

Immigration Alert

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Mintz Levin Cohn Ferris Glowsky and Popeo PC

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H-1B Cap to Be Reached Imminently

On January 21, 2011, U. S. Citizenship and Immigration Services (USCIS) announced that 62,800 H-1B petitions out of the regular quota of 65,000 have been received since April 1, 2010. USCIS also announced that the special quota of 20,000 for foreign nationals with U.S. master's degrees has been exhausted. This 62,800 number already exceeds 58,200, the quota for regular H-1Bs after subtracting the 6,800 H-1B1 numbers which are reserved solely for citizens of Chile and Singapore pursuant to free trade agreements.

However, the USCIS announcement indicates that the agency "continues to accept these petitions and they will be counted against the regular cap until the regular cap is reached." In addition, USCIS has the regulatory authority to utilize unused Chile/Singapore free trade visas from the previous fiscal year and may also allow regular H-1B filings based on low estimates of Chile/Singapore free trade filings in previous years. It is unknown exactly how much longer USCIS will continue to accept H-1B filings; however, we estimate the cap will be reached imminently—probably within the next few days.

Once the cap is reached this year, cap-subject employers will have to wait until April 1, 2011 to file new H-1B petitions, which will not be effective until October 1, 2011. Please note that H-1B filings will continue to be possible for cap-exempt employees and employers. A cap-exempt employee is any foreign national who previously held H-1B status with a cap-subject H-1B employer and has remaining H-1B time available. These are most often H-1B transfers from current H-1B employment. Cap-exempt employers include institutions of higher education and certain non-profit research organizations. H-1B petitions that are cap-exempt under any of these rules may continue to be filed and approved even though the quota for new H-1Bs has been exhausted.

Any continued H-1B availability offers opportunities to identify 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 residence. With the extensive priority date backlogs limiting immigrant visa availability, many of these employees will have to maintain their non-immigrant status and work authorization for years before they will be eligible for permanent residence. Once the permanent residence process reaches a certain stage, these employees may not be able to travel abroad because TN, H-1B1, and E-3 classifications do not permit "dual intent"—the intent to work temporarily while also applying for permanent residence. If an 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 solves this problem, because H-1B status specifically allows for "dual intent," allowing the employee to maintain H-1B status while also pursuing permanent residence. In addition to the benefit of dual intent, H-1B status may also be extended beyond the usual six-year limit for those whose permanent residence processing is commenced in a timely fashion. Employees in L-1 status may also benefit from conversion to H-1B. Although the L-1 classification permits dual intent, L-1 extensions beyond the usual limits are not permitted based on commencement of permanent residence processing. By converting to H-1B status, however, the employee becomes eligible for unlimited annual extensions as long as the green card process is

commenced in a timely fashion.

Even after H-1B usage reaches the cap for this fiscal year, cap-subject employers who are considering first-time H-1B filings may want to consider filing on April 1, 2011 when the H-1B filing window for the quota for the next fiscal year (which starts October 1, 2011) is opened.

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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