

The H-1B Season is Upon us ... Other Options for H-1B Lottery Losers!

We are rapidly approaching the April 1st deadline for the filing for new H-1B visas for the 2009 to 2010 Fiscal Year (FY 09-10). H-1B Petitions for FY 09-10 must be received by the U.S. Department of Homeland Security ("DHS"), Citizenship and Immigration Services ("CIS") on April 1st, 2009. If you do not begin to make preparations as early as possible then you and your prospective H-1B employer will be unable to secure an H-1B (subject to the cap) for the October 1st, 2009 start date.

Unless Congress acts immediately to increase the quota of 65,000 visas (plus and additional 20,000 for those with Masters Degrees from U.S. Academic Institutions), the allotted number of H-1B visas are likely to be taken on the very first day that the petitions may be filed. This is what happened last year and it is presently anticipated that the same thing is going to happen next year.

Last year during the "run on H-1Bs" many people did not receive the visa because the petitions were not filed in a timely manner. Other cases were not "properly filed" (defined in the CIS regulations) and were incomplete or deficient in some way and they were therefore not approved even though they were filed in a timely manner. If petitioners fail to properly meet each one of the regulatory filing requirements, then the petition may not be considered "properly filed" and may be returned.

There are a few things that prospective H-1B employers and H-1B employees can do to improve the likelihood that the H-1B will be accepted by the CIS. First, be sure that all of the appropriate documentation is contained in the H-1B petition. Second, be sure that the H-1B is submitted to the CIS in a timely manner. Third, be sure that the H-1B is sent to the proper CIS Service Center for adjudication.

Most importantly, H-1B petitioners should consider the possibility of utilizing filing multiple H-1B petitions. Be advised that the CIS issued guidance concerning multiple H-1Bs. Filing a master's H-1B and bachelor's H-1B is not considered a multiple H-1B filing. Many organizations have layers and layers of subsidiaries and affiliates (different organizations with different Employer Identification Numbers) and there appears to be nothing yet in the regulations to preclude the use of those organizations as vehicles for additional H-1Bs. With each H-1B submitted, there is a statistically higher chance of one of the H-1Bs being able to "win" the lottery.

What is your H-1B back-up plan? First consider trying to obtain an H-1B with a cap-exempt organization. Academic institutions of higher education can make petitions for the H-1B with no regard to the cap. Also, many may qualify for alternative visas to the H-1B. For example, in 1991, the law carved the O, P Q and R visa categories out of the H-1B nonimmigrant visa classification. You will want to look to all of your H-1B visa alternatives.

What is your H-1B Back-Up Plan? Look North to Canada.

The most common reason for H-1B applications to be returned is that too many are received for the number of available H-1B slots. Most foreign nationals invest all their energies in the H-B process without thinking of what they will do if they don't make the quota. It is recommended that H-1B applicants set up an "immigration back-up plan." Canada offers a viable alternative to those seeking entry in the U.S. and not accepted for an H-1B visa.

What many do not realize is that foreign nationals who are presently in the U.S. can make an application for Canadian permanent residence before, or while, they file for and await an H-1B determination. There is nothing to prevent applying for entry to both countries at the same time. Under the Canadian Immigration Regulations, there is a special provision to allow a foreign national to apply to enter Canada directly from the U.S. - without returning to their home country - as long as that person has been lawfully admitted to the U.S. for one year or more and has the visa(s) to prove it. However, it is preferable to apply to Canada (but not necessarily required) before the current visa in the U.S. expires.

Learn more...

About Nachman & Associates, P.C.

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To meet a growing demand for Canadian immigration from the United States, in 2005 Nachman & Associates formed a Canadian Division, managed by licensed Canadian legal staff. With offices in Montreal, and Toronto, Canada (as well as in New York and New Jersey in the U.S.) our Canadian Division attorneys are in the unique position to assist with cross-border issues. If you, or any member of your staff, are interested in receiving more information about U.S. and/or Canadian Immigration options, please contact our offices at 201-670-0006 (x100) or e-mail to us at info@visaserve.com.

Website: <http://www.visaserve.com>

Nachman & Associates, P.C.

David H. Nachman

Managing Attorney

email: david_nachman@visaserve.com

phone: 201-670-0006 ext. 100