DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

[INS 1993–99]

Information Regarding the H–1B Numerical Limitation for Fiscal Year 1999

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Notice.

SUMMARY: This notice explains how the Immigration and Naturalization Service (Service) will process H–1B petitions for new employment for the remainder of this fiscal year now that it is clear that the demand for H–1B workers exceeds the statutory numerical limit (the cap) of 115,000 H–1B petitions. This notice is published so that the public will understand the Service's procedure for processing H–1B petitions as the procedure may affect the business decisions of some prospective H–1B petitioners. These procedures are intended to minimize the confusion and burden to employers who use the H–1B program, reduce the administrative burden at the service centers, and eliminate the need for employers to inquire about the status of pending H–1B petitions.

This notice also serves to inform the public that the Commissioner is exercising her authority under 8 CFR 214.2(f)(5)(vi) and (j)(1)(vi) for this fiscal year to extend the duration of stay for certain F and J nonimmigrants (students and exchange visitors) if their employer has filed a timely request for change of nonimmigrant status to that of an H–1B nonimmigrant alien and the petition was filed on or before October 1, 1999. This is a stop-gap measure for such aliens in order to prevent a lapse of status until the Service is able to act on petitions to change their status.

The Service is also publishing a proposed rule in this issue of the **Federal Register** which would require the Service to accept and adjudicate petitions submitted after the cap is reached in future fiscal years and to assign to approved petitions a work start date beginning no earlier than the beginning of the next fiscal year.

DATES: This notice is effective June 15, 1999.

FOR FURTHER INFORMATION CONTACT: Sandra Schatz, Acting Branch Chief, Management and Records Liaison, Immigration Services Division, Immigration and Naturalization Service, 801 I Street, NW., Room 980, Washington, DC 20536, telephone (202) 616–7991.

SUPPLEMENTARY INFORMATION:

Background

Section 214(g) of the Immigration and Nationality Act provides, among other things, that the total number of aliens who may be issued H–1B visas or otherwise granted H–1B status during Fiscal Year 1999 may not exceed 115,000. As of April 30, 1999, the Service has recorded 103,753 petitions against the cap for Fiscal Year 1999. As of April 30, 1999, there are 42,376 H–1B cap petitions pending at the four service centers. Since on average the Service approves 92 percent of the H–1B petitions it receives, there now appears to be a sufficient number of H–1B petitions pending at the four service centers to reach the cap for this fiscal year.

Who Is an H–1B Nonimmigrant?

An H–1B nonimmigrant is an alien employed in a speciality occupation or a fashion model of distinguished merit and ability. A specialty occupation is an occupation that requires theoretical and practical application of a body of specialized knowledge and attainment of a bachelor's or higher degree in the specific speciality as a minimum for entry into the United States.

What Does This Notice Do?

This notice explains the Service's procedure for processing H–1B petitions for new employment that are filed by employers seeking to employ H–1B aliens during the remainder of this fiscal year, *i.e.*, through September 30, 1999. The process described in this notice is different from the process the Service used last year for handling H–1B petitions and applies only to Fiscal Year 1999. The Service intends to amend its regulations to prescribe the method to be used in handling H–1B petitions in subsequent fiscal years. In this regard, the Service is publishing a proposed rule in this issue of the **Federal Register**, concerning treatment of petitions filed after the cap has been reached. In addition, in the near future the Service intends to publish in the **Federal Register** a proposed rule to cover other aspects of handling of H–1B petitions.

Does This Procedure Apply to All H–1B Petitions Filed for This Fiscal Year?

No. The procedure described in this notice relates only to H–1B petitions filed for new employment to commence on or before September 30, 1999. A petition for new employment includes a petition where the alien beneficiary is outside the United States when the H–1B petition is approved or where the alien is already in the United States and is seeking a change of nonimmigrant status to an H–1B nonimmigrant alien.

Amended petitions and petitions for extension of stay are not affected by this procedure because these H–1B petitions do not count against the cap. Likewise, petitions for aliens in the United States who already hold H–1B status, *i.e.*, petitions filed on behalf of an H–1B alien by a new or additional employer, are not affected by this procedure. This procedure does not relate to petitions filed before October 1, 1999, for employment to commence on or after October 1, 1999. However, as described below, the Service is extending the duration of status for certain F and J nonimmigrant aliens who are the beneficiaries of a pending H–1B petition.

