

**H-1B NONIMMIGRANT VISA PROGRAM REVIEW**

**TALKING POINTS/OVERVIEW:**

**Numerical Limitations (“H-1B Cap”)**

- There is a congressionally-mandated numerical limitation (cap) of 65,000 H-1B visas that can be granted per fiscal year for new employment with some exceptions, including:
  - 20,000 petitions approved by USCIS where the beneficiary has obtained a U.S. master’s degree or higher from a U.S. institution of higher education;
  - Petitions filed on behalf of beneficiaries who will work at nonprofit or public U.S. institutions of higher education or related or affiliated nonprofit entities, nonprofit research organizations or governmental research organizations; and
  - Petitions filed between now and December 31, 2019 on behalf of beneficiaries who will work only in Guam or the Commonwealth of the Northern Mariana Islands.
- Petitions filed on behalf of H-1B workers who have been counted previously against the numerical limitation and are applying for the time remaining on their 6-year maximum H-1B authorized period of admission also do not count towards the congressionally mandated annual H-1B cap.
- The H-1B numerical limitations are mandated by statute. Changes to the numerical limits would require a statutory amendment.
- On April 7, 2017, USCIS received a sufficient number of petitions to reach the statutory cap and advanced degree exemption for Fiscal Year (FY) 2018. On April 11, 2017, USCIS used a computer-generated random selection process (commonly known as a “lottery”) to select a sufficient number of petitions needed to meet the statutory caps of 65,000 for the general category and 20,000 under the advanced degree exemption limit, taking into account that some of these petitions may be denied, revoked, or withdrawn.

**Combatting Fraud under the Buy American Hire American (BAHA) Executive Order**

- On April 18, 2017, the President issued an Executive Order (EO) 13788, “Buy American and Hire American” which seeks to create higher wages and employment rates for U.S. workers and to protect their economic interests by rigorously enforcing and administering our immigration laws. It also directs DHS, in coordination with other agencies, to advance policies to help ensure H-1B visas are awarded to the most-skilled or highest-paid beneficiaries. (b)(7)(e)



- To provide the public with a direct method of reporting suspected issues, in Fiscal Year (FY) 2017, USCIS established email addresses for the public to report tips about potential H-1B fraud and abuse: ReportH1BAbuse@uscis.dhs.gov.
- Additionally, USCIS is committed to providing transparency for U.S. workers by posting datasets with information about the hiring practices of employers who petition for H-1B workers on its website: <https://www.uscis.gov/laws/buy-american-hire-american-putting-american-workers-first>.

- Please note the issue paper on USCIS anti-fraud efforts outlines in greater detail additional efforts USCIS has undertaken to detect and deter immigration benefit fraud.

### **AC21 Rule**

- On January 17, 2017, the AC21 Final Rule became effective. The rule amended regulations to clarify various policies and procedures related to the adjudication of H-1B petitions, including extensions of status, determining cap exemptions and counting workers under the H-1B visa cap, H-1B portability, licensure requirements, and protections for whistleblowers. We are currently reviewing these policies to ensure that they are in line with the BAHA Executive Order.

### **Processing Times & Temporary Premium Processing Suspension**

- Based on the overall increase in H-1B filings, processing times for H-1B petitions increased and created concerns for certain H-1B beneficiaries for whom employment authorization is automatically extended for up to 240 days after the expiration of the beneficiary's I-94 Arrival/Departure record, when the same petitioner files a timely extension of stay petition. After this 240 day period, if the petition is not adjudicated, the beneficiary will have to cease employment until the H-1B petition is adjudicated.
- USCIS previously set up a process for which employers and representatives can submit inquiries in the Service Request Management Tool (SRMT inquiry) with the National Customer Service Center for any extension of stay petition pending over 210 days. An SRMT inquiry is a tool that allows an employer or their authorized representative to submit an inquiry regarding a pending petition.
- In an effort to reduce overall processing times and pending workload, USCIS temporarily suspended premium processing (PP) for all H-1B petitions on April 3, 2017 for up to six months. USCIS instituted a rollout plan to resume premium processing in phases. The phased resumption plan provided premium processing services sooner for certain petitioners, while also addressing operational concerns and allowing the service centers to reduce overall processing times.
  - The first phase of the premium processing resumption plan began on June 26, 2017. USCIS resumed PP services for all H-1B petitions filed for medical doctors under the Conrad 30 Waiver program, as well as interested government agency waivers.
  - The second phase of the PP resumption plan began on July 24, 2017. USCIS resumed PP services for all cap-exempt petitions, where the H-1B petitioner is:
    - an institution of higher education,
    - a nonprofit related to or affiliated with an institution of higher education, or
    - a nonprofit research or governmental research organization.
  - During the second phase, PP services also resumed for petitions where the beneficiary will be employed at a qualifying cap-exempt institution (as described above).
  - USCIS plans to resume PP for other sub-groups of H-1B petitions, such as cap subject petitions and extension of stay (EOS) petitions, prior to October 3, 2017 (which is the targeted expiration of the PP suspension).
  - During the premium processing suspension, petitioners may submit a request to expedite an H-1B petition if they meet the criteria on the Expedite Criteria webpage.
- USCIS implemented a workload distribution plan to also help decrease processing times. Specifically, USCIS transferred some H-1B petitions to its Nebraska Service Center and the Nebraska Service Center is now directly accepting H-1B and H-1B1 (specialty occupation workers who are nationals of Chile or Singapore) petitions if the petitioner requests a

