NEWSLETTER

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FY 2017 H-1B CAP REACHED

Now is the time to think about your H-1B Back-Up Plan. p. 3.

USCIS COMPLETES H-1B CAP LOTTERY

On April 9, USCIS used a computer-generated random selection process, or lottery, to select enough petitions to meet the 65,000 general-category cap and the 20,000 cap under the advanced degree exemption. USCIS will reject and return all unselected petitions with their filing fees, unless the petition is found to be a duplicate filing. p. 9.

VISA BULLETIN UPDATE FOR MAY 2016

Our analysis of the released May 2016 Visa Bulletin. We discuss family and employment priority dates, projections, and the new final action date for EB-4 and certain Religious Workers Preference Category. p. 10.

RECENT DEVELOPMENTS

In the past few weeks the following has been taking place:

(1) USCIS announced a new N-400 Naturalization Application will be effective on August 10, 2016;

(2) The Visa Bulletin for May 2016 reflects a final action date of January 1, 2010, for EB-4 visas for special immigrants from El Salvador, Guatemala and Honduras;

(3) The Securities and Exchange Commission (SEC) announced fraud charges and an asset freeze against a Vermont-based ski resort misusing millions of dollars raised under an EB-5 Immigrant Investor Program; and

(4) USCIS announced that it has received enough H-1B petitions to reach the statutory cap of 65,000 visas for

NEW N-400 Application for Naturalization

On April 13, 2016, USCIS revised Form N-400, Application for Naturalization. Applicants may continue to use the current edition of the form until August 9, 2016. USCIS will reject and return previous versions of Form N-400 submitted on or after August 10, 2016.

The eligibility requirements for naturalization have not changed.

USCIS changed the form by removing the barcode and streamlining the application process. The revised form allows applicants to skip certain parts that do not apply to them. In addition, USCIS added language to the form instructions to identify what kind of evidence must be brought to the interview.

fiscal year (FY) 2017. USCIS has also received more than the limit of 20,000 H-1B petitions filed under the advanced degree exemption, also known as the master's cap. USCIS received over 236,000 H-1B petitions during the filing period, which began April 1, 2016, including petitions filed for the advanced degree exemption.

(5) On April 18, the Supreme Court heard arguments in the Texas v. U.S. case. The ruling in this case may lead to work authorization for over 4 million individuals in the United States.

FY 2017 H-1B CAP REACHED: NOW IS THE TIME TO THINK ABOUT YOUR H-1B BACK-UP PLAN

On April 7, 2016, U.S. Citizenship and Immigration Services (USCIS) announced that it has reached the congressionally mandated H-1B cap for fiscal year (FY) 2017. USCIS also received more than the limit of 20,000 H-1B petitions filed under the U.S. advanced degree exemption.

USCIS received over 236,000 H-1B petitions during the filing period, which began April 1, including petitions filed for the advanced degree exemption. On April 9, USCIS used a computer-generated random selection process, or lottery, to select enough petitions to meet the 65,000 general-category cap and the 20,000 cap under the advanced degree exemption.

With uncertainty looming large as to who may or may not get selected in the H-1B lottery, it is time that H-1B visa hopefuls (and their prospective H-1B employers) start to explore other nonimmigrant work visa options to allow them to work and live in the United States on a temporary basis.

This article is timely in nature and it seeks to capture and present some of the possible nonimmigrant work visa options that may be available to prospective H-1B visa beneficiaries who may not get selected in the H-1B visa lottery this fiscal year.

1. CONSIDER THE 'CAP-EXEMPT' H-1B VISA OPTION:

There are certain categories of cap-exempt H-1B visas. One such category is for foreign nationals having (or hoping to have) an employment offer from an institution of higher education (or related or affiliated nonprofit entities), or from a nonprofit/government research organization.

To be classified as cap-exempt, it not mandatory that a prospective H-1B employee should be employed by the institution of higher education (or related or affiliated nonprofit entities), or nonprofit/governmental research organization. A prospective H-1B employee, employed by any employer, who will perform the majority of his/her work at the qualifying institutions, could qualify for the cap-exempt H-1B visa provided the work performed should "predominantly further" the "normal, primary, or essential purpose" of the qualifying institution.

