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## **FREQUENTLY ASKED QUESTIONS BY EMPLOYERS REGARDING H-1B VISA BENEFICIARIES WHO ARE SUBJECT TO THE ANNUAL H-1B QUOTA**

This document addresses frequently asked questions (FAQs) related to quota-subject, or “cap-subject,” H-1B petitions filed under the annual quota for the upcoming fiscal year (FY2019), which begins on October 1, 2018. Although the earliest start date for any approved H-1B petition filed under this year's annual quota is October 1, 2018, an employer may file a quota-subject H-1B petition up to six months in advance of that date (i.e., as early as April 1, 2018).

The scope of these FAQs is limited to questions that may arise regarding H-1B petitions filed for the upcoming fiscal year, and particularly for those petitions filed on behalf of individuals in F-1 (student) status.

### **A. General Information**

#### **1. What is the H-1B “lottery” and how does it work?**

Under current law, there is an annual quota for new H-1B petitions. This quota is currently set at 65,000. There are an additional 20,000 H-1Bs available for beneficiaries who possess an advanced degree (Master's degree or higher) from a U.S. academic institution at the time of filing.

If more petitions are received than allowed under the quota (which has happened for the past several years and is expected to happen again this year), the U.S. Citizenship & Immigration Services (USCIS) will conduct a computer-generated random selection process (commonly known as a “lottery”). During the most recent fiscal year, USCIS received approximately 199,000 H-1B petitions during the first five days of the filing window (under current regulations, any petition received during the first five days is treated as though it was received on the first day). As a result, the quota was reached immediately and every petition was subject to the lottery. We expect the same situation to occur during the upcoming fiscal year.

Thus, if we wait until the last possible year to transfer your employee's status, it is possible that the H-1B petition filed on his/her behalf will not be selected in the lottery. If that occurs, there may be an interruption in the employee's employment authorization. Filing early increases the likelihood that your employee will ultimately be able to obtain H-1B status.

#### **2. If the H-1B petition is selected in the lottery, how long will it take to receive a decision?**

Processing times vary. In most instances, the petition will take approximately 4 to 6 months for USCIS to adjudicate. Regardless of when USCIS adjudicates the petition, however, the earliest effective date of the H-1B quota petition is October 1, 2018.

#### **3. Is it possible to expedite an H-1B petition?**

Yes, H-1B petitions may be expedited via a process known as Premium Processing\*\*. Under this service, for an additional government filing fee of \$1,225.00, USCIS will adjudicate the H-1B petition within 15 calendar days (although as noted above, the earliest effective date in H-1B status is still October 1, 2018). This expedited processing timeline commences after USCIS has completed the H-1B lottery process, which is outlined in Question A.1 above. Please note that Morgan Stanley does not support premium processing for H-1B quota cases and discourages employees from utilizing this service absent an emergency.

\*\*Please note that USCIS suspended the operation of the Premium Processing Service for all H-1B petitions just before last year's H-1B Cap filing window opened. Currently Premium Processing Service is available. If we receive any notification that Premium Processing Service may be suspended again for this year's H-1B Cap, we will notify our clients.

#### **4. What are the different ways to structure an H-1B Cap petition filing?**

The petitioning company may structure the H-1B petition filing in one of two ways:

**“Change of Status”** - One option is to file the petition with a request for a “change of status.” Under this option, the Beneficiary of a change of status petition will automatically change from his/her current visa classification (e.g., F-1) to H-1B status upon the effective date of the H-1B petition (on or after October 1, 2018).

**“Out of Country” filing** - Alternatively, the petitioning company can choose to structure the H-1B petition as an “out of country” filing. In contrast to a change of status petition, the Beneficiary of an “out of country” petition does not obtain H-1B status until he/she applies for an H-1B visa at a U.S. Consulate abroad, and then enters the United States in H-1B status pursuant to that visa (Canadian citizens are exempt from the visa requirement). The earliest a Beneficiary may enter the United States in H-1B status is ten days prior to the effective date of the H-1B approval notice. However, the Beneficiary will not be work-authorized until the effective date of the H-1B approval notice.

The most common option for individuals who presently hold a different type of visa classification is a change of status petition, as it typically provides a seamless transition to H-1B status, without the need for the Beneficiary to take any additional steps. However, certain considerations (such as international travel) may impact the decision; these factors are discussed below.

