



FBT Immigration Update: November/December 2017

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USCIS Warns of I-9 Scam

USCIS announced that it has received reports of a scam which requests employers to provide I-9 information to a fictitious email address. Emails received from news@uscis.gov are not from USCIS. USCIS reports that the scam emails may contain USCIS and Office of the Inspector General labels, the employer's address, and a download button. The fraudulent download button links to a non-government web address (uscis-online.org). Employers are not required to submit the I-9 and/or information in the I-9 to USCIS. USCIS cautions employers to not respond to these emails or click the links in them. USCIS also asks that if an employer believes that it has received a scam email, it should report it to the [Federal Trade Commission](#). If an employer is not sure if it is a scam, USCIS recommends forwarding the suspicious email to the USCIS webmaster for review.

E-Verify Data Disposal Scheduled

USCIS is scheduled to dispose of E-Verify data which is dated on or before December 31, 2007. Employers who have case records on or before that date must retain this case information by obtaining a Historic Records Report. Employers can learn how to download the report by reviewing the [instructions to download](#).

Notice/Standing for Beneficiaries of Revoked I-140s

USCIS issued a policy memorandum which advises that in certain circumstances the beneficiary of a Form I-140, Immigrant Petition for Alien Worker, will be issued a Notice of Intent to Revoke (NOIR) or Notice of Revocation (NOR), if issued by USCIS. Previously, only the petitioner received the NOIR or NOR. A NOIR or NOR may be issued by USCIS if there has been fraud or willful misrepresentation of a material fact, lack of bona fide job offer, revocation or

invalidation of a labor certification, etc. Of special note, the memo also states that other omissions or new adverse information, which may result from a site visit, adjustment of status interview, or changes post filing, are another basis for a NOIR or NOR.

USCIS' memorandum states that a beneficiary must meet the following criteria to receive these notices and have standing to respond:

- Beneficiary of an approved I-140;
- Beneficiary's Form I-485, Adjustment of Status application, has been pending for 180 days or more; and
- Beneficiary has properly requested to port/transfer in writing, if prior to January 17, 2017 or by submitting Form I-485 Supplement J, if after January 17, 2017.

USCIS notes that a proper request means that it has been reviewed and approved by USCIS. A beneficiary who received a NOIR or NOR may submit rebuttal evidence. Adjudicators are to consider evidence received from both parties, or if evidence is received from only one party, it will be considered before a final determination is made. The decision will be sent to the petitioner and beneficiary. USCIS memorandum also states "[i]f the petition is denied the petitioner and beneficiary may file separate motions and/or appeals...even though existing form instructions generally preclude beneficiary filings."

FY2019 H-1B Cap Opens April 2, 2018

On Monday, April 2, 2018, USCIS will begin to accept FY2019 H-1B petitions. While that is several months from now, employers should begin to evaluate whether it should sponsor current employees or potential new hires, specifically those in F-1 status, L-1 status that are approaching the maximum time allowed, or TN status that intend to obtain permanent residence.

The H-1B cap remains at 65,000, and the first 20,000 petitions filed by foreign nationals with at least a U.S. master's degree will continue to be exempt from the cap. As has been the case since 2013, it is extremely likely the H-1B cap will be exceeded during the first five business days, requiring USCIS to resort to a lottery. Under last

year's FY2018 cap, USCIS received approximately 199,000 cap-subject petitions during the first five business days. When a lottery is triggered, USCIS will include all petitions received during the first five business days.

In the coming months, USCIS should update its annual H-1B cap page for the current cap season (FY 2019), which employers should review for guidance and tips. For now, employers should identify employees or potential new hires that will require sponsorship and begin to take steps so that an H-1B petition can be filed on April 2 or no later than the first five business days starting April 2.

USCIS Clarifies Function Manager Requirements in Recent Policy Memorandum

USCIS released a policy memorandum (PM) concerning function managers, which implements Adopted Decision, *Matter of G- Inc.* While *Matter of G- Inc.* involved an immigrant petition for a multinational manager, the decision also applies to L-1A visa classification function managers. The PM is now binding on all USCIS employees.

Per the PM, an employer that files an immigrant petition for a multinational manager or L-1A petition on behalf of a foreign national that involves a function manager position must now demonstrate the following:

- The function is a clearly defined activity;
- The function is "essential," i.e., core to the organization;
- The beneficiary will primarily *manage*, as opposed to *perform*, the function;
- The beneficiary will act at a senior level within the organizational hierarchy or with respect to the function managed; and
- The beneficiary will exercise discretion over the function's day-to-day operations.

Employers will need to carefully analyze the third criteria to determine whether a position, which lacks direct reports, qualifies as a function manager. Instead of direct reports, employers

will need to identify the teams and personnel that will assist the function manager in order to show he/she will manage, not perform, the function.

If you have questions relating to these topics, please contact [David Janklow](#), [Peggy Shukairy](#), or [Matt Wagner](#) in Frost Brown Todd's [Labor and Employment Practice Group](#).

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