Siskind's Immigration Bulletin: Special Issue - The H-1B Cap

On October 1, 2003, the allotment of H-1B visas provided annually by Congress dropped from 195,000 to 65,000. Out of that number, 6,800 are reserved for the H-1B1 program for nationals of Chile and Singapore . Numbers not used of that 6,800 (which will likely be several thousand) will be made available in the 45 day period beginning October 1st. Congress also has allocated an additional 20,000 H-1B visas for graduates of US masters programs or higher.

This week, the H-1B cap for fiscal year 2009 is to open up and USCIS is expected to announce almost immediately that it has received enough applications to meet the 2009 cap (which covers the fiscal year running from October 1, 2008 to September 30, 2009. Numbers in the 20,000 pool will likely last a little longer, but probably not much more than a few days.

The next allotment of H-1B visas in the 65,000 pool will open up on October 1, 2010 with applications being accepted on April 1, 2009. Until then, it will be impossible to obtain new H-1B visas for cap subject employees except for visas leftover from the H-1B1 Singapore/Chile program.

Who is actually subject to the cap?

Not every H-1B applicant is subject to the general cap. The cap does not apply to applicants filing H-1B visas through institutions of higher education or their related or nonprofit entities as well as nonprofit research organizations and government research organizations.

Visas will still be available for applicants filing for amendments, extensions, and transfers unless they are transferring from an exempt employer or exempt position and were not counted towards the cap previously (such as a physician who receives an H-1B for residency training with an exempt hospital and then seeks a job in private practice afterwards)

Physicians receiving waivers of J-1 home residency requirements as a result of agreeing to serve in underserved communities are exempt. Also, graduates of US masters and doctoral degree programs draw numbers from a "bonus" allotment of 20,000 visas. As noted above, nationals of Singapore and Chile draw from a separate cap of 6,800 (5,400 for Singapore and 1,400 for Chile).

Must one be employed by the institution by which he or she is claiming the H-1B cap?

Note that the statute states that applicants who work AT such institutions are covered so individuals employed by entities other than these institutions but who provide services at the qualifying institution may be cap exempt.

In 2006, USCIS released a memorandum discussing this question. The agency recognized that the law permitted third party employers to obtain a cap exemption, but set a requirement that the employment must "directly and predominantly" further the essential purposes of the qualifying institution.

USCIS has stated that the burden is on the petitioner to establish there is a logical nexus between the work performed by the beneficiary and the normal primary or essential work performed by the institution. They specifically give the example of a physician employed by a medical group who serves patients at an exempt university hospital.

What does it mean to be "affiliated" or "related to" for purposes of the H-1B cap exemption?

USCIS in the same June 2006 memorandum noted above has taken the position that "affiliated" for cap exemption purposes means the same thing as it does for fee exemption purposes (affiliates of institutions of higher education are exempt from worker retraining fees) even though the term is defined in the fee exemption statute and not in the cap exemption statute.

The term in the fee exemption context means "a nonprofit (including but not limited to hospitals and medical or research institutions) that is connected or associated with an institution of higher education, through shared ownership or control by the same board or federation operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative or subsidiary."

This relatively restrictive definition would seem to eliminate many employers. However, "related to" has yet to be defined by USCIS.

How does USCIS allocate H-1B visas for applications received on the

day the cap is announced as having been hit?

USCIS' policy is to hold a random drawing to select the exact number of petitions from the day's receipts needed to meet the cap. USCIS announced that for FY2009, if it receives too many applications in the first five days, all applications received in those five days will be considered together in a random drawing. This is a change from the previous year where just two days' worth of H-1B applications were included together.

All cases filed on that date or later that are subject to the H-1B cap will be returned. Returned petitions will be accompanied by the filing fee.

Can an applicant re-submit an H-1B application?

Petitioners may re-submit their petitions when H-1B visas become available for FY 2010. The earliest date a petitioner may file a petition requesting FY 2010 H-1B employment with an employment start date of October 1, 2009 would be April 1, 2009.

What will happen to the petitions that do not count against the cap?

