FOSTERQUAN, LLP
THE COMPREHENSIVE IMMIGRATION LAW FIRM

IMMIGRATION UPDATE©
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U.S. CITIZENSHIP & IMMIGRATION SERVICES (CIS) ANNOUNCES THE H-1B CAP HAS BEEN REACHED; H-1B Extension Petitions Are Not Impacted; H-1B Numbers Remain Available for Chileans and Singaporeans

On January 27, 2011, U.S. Citizenship & Immigration Services (CIS) announced that the CIS had received enough H-1B petitions to exhaust the H-1B quota for Fiscal Year 2011 (October 1, 2010, through September 30, 2011). New cap-subject H-1B petitions may be filed beginning April 1, 2011, with a requested H-1B employment start date of October 1, 2011.

Described below are exempt types of H-1B cases that may continue to be filed without regard to this limitation or time period.

The H-1B visa quota for each fiscal year is 65,000. However, some H-1B visa numbers are set aside for citizens of Chile and Singapore. Therefore, the effective cap for all other nationalities is actually less than 65,000. An additional 20,000 H-1B numbers are available for candidates who hold at least a Masters Degree or higher from a U.S. institution of higher education. The CIS received sufficient H-1B petitions under the "Masters Exemption" to exhaust the "Masters Cap" much earlier in the fiscal year.

The CIS Press Release dated January 27, 2011, indicates that the cap was reached on Wednesday, January 26, 2011. Petitions received after January 26th will be rejected and returned with the CIS filing fees. Those received on the final cap date, but not allocated a number, will also be returned with the CIS filing fees.

H-1B Petitions Not Subject to the H-1B Cap

H-1B visa numbers remain available for citizens of Chile and Singapore, pursuant to trade agreements that set aside H-1B numbers under each year's quota. Additionally, the following types of H-1B petitions are not subject to the annual H-1B cap and may be filed without numerical limitation:

1. H-1B Petition Extensions for existing H-1B employees

2. H-1B Change of Employer petitions for candidates counted under a previous year's H-1B cap who hold H-1B status and are seeking a change of employer

3. H-1B Petitions on behalf of employees of institutions of higher education

4. H-1B Petitions on behalf of employees of Nonprofit Organizations affiliated with institutions of higher education

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5. H-1B Petitions on behalf of employees of Nonprofit Research Organizations or Governmental Research Organizations

6. H-1B Petitions on behalf of candidates who were previously granted H-1B status in the past six years and have not left the United States for more than one year after attaining H-1B status

Most notably, non-profit organizations affiliated with institutions of higher education may file petitions that are exempt from the H-1B cap. Many school districts bear such an affiliation, and FosterQuan has pioneered the argument exempting H-1B petition filings by such school districts. For more information on a potential H-1B cap exemption for an H-1B petition to be filed by a school district or other organization with a qualifying affiliation, please contact your FosterQuan Immigration Attorney. If you are unsure whether a particular organization may meet the requirements for exemption, or wish to explore how it may qualify in the future, your FosterQuan Immigration Attorney can assist you in evaluating the affiliations and preparing the arguments on behalf of your organization.

Possible Alternatives to H-1B Classification

While the H-1B cap for Fiscal Year 2011 has been reached for all but Chileans and Singaporeans, many times candidates for H-1B classification potentially qualify under one or more alternative nonimmigrant classifications. The following classifications remain available, often without numerical limitation, for qualifying candidates to fill qualifying positions:

The TN nonimmigrant category is an appropriate alternative for Canadian and Mexican citizens seeking admission into the United States for employment in certain professional categories in accordance with the North American Free Trade Agreement (NAFTA). The NAFTA list of professional classifications, for which TN status is available, includes, *but is not limited to*, the following professional occupations: Engineer, Accountant, Architect, Computer Systems Analyst, Graphic Designer, Management Consultant, Scientific Technician/Technologist (including Engineering Technicians), and various occupations in the medical and allied health professions.

The H-3 visa category may be used for the temporary training of qualified foreign nationals in the United States pursuant to a detailed, established training program.

The L-1 category is for international transferees who have worked with a company abroad for at least a year and are being transferred to the United States to continue working with an affiliate, parent, subsidiary, or branch office of the company in the United States. Employment must have been and must continue to be in a managerial, executive, or specialized knowledge capacity.

The E-1 and E-2 Treaty Trader and Treaty Investor categories may be used for employing qualified personnel with companies in the United States where the company maintains the nationality of a country with which the United States has entered into an applicable trade or investment treaty. Generally, the prospective employee must be coming to engage in employment with the company as a managerial, executive, or essential employee with the company in order to qualify.

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The E-3 nonimmigrant visa category is available for Australian citizens who will be employed in the United States in a specialty occupation. The requirements for this category are similar to those for the H-1B category.

The O-1 Alien of Extraordinary Ability category would be an appropriate alternative for those individuals who have reached the pinnacle of their fields of endeavor and have sustained national or international acclaim for their extraordinary achievements.

Under very limited, short-term circumstances in which a foreign national will remain on a foreign payroll and meet other strict criteria when coming to the United States, the B-1 visa may be an appropriate option in lieu of the H-1B visa. Your FosterQuan immigration attorney can assist you in determining whether the B-1 visa may be an appropriate alternative in particular cases.

In limited cases, a more direct route to permanent residency may exist and could be considered for individuals who meet established criteria and are classifiable under an employment-based immigrant visa category for which immigrant visa numbers are readily available under the annual quota system for immigrant visas.

For more information regarding these potential alternatives to H-1B classification, contact your FosterQuan Immigration Attorney. Your FosterQuan Immigration Attorney will be happy to assist you in determining whether a beneficiary may qualify under one of these nonimmigrant classifications and can assist you in developing an appropriate case strategy for collecting the information and documentation required to proceed.

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