

# PUBLICATION

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## Immigration Update: H-1B Cap FY2017 and Aftermath; Adjudicating the L-1A Functional Manager Petition Requires Consideration of Role Within the Wider Qualifying International Organization

May 10, 2016

### H-1B Cap FY2017 and Aftermath

The USCIS received more than 236,000 H-1B petitions during this year's FY2017 filing period for the annual supply of 85,000 new H-1B visas (65,000 for regular cap plus an additional 20,000 for workers with a U.S. master's degree). This year's number of petitions represents another increase after receiving 233,000 petitions for FY2016, 172,500 for FY2015, and 124,000 for FY2014. On April 12, 2016, the USCIS completed a computer-generated random selection process to select sufficient petitions to meet the 65,000 and 20,000 limits and premium processing will begin on May 12, 2016.

If your petitions were not among the ones who "won" the lottery and were picked, there may be other options for potential employees until the next cap season starts October 1, 2017, with filings that can be made on April 1, 2017:

- An F-1 student who is still in status and has no other options might consider pursuing another level of study in F-1 status.
- Students working under the Optional Practical Training (OPT) in science, technology, engineering and mathematics (STEM) fields may be eligible for an extended (now 24-month) period of OPT. The longer period of STEM OPT will allow some former students another chance to be sponsored for "capped" H-1B employment next year, but it comes with increased reporting, training and monitoring obligations for the employer and student.
- SEVP is likely to expand the list of STEM majors that can be used for STEM OPT.
- L-1B or L-1A status may be available for individuals who have qualifying experience in a specialized knowledge or managerial position with a related entity. Employers could pursue a strategy in transferring an employee abroad for one year and then back to the U.S. as a multinational business transferee.
- H-4 dependent spouses of H-1B workers may be eligible for work authorization if the H-1B spouse is the principal beneficiary of an approved I-140 immigrant petition or is in H-1B status beyond the normal six-year maximum under the "AC21" law. For more information regarding H-4 work authorization, see our blog post [here](#).

Country specific options include:

- Canadian or Mexican nationals may be able to pursue TN, or non-immigrant, classification.
- Australians can pursue E-3 classification for specialized occupations requiring a bachelor's degree.

Other options may be available for individuals with extraordinary ability under an O classification, or under an E classification for investors or foreign companies from countries covered by a treaty of commerce and navigation with the U.S. that engage in a substantial amount of business in the U.S.

## **Adjudicating L-1A Functional Manager Petition Requires Consideration of Role Within the Wider Qualifying International Organization**

The USCIS issued a Policy Memorandum adopting as binding a USCIS Administrative Appeals Office (AAO) non-precedent decision that provides guidance on evidence considered when determining whether a beneficiary qualifies as L-1A functional manager. The decision clarifies that, when determining whether an L-1A beneficiary will primarily manage an essential function, USCIS officers must weigh all relevant factors including, if applicable, evidence of the beneficiary's role within the wider qualifying international organization.

A successful functional manager petition must provide evidence that a beneficiary's duties are primarily managerial – not primarily performing roles that the supervised workers perform. The USCIS officers consider factors such as the nature and scope of the petitioner's business; the petitioner's organizational structure, staffing levels and the beneficiary's position within the petitioner's organization; the scope of the beneficiary's authority; the work performed by other staff within the petitioner's organization, including whether those employees relieve the beneficiary from performing operational and administrative duties; and any other factors that will contribute to understanding the beneficiary's actual duties and role in the business.

When USCIS officers consider staffing levels to determine whether a beneficiary will act as a manager, the reasonable needs of related entities in the international organization and overall stage of development of the company are also relevant. The AAO decision explains that adjudicators must consider the beneficiary's role within the corporate group's organizational hierarchy and any foreign employees within that hierarchy who perform the essential function and thereby support the day-to-day operational needs of the function.

The decision's guidelines may be helpful to show a beneficiary's managerial capacity in a company with few employees in the United States and foreign employees who perform administrative and other duties related to the function in the United States. For example, in the case underlying the decision, the sponsoring employer's U.S. operation to develop the U.S. market for a large sized foreign company consisted of a functional manager with the title chief operating officer and two other U.S. employees. To show the beneficiary is performing primarily managerial duties, that employer submitted documentation about overseas staff, such as technical, sales and administrative staff, performing the essential function and dedicated to support the growth of the corporate group's U.S. business.

See the April 14, 2016 Policy Memorandum [here](#).