

H-1B “Lottery” Coming: Begin Filing Preparations by March 2008

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Under immigration law, the H-1B program allows U.S. employers to hire foreign nationals in "specialty occupation" positions that require a bachelor's degree or the equivalent. Under current law, there is a cap on the number of new H-1B petitions that will be granted during each federal fiscal year ("FY"). This year, current trends suggest that employers who do not mail their petitions on March 31, 2008, will be out of luck for what is considered the H-1B "lottery."

What Are the H-1B Cap Numbers?

During the dot-com boom, the H-1B cap was temporarily set at 195,000, but as of October 1, 2003, the cap returned to 65,000. Of those, 6,800 H-1Bs are allocated to citizens of Singapore and Chile under recent trade agreements with those countries, reducing the number available for the remaining countries to 58,200.

In December 2004, Congress carved out an exemption of 20,000 more "bonus" numbers to the H-1B cap, but reserved them for foreign workers with U.S. master's or higher degrees. For this bonus cap, the first 20,000 qualifying H-1B petitions that U.S. Citizenship & Immigration Services ("USCIS") receives for employment in FY2009 will not be counted toward the regular H-1B cap.

The quota is available starting October 1, and petitions can be filed up to six months in advance, which is April 1. Demand has outstripped supply in recent years. In 2007, USCIS received more than 150,000 H-1B petitions on April 1, depleting the cap in one day. USCIS resorted to randomly selecting which petitions would be accepted, and which would be refused and returned. The process came to be considered the H-1B "lottery."

Who Is Exempt From the Cap?

New employees hired in H-1B status are subject to the cap, unless they are exempt. Many people can still obtain H-1B status through exemptions to the H-1B cap, in particular the following:

- Petitions for persons who currently hold H-1B status and seek an extension do not count towards the H-1B cap numbers;
- An H-1B worker can move to a new employer without using an H-1B cap number;

- In some cases, persons who previously held H-1B status can regain H-1B status without using an H-1B cap number;
- Institutions of higher education or nonprofit research organizations, or governmental research organizations, are exempt from the cap;
- J-1 Physician who has obtained a waiver through the “State 30” or federal program; and
- In addition, the caps carved out for citizens of Chile and Singapore are rarely hit.

How Can an Employer Seek H-1B Status for a Recent College Graduate?

Reaching the cap early affects the ability of foreign students to begin or continue working. Students may be permitted to work for employers under Optional Practical Training (“OPT”) for a year after graduation. Because of academic schedules, the OPT year typically begins and ends in May, June, July or August. A student usually can remain in the United States 60 days after OPT ends while an H-1B petition is pending, but cannot work until the H-1B is approved. If the H-1B petition for the student does not make it through the lottery, the student could be stranded without employment authorization and the employer without an employee. Even if the H-1B petition is approved, the graduate might need to leave the United States to avoid a gap in authorization if the 60-day grace period expires before October 1.

What H-1B Alternatives Exist?

There are alternative immigration options other than H-1B status, including the following:

- L-1 intracompany transfers for persons who worked for a foreign entity related to a U.S. company for at least one year;
- For Canadians and Mexicans, TN status under the North American Free Trade Agreement (“NAFTA”);
- J-1 training and other exchange programs;
- E-1/E-2 treaty investor and treaty trader status for numerous countries;
- E-3 visas for Australians;
- O-1 for extraordinary ability with degrees;
- Returning to school for a higher level of education and work authorization;
- Labor certification for permanent resident status under the “PERM” process as a first step toward “green cards.” Note, however, there are processing backlogs for many types of permanent resident applications.

Other creative alternatives are often available as well, for a temporary or a stopgap measure.

What Does This Mean for Employers?

An employer cannot hire a person in the United States without proper work authorization. While the person cannot work without work authorization, there are ways to tide the person over for short periods of time while waiting for adjudication. In particular, in some instances the employer can give the potential employee a “signing bonus” as some support for the person

waiting for the adjudication, so long as the person does not work in the interim and has status to remain in the United States while waiting for the H-1B.

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