

## Immigration Law Update

**10/28/2011**

### **H-1B Numbers May Run Out Before End of 2011: Quota for Master's Degree Filled**

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 (“FY”). The quota for graduates with a master's or higher degrees from U.S. universities already has been filled. Current trends suggest that the cap for all remaining H-1B numbers for FY2012 could be reached before the end of 2011. To avoid the cap and ensuing complications and processing delays, employers who would like to hire H-1B workers to begin employment before October 1, 2012, should plan to file soon.

### **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-1Bs 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 U.S. Citizenship & Immigration Services (“USCIS”), the Department of Homeland Security agency that processes H-1Bs, receives for employment in FY2012 will not be counted toward the regular H-1B cap.

The quota is available starting October 1, each year, and petitions can be filed up to six months in advance, which this year was April 1, 2011. Demand has outstripped supply in recent years. In 2008, USCIS received more than 163,000 H-1B petitions by April 7, depleting the cap in one week. USCIS resorted to randomly selecting which petitions would be accepted, and which petitions would be refused and returned. The process is considered the “H-1B lottery.”

Last year, for FY2011, the regular cap remained unfilled until January 26, 2011. At that time, USCIS applied the random lottery selection process to the H-1B petitions received that day. This year, the H-1B cap is proceeding more rapidly toward extinction than in past years. Approximately 25,000 cap-subject petitions have been filed since August 12. Now that the

master's cap has been reached, all numbers will go against the remaining 18,800 regular H-1Bs. At this rate, H-1B numbers will be gone by the end of 2011, which is earlier than the past few years.

### **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 toward 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
- 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; and
- 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 for a temporary or a stopgap measure are available as well.

## What Does This Mean for Employers?

Due to the alarmingly few H-1B cap positions left for FY2012, all employers seeking to hire cap-subject H-1B workers before October 1, 2012, should immediately prepare and file the petitions.

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.

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