

Immigration Law Update

11/28/2011

H-1B Quota Filled: Some Options Remain

Without notice, the H-1B filing window for the year has closed. U.S. Citizenship and Immigration Services (“USCIS”) announced the day before Thanksgiving that on Tuesday, November 22, 2011, it had received a sufficient number of H-1B petitions to reach the statutory cap for fiscal year 2012 (“FY2012”). This means that petitions for first-time H-1Bs received November 23 or thereafter will be rejected and mailed back to the petitioner unprocessed.

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. As in prior years, the cap for FY2012 was filled with several months remaining in the fiscal year.

Once again, this shows that demand for an educated workforce has outstripped the diminished supply in the United States. Employers who haven’t already filed H-1B petitions will be left to consider alternatives for foreign candidates, or have openings go unfilled until October 1, 2012.

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 USCIS receives for employment in FY2012 were not 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. The cap remained open longer than in prior years. In 2008, USCIS received more than 163,000 H-1B petitions by April 7, which is more than double the number of petitions approvable under the annual cap. USCIS resorted to randomly selecting which petitions would be accepted, and which would be refused and returned. This process is considered the “H-1B lottery.”

Last year, for FY2011, the regular cap remained unfilled until January 2011. At that time, USCIS applied the random lottery selection process only to the H-1B petitions received on that day. Nevertheless, the resulting inability to petition for new H-1B employment between December 2011 and September 2012 indicates that the H-1B visa supply is still ineffective to meet the needs of U.S. employers.

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?

Employers can prepare to file H-1B petitions for workers who are subject to the cap on April 1, 2012, for a start date of October 1, 2012, or thereafter.

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.

**For more information, please contact the Immigration Practice Group at
Lane Powell: bus.immigtrn.atty@lanepowell.com**

1.800.426.5801 ■ Your Pacific Northwest Law Firm® ■ www.lanepowell.com

This is intended to be a source of general information, not an opinion or legal advice on any specific situation, and does not create an attorney-client relationship with our readers. If you would like more information regarding whether we may assist you in any particular matter, please contact one of our lawyers, using care not to provide us any confidential information until we have notified you in writing that there are no conflicts of interest and that we have agreed to represent you on the specific matter that is the subject of your inquiry.

Copyright © 2011 [Lane Powell PC](http://www.lanepowell.com)
Seattle | Portland | Anchorage | Olympia | Tacoma | London