What Is the Service's Procedure for Processing H–1B Petitions for New Employment During the Remainder of This Fiscal Year?

The Service will adjudicate all H–1B petitions for new employment to commence on or before September 30, 1999, if the petition was filed before publication of this notice. The Service will not reject a petition solely because the Fiscal Year 1999 allotment of 115,000 H–1B numbers has been exhausted. If the cap is reached before the Service adjudicates a petition, and the petition is otherwise approvable, the Service will grant the petition with a starting validity date of October 1, 1999. An alien beneficiary may not begin his or her employment with the petitioner under the H–1B petition until that date.

Unlike previous years when the cap was reached before the close of the fiscal year, the Service will not attempt to contact petitioners individually to advise that the cap has been reached. Rather, the Service will proceed to adjudicate the petition based on a presumption that the employer will accept October 1, 1999, as the date from which the approved petition is valid and the first date on which the alien beneficiary may begin employment as an H–1B worker.

How Will the Service Treat Petitions Received After Publication of This Notice?

This notice informs the public that there is a sufficient number of H–1B petitions pending at the four service centers to reach the cap of 115,000 for this fiscal year. The Service, in keeping with current practice, will not accept any further H–1B petitions for new employment to commence before October 1, 1999. These petitions will be rejected and returned (along with the

fee) to the petitioner according to 8 CFR 214.2(h)(8)(ii)(E). However, such petitioners are free to refile those petitions with a new starting date of October 1, 1999, or later. The Service does not anticipate that it will be required to return a significant number of petitions under the existing rule.

For Fiscal Year 2000 and beyond, the Service is publishing a proposed rule in this issue of the **Federal Register** to amend its regulations to assign a work start date of no earlier than the beginning of the following fiscal year for approval petitions which are filed after the cap is reached. The Service believes that this proposed rule will benefit the great majority of petitioners by relieving them from the burden of refiling or resubmitting a new petition once the cap is reached. The rule would also ensure consistency by providing an October 1 or later work start date to beneficiaries of petitions filed and pending before the date of the cap is reached and beneficiaries of those petitioners filed thereafter.

How Will the Service Adjudicate H–1B Petitioners Pending on the Date of This Notice?

The fiscal year allotment of 115,000 H–1B numbers is available on a national basis to qualifying United States employers. As a matter of fairness to participating employers, the Service has developed procedures to ensure that petitions will be processed in all four service centers based on the time of filing and in the same order of receipt by the Service. Each of the service centers will coordinate their adjudication of pending H–1B petitions to ensure that petitions will be processed in order of receipt by the Service irrespective of the place of filing. The Service is currently adjudicating H–1B petitions which were filed as late as April 7, 1999. All service centers will continue to adjudicate petitions having the same priority date until the cap is reached. Thereafter ''pipeline'' cases (petitions filed prior to the date the cap was reached) will be adjudicated in the order of receipt but will be assigned a work start date of October 1 of the new fiscal year or later.

Why Isn't the Service Using the Procedure Adopted Last Fiscal Year To Process H–1B Cases This Fiscal Year?

The procedure used last year by the Service to process H–1B cases was overly labor intensive. Service personnel were required to contact each petitioner and obtain authorization to approve the petition with a start date of October 1. Further, the vast majority of petitioners contacted by the Service last year chose the October 1 start date. If the petitioner declined to postpone the starting date for employment until October 1, then the Service was required to deny the petition outright.

What Should a Petitioner Do if the October 1 Start Date for Employment Is Not Acceptable?

If the petitioner is unwilling to wait until the October 1 start date for employment of the H–1B alien and the Service has not yet adjudicated the petition, the petitioner should notify the Service in writing that he/she wishes to withdraw the petition. AS noted below, the Service cannot refund the filing fee in such cases.

If the Service has approved a petition for work to begin as of October 1, 1999, and the petitioner determines that the date is not acceptable, the petitioner should notify the Service in writing immediately so that the Service can revoke the petition and recapture the number and return it to the pool of unused numbers for Fiscal Year 2000.

How Should a Petitioner Notify the Service That It Wishes To Withdraw a Petition?