#### **B. International Travel During the Filing of the Change of Status Petition**

**5. An individual presently holds a different type of visa classification (e.g., F-1). We wish to file a petition with USCIS to change the Beneficiary’s status to H-1B. May a change of status petition be filed if the Beneficiary is abroad on the filing date?**

No. A Beneficiary of a change of status petition must be physically present in the United States on the day the petition is filed with USCIS. If the Beneficiary will not be physically present in the U.S. at the time of filing, the petitioning company can choose to structure the H-1B petition as an “out of country” filing, as described above. All potential international travel should be disclosed to Ogletree Deakins in advance, so that we may advise on the best way to structure the H-1B petition.

#### **C. International Travel While the Change of Status Petition is Pending with USCIS**

**6. May the Beneficiary travel abroad while the H-1B petition is pending with USCIS?**

We do not recommend international travel while a change of status petition is pending, as this travel will likely nullify the change of status request. If a change of status request is nullified, it will be adjudicated as an “out of country” petition. As a result, the Beneficiary would need to take additional steps to “activate” his/her H-1B status, as described above.

**7. My employee has international travel that cannot be avoided. If we file an “out of country” petition, how will the employee obtain H-1B status?**

In this scenario, upon approval of the H-1B petition, the Beneficiary will need to depart the United States and apply for an H-1B visa at a U.S. Consulate abroad. Please note that Canadian citizens are exempt from this visa requirement. However, as noted above, the Beneficiary is not authorized to work per the H-1B status until on or after the effective date of the H-1B approval notice.

**8. If the Beneficiary must apply for an H-1B visa, is he/she required to apply at the U.S. Consulate located in his/her country of citizenship?**

Applicants should typically apply for their initial H-1B visas at a U.S. Consulate located in their country of citizenship or permanent residence. In limited circumstances, it may be possible to apply at a Consulate in a different country, but this should be discussed with Ogletree Deakins in advance of the visa application.

**9. Are there any risks to filing the petition as “out of country”?**

There is always the possibility that the Beneficiary’s visa application at the U.S. Consulate will be subject to a lengthy security check or other unforeseen delays. If a visa application is subject to a

delay, the applicant will be unable to return to the United States until the matter is resolved.

**D. International Travel After the H-1B Change of Status Petition is Approved**

**10. USCIS has approved the request to change the Beneficiary's status from F-1 to H-1B, which becomes effective on October 1, 2018. Now that the petition has been approved, may the Beneficiary travel internationally before October 1, 2018?**

A Beneficiary who holds a valid Employment Authorization Document (EAD) may be permitted to travel abroad and reenter the United States in F-1 status, provided that he/she has a valid passport, EAD and a Form I-20 endorsed for re-entry by his/her International Student Office's Designated School Official (DSO) within the last six months. The F-1 student may return to the United States to resume employment after a period of temporary absence. The phrase 'to resume employment' is understood to mean that the student must have a job and not be returning simply to seek employment. Students who travel while engaged in OPT are also well-advised to have proof of employment at hand, such as a letter from the employer and pay stubs, as well as a copy of the signed offer letter.

Applicants that meet these criteria should contact their International Student Office for more information on whether travel is advisable. Importantly, however, travel while the F-1 student is within the "cap gap" extension period is not recommended. (Please see below for more details).

In other situations, travel may not be advisable, and should be discussed with Ogletree Deakins in advance.

**11. USCIS has approved the company's H-1B petition and change of status request. As of October 1, 2018, the employee will be in H-1B status. Now that the petition has been approved, may the employee travel internationally after October 1, 2018?**

Yes, the employee may travel after October 1, 2018. However, the employee must obtain an H-1B visa from a U.S. Consulate abroad in order to return to the United States in H-1B status (except for certain short trips of less than 30 days to Canada or Mexico). The employee must allocate sufficient time to obtain the visa at the Consulate. Ogletree Deakins can provide guidance on the visa application process. **Travel should be discussed with Ogletree Deakins in well in advance of the planned travel dates.**

**E. F-1 Optional Practical Training (OPT) and "Cap Gap"**

**12. Our employee's F-1 OPT authorization will expire before October 1, 2018. Can we continue to employ him or her during this interim period?**

If the employee's post-completion OPT will expire before April 1, 2018, please alert your Ogletree Deakins attorney for further guidance.

