2016, (2) the student must have 150 calendar days remaining prior to the expiration of the 17-month STEM OPT extension period before the I-765 is filed, and (3) meet the requirements of the new STEM OPT rule (though not required to be in a valid period of 12-month post-completion OPT).

Post-May 10 STEM OPT extensions

- USCIS will adjudicate all STEM OPT extensions that remain pending on May 10, 2016 under the new rule and will issue Requests for Evidence (RFEs) seeking the additional documentation needed under the new rule.

USCIS rolls out its “Known Employer” pilot program

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In an effort to "streamline the process for employers seeking to hire certain workers through employment-based visa categories" and "reduce paperwork, costs and delays in processing these benefit requests", the U.S. Department of Homeland Security (DHS) rolled out its "Known Employer" pilot program on March 3, 2016. In a March 10, 2016 news release, USCIS summarized the process and benefits by stating:

> Under the Known Employer pilot, employers will file an application to request that USCIS predetermine certain requirements of select immigrant and nonimmigrant visa classifications that relate to the employer itself. These requirements generally relate to the employer's corporate structure, operations and financial health. When making this request, employers will create a profile in the Web-based Known Employer Document Library (KEDL), and upload documents related to the requirements. Participating employers will also complete and upload Form I-950, Application for Predetermination under Known Employer Program. USCIS officers will then review the documents and predetermine whether the employer has satisfied certain requirements for each classification requested.

The pilot program consists of preselected employers that were invited to participate. At the time of its launch, five employers are known to be participating. The list of participating employers was made available in the March 10 news release and will be updated periodically.

The program only covers certain immigrant classifications (outstanding professor/researcher and multinational executive/manager) and nonimmigrant classifications (H-1B, L-1A, L-1B, and TN).

While the duration of the pilot program is not known, if successful, DHS will then work to implement it on a larger scale and open up participation to qualifying employers. Therefore, employers should keep up-to-date on the status of this program so they may decide whether it is something they may wish to participate in. The factors that are likely to influence an employer's decision is whether the

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program succeeds in simplifying paperwork and improving processing times. Also, it will be important for employers to consider whether the sharing of such data could actually expose them to increased government scrutiny, audits, or site visits.

USCIS extends Form I-9 comment period

On November 24, 2015, the USCIS released a notice of proposed rulemaking (NPRM) in connection with proposed revisions to the Form I-9, Employment Eligibility Verification. As stated by USCIS, "[m]any of the proposed changes to Form I-9 were designed to reduce technical errors and help customers complete the form on their computer after they have downloaded it from uscis.gov." As a result of the comments made by 133 commenters during the 60-day public comment period, USCIS revised its proposed changes and reopened the public comment period through April 27, 2016. USCIS' March 29, 2016 news release, contains a list of the new, proposed changes, and the "Proposed Form I-9" in its pdf form can be found here.

USCIS announced that employers should continue to use the current version of Form I-9 (03/08/13 edition) until further notice.

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