

Immigration Alert: H-1B Cap Update

5/21/2009

On May 18, 2009, United States Citizenship and Immigration Services (USCIS) announced that 45,500 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 approximately 12,700 H-1Bs available for FY2010, which begins on October 1, 2009.

We remind our clients that this surprisingly large number of available H-1B visas offers opportunities for businesses to identify valued employees who might benefit from a conversion of their current status to H-1B. These include L-1B specialized knowledge employees, particularly those who are pursuing, or may want to pursue, permanent residency. L-1B workers have a maximum of five years to remain in the U.S., and this time period is not extendable beyond the five years even if there is a pending permanent residency petition. This is often not enough time to complete the permanent residency process. Conversely, H-1B employees may extend beyond the maximum six years of H-1B status on an indefinite basis until the green card is approved, if either the permanent residency process has been pending for at least 365 days, or an I-140 Immigrant Visa Petition has been approved by USCIS, *prior* to the end of the six-year period. This extra time in H-1B status affords employees a legal means of remaining in the U.S. and working while the permanent residency process moves forward.

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. In addition USCIS is applying new, more stringent standards to the L-1B specialized knowledge category, which could result in increased challenges for those employees holding this status. For these reasons, we encourage employers of L-1B employees to consider changing to H-1B status now.

Employees in TN, H-1B and E-3 status who are in the permanent residency process, or need to commence the process, are potential H-1B candidates. 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. Generally, the 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 unavailable worldwide at the current time.

There may not be another opportunity to obtain H-1B status in the coming year if the number of applicants increases, and so the opportunity to act is now.

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.

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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