

SCHOLAR UPDATE
NAFSA REGION III
OCTOBER 26, 2010

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H-1B Update

USCIS reports that, as of October 22, 2010, the H1B **remaining** cap numbers are...

- Regular Cap: 21,200 (out of 65,000)
- Master's Cap: 3,800 (out of 20,000)
- Rate of use: about 900 per week.

H-1B Update

No gap now if going from cap exempt to cap subject (ie we are now as of Oct 1, in the fiscal year)

H-1B Update

As of August 14, 2010, employers with 50+ employees and 50% of its employees are in H-1B or L status must pay an additional \$2,000 for H-1B petitions.

To avoid the fee and inquiries by USCIS, employers should include a statement in the petition that specifies the number of total employees and the number of whom are in H-1B or L status.

- For example:
 - “Please note that ABC Corp. has approximately X# of employees and Y# of those are employed in valid H-1B. Therefore, this petition is not subject to the additional fees of Public Law 111-230.”

H-1B Update

Escaping the cap and certain fees: Nonprofit entities affiliated with an institution of higher education

To qualify the nonprofit must be:

- Connected or associated with an institution through shared ownership or control by the same board or federation;
- Operated by an institution of higher education; or
- Attached to an institution of higher education as a member, branch, cooperative or subsidiary.

H-1B Update

Terminations and furloughs

- LCA requires payment of wage during period of LCA
- Nonimmigrant considered out of status if not rendering services in exchange for remuneration
- Best practice in cases of termination: withdraw both LCA and I 129.
- LCA can be withdrawn in I Cert; to withdraw I 129 you must send letter with 797 to USCIS office that approved it.

H-1B Update

Administrative Site Visit and Verification Program (ASVVP)

- Part of the Fraud Detection and national Security Directorate
- Created in July 2009
- Visits conducted before and after issuance
- Petitioners have the opportunity to review and address information gathered during a visit prior to the denial or revocation of a petition.
- <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=836d7b8a96aa7210VgnVCM100000082ca60aRCRD&vgnnextchannel=66965ddca7977210VgnVCM100000082ca60aRCRD>

H-1B: The Neufeld Memo

The Neufeld Memo

<http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf>

Sponsoring employers must establish that a valid “employer-employee relationship” exists.

Who does this really affect?

- Independent contractors
- Self-employed beneficiaries
- Beneficiaries placed at third-party worksites

H-1B: The Neufeld Memo

What constitutes an employer-employee relationship?

- Right to control over:
 - **when, where** and **how** the beneficiary performs the job
 - that must exist throughout the validity period of the H-1B petition

H-1B: The Neufeld Memo

- Memo provides a list of factors to consider with a flexible weighing system, including:
 - Does the petitioner provide the tools or instrumentalities needed to perform the job;
 - Does the petitioner have the ability to hire, fire and supervise;
 - Does beneficiary use proprietary information of the petitioner
 - Does petitioner have ability to control the manner and means in which the work product is accomplished?
- Standard: Totality of the circumstances

H-1B: The Neufeld Memo

What is the status of the Neufeld Memo?

- A recent challenge to the memo was thrown out by a federal district court in D.C.
- *Broadgate v. USCIS*, No. 10-00941 (D.D.C. *dismissed* Aug. 13, 2010)

Service Center Update: US CIS Lockboxes

As of August 2010, several immigration forms are processed through US CIS lockboxes

- Form I-539 (Application to Extend/Change Nonimmigrant Status): File with the Dallas Lockbox, except where Form I-539 is being filed with Form I-129 (Petition for Nonimmigrant Worker) Mail these to CSC
- Additional exceptions can be found in the Form I-539 Instructions
- Mailing addresses can be found in the form instructions

Service Center: US CIS Lockboxes

- Form I-140 (Immigrant Petition for Alien Worker): File with the Dallas Lockbox, except where:
 - Form I-140 is accompanied by Form I-907 (Request for Premium Processing) Mail these to the NSC or TSC depending on location of employment
 - Form I-140 is for EB-3 preference category (marked "f" in Part 2, Petition Type). Mail these to NSC or TSC depending on location of employment
- I-140 petitions filed concurrently with Form I-485 should be filed at the Dallas Lockbox unless they meet one of the exceptions above
- See Form I-140 instructions for more details, including mailing addresses