continuation of previously approved employment without change with the same employer. Prior to that transfer, H-1B petitions were adjudicated only by officers at the California and Vermont Service Centers.

**Matter of Simeio Solution, LLC (USCIS Administrative Appeals Office Precedent Decision)**

- On April 9, 2015, the USCIS Administrative Appeals Office (AAO) issued the precedent decision *Matter of Simeio Solution, LLC (Simeio)*. The decision, which is binding upon the agency, clarified existing regulations and previous agency policy pronouncements on when an amended H-1B petition must be filed. Specifically, the decision holds that a petitioner must file an amended or new H-1B petition if the H-1B employee is changing his or her place of employment to a geographical area requiring a new corresponding labor condition application (LCA) to be certified to USCIS, even if the new labor condition application is already certified by the U.S. Department of Labor and posted at the new work location. This precedent decision represents the USCIS position that H-1B petitioners are required to file an amended or new petition before placing an H-1B employee at a new place of employment not covered by an existing, approved H-1B petition. On July 21, 2015, USCIS issued a Policy Memorandum providing additional guidance based on the *Simeio* decision. The policy memorandum granted a safe harbor period for employers to come into compliance with *Simeio*.
- Some stakeholders have expressed concern regarding the *Simeio* precedent decision claiming the requirement to file an amended or new petition is very costly and time consuming for companies who have a mobile workforce. The *Simeio* precedent decision is not a new policy but a clarification of existing legal requirements under DHS regulations regarding when an H-1B petitioner must file an amended or new H-1B petition.

**Rescission of the December 22, 2000 “Guidance memo on H1B computer related positions” (Policy Memo PM-602-0142)**

- On March 31, 2017, USCIS issued a Policy Memorandum titled “Rescission of the December 22, 2000 ‘Guidance memo on H1B computer related positions’” and on May 1, 2017, USCIS also issued internal clarifying guidance.
- The Policy Memorandum reiterates that the petitioner bears the burden of proof to establish that the particular position in which the beneficiary will be employed qualifies as a specialty occupation and that, for some occupations, the general discussion in DOL’s Occupational Outlook Handbook (OOH) may be insufficient, in the absence of additional evidence, to establish that the particular position is a specialty occupation. In addition, the memorandum also reiterates that the specialty occupation determination is not driven by a beneficiary’s qualifications.
- The Policy Memorandum is specific to computer programmers, however the analysis should be conducted for any occupation where the OOH does not specify that the minimum requirement for a particular position is at least a bachelor’s degree in a specific specialty.
- The Policy Memorandum clarifies existing policy and legal requirements when evaluating an H-1B petitioner’s claim that a position qualifies as a specialty occupation and should also be applied to same employer extension petitions.
- The Policy Memorandum also reminds officers that USCIS must also review the Department of Labor certified Labor Condition Application submitted in support of the H-1B petition to ensure that the wage level designated by the petitioner corresponds to the proffered position.

**BACKGROUND:**

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- The H-1B nonimmigrant classification is for aliens coming to the United States temporarily to perform services: in a specialty occupation; of an exceptional nature relating to certain types of projects administered by the U.S. Department of Defense; or as a fashion model of distinguished merit and ability.
- The initial and extension periods of validity for H-1B specialty occupation petitions are issued in increments of up to three years. An H-1B nonimmigrant worker's total period of authorized admission generally cannot exceed six years, with certain exceptions authorized under the American Competitiveness in the Twenty-first Century Act of 2000 (AC21).
- Fees associated with the filing of an H-1B petition include a base petition fee of \$460 and an American Competitiveness and Workforce Improvement Act (ACWIA) fee for certain initial petitions, including change of employer petitions, and the first extension filed by the petitioner for certain beneficiaries, of \$1,500 for petitioners with more than 25 employees or \$750 for petitioners with 25 or fewer employees. Initial H-1B petitions or change of employer petitions also require a \$500 Fraud Prevention and Detection fee. Additionally, a \$4,000 fee mandated by Public Law 114-113 Consolidated Appropriations Act, 2016 is required for initial H-1B petitions or change of employer petitions if the petitioner employs 50 or more employees in the United States and if more than 50 percent of those employees are in H-1B, L-1A, or L-1B status.