



Making Sense of the H-1B Cap

A "Need to Know" Immigration Resource from Ellis Porter

What Is The H-1B Cap?

Under U.S. immigration law, there is an annual limit on the number of new H-1B petitions that can be granted. This annual limit is referred to as the "H-1B Cap."

How Many H-1Bs Are Available?

The total annual limit is 65,000. However, 6,800 of these numbers are reserved for citizens of Chile and Singapore pursuant to trade treaties. So, the H-1B Cap is effectively 58,200. In the past, the H-1B cap had been raised to as high as 195,000, but the cap-raising legislation expired and Congress has not renewed it.

What Is The H-1B Counting Period?

The H-1B cap is calculated based on the USCIS fiscal year, which starts on October 1 and ends on September 30. October 1, 2008 marks the start of Fiscal Year 2009.

When Can H-1B Petitions Be Filed?

H-1B petitions subject to the H-1B cap can be filed no more than six months before the start of a fiscal year. **For Fiscal Year 2009, the first available filing date is April 1, 2008.** Starting on this date, employers can file H-1B petitions requesting a start date no earlier than the first day of Fiscal Year 2009, or October 1, 2008.

Which H-1B Petitions Fall Under The H-1B Cap?

Generally speaking, only petitions requesting "new" H-1B status are counted in the H-1B cap. This includes petitions for employees outside the U.S., and for individuals in the U.S. in another immigration status (typically F-1 students, TN workers or H-4 dependents) who are seeking to change status to H-1B.

Which H-1B Petitions Are Not Impacted?

A petition filed on behalf of an employee who is already in H-1B status with one employer, and is seeking to change to another employer, is not normally subject to the H-1B cap. Also, H-1B petitions filed by certain exempt employers (colleges/universities and certain non-profit organizations) are not subject to the H-1B cap.

H-1B petitions that are not subject to the H-1B cap can be filed at any time during the year regardless of whether the H-1B cap has been exhausted or not.

What Is The H-1B Masters Cap?

The first 20,000 petitions received from employees with U.S. Masters or Ph.D degrees are exempted from the H-1B cap. The qualifying degree must be possessed at the time of filing, but need not be a minimum job requirement for the offered position.

How Long Does It Take To Hit The H-1B Cap?

Last year, USCIS received more than twice as many petitions as cap numbers available on the first day of filing. As a result, a lottery was conducted to award the available numbers, and the petitions not selected were rejected and returned. The special cap for U.S. Masters/Ph.D graduates was met on April 30, 2007.

How Long Will It Take This Year?

It is almost certain the H-1B cap will again be met on the first day of filing (April 1, 2008), and the number of petitions received will exceed last year's total. If so, a lottery would again be conducted, and the odds of having an H-1B petition selected will likely be less favorable than last year. It is also very possible that the special cap for U.S. Masters/Ph.D graduates will be met on April 1, 2008 or shortly thereafter.

H-1B Cap Action Items for Employers

- [1] Identify potential new H-1B employees**
Even if you are not planning to hire them until later, the time to file their H-1B petitions is April 1, 2008.
- [2] Identify current F-1/OPT or TN employees**
If you employ F-1 students or TN workers, they may require a future change of status to H-1B to maintain work authorization or pursue a green card. In most cases, their H-1B petitions must be filed before the H-1B cap expires.
- [3] Contact Ellis Porter**
For the employees you've identified, we will confirm whether an H-1B petition will be required. If so, we'll collect the necessary information from you and make sure it's ready to file on the first day possible (April 1, 2008).

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