If the employee's post-completion OPT will expire after April 1, 2018, but before October 1, 2018, the ability to continue to work during this interim period (known as the "cap gap") is dependent upon the timely filing (and subsequently, the acceptance in the H-1B lottery and approval by USCIS) of the employer's H-1B petition that includes a request for change of status. If the employer's petition and request for change of status is approved, the employee's OPT work authorization will be automatically extended until September 30, 2018. The employee should request a new Form I-20 from his/her school that reflects this extension.

If the employer's change of status petition is not approved by October 1, 2018, the employee's F-1 work authorization would end. In this scenario, the employer may choose to upgrade the H-1B petition to Premium Processing in order to expedite the approval process.

**13. Can the employee travel during the "cap gap" period?**

Generally speaking, no. If the employee *must* travel during the gap period, he/she may depart the U.S., but may not be able to reenter the U.S. until ten days prior to the effective date of the H-1B approval notice. Additionally, he/she would first need to obtain an H-1B visa at a U.S. Consulate abroad, as described above.

**14. Does the "cap gap" extension only apply to individuals with a degree in a Science, Technology, Engineering, or Math (STEM) field of study?**

No, the "cap gap" provisions apply to all F-1 students in valid post-completion OPT expiring prior to October 1, 2018, regardless of the field of study.

**F. OPT Extension for International Students with Degrees in STEM Fields from U.S. Institutions of Higher Education**

In some circumstances, international students with degrees in a Science, Technology, Engineering, or Mathematics (STEM) field of study from U.S. institutions of higher education are able to obtain a 24-month extension of their OPT work authorization (commonly known as a "STEM OPT extension").

**15. What is a STEM OPT extension?**

F-1 students are typically eligible for 12 months of post-completion OPT. In certain situations, an individual with a degree in a Science, Technology, Engineering or Math (STEM) field of study from a U.S. institution of higher education may be able to obtain an additional 24-month period of OPT (commonly known as the "STEM OPT extension").

**16. Does the employee's degree qualify for a STEM extension?**

A list of qualifying STEM degrees may be accessed at the following website:

<https://www.ice.gov/sites/default/files/documents/Document/2016/stem-list.pdf>

In certain situations, F-1 students who have completed a Bachelor's, Master's or Doctoral degree in a qualifying STEM field, and who are currently engaged in post-completion OPT, may apply for the STEM extension. The employee will need to contact the International Student Office at his/her school to confirm whether he/she is eligible for the STEM extension.

**17. What are the other requirements for a STEM extension?**

Under current regulations, the employer (or applicable division/worksites) must be a registered user of E-Verify, the government's electronic employment eligibility verification program. In addition, the employer and student each have specific reporting requirements. For instance, if the student's employment ends prior to the expiration of the 24-month STEM extension, the employer must notify the DSO within 48 hours of the separation from employment. Students also have additional reporting requirements while on a STEM extension. Employees should contact their International Student Office for further details regarding those requirements. It is critical for the employee to precisely follow the STEM application guidelines, as seemingly minor items (such as filing an application more than 30 days after issuance of the Form I-20) may result in a denial.

**18. The employee has applied for a STEM extension, but has not yet received the new Employment Authorization Document (EAD). Can I continue to employ this individual in the meantime?**

Employees who have filed for a STEM extension *prior* to the expiration of their current EAD, but who have not yet received the new EAD authorizing that extension, may continue to work for a period of up to 180 days while waiting for the approval of the new EAD. Employees may provide evidence of their pending extension to their employer to satisfy the Form I-9 (employment verification) requirements.

**19. Can the employee travel while working on the STEM extension?**

The employee cannot travel outside the United States while the application for the STEM extension is pending if the current OPT EAD card has expired. Once the STEM extension is approved and the employee has a valid EAD, he/she may travel and reenter the United States in F-1 status and resume employment, if all of the other requirements for travel are satisfied, as discussed above. Employees with a STEM EAD should contact their International Student Office for more information on travel procedures.

**20. Where can the employee obtain additional information on the “cap gap” or STEM extension?**

The employee is encouraged to contact the International Student Office at his/her school for additional information pertaining to the “cap gap” and STEM extension provisions. The Student and Exchange Visitor Program website also has a detailed FAQ on these topics at the following website:

<https://studyinthestates.dhs.gov/h-1b-status-and-the-cap-gap-extension>