To illustrate, consider the case of an Information Technology (IT) company having a contract with a U.S university for hiring and placing IT consultants for developing/customizing university' s software. Assuming that IT consultants hired by the consulting company will primarily work developing/customizing the university's software and that the work will benefit the university in reaching one of its stated primary or essential goals; such employees may be treated as H-1B cap-exempt even though they will not be employed directly by the university.

A thorough review of the Memorandum promulgated by the USCIS that deals with cap exempt H-1B opportunities reflects a great deal of flexibility. Furthermore, a thorough analysis needs to be undertaken to ensure whether the employer is or is not cap-exempt.

2.CONSIDER OTHER PROFESSIONAL AND SPECIALTY OCCUPATION WORK VISA CLASSIFICATIONS: TN, H-1B1 AND E-3 VISAS.

There are three nonimmigrant visa categories quite similar to H-1B visas that are designated for temporary professional workers from specific countries. These visas are based upon specific trade agreements that foreign nations have signed with the United States.

The 'H-1B1' visa program is designed specifically for the nationals of Chile and Singapore. Up to 6,800 visas (1,400 visas for the nationals of Chile, and 5,400 visas for the nationals of Singapore) are set aside from the H-1B cap of 65,000 during each fiscal year for the H-1B1 program.

Additionally, the Canadian and Mexican temporary professional workers may explore the potential option of obtaining TN classification. With regard to the TN classification, the regulations specify various categories of professions as well as the minimum qualifications for each profession that are covered by Appendix 1603.D. 1 to Annex 1603 of North American Free Trade Agreement (NAFTA).

In addition, nationals of the Commonwealth of Australia may qualify for E-3 temporary work visas. Like the H-1B1, E-3 visas are subject to an annual cap of 10,500 per Fiscal Year.

Occupationally, H-1B1, TN and E-3 mirror the H-1B visa in that the foreign worker must be employed in a specialty occupation (defined loosely as "professional"). While both the H-1B1 and E-3 require Labor Condition Applications (LCA) from the Department of Labor (DOL), the TN visa does not require the employer to obtain an LCA. However, unlike the H-1B visa, which is a "dual intent" visa, none of the above-mentioned categories are "dual intent".

In simple terms, while a foreign national employed in valid H-1B status can pursue employed-based immigrant visa (commonly referred to as employed-based "Green Card"), foreign nationals employed on H-1B1, TN or E-3 lack this advantage. However, foreign nationals employed in these categories can pursue their employment-based Green Card by changing their status to another nonimmigrant visa category such as H-1B, L-1, etc., which recognizes dual intent.

The H-1B1, TN and E-3 are not classifications for everyone. They are specific to certain geographic areas in the world. Nevertheless, the immigration lawyers at the NPZ Law Group continue to find that individuals have immigrated to Australia and/or Canada (or other countries) and obtained their Citizenship there. If this is the case then this may open the door to a foreign national to live and work in the United States using another work visa. As they say, we should aim to leave "no stone unturned."

3. E-1 TREATY-TRADER AND THE E-2 TREATY INVESTOR VISAS.

A foreign national may qualify for an E visa depending upon what country he/she is from. There are certain countries in the world that have a specific type of treaty or agreement with the U.S. The most common of these agreements or treaties is referred to as a Bilateral Investment Treaty (BIT), a Free Trade Agreement (FTA), or a Treaty of Friendship, Commerce and Navigation (FCN) with the United States. There are two types of E visas: Treaty Trader visa (E-1) and Treaty Investor visa (E-2). Though nationals of a foreign country having FTA with the United States may qualify for both an E-1 and E-2 visa, BIT allows only for an E-2 visa.

For an E-1 visa, a foreign national entering the United States is required to carry on substantial trade that is international in scope, and principally between U.S. and the foreign country. The E-2 visa, on the other hand, requires the foreign national to develop and direct the operations of an enterprise in which the foreign national has invested, or is actively in the process of investing, a substantial amount of capital.