If a petitioner wishes to withdraw a pending H–1B petition or an approved H–1B petition for new employment, the petitioner should fax a withdrawal request to the Immigration and Naturalization Service, Immigration Services Division, H–1B Withdrawal Section, Washington, DC, fax number: 202–305–0108. The request should be signed by the petitioner or authorized representative and include the filing receipt number and the names of both the petitioner and beneficiary. Employers seeking to request withdrawal of an H–1B petition through September 30, 1999, should use this fax number and special procedure.

Does This Process Apply to H–1B Petitions Filed for Employment To Commence On or After October 1, 1999?

No. Those petitions are not affected by the procedures described in this notice and will be adjudicated in the normal fashion, whether or not they are currently in the pipeline or filed after this year's cap is reached.

How Will the Service Process Petitions That Are Revoked?

The Service will subtract revocations of any H–1B petitions for new employment from the total H–1B count in the fiscal year for which the new employment was approved. After the petition is revoked, the case number will be sent to the Immigration Services Division (ISD) where the number will be recaptured for use. The number will then be forwarded by ISD to a service center to be assigned to a pending petition. Priority will be given to approved petitions in the order they were filed (*e.g.,* petitions that were originally denied but subsequently ordered approved by the Administrative Appeals Office).

Will the Service Refund a Filing Fee if a Petition Is Withdrawn or Revoked?

No, the Service will not refund either the $110 filing fee or the additional $500 filing fee imposed by the American Competitiveness and Workforce Improvement Act of 1998. The regulation at 8 CFR 103.2(a)(1) precludes the refunding of filing fees for petitions filed in behalf of H nonimmigrant aliens.

Will the Service Allow Certain F and J Nonimmigrant Aliens Who Are the Beneficiaries of H–1B Petitions To Remain in the United States Until They Can Change Their Status to H–1B On or After October 1, 1999?

Yes. The Service is amending its regulations by interim rule (published elsewhere in this issue of the **Federal Register**) to expand the definition of duration of status for certain F and J nonimmigrant aliens whose employers have filed a timely H–1B petition and application for change of nonimmigrant classification before the cap has been reached. Data indicates that 60 percent of the H–1B cases recorded against the cap are for aliens who are changing nonimmigrant classification to H–1B. The Service estimates that of these, the most common changes are from F or J to H–1B.

In order to avoid confusion for employers and adverse legal consequences to certain F and J nonimmigrant aliens, the interim rule (published elsewhere in this issue of the **Federal Register**) provides that the Commissioner may, at any time she determines that the H–1B cap will be reached prior to the end of the fiscal year, extend the duration of status, by notice in the **Federal Register**, of any F or J nonimmigrant alien whose employer has filed a timely petition for change of nonimmigrant status to that of an H–1B nonimmigrant. As provided in 8 CFR part 248, the alien must not have violated the terms of his or her admission to the United States in order to qualify for the change of nonimmigrant status. This extension shall continue for such time as is necessary for the Service to approve a petition changing the alien's status to H–1B in the following fiscal year. An alien whose duration of status has been

extended by the Commissioner under these regulations (and who continues to adhere to the other terms of the alien's F and J status) is considered to be maintaining lawful nonimmigrant status for all purposes under the Immigration and Nationality Act.

When Will the Commissioner Exercise Her Authority To Extend Duration of Status for This Fiscal Year?

This notice serves to inform the public that the Commissioner, in her discretion, has exercised her authority under 8 CFR 214.2(f)(5)(vi) and (j)(1)(vi) for this fiscal year. Accordingly, any F or J nonimmigrant whose employer has filed a timely request for change of nonimmigrant status to that of an H–1B nonimmigrant alien whose petition was filed on or before October 1, 1999, is considered to be in a valid nonimmigrant status until October 1, 1999, or until the date the Service adjudicates the change of status application. Pursuant to 8 CFR 248.1(b) and 214.1(c)(4), the term ''timely filed'' refers to an application for a change of nonimmigrant status filed prior to the expiration of the alien's period of authorized stay in the United States. This provision also applies to the dependents of the affected F and J nonimmigrant aliens. An alien affected by this provision may not work for the petitioning employer or otherwise engage in activities inconsistent with the terms and conditions of the alien's nonimmigrant classification prior to the date for which the Service approved the request for a change of status.

Dated: June 4, 1999.

Doris Meissner,

Commissioner, Immigration and Naturalization Service.

[FR Doc. 99–15034 Filed 6–11–99; 8:45 am]

BILLING CODE 4410–10–M