

THE IMMIGRATION EDGE

Cap for H-1Bs Hit in One Day: Some Options Remain

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Each year there are 65,000 new H-1B slots available for companies to hire foreign workers. The quota is available starting October 1, and cases can be filed six months in advance. This year, U.S. Citizenship & Immigration Services (“USCIS”) received more than 150,000 H-1B petitions on April 2, 2007, depleting the cap in one day.

Once the quota is hit, no H-1Bs will be available for the rest of the fiscal year, which runs from October 1, 2007, to September 30, 2008. To weed out the excess, USCIS is subjecting the H-1B petitions received on April 2 as well as on April 3 this year to a random lottery selection. No cases are guaranteed a slot, not even cases filed for expedited “premium processing” treatment. They, too, will be subject to the lottery. Even cases already assigned a number after April 2 have no guarantee that they will not be rejected if they don’t win the lottery. All H-1B cases received April 4 and thereafter will be rejected and returned.

Once again, this shows that demand for an educated workforce has outstripped the diminished supply in the United States. Unless Congress acts, employers who haven’t already filed H-1B petitions will be left to consider alternatives for foreign candidates, or have openings go unfilled through September 30, 2008.

What Are the H-1B Cap Numbers?

Under immigration law, the H-1B program allows U.S. employers to hire foreign nationals in "specialty occupation" positions, requiring at least 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”). FY2008 runs from October 1, 2007, through September 30, 2008. During the dotcom boom, the H-1B cap was temporarily raised to 195,000, but as of October 1, 2003, the cap dropped precipitously to 65,000. Of those, 6,800 H-1Bs are allocated to citizens of Singapore and Chile under recent free trade agreements with those countries, reducing the number generally available to 57,000 for the remaining 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. advanced degrees of Master’s or higher degrees. For this bonus cap, the first 20,000 H-1B petitions that USCIS receives for employment in FY2008 will not be counted toward the regular H-1B cap. USCIS has not issued the count for the Masters cap, but as of April 3, the Masters cap pipeline could be full as well.

H-1B petitions can be filed as far as six months in advance of an employment start date. Last year, the H-1B program for temporary workers closed in May, little more than one month before the fiscal year began. The prior year, it had opened and closed in August.

Who Is Exempt From the Cap?

New employees hired in H-1B status could be 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 already granted who currently hold H-1B status and seek an extension do not count in 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;
- Nonprofit institutions of higher education and research organizations are exempt from the cap; and
- In addition, the caps carved out for citizens of Chile and Singapore are rarely hit.

In contrast, an H-1B worker who terminates H-1B employment and is absent from the United States for one year or more uses a cap number to return in H-1B status.

Congress is considering other exemptions as part of proposed Comprehensive Immigration Reform legislation, including exemptions for foreign students pursuing science, technology, engineering or math degrees (the so-called “STEM” degrees).

What H-1B Alternatives Exist?

There are 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 extraordinary ability with degrees; and
- Labor certification for permanent resident status and “green cards,” although these alternatives generally have processing backlogs.

Other creative alternatives are often available as well, for temporary or stopgap measures.

What Does This Mean for Employers?

An employer cannot hire a person in the United States without proper work authorization. While the person cannot work without work authorization, there are ways to tide the person over for short periods of time while waiting for adjudication. In particular, in some instances the employer can give the potential employee a “signing bonus” as some support for the person waiting for the adjudication, so long as the person does not work in the interim.

There are often solutions for companies to hire valuable candidates. The employer who is considering hiring a foreign national in H-1B status should plan to prepare and file the petition as soon as possible after April 1 for the coming year’s H-1B quota. The situation is unlikely to change unless Congress is urged to increase the cap or expand the exemptions to the cap.

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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