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DON'T DELAY! H-1B VISAS ARE GOING FAST THIS YEAR

By Will Krasnow
Boston, MA Office

There is an annual limit on the number of H-1B visas that can be issued each fiscal year to persons subject to the H-1B cap (primarily first-time H-1B beneficiaries) – approximately 65,000 in the general category and 20,000 limited to persons with U.S. master's or more-advanced degrees.

On April 2, 2012, the U.S. Citizenship and Immigration Service began accepting H-1B Petition filings for the 2013 Fiscal Year (which begins on October 1, 2012). **The USCIS has reported that the usage of H-1B cap numbers is significantly greater for fiscal year 2013 than for the prior two fiscal years.** As of April 4, 2012, the USCIS announced unofficially that a total of 22,323 cap-subject H-1B Petitions had been filed. Approximately 25 percent of those (5,000) were filed for individuals with advanced degrees.

Such usage at this early stage of filing reflects an improving economy and means that employers cannot expect H-1B numbers to last until late 2012 or early 2013 as has been the case in the recent past. This year's usage is more reflective of the pre-recession pattern, in which H-1B numbers were exhausted several months before the new fiscal year began, sometimes as early as April, the first month of filing. **We recommend that cap-subject H-1B Petitions for fiscal year 2013 be filed as soon as possible.**

Exceptions to the H-1B cap

The H-1B cap does not apply to the following:

- Persons who are or who have been in H-1B status within the last six years;
- Petitions for exempt organizations – institutions of higher education, or a related or affiliated nonprofit entity, nonprofit research organization, or governmental research organization; or
- J-1 nonimmigrant physicians who are changing status to H-1B and who have obtained waivers of the two-year return home residency requirement through the Conrad 30 Program (the physician agrees to work in a medically-underserved area).

Alternatives to the H-1B

If the H-1B option is not available, employers may want to consider these alternatives:

- As a prelude to filing for H-1B, optional practical training for foreign graduates of U.S. colleges and universities who may be eligible for a year of employment (or up to 29 months for students in Science, Technology, Engineering and Math fields) after USCIS approval of an Application for Employment Authorization.
- TN visas under the North American Free Trade Agreement for Canadian and Mexican professionals.
- L-1 visa for intracompany transferees. If an employer has foreign operations

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(or decides to create them), this visa permits an employee to transfer to the U.S. affiliated company in a similar position if he has worked abroad for the foreign parent, subsidiary or affiliate continuously for at least one year (six months where a Blanket L-1 Petition is being filed) within the preceding three years as an executive or manager, or in a specialized knowledge capacity.

- E visa classification for treaty traders and investors if the L-1 visa is not available.
- J-1 exchange visitor classification for business trainees, experts, scholars and others.
- O-1 visas for individuals with extraordinary ability. Although the standards vary somewhat depending on the type of employment, generally speaking, the O-1 visa applies to those recognized as being at or near the top of their field of endeavor.

If you have any questions, please contact any member of Constangy's Immigration Practice Group or the Constangy attorney of your choice.

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