Petitions for current H-1B workers normally do not count towards the congressionally mandated H-1B cap. USCIS will continue to process petitions filed to:

- Extend the amount of time a current H-1B worker may remain in the United States
- Change the terms of employment for current H-1B workers
- Allow current H-1B workers to change employers (unless the beneficiary is transferring from a cap exempt employer to a cap subject employer and was never counted towards the cap- in that case the beneficiary will be subject to the cap)
- Allow current H-1B workers to work concurrently in a second H-1B position

USCIS will also continue to process petitions for new H-1B employment filed by applicants who will be employed at an institution of higher education or a

related or affiliated nonprofit entity, or at a nonprofit research organization or a governmental research organization. USCIS will also continue to process H-1B petitions for workers from Singapore and Chile consistent with Public Laws 108-77 and 108-78.

And doctors working in underserved communities as a result of receiving a J-1 home residency requirement waiver sponsored by a state or federal agency will also be exempt from the annual cap even after they complete their service. Nationals of Singapore and Chile and graduates of US masters and doctoral programs will be counted against caps specifically set aside for those groups.

Note that beginning in January 2008, USCIS requires cap exempt cases to be filed at the USCIS California Service Center .

What will happen to F and J visa holders who are beneficiaries of an H-1B petition?

In the past, INS (now USCIS) had safeguards in place for those with F and J visa status. According to 8 CFR Section 214.2 (f)(5)(vi), if it can be determined that all of the H-1B visas will be used before the end of the current fiscal year, the director of USCIS can extend the duration of status of any F-1 student if the employer has timely filed an application for change of status to H-1B. However, in recent years, USCIS has chosen not to exercise this discretion and no word has been given on whether they will or will not do so in the future.

8 CFR Section 214.2(j)(1)(vi) has similar language regarding those in J status. If the USCIS director can determine that all of the H-1B visas will be used before the end of the current fiscal year, the director of USCIS may extend the duration of status of any J-1 nonimmigrant if the employer has timely filed an application for change of status to H-1B. USCIS also declined in recent years to exercise this discretion.

When will the numbers in the new 20,000 "bonus" cap be filled and who qualifies?

For the current fiscal year that began on October 1, 2007, USCIS reached the 20,000 cap on just a few weeks afterward. However, many believe the cap will be hit even earlier this year.

To qualify in this bonus cap, applicants must have earned a US master's or higher degree. Graduates of medical residency and fellowship programs do not qualify in this category.

What will happen if I am not exempt from the cap and my current status expires after the numbers run out?

In order to deal with the lack of H-1B visas, a number of alternate categories may be available including O-1 visas, TN visas for Canadians and Mexicans, E-1 and E-2 visas, L-1s and J-1 training programs. Many will look at pursuing graduate education in the US and then will be eligible for the bonus H-1B quota.

An option available to many this year will be filing for permanent residency. There are many work-related green card applications that can be filed without a labor certification. And the new PERM labor certification program means that employment authorization can be obtained much earlier. Now that concurrent filing of I-140 and adjustment of status applications area available, it may be possible to secure an employment authorization document in a matter of a couple of months after the green card process is started. Furthermore, premium processing of I-140s is now available in several categories.

Note that green cards are backlogged as of April 2007 for numerous categories and nationalities so a permanent residency strategy may not work for many.

We advise people subject to the cap looking for alternative strategies to consult early with their immigration lawyers.

What happens if the 20,000 bonus cap for master's degree holders and higher and the general cap of 65,000 are reached within the first five days of the fiscal year?

Under a rule promulgated in March 2008, If both caps are exhausted within the first five days, USCIS will first conduct a random selection process for the master's cap cases and then those not selected will be counted in the random selection process for the general cap. This is intended to ensure that those not selected in the master's cap are treated no worse than those in the general cap. A person not selected in either drawing will have his or her application

rejected.

What happens to petitioners who file multiple applications?

Under the March 2008 rule released by USCIS, petitioners are barred from filing more than one H-1B petition on behalf of the same alien even if the petitions are for different positions. If an employer legitimately has two positions it wants an alien to fill, it would need to amend the application or file a concurrent H-1B application to change the job or add additional duties. Employers found to have violated this rule will have all petitions for an individual worker rejected. Note that the new rule does not preclude related employers from filing petitions on behalf of the same employer. But in these cases, the related employer may be requested to show that it has a legitimate business need for the employee lest employers seek to use related employers to improve the chances of an applicant being selected.

Will an employer get a refund of the filing fees if it files a case claiming to be exempt from the H-1B cap and USCIS decides it is subject?

Under the March 2008 rule, USCIS will now deny the case and keep the filing fees rather than reject the case and return the fee. According to USCIS, this is because it is necessary for the agency to actually adjudicate the case to determine if it is subject to the cap.

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