

Changes in H-1B Interim Rule effective March 24, 2008

A. Final Receipt Date When Cap Numbers Are Used Up Quickly

This rule provides that USCIS will include petitions filed on all of those first five business days in the random selection process if USCIS receives a sufficient number of petitions to reach the applicable numerical limit (including limits on exemptions) on any one of the five business days on which USCIS may accept petitions. This will eliminate filing problems resulting from a rush of filings made on the first day on which employers may file petitions for the upcoming fiscal year. See revised 8 CFR 214.2(h)(8)(ii)(B). USCIS has determined that a filing period of five business days is sufficient to account for a wider range of mail delivery times offered by the various mail delivery providers available to the public.

This rule also provides that, if both the 65,000 and 20,000 caps are reached within the first five business days available for filing H-1B petitions for a given fiscal year, USCIS must first conduct the random selection process for petitions subject to the 20,000 cap on master's degree exemptions before it may begin the random selection process of petitions to be counted towards the 65,000 cap. See revised 8 CFR 214.2(h)(8)(ii)(B). After conducting the random selection for petitions subject to the 20,000 cap, USCIS then must add any non-selected petitions to the pool of petitions subject to the 65,000 cap and conduct the random selection process for this combined group of petitions. Therefore, those petitions that otherwise would be eligible for the master's degree exemption that are not selected in the first random selection will have another opportunity to be selected for an H-1B number in the second random selection process. This rule also clarifies that those petitions not selected in either random selection will be rejected. See *id.*

B. Elimination of Multiple Filings

To ensure the fair and equitable distribution of cap numbers, this rule precludes a petitioner (or its authorized representative) from filing, during the course of any fiscal year, more than one H-1B petition on behalf of the same alien beneficiary if such alien is subject to the 65,000 cap or qualifies for the master's degree exemption. See new 8 CFR 214.2(h)(2)(i)(G). This preclusion applies even if the petitions are not duplicative.

USCIS recognizes that, by statute, multiple filings of H-1B petitions are contemplated. See INA sec. 214(g)(7), 8 U.S.C. 1184(g)(7). Nevertheless, USCIS finds that this rule's preclusion of duplicative H-1B filings is consistent with the statute. Section 214(g)(7) of the INA, 8 U.S.C. 1184(g)(7), states that "[w]here multiple petitions are approved for 1 alien, that alien shall be counted only once." USCIS interprets this statutory language as applying to an alien who has multiple petitions filed on his or her behalf by more than

one employer. Therefore, an alien who will be performing H-1B duties on behalf of two separate petitioners will be counted only once against the cap. USCIS does not believe that the statutory language at section 214(g)(7) of the INA, 8 U.S.C. 1184(g)(7), was intended to allow a single employer to file multiple H-1B petitions on behalf of the same alien. Such a broad interpretation would undermine the purpose of the H-1B numerical cap since multiple filings can result in the misallocation of the total available cap numbers.

USCIS recognizes that, on occasion, an employer may extend the same alien two or more job offers for distinct positions and therefore have a legitimate business need to file two or more separate H-1B petitions on behalf of the same alien. This rule precludes this practice if the alien beneficiary is subject to the numerical limitations or qualifies for the master's degree exemption. First, allowing multiple filings by one employer on behalf of the same alien could create a loophole for employers that seek to exploit the random selection process to the competitive disadvantage of other petitioners. Such employers could file multiple petitions on behalf of the same alien under the guise that the petitions are based on different job offers, when the employment positions are in fact the same or only very slightly different.

Second, requiring USCIS adjudicators to distinguish between multiple petitions filed by one employer for one alien based on different job offers and duplicative petitions for one alien for the same, single position would require a significant expenditure of limited USCIS adjudicative resources. USCIS could not make such determinations on the face of the petition, but would need to substantively examine and compare the merits of the petition and any other petition filed by the same employer on behalf of the alien. This would defeat the purpose of the random selection process, which is not intended to be a decision on the merits, but instead, an expeditious way for USCIS to determine which petitions are eligible for consideration on the merits.

