

Immigration Alert: H-1B Cap Update

12/15/2010

By [Maryanne Kline](#)

On December 10, 2010, United States Citizenship and Immigration Services (USCIS) announced that 52,400 H-1B petitions out of the regular quota of 65,000 have been received since April 1, 2010. Last year, this number of H-1B petitions had been received by the end of October, with the cap being reached on December 21, 2009. Although this year's supply will last longer than did last year's, it is impossible to predict exactly when the cap will be reached and USCIS will stop accepting new H-1B filings.

In addition, USCIS may set aside up to 6,800 visas from the 65,000 cap for H-1B1 visas for nationals of Chile and Singapore pursuant to free trade agreements. Unused Chile/Singapore free trade visas are made available for H-1B use in the following fiscal year, but it is not known how many of these visas remained last year and were added back into this year's cap, effectively offsetting some portion of the 6,800 "carveout."

As of December 10th, USCIS has also received 19,100 H-1B petitions under the special quota of 20,000 for foreign nationals with U.S. advanced degrees, so this cap will likely be reached very soon. Once this cap is reached, H-1B petitions for individuals with U.S. advanced degrees will count toward the general H-1B cap of 65,000.

This continued H-1B availability offers opportunities to identify valued employees who might benefit from a conversion of their current status to H-1B. These include foreign nationals in the U.S. in TN, H-1B1, or E-3 status, particularly those who may want to pursue permanent residence. With the extensive priority date backlogs limiting immigrant visa availability, many of these employees will have to maintain their non-immigrant status and work authorization for years before they will be eligible for permanent residence. Once the permanent residence process reaches a certain stage, these employees are discouraged from traveling abroad because TN, H-1B1, and E-3 classifications do not permit "dual intent"—the intent to work temporarily while also applying for permanent residence. If the employee in TN, H-1B1, or E-3 status cannot file an I-485 application because of priority date backlogs, he or she may not be able to travel for several years. Conversion to H-1B status solves this problem, because H-1B status specifically allows for "dual intent" such that the employee may maintain this status while also pursuing permanent residence. Generally, employees who are affected by the priority date backlogs are those in EB-2 classification who were born in India or China, or anyone in EB-3 classification regardless of nationality. In addition to the benefit of dual intent, H-1B status may also be extended beyond the usual six-year limit for those whose permanent residence processing is commenced in a timely fashion.

Employees in L-1 status may also benefit from conversion to H-1B. Although the L-1 classification permits dual intent, L-1 extensions beyond the usual limits are not permitted based on commencement of permanent residence processing. By converting to H-1B status, however, the employee becomes eligible for unlimited annual extension as long as the green card process is commenced in a timely fashion.

As H-1B usage continues to approach the cap, cap-subject employers who are considering first-time H-1B filings should make a decision as soon as possible.

* * *

Please contact a member of the Mintz Levin Immigration Section for additional information regarding the H-1B visa program, or if you have a particular candidate in mind for H-1B status.

[Click here to view Mintz Levin's Immigration attorneys.](#)