

Business Immigration Weekly for April 8, 2015

4/8/2015

Practices: Immigration

H-1B QUOTA FOR FISCAL YEAR 2016 ALREADY REACHED – USCIS TO CONDUCT RANDOM SELECTION PROCESSES

The U.S. Citizenship and Immigration Services (USCIS) has announced that, as expected, the H-1B quota for fiscal year 2016 (October 1, 2015 to September 30, 2016) was reached during the initial filing period (April 1, 2015 to April 7, 2015). The H-1B quota for fiscal year 2016 is 65,000 for the regular quota with an additional 20,000 allotted for individuals who have earned a U.S. Master's or higher degree. The number of H-1B quota petitions that the USCIS may accept in any fiscal year has not changed in more than 10 years. Although the USCIS announced that the quota has been reached, the USCIS has not yet provided information about the number of petitions that it received during the initial filing period. It is assumed that the USCIS will provide this information after it has completed the intake of the filed petitions.

Last fiscal year's H-1B quota was also reached within the initial filing period. The USCIS received approximately 172,500 petitions filed against both the regular H-1B quota and the U.S. Master's Degree exemption. Unless legislation is enacted which increases the H-1B quota, it can be expected that the H-1B quota will continue to be met during the initial filing period. Due to the limited availability of H-1B quota numbers each year, employers are reminded of the importance of advance planning for current and future employees that may be subject to the H-1B quota and to contact our office in January or February of every year to discuss the H-1B quota process and any alternatives.

When the USCIS receives more H-1B quota petitions than allowed in a fiscal year, it conducts a computer-generated random selection process to choose which petitions it will accept and adjudicate. This is a random process with no preference being given for the type of position, the beneficiary's country of birth, etc. The USCIS will actually complete two random selection processes this fiscal year. The first random selection process will be for those petitions claiming the U.S. Master's Degree or higher exemption because this exemption is limited to 20,000 and the USCIS has received in excess of 20,000 requesting this exemption. For those petitions claiming this exemption that are not selected in this first random selection process, they will then be added to the other regular quota petitions and then a second random selection process will be completed on all of these petitions. After the USCIS completes these two random selection processes, the USCIS will issue receipt notices for those petitions that were selected in either random selection process and will ultimately adjudicate the petitions. For the petitions that are not selected in either random selection process, the USCIS will return the petitions to the employer (or its attorney of record) without adjudicating

them. Due to the estimated extremely large volume of H-1B quota petitions filed against the fiscal year 2016 quota, it may take the USCIS a few weeks to complete the random selection processes and begin to issue receipt notices. The USCIS has already announced that the 15-day premium processing clock will not commence for those petitions accepted for adjudication in the random selection process and that requested premium processing until May 11, 2015. For those petitions not selected in a random selection process, it is assumed that the USCIS will take a few months after the completion of the random selection processes to return the unadjudicated petitions.

Additional information about the fiscal year 2016 H-1B quota will be contained in our firm's future Immigration Updates when it becomes available.

USCIS TO BEGIN ACCEPTING EMPLOYMENT AUTHORIZATION (EAD) APPLICATIONS FROM CERTAIN H-4 DEPENDENT SPOUSES ON MAY 26TH – QUALIFIED H-4 NONIMMIGRANTS MAY WANT TO COMMENCE THE PROCESS AT THIS TIME

Background

The Department of Homeland Security (DHS) has finalized the rule allowing certain H-4 dependent spouses to obtain employment authorization. This rule was initially announced in May 2014. The goal of this new program is to lessen the burden on H-1B families that are subject to lengthy employment-based immigrant visa (a.k.a. green card) processes by allowing the H-4 dependent spouse to work. This rule does not apply to minor children of qualifying H-4 dependent spouses or to the dependent spouses of nonimmigrants in the following classes: H-1B1 (Chilean and Singaporean), H-2A/H-2B (Temporary Agricultural/Non-Agricultural Workers) and H-3 (Trainees).

