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ANOTHER SHORT H-1B VISA SEASON?

Employers: H-1B season is upon us again so if you are planning on hiring a foreign worker, you need to file as early as possible! Here's why.

Will it be Another Lottery for H-1B Visas This Year?

During the first week of April 2013, the earliest possible filing period for H-1B visa petitions for United States Citizenship and Immigration Services (USCIS) FY 2014 (October 1, 2013 to September 30, 2014), USCIS received approximately 124,000 H-1B visa petitions - sufficient to fill both the statutorily mandated annual quota of 65,000 visas for the general category of H-1B visas, and the annual quota of 20,000 additional H-1B visas for those prospective specialty occupation workers with advanced degrees. As a result, last April, USCIS used a computer-generated lottery selection process to allocate the limited number of visas available among those petitions received. Petitions not selected were returned to their senders.

With increasing improvement in the U.S. economy, it is sensible to assume that a similar situation will arise at the beginning of this coming H-1B season, which will begin on April 1, 2014 (for USCIS FY 2015). Thus those employers that anticipate using the H-1B visa to hire foreign workers this year must act now, or take the risk that the H-1B cap will be reached leaving them high and dry, unable to employ foreign workers until October 2015.

Employers use the H-1B visa to employ foreign nationals in "specialty occupations," that is, in jobs that involve the theoretical and practical application of a body of highly specialized knowledge and require a baccalaureate or higher degree (or the equivalent achieved through a combination of education, training and/or work experience) as a minimum requirement for the position offered. The H-1B visa is often used by students coming to the end of their periods of optional practical training. For others, the H-1B visa is used as an alternative to the L-1 (intracompany transferee) visa, or the E-1 or E-2 (treaty trader or investor) visas, or even in lieu of TN (treaty national) status. For professional workers, the H-1B visa might be the only visa for which an individual can qualify.

What is the H-1B Cap?

The H-1B "cap" refers to the congressionally mandated quota of H-1B visas made available each year to foreign workers entering the United States in H-1B visa status. At the start of every USCIS fiscal year (October 1) Congress makes available 65,000 H-1B visas, 6,800 of which are set aside for students from Chile and Singapore. Aside from the visas set aside for Chile and Singapore, therefore, this leaves 58,200 visas available for the thousands of employers who line up each year to file their H-1B visa petitions. In addition to this annual quota or cap of 65,000 visas (the "standard cap"), 20,000 more H-1B visas are made available each year for those foreign nationals holding U.S. master's degrees (the "advanced degree cap").

With the standard cap of 65,000, and the advanced degree cap of 20,000, there are essentially 85,000 H-1B visas made available each year. Although H-1B visas do not become available until October 1 each year, employers may file H-1B visa petitions to sponsor their prospective H-1B workers up to six months in advance, that is, as early as April 1 for an employment commencement date of October 1.

Once the H-1B Cap Has Been Reached, What Does This Mean?

In a nutshell, once the H-1B visa quota has been filled for FY 2015, U.S. employers will no longer be able to file visa petitions for new H-1B workers until April 1 next year and, even then, those H-1B employees will not be permitted to commence their H-1B employment until October 1, 2015, the date when 85,000 new H-1B visas allocated for USCIS FY 2016 will become available.

This restriction applies only to those H-1B visa petitions subject to the annual H-1B quota or "cap". Therefore, workers not subject to these annual quotas may continue to file H-1B visa petitions; such "cap-exempt" H-1B employment remains unaffected. "Cap-exempt" H-1B workers include current H-1B workers who have already been counted against the H-1B cap for a prior year, those merely changing H-1B employers, those extending or amending their period of H-1B employment, or those H-1B workers employed at an institution of higher education (or a related/affiliated non-profit entity), or at a non-profit or governmental research organization.

Although "cap-exempt" H-1B employment is not affected, the limited number of H-1B visas allocated each year does cause a problem. For many individuals, the H-1B visa may be the only visa for which they may qualify, while others will have to explore eligibility for alternative visas.

Is the H-1B Cap Always Reached?

The H-1B cap has been reached before the end of every fiscal year over the last decade or more. H-1B visas have been limited in number since the start of FY 1992 following the passage of the Immigration Act of 1990. The "dotcom boom" of the 1990s caused the quota of 65,000 H-1B visas to be reached for the first time in 1997 and again in 1998. Congress responded to employers' increased demand for H-1B workers by temporarily increasing the H-1B cap to 115,000 for FY 1999 and FY 2000, and then to 195,000 for FY 2001, FY 2002 and FY 2003.

The standard H-1B cap reverted back to 65,000 for FY 2004. However, that year the cap was reached less than 5 months into the fiscal year. And in FY 2005, the cap was again reached, this time on October 1, 2004, the first day of the new fiscal year.

Congress responded to this shortage by providing an additional 20,000 visas for those prospective H-1B workers holding U.S. master's degrees. Despite this, in subsequent years, the supply of H-1B visas became exhausted even sooner after the April 1 earliest permitted filing date. In FY 2006 the quota was filled by August 10, nearly two months before the start of the fiscal year, and in the following year the cap was reached more than four months before the start of FY 2007.

In FY 2008, the cap was reached within 24 hours, while the scenario was pretty much repeated in FY 2009. But H-1B visas were readily available again in FY 2010 following the onset of the economic slowdown, which, for employment, had started the year before. That year, it took until December 2009 for the H-1B visa quota to be filled. After two more years of availability extending until January 2010 (in FY 2011) and until November 2011 (in FY 2012), the H-1B visa season for FY 2013 ended on June 11, 2012, having lasted a little over 2 months. And then last year, FY 2014, for the first time USCIS implemented a lottery system to allocate the limited number of visas available among the excessive number of H-1B petitions filed.

Year	Date H-1B Cap Reached	Approximate Period of Time Visas Remained Available
FY 2004	October 1, 2003	6 months
FY 2005	October 1, 2004	6 months
FY 2006	August 10, 2005	4 months
FY 2007	May 26, 2006	2 months
FY 2008	April 3, 2007	2 days
FY 2009	April 7, 2008	6 days

FY 2010	December 21, 2009	8 months
FY 2011	January 26, 2011	9 months
FY 2012	November 22, 2011	7 months
FY 2013	June 11, 2012	2 months
FY 2014	April 5, 2013	Less than one week

This chart is based on data provided in USCIS Press Releases, which have announced annually the receipt of sufficient H-1B visa petitions to meet the congressionally mandated H-1B visa quota.

What Does All This Mean for Employers Today?

In short, the message today is that employers must act now and ready themselves to file their H-1B visa petitions during the first week of April. Otherwise, they will not be able to hire a new H-1B worker, who is subject to the cap, until October 1, 2016, more than a year and a half from now! So if you or your company plans on utilizing the H-1B visa category to hire a foreign worker this year, don't get left out - plan now to provide sufficient time to prepare the H-1B visa petition for early filing in the first week of April, or face a mad scramble later to find an alternative visa strategy for your foreign workers.