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H-1B Numbers May Run Out Before End of 2010 — File Soon and Beware of Procedural Changes

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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"). Current trends suggest that the cap for FY2011 could be reached before the end of 2010. 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, 2011, 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-1B visas 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 FY2011 will not be counted toward the regular H-1B cap.

The quota is available starting October 1, and petitions can be filed up to six months in advance, which, this year, was April 1, 2010. 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 would be refused and returned. The process is considered the "H-1B lottery."

Last year, for FY2010, while the Master's cap was hit by June 2009, the regular cap remained unfilled until December 21, 2009. At that time, USCIS applied the random lottery selection process to the H-1B petitions received that day. This year, the 20,000 cap for Master's degree petitions already has been reached, and there are only approximately 10,000 numbers for new H-1B positions left under the FY2011 quota.

What Procedural Changes Have Occurred Recently?

This year, there are a few procedural changes for employers to note:

- Due to H-1B prevailing wage requirement changes, the Labor Condition Application ("LCA") should be filed at least a week before the planned date to file the H-1B petition. A preliminary step in filing an H-1B petition is to show that the employer will pay the prevailing wage by obtaining a certified LCA from the Department of Labor ("DOL"). Employers submit the Form 9035 online to the DOL through its web-based portal called iCERT http://icert.doleta.gov/. Then, the certified Form must be submitted to USCIS, along with the H-1B petition; otherwise, the H-1B petition will be rejected.

  For a time, LCA certification occurred more-or-less instantaneously. Under the current DOL system, Form 9035 LCA processing can take a week to process, or longer if the DOL requests verification of the federal employer tax identification number ("FEIN"). Therefore, LCAs should be filed at least a week in advance of the planned date to file the H-1B petition to avoid delays and the risk that the cap might be reached.

- Notable changes to the H-1B petition form include the following:
  - Questions about placement of H-1B personnel at third-party worksites;
  - Questions about the deemed export of controlled technologies to H-1B personnel; and
  - Additional fees required for employers of H-1B personnel with 50 or more employees, and 50 percent or more employees in H-1B status or L-1 status (intracompany transfers from related company abroad).

  Employers must use a new version of the H-1B petition form that USCIS released on November 23, 2010.

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 towards 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
- In addition, 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 often are available as well, for a temporary or as a stopgap measure.

What Does This Mean for Employers?

Due to the alarmingly few H-1B cap positions left for FY2011, all employers seeking to hire cap-subject H-1B workers before October 1, 2011, 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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