Although DHS estimates that approximately 180,000 H-4 nonimmigrants will qualify for this provision in the first year and approximately 55,000 for each subsequent year, our firm anticipates that these number may understate the number of H-4 spouses who may be eligible for this new program. Although the earliest date on which H-4 EAD applications may be filed with the USCIS is May 26th, our firm is encouraging those H-4 nonimmigrants who may be eligible for an EAD card to commence the H-4 EAD process at this time so that the necessary documents are prepared and ready to be filed with the USCIS on or after May 26th.

ELIGIBILITY & FILING REQUIREMENTS

The new program applies to H-4 dependent spouses when the principal H-1B nonimmigrant:

1. Has an approved Form I-140, Immigration Petition for Alien Worker; or
2. Has been granted H-1B status beyond the sixth year maximum period of stay in H-1B status on the basis of the Section 106(a) and (b) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21).

A qualifying H-4 dependent spouse will not automatically receive employment authorization incident to their status, but will have to apply for an Employment Authorization Document (EAD) card by submitting the Form I-765, Application for Employment Authorization, to the U.S. Citizenship and Immigration Services (USCIS). The Form I-765 must be submitted with fee (currently \$380) and supporting documents. The H-4 dependent spouse

will only be eligible to work upon receipt of the EAD. When the EAD expires, the H-4 dependent spouse will lose employment authorization unless he/she has received a new EAD card prior to the expiration. The USCIS will modify the existing Form I-765 to include a box specifically for this new program.

The supporting documents that must be filed with the Form I-765 include documentation demonstrating that:

1. The H-4 spouse is in valid H-4 status;
2. The H-1B spouse holds valid H-B status;
3. Proof of marriage; and
4. Proof that the H-1B spouse has an approved Form I-140 or has been granted H-1B status beyond the sixth year maximum period of stay under Section 106(a) or (b) of AC21.

If primary documentation is unavailable, the USCIS will accept secondary documentation in the form of two or more sworn affidavits by individuals not including the H-4 spouse or H-1B principal beneficiary.

The Form I-765 can be filed concurrently with the Form I-539, Application to Extend/Change Nonimmigrant Status requesting a change or extension of H-4 status. Additionally, the Form I-765 can be filed with the Form I-539 (and if applicable the principal H-1B spouse's Form I-129, Petition for a Nonimmigrant Worker) up to six months prior to the EAD/I-94 expiration date.

VALIDITY

An EAD for a qualifying H-4 dependent spouse will be issued until the earlier of the H-4 dependent spouse's authorized period of stay as indicated by his/her Form I-94 or the H-1B principal's authorized period of stay as indicated by his/her Form I-94. The maximum period that the EAD will be issued for is 3 years. A qualifying H-4 dependent spouse must file an extension of the EAD on a timely basis as there will not be an automatic extension of employment authorization while a new Form I-765 application is pending. When the EAD expires, the H-4 dependent spouse will lose employment authorization unless he/she has received a new EAD card prior to the expiration.

EFFECT OF NEW PROGRAM ON PROCESSING TIMELINE FOR F-1 OPT EADS AND OTHER USCIS BENEFITS

The DHS has made it clear that the timing of when the USCIS will begin accepting Forms I-765 for qualifying H-4 dependent spouse in May 2015 is designed to prevent an overlap with the H-1B cap season and the EAD applications filed by F-1 students through the Optional Practical Training (OPT) program. However, because many F-1 students who are graduating from school this spring/summer will file their post-completion OPT EAD applications in May, it is highly recommended that the F-1 students file their OPT EAD applications prior to the effective date of this program because it is uncertain whether the USCIS will have the resources to timely process EAD applications filed through this program and the other EAD programs.

Premium processing is not available for this program. Although the Form I-765 may be submitted with the Form I-539 and Form I-129, the USCIS will not process the Form I-765 until the Form I-539 and/or the Form I-129 have been approved. Therefore, the 90-day period by which the USCIS must adjudicate a Form I-765 will begin on the last day that the Form I-539/Form I-129 is approved.

EARLIEST DATE TO FILE

The earliest date that a qualifying H-4 dependent spouse may submit the Form I-765 as part of this program is May 26, 2015. Any applications submitted prior to this date will be rejected. Although the earliest filing date is May 26, 2015, our office is recommending that H-4 dependent spouses contact our office at this time to prepare the necessary documents so that they are ready to be filed when the program commences on May 26, 2015.