

THE IMMIGRATION EDGE

H-1Bs Quota Filled — Some Options Remain

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Without notice, the H-1B filing window for the year closed. U.S. Citizenship and Immigration Services (“USCIS”) announced on January 27, 2011, that the day before it had received a sufficient number of H-1B petitions to reach the statutory cap for fiscal year 2011 (“FY2011”). USCIS notified the public that January 26, 2011, was the final receipt date for new H-1B specialty occupation petitions requesting an employment start date up to September 30, 2011.

Under immigration law, the H-1B program allows U.S. employers to hire foreign nationals in "specialty occupation" positions, which 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 each federal fiscal year. As in prior years, the cap for FY2011 was filled with several months remaining in the fiscal year.

Once again, this shows that demand for an educated workforce has outstripped the diminished supply in the United States. Employers who haven't already filed H-1B petitions will be left to consider alternatives for foreign candidates, or leave openings unfilled until October 1, 2011.

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-1B are allocated to citizens of Singapore and Chile under trade agreements with those countries, reducing the number generally available to 58,200 for all other countries.

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 Master's or advanced degree cap, the first 20,000 qualifying H-1B petitions that USCIS receives for employment in FY2011 will not be counted toward the regular H-1B cap.

The quota is available starting October 1, 2011, and petitions can be filed up to six months in advance, which, this year, was April 1, 2011. The cap remained open longer than in prior years. In 2008, USCIS received more than 163,000 H-1B petitions by April 7, more than double the number of petitions approvable under the annual cap, in less than one week. USCIS resorted to randomly selecting which petitions would be accepted, and which would be refused and returned. This process is considered the “H-1B lottery.”

Last year, for FY2010, while the Master's cap was hit within two weeks of the cap opening on April 1, the regular cap remained unfilled until December 21, 2009. At that time, USCIS applied the random lottery selection process only to the H-1B petitions received on that day. This year, both caps took longer to be exhausted. The 20,000 cap for Master's degree petitions within about nine months, and the regular cap, within about ten months. Nevertheless, the resulting inability to petition for new H-1B employment between February and September 2011 indicates that the H-1B supply is still ineffective to meet the needs of U.S. employers.

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, nonprofit research organizations and governmental research organizations are exempt from the cap; and
- In addition, the country-specific caps carved out for citizens of Chile and Singapore are rarely hit.

What H-1B Alternatives Exist?

There are employment-based 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 persons with extraordinary ability;
- 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 as a temporary or stopgap measure.

What Does This Mean for Employers?

Employers can prepare to file H-1B petitions for workers who are subject to the cap on April 1, 2011, for a start date of October 1, 2011, or thereafter.

Employers need to resist any temptation to have potential employees begin or continue working, even in what might be considered volunteer positions, without the proper work authorization. Hiring employees without the proper authorization can subject the employer to penalties and subsequent scrutiny under immigration law.

For more information, contact Diane M. Butler, Chair, Immigration Law Department, at butlerd@lanepowell.com or (206) 223-7715.

206.223.7000 Seattle
503.778.2100 Portland
360.754.6001 Olympia
253.272.3641 Tacoma
bus.immigrtn.atty@lanepowell.com
www.lanepowell.com

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