

# Immigration Alert: H-1B Cap Update

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On October 25, 2009, United States Citizenship and Immigration Services (USCIS) announced that 52,800 H-1B petitions have been received since April 1, 2009. After factoring in the H-1B numbers which are reserved solely for nationals of Chile and Singapore pursuant to trade agreements between these countries and the U.S., there are now only 5,400 H-1Bs available for FY2010, which began on October 1, 2009. A significant increase in the pace of H-1B filings was detected in September and this has shown no signs of slowing. While the rate of H-1B filings is still down considerably from previous years, the prospect of only 5,400 for the remainder of FY 2010 means cap subject employers who are considering H-1B filings will need to commit soon, or wait until October 1, 2010 for H-1B availability.

We remind our clients that continued H-1B availability offers opportunities to identify valued employees who might benefit from a conversion of their current status to H-1B. These include foreign nationals in the U.S. in TN, H-1B1, or E-3 status, particularly those who may want to pursue permanent residency. With priority date backlogs (causing lengthy queues) at their worst in years, many of these employees will have to maintain their non-immigrant status and work authorization for years to come before they will be eligible for permanent residence. Once the permanent residence process starts, these employees are discouraged from traveling abroad after the filing of an I-140 Immigrant Visa petition due to the fact that these statuses do not permit “dual intent”—the intent to work temporarily while applying for permanent residence. If the employee in TN, H-1B1, or E-3 status cannot file an I-485 application because of priority date backlogs, he or she may not be able to travel for several years. Conversion to H-1B status would solve this problem, because H-1B status may be extended annually as long as the permanent residency process is timely commenced. Generally, employees who would be affected by the priority date backlogs would be those in EB-2 classification who were born in India or China, or anyone in EB-3 classification, since the EB-3 category is also significantly backlogged for all nationalities at the current time.

Employees in L-1B status, though permitted to have dual intent, often fall into the EB-3 category and thus may have a very difficult time maintaining legal status in the U.S. while waiting for their priority dates to become current—unless they change to H-1B, where unlimited annual extensions are permitted as long as the green card process is timely commenced.

Please contact a member of the Mintz Levin Immigration Section for additional information regarding the H-1B visa program or if you have a particular candidate in mind for H-1B status.

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*For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.*

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