Service Center: Lockbox Process

- Applications are scanned into intake system to screen for acceptance/receipt or rejection
- Scan is sent to service center for adjudication, within 24 hours
- For form I-140, only the petition itself, the envelop, and the labor certification (if applicable) is scanned into the system, to keep exhibit tabs in place
- Receipt numbers are not printed on the back of a canceled check as this feature was not included in the original software program; System update which will include the feature is expected spring 2011
- The date the package is delivered to USCIS is the official date of receipt, even if there is a delay in receipt issuance

Service Center: Lockbox Problems

- Delay in cashing checks and issuing receipt notices
- Rejections for incorrect form version where USCIS indicates “prior form versions accepted”
- Rejections for missing information on form
- Rejections for missing “A” number in Form I-485s, caused by computer glitch error

Service Center: Lockbox Do's and Don'ts

- Don't highlight on forms, as this can not be read by the scanner; circle items, instead
- Don't use bright cover sheets like red as these scan dark and can not be read well; If you must use color, use light bright colors like yellow
- Don't stop payment on checks and re-file applications if a receipt is delayed
- Don't use staples; use paper clips
- Don't use outdated forms; use the latest form version
- To re-file a petition which you believe was rejected in error, mark the package "attention supervisor"

Service Center: Lockbox Contact Information

- To trace an application where no receipt notice is received, or where an application is rejected in error, or for other reason, contact:
lockboxsupport@dhs.gov
- Lockbox staff hope to respond to emails within 5 days of receipt

RFE Review Process

- CIS is in the process of refining its RFE process
- Initiative began in April 2010 to make RFEs consistent across service centers and make them specific and clear
- Initial focus is on O, P, Q and EB-1 Petitions
- Advance copy of draft RFE template for EB-1 was posted on website
- 10 day window to comment
- <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=95e92d40ee989210VgnVCM100000082ca60aRCRD&vgnnextchannel=95e92d40ee989210VgnVCM100000082ca60aRCRD>

RFE Tips

- Proactively avoid RFEs by including all required initial evidence upfront
- Read instruction pages of forms
- Explain and restate information clearly and without using too much jargon
- Number exhibits
- Use the information in RFEs to take offensive approach in the initial submission
- File early to give enough time to deal with potential RFE
- Report RFE trends to IssueNet – “Report an Issue”
- Report unreasonable, impossible requests, to IssueNet – “Get Liaison Help”
- Avoid Premium Processing if possible

Prevailing Wages

Processing Times

- New Requests
- Requests to Reconsider

Department of Labor Update

Special Handling Issues

- Print Ads
- Type of Publication
- Type of Position
- Standard upon reselection

Department of Labor Update

Special Handling Issues

● Print Ads

- *Matter of Syracuse University*
 - Two ads placed, one in electronic form and one in print form
 - Print ad deemed inadequate by DOL and denied case without audit
- What's the matter with this?
 - No mention of a print ad requirement in the regulations, only in an FAQ
 - University was given no notice nor an opportunity to respond

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Special Handling Issues

● Type of Publication

- DOL is improperly questioning the appropriateness of publications used by higher ed
- Regulations state the publication need only be "a national professional journal"
- While some such journals reach a narrow audience, it is the perfect audience.

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Special Handling Issues

- Type of Position
 - Position must include “some actual classroom teaching”
 - Even nonacademic positions with teaching duties may qualify
- How much classroom teaching?
 - Only “some,” even if teaching is not a primary responsibility of the position.
 - Teaching duties can be speculative, though DOL is having a hard time accepting this.

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- Special Handling Issues
 - If doing a reselection?
 - The person best qualified for the job
 - Even if reselected through the professional method of recruitment.

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How long do I have to wait?

- ◉ Special Handling
- ◉ Regular Handling Professional Cases
 - PERMs filed in July 2010 are currently being reviewed.
 - To view processing times, select the “PERM Processing Times” tab at <http://icert.doleta.gov/index.cfm?event=ehGeneral.dsplogin&Logout=1&lob=1>

QUESTIONS?
¿Preguntas?
Domande?
Fragen?
Qüestiós?
Vragen?
Perguntas?