The enterprise must be a bona fide enterprise. Further, a "key employee", including the executives and supervisors, or persons whose services are "essential to the efficient operation of the enterprise" may qualify for an E-1/E-2 visa depending upon the bilateral agreement between the foreign country and the United States.

4. ALTERNATIVES FOR INTERNATIONAL STUDENTS ON OPT.

There may be alternate visa options available to foreign graduates of U.S. universities. If not selected for H-1B cap, F-1 students in Science, Technology, Engineering, and Mathematics (STEM) fields, who have elected to pursue 12 months of OPT in the United States, can extend the OPT period by 24 months (STEM OPT extension). To get the extension, the student should be employed by an employer who is duly enrolled in the E-Verify Program, and should have received an initial grant of post-completion OPT related to such a degree.

The new STEM extension regulations of the OPT period for STEM degree holders gives U.S. employers several chances to recruit these highly desirable graduates through the H-1B process, as the extensions oftentimes may be long enough to allow for H-1B petitions to be submitted in several successive fiscal years.

Students who do not hold STEM degrees may choose the option of going back to school. For instance, a student who has completed a bachelor's degree from a U.S. institution may exercise the option of enrolling in another bachelor's or master's degree program. While enrolling in a bachelor's degree program may be a good idea to buy time in the United States with the hope of making it into another H-1B cap filing cycle the next fiscal year, the option of enrolling in a master's degree program should be exercised with caution.

Before enrolling in a master's degree program, a student should double check whether the U.S. University qualifies as an "institution of higher education" as defined by section 101(a) of the Higher Education Act of 1965 because not every master's degree from a U.S. educational institution will qualify an individual for the H-1B master's cap. For example, some private academic institutions are "for profit" organizations. As such, holding a master's degree from such academic institutions would not qualify the foreign national for the H-1B master's cap.

5. L-1A AND L-1B VISAS FOR INTRACOMPANY TRANSFEREES OF MULTINATIONAL COMPANIES.

Employees employed by companies with an offshore presence can explore the possibility of using the L-1 nonimmigrant visa option. The L-1 visa program was designed to facilitate the temporary transfer of foreign nationals with executive, managerial, and specialized knowledge skills to the United States. Thus, even within the L category, important distinctions are drawn between the two types of L visas: The L-1A for executives and managers, and the L-1B for employees with specialized knowledge.

L-1A executives direct the management of an organization or a major component or function of an organization. Similarly, L-1A managers have the primary duty of directing an organization, or area of an organization, and supervision or control of the work of others, or management of an essential function at a senior level in the organization's hierarchy. Managers and executives need not supervise

subordinates. Regulations allow for "functional management". To qualify for an L-1B visa, the employee should have the specialized knowledge of the company's product, service, research, etc., and its application in international markets, or have an advanced level of knowledge of processes and procedures of the company.

The use of the L-1 is often referred to strategically as a "transfer out". The idea behind the "transfer out" is that the prospective L-1 candidate is transferred outside the U.S. to work for the subsidiary, affiliate or branch office of the qualifying organization in the U.S. After spending 365 days (one year) outside the U.S, the individual can be brought back to the U.S. in L visa status. The advantage to the use of the "transfer out" strategy is also that if the individual is serving as an executive or manager outside the U.S. and they return as an executive or manager to the U.S. as an L-1A then they can immediately apply for the green card in the E1-3, multinational manger/executive category. This is a pre-certified employment-based green card category and one of the very fastest ways to get the green card in the U.S.

6. O-1 VISAS FOR EXTRAORDINARY ABILITY OR ACHIEVEMENT CANDIDATES.

There are two types of O-1 visas. Like the L-1 visas, O-1 visas are not subject an annual cap. The O-1 visa category is primarily divided into two categories: O-1A and O-1B. O-1A is for foreign nationals having "extraordinary ability" in the field of the arts, sciences, education, business or athletics. If in motion picture or TV production or an artist, the person may qualify for O-1B visa provided she/he has demonstrated a record of "extraordinary achievement." Sometimes, for artists, all that is required is a showing of "distinction". Thus, there are different standards under the O-1 visa.

