

H-1B Cap Reached for 2010 Fiscal Year

On December 22, 2009, the CIS announced that the H-1B cap for the 2010 fiscal year had been reached on December 21, 2009. Any H-1B cases received by the CIS after December 21, 2009 will be rejected and returned. The USCIS will place all cap-subject H-1B petitions that were received on December 21, 2009 into a lottery and winners will be chosen through a computer-generated random selection process. H-1B1 visas continue to remain available for Chile and Singapore citizens under their respective Free Trade Agreements.

The Citizenship and Immigration Service ("CIS") makes available 58,200 new H-1Bs each fiscal year, plus 20,000 new H-1Bs for foreign nationals with a Master's degree or higher from a U.S. academic institution. A total of 6,800 H-1B1 visas are made available to citizens of Chile and Singapore pursuant to Free Trade Agreements with those countries.

There has been a chronic shortage of H-1B visas since their numbers were reduced to 65,000 – a level originally set in 1990 under the Immigration and Nationality Act of 1990 (IMMACT 1990). Congress attempted to ameliorate this shortfall by exempting 20,000 H-1B visas from

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the quota for foreign nationals that graduated with a Master's degree or higher from a U.S. academic institution. However, the additional numbers provided under the exemption have proven insufficient. On the other hand, the 6,800 H-1B1 visas set aside for citizens of Chile and Singapore have not been fully utilized year to year. Unused H-1B1 visas may be added back into the next fiscal year's quota as they were in FY 2010. However, it is little comfort for employers who may wish to hire a new H-1B worker prior to October 1, 2010. Employers seeking to sponsor H-1B workers who are subject to the H-1B cap will need to wait until at least April 1, 2010 to file an H-1B petition for employment authorization commencing October 1, 2010.

Given this news employers should be careful when recruiting and interviewing candidates. If a candidate indicates that he/she will require sponsorship, try to determine whether the candidate has previously been issued an H-1B visa in the past several years. A candidate who is in H-1B status with another employer or who has been in H-1B status previously and not been outside of the U.S. for more than 1 year, is not

subject to the H-1B cap and can transfer their H-1B sponsorship to another employer. Note, however, that if the candidate currently holds or has held H-1B status, it is important also to know whether the H-1B sponsor is a "cap exempt" institution. Institutions of higher education or "affiliated" employers, non-profit research organizations and governmental research organizations are exempted from the H-1B numerical limitations. A candidate that has only held H-1B status through one of these "cap exempt" employers will be subject to the H-1B cap when moving to a non-exempt H-1B employer.

There may be other visa options that will allow for employment of candidates who would otherwise require a cap-subject H-1B visa and have not been counted against the quota. For example, recent U.S. college graduates who are in F-1 status and have earned a bachelor's or higher degree

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program are entitled to 12 months of employment authorization with any U.S. employer through a grant of Optional Practical Training (“OPT”). Moreover, if an F-1 student has graduated with a degree in a STEM (Sciences, Technology, Engineering or Mathematics) designated field, they can extend their OPT and employment authorization for an additional 17 months beyond their current 1 year of authorized employment. Accordingly, employment authorization available to foreign students may allow you to hire a candidate in OPT status with the plan to move them to H-1B status in the following year’s quota.

Citizens of certain countries also have options available that citizens of others don’t. Citizens of Australia may be eligible for an E-3 visa, which allows employment with a sponsoring U.S. employer in 2 year increments in a professional position. As noted above, citizens of Chile or Singapore may be eligible for an H-1B1 visa, which has the same characteristics of an H-1B visa but is available throughout the year. Citizens of Canada or Mexico may be eligible for TN visa status, which allows them to come to the U.S. to work with a sponsoring employer in any one of approximately 50 separate occupational categories. Finally, if the individual is highly accomplished, an O-1 visa might be an option if a track record of extraordinary achievement in a particular field can be documented.

Last but not least, keep in mind that Comprehensive Immigration Reform is being actively debated and, should such a bill pass, it will likely

include new regulations on H-1B employment including a possible expansion of the number of new H-1B visas available each year. Of course, if past immigration legislation is any indication, an expansion of the H-1B program is likely to be accompanied by higher fees or more restrictive rules applicable to employers in other respects. Time will tell whether or not new legislation will be welcome news.

Please contact John J. Gallini (jgallini@mbbp.com) or Donald W. Parker (dwparker@mbbp.com) if you have any questions about how the exhaustion of the FY 2010 H-1B cap may affect your company.

Please see our special article in the MBBP Quarterly Life Sciences Newsletter, Vector, for considerations on hiring/recruiting post-H-1B cap. The article can be found here: <http://www.mbbp.com/resources/iptech/newsletters/vector/vectorq409.pdf>

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