

NO MORE H-1BS FOR FISCAL YEAR 2012; NOW WHAT?

The H-1B quota for 2012 (10/1/2011 – 9/30/2012) was met on November 22, 2011. Although most immigration practitioners knew it was coming, it was still a disappointment to hear this news – particularly because it was given the day AFTER it happened. So, as in years past, we are again messengers of a frustrating policy to U.S. employers eager to issue job offers to foreign nationals.

Fortunately, there are some exemptions to the cap. These should be kept in mind when strategizing a case, as it means an employer could file even after the quota has been met:

- *Extension applications* for persons currently in H-1B status (and, in certain circumstances, for persons who were previously in H-1B status and seek to regain it)
- *New Employer applications* for H-1B holders transferring from one employer to another
- Applications by employers who are *institutions of higher education, nonprofit research organizations, or governmental research organizations*

If the cap has been met, and a case is not eligible for an exemption, what's left to do?

In certain circumstances, there are other – some perhaps lesser known - employment visas that should be carefully explored with the employer and the employee:

- *L-1* intracompany transferees, for employees who worked for a related corporate entity abroad
- *TN* (under NAFTA) for Canadians and Mexicans
- *E-3* for Australians
- *E-1 and E-2* for treaty-investor or treaty-traders (from certain countries)
- *F-1* for students of higher education who qualify for limited work authorization (and possible STEM OPT extensions)
- *O-1* for persons of extraordinary ability

In addition, there may be work authorization available to employees at certain stages of the “Green Card” process.

Federal law caps the number of new H-1Bs at 65,000 per year. Citizens of Singapore and Chile get 6,800 of those under specific trade agreements, so general availability is actually 58,200. There are an additional 20,000 for those who have achieved a U.S. Master's (or higher) degree, a 'gift' bestowed by Congress in December 2004.

With the American economy slowing down as it has, last year's quota remained open for 10 months, and this year's remained open for almost 8 months. In past years, the H-1B quota was exhausted in one day!

Not having this vital program available to employers year-round makes obvious the point that the arbitrary quota is not sufficient to meet U.S. workforce needs. Congress and the President should increase the quota, or in the alternative, eliminate it altogether.

Although the H-1B is by far the most commonly used temporary, nonimmigrant work visa, there *are* some other options to consider. As with all immigration law, however, they are complex. Remember to consult with a qualified immigration attorney to help you through the labyrinth of each possibility, and to ensure compliance with federal law.