Finally, prohibiting employers from filing multiple petitions on behalf of the same alien should have no impact on the unusual situation where an employer may have the same alien in mind for materially distinct employment positions. Once an alien is allocated an H-1B number based on one petition, the employer is able to file an amended petition or a petition for concurrent employment to reflect the different nature of the duties that are associated with the beneficiary's second employment position. Since the alien would have already been counted against the cap, such amended or additional petition would not be affected by the prohibition on multiple petition filings. See INA sec. 214(g)(7), 8 U.S.C. 1184(g)(7).

For these reasons, USCIS believes that it must curtail both duplicative and multiple petition filings by the same employer in order to prevent future

fairness problems similar to those USCIS experienced with its administration of the FY 2008 random selection process for the 65,000 cap. Accordingly, this rule provides that USCIS will deny all the petitions filed by an employer (or authorized representative) for the same fiscal year with respect to the same alien subject to the 65,000 or 20,000 caps. See new 8 CFR 214.2(h)(2)(i)(G). In cases where USCIS does not discover that duplicative or multiple petitions were filed until after approving them, this rule also provides that USCIS may revoke all such petitions if they were approved after this rule becomes effective. Id.

This rule does not, however, preclude related employers from filing petitions on behalf of the same alien. USCIS recognizes that an employer and one or more related entities (such as a parent, subsidiary or affiliate) may extend the same alien two or more job offers for distinct positions and therefore have a legitimate business need to file two or more separate H-1B petitions on behalf of the same alien.

For example, a Fortune 500 company may be the parent company of numerous U.S.-based subsidiaries whose business is to engage in either the food, beverage or snack industries. Each line of business may, in turn, be divided into several business units and operate distinct companies (restaurant, bottled beverage plant, cereal manufacturer, etc) with different EIN numbers, addresses, etc. Although all the subsidiaries are ultimately related to the parent company through corporate ownership, this rule does not prohibit different

subsidiaries from filing one H-1B petition each on behalf of the same alien so long as each employer/subsidiary has a legitimate business need to hire such alien for a position within that subsidiaries' corporate structure. Thus, in this example, if the bottled beverage plant owned by the Fortune 500 company and the cereal manufacturing company owned by the same Fortune 500 company are each in need of the services of a Chief Financial Officer, both may file one petition each on behalf of the same alien. A subsidiary should not file an H-1B petition for an alien just to increase the alien's chances of being selected for an H-1B number where that subsidiary has no legitimate need to employ the alien and is, instead, only filing a petition to facilitate the alien's hiring by a different, although related, subsidiary.

USCIS may issue a request for additional evidence or notice of intent to deny, or notice of intent to revoke for any or each petition if it determines that the employer and related entity(ies) filed a duplicate petition as defined in this regulation. See 8 CFR parts 103 and 214.2(h)(11). The burden rests with the employer to establish that it has a legitimate business need to file more than one H-1B petition on behalf of the same alien. If the employer does not meet its burden, USCIS may deny or revoke each petition, as

appropriate. Without such authority, a loophole would exist for related employers to file multiple petitions on behalf of the same alien under the guise that the petitions are based on different job offers, when the true purpose of filing the petitions is to secure employment for the alien with a single employer seeking his or her services. As an example, one target of this provision is the unscrupulous employer that establishes or uses shell subsidiaries or affiliates to file additional petitions on behalf of the same alien in order to increase the alien's chances of being allotted an H-1B number. USCIS believes that these consequences are warranted in order to deter unfair filing practices and further ensure the integrity of the H-1B cap counting process.

To date, USCIS has identified the problems resulting from multiple filings only in the context of H-1B petitions. For this reason, this rule limits the bar on multiple petition filings to H-1B petitions.

C. Denial of Petitions After Cap Numbers Are Used

Over the past few years, USCIS has received a significant number of petitions that claim to be exempt from the 65,000 cap, but are determined after the final receipt date or after all cap numbers have been used to be subject to the cap. The current regulations do not specifically address treatment of such petitions. This rule amends the regulations to clarify that such petitions will be denied rather than rejected. See revised 8 CFR 214.2(h)(8)(ii)(B) and (D). USCIS has determined that denial of these petitions is appropriate because USCIS must adjudicate them in order to make a determination on whether the alien beneficiary is subject to the numerical cap. USCIS only rejects filings before an adjudication takes place. See 8 CFR 103.2(a)(7). Because USCIS must adjudicate these petitions, it will not return the petition and refund the filing fee.