It is important to know that O-1 visas are not limited to the above-mentioned categories. USCIS interprets the statute to encompass "any field of endeavor" including craftsmen and lecturers. Further, the term "arts" includes not only the principal creators and performers, but also essential personnel such as directors, set designers, choreographers, orchestrators, coaches, arrangers, costume designers, producers, make-up artists, stage technicians and animal trainers.

CONCLUSION.

On the basis of the foregoing, it is safe to conclude that before packing-up your bags and leaving the U.S. or giving-up on the hopes of living and working in the United States, prospective H-1B visa beneficiaries should carefully explore alternative work visa options that may be available to them in the United States. One may qualify for a cap-exempt H-1B visa if she/he has an offer of employment from an institution of higher education (or related or affiliated nonprofit entities), or from a nonprofit/government research organization. Even

employment with a third-party employer may qualify an individual for cap-exempt H-1B provided the beneficiary will perform the majority of work at the qualifying institutions and, the work will benefit the primary or essential purpose of the qualifying institution.

Also, it continues to be prudent for the national of a foreign country to check on the type of trade agreement his/her country has in effect with the United States as this may qualify the individual for an H-1B1, TN, E-1, E-2 or the E-3 nonimmigrant classifications. Additionally, employees of companies with offices both in the United States and offshore should explore the option of L-1 intracompany transfer visa.

Moreover, individuals with the "extraordinary ability" in the fields of science, art, education, business or athletics may qualify for an O-1A visa while an O-1B may be appropriate for a foreign national with "extraordinary achievement" in motion pictures or TV production.

Last but not least, F-1 STEM students on OPT should be sure to speak to their International Student Officers (ISO) or their Designated Student Officers (DSO) about obtaining another 24 months extension in order to be able to try to get into the next H-1B cycle.We want to reiterate and re-emphasize that students choosing to enroll in a master's degree program with the hope of having a better chance of making it to the H-1B cap next year should carefully choose their master's degree program since not all master's degree programs qualify an individual for the master's degree H-1B cap of additional 20,000 visas.

USCIS Completes the H-1B Cap Random Selection Process for FY 2017

U.S. Citizenship and Immigration Services (USCIS) announced on April 7, 2016, that it has received enough H-1B petitions to reach the statutory cap of 65,000 visas for fiscal year (FY) 2017. USCIS has also received more than the limit of 20,000 H-1B petitions filed under the advanced degree exemption, also known as the master's cap.

USCIS received over 236,000 H-1B petitions during the filing period, which began April 1, including petitions filed for the advanced degree exemption. On April 9, USCIS used a computer-generated random selection process, or lottery, to select enough petitions to meet the 65,000 general-category cap and the 20,000 cap under the advanced degree exemption. USCIS will reject and return all unselected petitions with their filing fees, unless the petition is found to be a duplicate filing.

The agency conducted the selection process for the advanced degree exemption first. All unselected advanced degree petitions then became part of the random selection process for the 65,000 limit.

USCIS will begin premium processing for H-1B cap cases no later than May 16, 2016. It will continue to accept and process petitions that are otherwise exempt from the cap. Petitions filed on behalf of current H-1B workers who have been counted previously against the cap will also not be counted towards the congressionally mandated FY 2017 H-1B cap. USCIS will continue to accept and process petitions filed to:

1) Extend the amount of time a current H-1B worker may remain in the United States;
2) Change the terms of employment for current H-1B workers;

3) Allow current H-1B workers to change employers; and
4) Allow current H-1B workers to work concurrently in a second H-1B position. U.S. businesses use the H-1B program to employ foreign workers in occupations that require highly specialized knowledge in fields such as science, engineering, and computer programming.

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Family-Based Projections. Because most family-based demand is generated at overseas posts, the Department of State (DOS) has greater visibility into those categories and is able to move the final action dates more consistently than the employment-based categories, which has a high percentage of USCIS-based (adjustment of status) filings. As a result, dramatic fluctuations in the family-based categories tend to be rare and typically occur only when there is a surge in family-based applicants responding to the agent of choice letter and becoming documentarily qualified.

