

Erickson Column: Has H-1B quota

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For the last several years, many U.S. employers have been forced to utilize a risky approach to filling open positions within their organizations. The strategy in question involves the H-1B visa program. The risk was genuine because the annual cap for new H-1B cases was routinely met on or about the first day of filing (i.e. April 1) for each fiscal year. This resulted in a lottery drawing involving those persons who filed prior to the cap being reached. As a result, the H-1B has recently proven not to be the best strategy for planning a corporate workforce.

The H-1B program has recently attracted more attention and critics, especially with the unemployment rate currently off the chart. There are supporters (i.e. the high-tech industry) who would like to see the annual cap expanded or lifted all together. There are detractors who argue that the H-1B program takes jobs away from U.S. workers and depresses wages. For the record, the Department of Labor mandates the minimum wage that must be paid to all H-1B workers through its prevailing wage system. Employers respond that they wouldn't be forced to use the H-1B program if there were sufficient U.S. workers to fill the offered positions. Microsoft alone filed 3,117 H-1B petitions last year. As such, a bit of background on the program is in order.

The number of new H-1Bs available each year is subject to an annual congressionally set limit. Each H-1B quota applies to a particular fiscal year which begins on October 1. H-1B petitions for the year can be filed on the preceding April 1. The annual quota has been set at 65,000 visas for the last few years, down from a high of 195,000.

This year, only 45,800 petitions have been filed since April 1, said Sharon Rummery, spokeswoman for U.S. Citizenship and Immigration Services (USCIS). "They're coming in, but they're not coming in at a speedy pace," she said.

The H-1B category allows U.S. employers to temporarily employ foreign workers in specialty occupations. The positions are typically in the fields of architecture, engineering, mathematics, physical sciences, social sciences, biotechnology, medicine and health, education, law, accounting, business specialties, theology, and the arts. In general, to qualify for an H-1B, the individual must have earned a bachelor's degree or its equivalent as a minimum, and the position must require same.

During the early 1990s, the quota was rarely reached. In 1998 the quota was increased to 115,000 and then, in 2000, to 195,000 visas per year. During the years the quota was set at 195,000, it was not an issue as it was never reached. At that point the business community was at peace with the program. However, this was short lived.

In 2004, the quota was reduced to 90,000. Since then, the quota has filled up rapidly every year, making H-1Bs again hard to get. Most recently, the basic quota has been at 65,000, with an additional 20,000 visas possible for foreign workers with U.S. advanced degrees.

For 2007, the entire quota of visas for the year was exhausted within a span of less than 2 months. The writing was on the wall.

For 2008, the quota was met before the end of the first day on which petitions were accepted (i.e. April 1). Under USCIS rules, the 123,480 petitions received were then subject to a lottery process for the 65,000 available slots. This doesn't seem like a process for staffing a workforce.

Measures to discourage foreign workers are a mistake that could hurt the U.S. economy in the long run, said Vivek Wadhwa, a visiting scholar at UC Berkeley's School of Information. China and India, the two countries that provide the majority of H-1B holders to the U.S., have growing economies that are already luring talented American-educated foreign students away, he said.

This year's drop in petitions, he said, is a sign that "the laws of supply and demand are working the way they should" but also that the people who were rejected by previous U.S. restrictions might have found better opportunities elsewhere.

"The majority have probably moved on. They're not here waiting for H-1Bs," he said. "They're frustrated with the visa system and they see more opportunities back home. It's too much hassle trying to get a job in the United States."

With the above in mind, the question is whether or not the annual cap is an issue that Congress should concern itself with. Should the business community be forced to deal with an annual cap? Simply put, it seems that if there is demand for new workers, then U.S. employers will hire the number of people needed to fill the open roles. With the downturn in the economy, this year has shown that if there are available U.S. workers to fill those roles, then the H-1B will not be utilized as much. When the need is low, as we've seen this year, then the business community will only use the H-1B to the extent needed to fill out its workforce.

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