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USCIS Continues to Accept Fiscal Year 2010 H-1B Petitions

Executive Summary

Annually, United States Citizenship and Immigration Services ("USCIS") places a limitation ("cap") on the number of new H-1B visas available for the upcoming fiscal year. That number for fiscal year 2010 ("FY 2010") is 65,000 for the regular cap and 20,000 for the U.S. master's degree or higher educational cap. In previous years, the cap was reached on the first day applications could be submitted, which is typically April 1. However, this week USCIS announced that the FY 2010 cap has not yet been reached, and USCIS will continue to accept H-1B nonimmigrant visa petitions. As of April 8, 2009, USCIS received less than half the number of petitions necessary to reach the 65,000 cap, but close to the number needed to fill the 20,000 cap. Should USCIS receive the necessary number of petitions to meet the respective caps, it will issue a public announcement that, as of a certain date (the "final receipt date"), the respective FY 2010 H-1B caps have been met. Employers interested in filing cap-subject H-1B petitions should do so as soon as possible to ensure the earliest possible final receipt date for inclusion in this year's cap.

Detailed Analysis

In general, an H-1B petition may be submitted no more than six months in advance of the anticipated start date of employment. In recent years, the H-1B cap has presented an annual obstacle to hiring H-1B employees, since there are roughly 2-3 applications per available spot in any given fiscal year. In prior years, the cap was reached on the first day applications could be submitted. As a result, USCIS instituted a lottery system. This year USCIS received less than half the number of petitions necessary to reach the 65,000 FY 2010 cap. Should USCIS receive the number of petitions to meet the respective caps, all applications that have been submitted by the final receipt date may be included in the lottery. USCIS may randomly select from the petitions received by the final receipt date to reach the numerical limit. USCIS will reject cap subject petitions that are not selected as well as those received after the final receipt date. The final receipt date is based on the date USCIS physically receives the petition, and not the date the petition is postmarked. The date USCIS informs the public that the respective caps have

been reached may differ from the actual final receipt date.

Petitions filed on behalf of current H-1B workers, who have been counted previously against the cap, will not count toward the FY 2010 cap. Therefore, USCIS will continue to process petitions filed to extend the amount of time a current H-1B worker may remain in the U.S., 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.

Conclusion

USCIS will continue to receive and process all cap-subject H-1B petitions until the respective caps are met. When USCIS receives a sufficient number of petitions to meet the caps, they will issue another announcement to indicate the final receipt date. Only those petitions received by the final receipt date will be included in the lottery to determine the remaining available numbers. Employers should immediately file any remaining cap-subject H-1B petitions as soon as possible to ensure the earliest possible receipt date for inclusion in the FY 2010 cap.

Should you have any questions, please do not hesitate to contact your regular Hall Render attorney or:

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