As noted in the May Visa Bulletin, the final action dates for FB-4 China and India will remain at July 22, 2003, consistent with the final action date for FB-4 Worldwide. However, we can expect to see changes soon due to an increase in demand in both of these categories in recent months. The FB-4 India final action date will likely retrogress, possibly as early as June. It may also be necessary to hold or retrogress the FB-4 China final action date in late summer. We will continue to watch these categories closely.

New Final Action Date for EB-4 and Certain Religious Workers (SR) Preference Categories. In May, a final action date of January 1, 2010 will be imposed for EB-4 and certain religious workers from El Salvador, Guatemala and Honduras. The imposition of a final action date for these countries in these categories is primarily attributable to a spike in demand for adjustment of status over the past two months for Special Immigrant Juvenile (SIJS) applicants. As noted in the Bulletin, any forward movement in these categories this fiscal year is unlikely.

DOS tells us that the per country limit for this category has already been reached for these countries for this fiscal year. Given EB-4 Worldwide demand, it is unlikely that there will be any additional "otherwise unused numbers" to allocate to these countries. Similarly, it is extremely likely that EB-4 India and Mexico will also become oversubscribed at some point during the summer months.

EB-5 China. Although demand in this category is increasing, I-526 petitions are being acted upon more quickly so the final action date may continue to advance slowly. DOS has good visibility into demand in this category since most of these cases are at the NVC, although they are becoming documentarily qualified at their own pace.

EB-2 and EB-3 Philippines. Since the last announcement, several folks have asked DOS for predictions for the Philippines employment-based categories. EB-2 Philippines remains current and DOS expects it to remain so for the foreseeable future. With regard to EB-3 Philippines, DOS expects the final action date to continue to advance a few months at a time, consistent with movement over the past few months. He does not foresee it returning to the Worldwide final action date this fiscal year.

There is significant pent up demand in this category and given the greater level of visibility into it, DOS is able to move the final action date consistently. Currently, the Texas Service Center has more than 1,600 EB-3 Philippines cases in the pending demand file and the Nebraska Service Center has more than 1,200. Demand at the U.S. Consulate in Manila is about half of that at USCIS. DOS hopes that the EB-3 Philippines final action date will advance as far as mid-2010 by the end of this fiscal year.

EB-2 and EB-3 China. Recently, number usage for EB-3 China has exploded due to the EB-3 downgrade effect that DOS has been expecting. Although anticipated, there was no advance warning as to when this demand would materialize, to what extent, or for how long. Demand for EB-3 China numbers exceeded 400 in March alone. EB-2 China spiked to 850 in March. April demand in both categories is expected to be at least on par with March demand, and may possibly exceed it. As a result, it would most likely be necessary to retrogress EB-2 and EB-3 China in June in an effort to hold number use within the annual limit.

EB-1 Demand and Impact to Other Categories. EB-1 demand from USCIS increased almost 100 percent from February (2,500+) to March (5,000+) which reflects more than 95 percent of the EB-1 Worldwide demand. This spike leaves fewer numbers to potentially spill down to other categories, which will impact EB-2 final action dates. Members should expect that the EB categories that typically rely on unused EB-1 numbers, such as EB-2 India, will be impacted. It remains to be seen whether a cut-off date will need to be established for any EB-1 countries this fiscal year.

India Employment-Based Final Action Dates. The final action date for EB-2 India will advance modestly, from November 8, 2008 in April to November 22, 2008 in May. Similarly,

EB-3 India will creep forward from August 8, 2004 in April to September 1, 2004 in May. EB-3 demand, after the initial allocation of numbers, has been increasing by 100 month over month from January to February and February to March.

A number of factors make it difficult for DOS to accurately predict movement in these categories. Increased EB-1 usage negatively impacts the supply of available visas for EB-2 India, and upgrades are currently driving EB-2 India demand. As a result of these two factors, there may be fewer numbers available to EB-2 India than previously expected.

When USCIS requests an EB-2 number in an upgrade case, it also asks that the previously requested EB-3 number be cancelled. DOS has no visibility into EB-2 upgrade demand until USCIS completes adjudication of the I-485, requests an EB-2 number, and cancels the EB-3 number. This lack of visibility can potentially result in unexpected and dramatic changes in the EB-2 India final action date, as well as other employment-based preference categories.