

Immigration Law Update

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H-1B Quota for October 1: Prepare Labor Condition Applications by March 16

The U.S. government's H-1B temporary professional worker program allows U.S. employers to hire foreign nationals in "specialty occupation" positions that require a bachelor's degree or the equivalent. Under current law, the number of new H-1B petitions that will be granted each federal fiscal year (FY) is subject to a quota ("cap"). This year, if demand is high, the cap for H-1B numbers for FY2016, which begins October 1, 2015, could be reached within the first few days of April. Employers who would like to hire H-1B workers subject to the cap should plan to file soon.

What Are the H-1B Cap Numbers?

During the dot-com boom, the H-1B cap was temporarily set at 195,000, but as of October 1, 2003, the cap returned to 65,000. Of those, 6,800 H-1Bs are allocated to citizens of Singapore and Chile under trade agreements with those countries, reducing the number generally available to 58,200 for all workers from other 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. master's or higher degrees. The separate master's or advanced degree cap applies to the first 20,000 qualifying H-1B petitions received for FY2016 processing by U.S. Citizenship and Immigration Services (USCIS), the Department of Homeland Security agency that processes H-1B petitions. These advanced degree cases will not be counted toward the regular H-1B cap.

The H-1B quota is available starting October 1 each year, and petitions can be filed up to six months in advance, which means the first possible filing date for FY2016 is Wednesday, April 1, 2015. Demand has outstripped supply in recent years so it is very important to file as soon as possible. In 2008, when employers filed more than 163,000 H-1B petitions by April 7, depleting the cap in one week, USCIS resorted to randomly selecting the petitions that would be accepted, and which petitions would be refused and returned. The process is considered the "H-1B lottery." We expect this situation will recur in April 2015.

Are There Specific Considerations for the H-1B Timing This Year?

A prerequisite to filing an H-1B petition with USCIS is to file a labor condition application (LCA) and obtaining LCA certification from the Department of Labor (DOL). Currently, LCAs take seven days to process or longer if the DOL seeks to verify the company's existence. Thus, employers should plan to submit the LCA no later than March 16 for any H-1B petition to be filed by April 1.

Who Is Exempt From the Cap?

New employees hired in H-1B status are subject to the cap, unless they are exempt. Many workers can still obtain H-1B status through exemptions to the H-1B cap, in particular the following:

- Petitions for individuals who currently hold H-1B status and seek an extension do not count toward 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;
- Institutions of higher education, nonprofit research organizations and governmental research organizations are exempt from the cap; and
- The country-specific caps carved out for citizens of Chile and Singapore are rarely reached.

What H-1B Alternatives Exist?

There are employment-based 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;
- 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 persons with extraordinary ability;
- Returning to school for a higher level of education and work authorization; and
- Labor certification for permanent resident status under the Program Electronic Review Management (PERM) process as a first step toward “Green Cards.” Note, however, there are processing backlogs for many types of permanent resident applications.

Other creative alternatives for a temporary or a stopgap measure are available as well.

What Does This Mean for Employers?

Due to the unique considerations for the H-1B cap for FY2016, all employers seeking to hire cap-subject individuals should immediately prepare and file the petitions.

Employers should 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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