

## H-1B Season is Almost Upon Us... Other Options for H-1B Losers!

We are rapidly approaching the April 1st deadline for the filing for new H-1B visas for the 2010-2011 Fiscal Year (FY 2010-2011). To ensure success of an H-1B for 2010-2011, H-1B Petitions should be properly filed with the U.S. Department of Homeland Security ("DHS"), Citizenship and Immigration Services ("CIS") on April 1st, 2010. If you do not begin to make preparations as early as possible then you and your prospective H-1B employer may be unable to secure an H-1B (subject to the cap) for an October 1st, 2010 start date.

Unless Congress acts immediately to increase the quota of 65,000 visas (plus and additional 20,000 for those with Masters Degrees from U.S. Academic Institutions), the allotted number of H-1B visas may be taken on the very first day that the petitions can be filed. This is what happened in the 2008-2009 Fiscal Year and it is not clear whether or not the same thing is going to happen during the 2010-2011 Fiscal Year.

In the past, during the "run on H-1Bs", many people did not receive an H-1B visa because their petitions were not filed in a timely manner. Other cases were not "properly filed" (defined in the CIS regulations) and were incomplete or deficient in some way and they were therefore not approved even though they were filed in a timely manner. If H-1B employers fail to properly meet each one of the regulatory filing requirements, then the petition may not be considered properly filed by the CIS and it may be returned. A delay like this could spell the death knell for an H-1B petition.

There are a few things that prospective H-1B employers and H-1B employees can do to improve the likelihood that the H-1B will be accepted by the CIS. First, be sure that all of the appropriate documentation is contained in the H-1B petition. Second, be sure that the H-1B is submitted to the CIS in a timely manner. Third, be sure that the H-1B is sent to the proper CIS Service Center for adjudication.

Recently, another aspect of the H-1B visa process has become the "site visit". H-1B employers should be familiar with the site visit process and procedure and be sure to prepare public access files for review by potential DOL, CIS or ICE auditors. Additionally, when H-1B visa holders are sent to client sites, H-1B employers and beneficiaries need to be sure to have itineraries for those visits and information about offsite work when H-1B beneficiaries travel to and from the U.S.

If H-1B visas begin to be used quickly, H-1B petitioners should consider the possibility of utilizing filing multiple H-1B petitions. Some time ago CIS issued guidance concerning multiple H-1Bs. Filing a Master's H-1B and Bachelor's H-1B is not considered a multiple H-1B filing. Also, many organizations have layers and layers of subsidiaries and affiliates (different organizations with different Employer Identification Numbers) and the law does permit use of those organizations as vehicles for additional H-1Bs. With each H-1B submitted, there is a statistically higher chance of one of the H-1Bs being able to receive an H-1B visa.

What is your H-1B back-up plan? First consider trying to obtain an H-1B with a cap-exempt organization. Academic institutions of higher education can make petitions for the H-1B with no regard to the cap. This means that those organizations do not have to wait until April 1st to file and H-1B visa petition. Also, foreign national workers may qualify for alternative visas to the H-1B. For example, in 1991, the law carved the O-1, P-1, P-3, Q-1, and R-1 visa categories out of the H-1B nonimmigrant professional and specialty occupation work visa classification.

What is your H-1B Back-Up Plan? Look North to Canada.

The most common reason for H-1B petitions to be returned to intending H-1B employers is that too many are received for the number of available H-1B slots. Most foreign nationals invest all their energies in the H-B process without thinking of what they will do if they don't make the quota. It is recommended that H-1B applicants set up an "immigration back-up plan." Canada offers a viable alternative to those seeking entry in the U.S. and not accepted for an H-1B visa. Canada is also a destination of choice for those who do not have other U.S. employment or family immigration options.

What many do not realize is that foreign nationals who are presently in the U.S. can make an application for Canadian permanent residence before, or while, they file for and await an H-1B determination (or for lawful permanent residence in the U.S.). There is nothing to prevent someone from applying for entry to both countries at the same time. Under the Canadian Immigration Regulations, there is a special provision to allow a foreign national to apply to enter Canada directly from the U.S. - without returning to their home country - as long as that person has been lawfully admitted to the U.S. for one year or more and has the visa(s) to prove it. However, it is preferable to apply to Canada (but not necessarily required) before the current visa in the U.S. expires.

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When traditional immigration approaches do not work, we analyze a candidate's resume and determine if they may qualify for various nonimmigrant or temporary work permits or permanent immigrant visa transfer options such as outstanding researcher classification, TN under NAFTA or E-3 classification for Australia. Now that the H-1B nonimmigrant visa has become more difficult to obtain, we work closely with our clients who are seeking to transfer highly-skilled foreign national workers to the U.S. to determine if there are other nonimmigrant options for such transfers. No matter what the situation, our attorneys work hard to provide a variety of visa options to support their needs.

Contact Us.

Our staff of immigration lawyers and professionals are sensitive to the needs of our clients and the members of their families. Many members of our staff are themselves foreign born and have family and/or friends who have gone through the immigration process. As a result, our staff of business immigration lawyers and professionals have a personal and unique approach to processing visas and for dealing with our foreign national clientele. Our legal team can clearly explain how to process temporary and permanent work permits in the U.S. The PERM Labor Certification Process is time-consuming and complex and our staff of business immigration law professionals can clearly explain the process in Spanish, French, Japanese, Korean, Tamil, Hindi, Slovak, Czech, Russian, Chinese, German and English.

To schedule a consultation, please feel free to contact Nachman & Associates by e-mail or call 1-866-599-3625. Please contact our offices at 201-670-0006 (x100) or e-mail to us at [info@visaserve.com](mailto:info@visaserve.com).

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